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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

EARNHARDT PLUMBING, LLC, PLAINTIFF
v.
THOMAS BUILDERS, INC. AND THOMAS PROPERTIES
OF NORTH CAROLINA, LLC, DEFENDANTS

No. COA23-228

Filed 17 October 2023

1. Appeal and Error—interlocutory order—substantial right—contract dispute—forum for arbitration

In a contract dispute between plaintiff (a North Carolina plumbing company) and defendants (a Tennessee building corporation and a North Carolina property company), the trial court's order requiring the parties to conduct arbitration in North Carolina was immediately appealable as affecting a substantial right. The court's determination that the forum-selection clause in the contract (allowing arbitration to be held in another state) was unenforceable as against public policy deprived defendants of their contractual right to select an arbitration forum, and this right would be lost absent immediate review.

2. Arbitration and Mediation—arbitration agreement—forum selection clause—federal preemption—interstate commerce—findings required

In a contract dispute between plaintiff (a North Carolina plumbing company) and defendants (a Tennessee building corporation and a North Carolina property company) over payment for services rendered, the trial court's order compelling arbitration in North Carolina was vacated and the matter was remanded for further findings of fact regarding whether the contract involved interstate

commerce. Without those findings—required to support the court's conclusion that the Federal Arbitration Act (FAA) did not preempt state law and, therefore, that the forum-selection clause in the parties' contract was unenforceable as against public policy—the appellate court could not properly evaluate whether the FAA applied in this instance.

Appeal by Defendants from Order entered 17 November 2022 by Judge Patrick T. Nadolski in Cumberland County Superior Court. Heard in the Court of Appeals 23 August 2023.

Vann Attorneys, PLLC, by James R. Vann, for Plaintiff-Appellee.

Penn Stuart & Eskridge, P.C., by M. Shaun Lundy, for Defendant-Appellants.

HAMPSON, Judge.

Factual and Procedural Background

Thomas Builders, Inc. (Thomas Builders) and Thomas Properties of North Carolina (Thomas Properties) (collectively, Defendants) appeal from an Order, which compelled Earnhardt Plumbing, LLC (Plaintiff) to arbitrate its claims, but denied Defendants' request to compel enforcement of a contractual provision allowing them to require arbitration take place in Tennessee. The Record before us tends to reflect the following:

Plaintiff is a North Carolina limited liability company. Thomas Builders is a Tennessee corporation and maintains a registered office in Wake County, North Carolina. Thomas Properties is a North Carolina limited liability company. Plaintiff entered into a contract with Defendants to provide services related to the construction of a Tru by Hilton hotel at a property owned by Thomas Properties in Fayetteville, North Carolina (the Contract). Under the Contract, Plaintiff agreed to provide and install plumbing and gas line systems for the hotel. Plaintiff alleges Thomas Builders accepted Plaintiff's performance without complaint and has breached the Contract by failing to pay Plaintiff in full for services rendered under the Contract. Specifically, Plaintiff alleges that it is owed $159,588.50 under the Contract.

Paragraph 20b of the Contract provides claims arising "out of or related to this Subcontract . . . shall be subject to arbitration." Further, "[t]he Arbitration shall be held at the discretion of the Contractor either at Contractor's principle [sic] place of business or where the Project is located."

Plaintiff filed a Complaint on 7 March 2022. On 5 May 2022, Defendants filed a Pre-Answer Motion to Dismiss or in the alternative to Stay Proceedings Pending Mediation and/or Arbitration. The trial court heard arguments on Defendants' Motion on 1 November 2022. The focus of the parties' arguments during this hearing was not whether the matter should be arbitrated, but rather whether Defendants could require arbitration take place in Tennessee under the terms of the Contract permitting "[t]he Arbitration shall be held at the discretion of the Contractor either at Contractor's principle [sic] place of business or where the Project is located."

On 17 November 2022, the trial court entered its Order Denying Defendants' Motion to Dismiss and Granting Defendants' Alternative Motion to Stay Proceedings Pending Arbitration. The Order stayed judicial proceedings for six months to allow the parties to arbitrate the dispute. However, while the trial court concluded the parties' Contract included a valid arbitration agreement, the trial court further concluded the provision allowing Defendants to require Tennessee be the forum for arbitration was unenforceable under N.C. Gen. Stat. § 22B-3, which provides: "any provision in a contract entered into in North Carolina that requires . . . the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable." N.C. Gen. Stat. § 22B-3 (2021). The trial court further concluded the Federal Arbitration Act (FAA) did not preempt the application of N.C. Gen. Stat. § 22B-3. In its decree, the trial court ordered the arbitration "shall be conducted in the State of North Carolina." Defendants filed Notice of Appeal from the trial court's Order on 28 November 2022.

Appellate Jurisdiction

[1] As Defendants acknowledge, the trial court's Order is interlocutory and not final in nature. "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). "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).

However, under N.C. Gen. Stat. § 7A-27(b)(3)(a), an interlocutory order may be appealed as of right if it "[a]ffects a substantial right." N.C. Gen. Stat. § 7A-27(b)(3)(a) (2021). "A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Turner v. Norfolk S. Corp.*, 137 N.C.

App. 138, 142, 526 S.E.2d 666, 670 (2000) (citation and quotation marks omitted). As such, "an appeal is permitted . . . if the trial court's decision deprives the appellant of a substantial right would be lost absent immediate review." *Cox*, 129 N.C. App. at 775, 501 S.E.2d at 354 (citation and quotation marks omitted).

"[A]n order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime S. Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991); *see also Gay v. Saber Healthcare Grp., LLC.*, 271 N.C. App. 1, 5, 842 S.E.2d 635, 638 (2020). 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).

Here, Defendants contend the trial court's Order affects a substantial right because it deprives them of their contractual right to select the forum for arbitration. We agree with Defendants that this is a right which "might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal" from the Order. *Clements v. Clements ex rel. Craige*, 219 N.C. App. 581, 584, 725 S.E.2d 373, 376 (2012) (quotation marks omitted).

Thus, the trial court's Order affects a substantial right. Therefore, Defendants have a right of appeal from the trial court's interlocutory Order. Consequently, this Court has jurisdiction to review this matter pursuant to N.C. Gen. Stat. § 7A-27(b)(3).

Issue

[2] The dispositive issue is whether the trial court properly concluded the FAA did not preempt N.C. Gen. Stat. § 22B-3 in this case and that the forum-selection clause in the arbitration agreement was unenforceable under North Carolina law.

Analysis

"[W]hether a particular dispute is subject to arbitration is a conclusion of law, reviewable de novo by the appellate court." *Epic Games, Inc. v. Murphy-Johnson*, 247 N.C. App. 54, 61, 785 S.E.2d 137, 142 (2016) (quoting *Carter v. TD Ameritrade Holding Corp.*, 218 N.C. App. 222, 226, 721 S.E.2d, 256, 260 (2012)). Likewise, "[i]ssues relating to the interpretation of terms in an arbitration clause are matters of law, which this Court reviews *de novo*." *Id.* at 61-62, 785 S.E.2d at 142-43.

Here, Defendants contend the trial court erred in failing to enforce the forum-selection clause of the arbitration agreement in the parties'

Contract. Defendants argue, presuming N.C. Gen. Stat. § 22B-3 applies to void the forum-selection clause, the FAA preempts state law in this instance because the Contract necessarily involves interstate commerce—allegedly arising from Plaintiff's dealings under the Contract with Thomas Builders, a Tennessee company. Thus, Defendants posit the arbitration clause and its forum-selection clause fall within the purview of the FAA.

Under the FAA,

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4 [of the FAA].

9 U.S.C. § 2 (2022). In relevant part to this case, the FAA defines "commerce" as "commerce among the several States[.]" 9 U.S.C. § 1 (2022).

N.C. Gen. Stat. § 22B-3 provides: "any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable." N.C. Gen. Stat. § 22B-3 (2021). However, when the contract at issue involves commerce among the States, "the FAA preempts North Carolina's statute and public policy regarding forum selection." *Goldstein v. Am. Steel Span, Inc.*, 181 N.C. App. 534, 538, 640 S.E.2d 740, 743 (2007).

"The FAA will apply if the contract evidences a transaction involving interstate commerce." *Hobbs Staffing Servs., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 226, 606 S.E.2d 708, 711 (2005). Whether a contract evidences a transaction involving interstate commerce is a question of fact, which an appellate court should not initially decide. *Id.*

In this case, the trial court concluded "[t]he Federal Arbitration Act does not preempt the applicable North Carolina law." However, the trial court made no findings of fact to support that conclusion. The only facts the trial court found were that there was a valid arbitration agreement and that the dispute in this case falls within the substantive scope of the parties' agreement. Specifically, the trial court made no findings as to whether the parties' Contract evidences a transaction involving interstate commerce.

Thus, without additional findings of fact, we cannot evaluate the underlying question of whether the FAA applies in this case. Therefore, we cannot properly consider the trial court's ruling that the FAA does not preempt applicable North Carolina law. Consequently, we must remand the case to the trial court to make findings of fact as to whether the Contract at issue evidences a transaction involving interstate commerce—or not—and, based on its fact-finding, apply the applicable law to the forum-selection clause in the arbitration agreement contained in the parties' Contract.[1]

Conclusion

Accordingly, for the foregoing reasons, we vacate and remand this case to the trial court for additional findings of fact as to whether the Contract evidences a transaction involving interstate commerce and whether the Federal Arbitration Act applies to the Contract. The trial court should then apply the applicable federal or state law to the arbitration provision of the Contract.

VACATED AND REMANDED.

Judges MURPHY and WOOD concur.

1. There is another related issue which we do not reach in this case, but which may become relevant to the trial court's analysis on remand: whether the forum-selection clause is mandatory or permissive. At the hearing on Defendant's Motion below, the trial court aptly picked up on this issue; however, the trial court's Order does not address the issue, because it was, ultimately, not relevant to its legal analysis. On remand, however, should the trial court deem that issue necessary to its analysis, the trial court is certainly free to revisit it.

HARVEY W. GOUCH, Plaintiff
v.
CLIFFORD ROTUNNO AND DOLORES ROTUNNO, Defendants

No. COA23-283

Filed 17 October 2023

Deeds—residential restrictive covenants—enforceability—sufficiency of pleadings—instrument in chain of title

In an action for injunctive relief and monetary damages for alleged violations of restrictive covenants in a residential neighborhood, plaintiff adequately pleaded a claim for relief to survive defendants' motion to dismiss where, although the deed by which plaintiff conveyed one lot in the subdivision to defendants did not reference plaintiff's previously registered Declaration of Covenants, the instrument was in the chain of title for defendants' lot discoverable upon a proper examination of the public records for that subdivision; there was no ambiguity about which subdivision was subject to the Declaration; and plaintiff's Declaration, which was applicable to the eleven (out of sixteen total) lots that plaintiff owned at the time of its registration, was evidence of a general plan and scheme to impose uniform characteristics on the subject lots.

Appeal by Plaintiff from an order entered 28 December 2022 by Judge Carla Archie in Gaston County Superior Court. Heard in the Court of Appeals 23 August 2023.

Winfred R. Ervin, Jr. and Isaac Cordero, for Plaintiff-Appellant.

Brett E. Dressler, for Defendants-Appellees.

WOOD, Judge.

Mr. Harvey Gouch ("Plaintiff") appeals an order granting Clifford and Dolores Rotunno's ("Defendants") motion to dismiss pursuant to Rule 12(b)(6). After careful review, we reverse the trial court's order.

I. Factual and Procedural Background

Defendants live in a single-family residence on a lot in the Stoney Brook Estates subdivision in Gaston County. The issue on appeal is whether Defendants' lot is subject to certain recorded covenants.

In 2007, Defendants' lot was part of a larger undeveloped tract previously owned by Integrity Builders of NC, LLC ("Integrity"). On 15 March 2007, Integrity recorded a plat in Book 73 at page 85 of the Gaston County Public Registry, subdividing its larger tract into sixteen residential building lots. This plat designated the name of the subdivision as Stoney Brook Estates and depicted the sixteen lots as Lots 1-11, 30-34. The plat itself does not reference or refer to any type of restrictions. Defendants are the current owners of Lot 32, a property located in Stoney Brook Estates, a residential subdivision in Gaston County.

On 15 August 2008, Integrity deeded eleven of the sixteen lots in Stoney Brook Estates to Plaintiff by deed recorded in Book 4423 at Page 1654 in the Gaston County Public Registry. Because Integrity conveyed only eleven of the sixteen lots to Plaintiff, Integrity's deed to Plaintiff specifically exempts the lots not purchased, lots 6-10:

> THERE IS EXCEPTED from this conveyance Lots 6, 7, 8, 9 and 10 as shown on plat of Stoney Brook Estates, Phase 1, which map is recorded in Map Book 73 at Page 85 of the Gaston County Public Registry.

Nine years later, on 10 July 2017, Plaintiff executed and recorded in the Gaston County Register of Deeds a "Declaration of Covenants, Conditions and Restrictions for Stoney Brook Estates" ("Declaration") which purported to place restrictions on the lots in "Stoney Brook Estates." The Declaration states, "[t]he subdivision of Stoney Brook Estates is made subject to these protective covenants." However, the Declaration does not reference the lots within Stoney Brook Estates subject to the Declaration, offer the legal description of property comprising Stoney Brook Estates or reference the 2007 plat recorded by Integrity or any other map. The Declaration includes a setback covenant, requiring all construction within Stoney Brook Estates to be built at least 110 feet from the lot's front property line and requires the front and sides of each residence be constructed of brick, stone, or a combination of both. At the time of the recording of the Declaration, Plaintiff continued to own the same eleven lots in Stoney Brook Estates which it had acquired from Integrity.

On 8 October 2019, over two years after filing the Declaration, Plaintiff sold and conveyed Lot 32 of Stoney Brook Estates to Defendants as tenants by the entirety. The deed contains a description of the land being conveyed, specifically Lot 32, references the 2007 Plat map recorded by Integrity showing Lot 32 as appearing on page 85 of Plat Book 73, and

references the Plat book and page number of the deed transferring Integrity's interest to Plaintiff. The deed states, as a general warranty deed, the "Grantor will warrant and defend the title against the unlawful claims of all persons whomsoever, other than the following exceptions: Restrictions and easements of record, and the lien of 2019 ad valorem taxes." The deed, however, did not expressly reference Plaintiff's 2017 Declaration.

In 2020, Defendants constructed their home and garage within the Declaration's 110-foot setback. Additionally, the front and sides of their home were constructed with material other than brick and stone.

In a letter dated 16 November 2020, Plaintiff provided notice to Defendants of the purported violations of the Declaration and demanded Defendants bring their Lot into compliance with the Declaration. Defendants refused to make the requested changes to Lot 32. Thereafter, Plaintiff filed a summons and complaint for injunctive relief and monetary damages on 5 April 2021. On 10 June 2021, Defendants filed a motion to dismiss pursuant to Rule 12(b)(6), alleging the Declaration is not applicable to Lot 32, "did not create a North Carolina Planned Community, is not enforceable, and is not enforceable by Plaintiff."

On 18 October 2021, the trial court filed its order on Defendant's motion to dismiss, granting with prejudice Defendant's motion to dismiss pursuant to Rule 12(b)(2). The trial court's written order made no reference to Defendant's Rule 12(b)(6) motion. Plaintiff gave written notice of appeal from the trial court's order on 9 November 2021. On 4 October 2022, this Court vacated the trial court's order of dismissal and remanded the case for further proceedings based upon the discrepancy between Defendant's 12(b)(6) motion and the trial court's order based upon 12(b)(2). *Gouch v. Rotunno*, 285 N.C. App. 559, 562, 878 S.E.2d 324, 327 (2022).

On remand, Plaintiff's counsel issued a notice of hearing on Defendant's Rule 12(b)(6) motion for 26 October 2022. On 12 December 2022, Defendants filed an objection to "any judge considering Defendants' motion to dismiss other than Judge Carla Archie" which the trial court subsequently granted on 13 December 2022. On 28 December 2022, Judge Archie filed an amended order on Defendant's motion to dismiss. The trial court clarified that the 18 October 2021 order's reference to Rule 12(b)(2) "was a scrivener's error" and that the motion to dismiss was pursuant to Rule 12(b)(6). The trial court thus granted with prejudice Defendant's motion to dismiss. Plaintiff filed a written notice of appeal on 5 January 2023.

II. Analysis

First, Plaintiff argues the trial court erred in granting Defendants' motion to dismiss because the facts alleged in his complaint are sufficient to state a cause of action to enforce the residential restrictive covenant contained in the Declaration against Defendants. Plaintiff also contends the trial court treated Defendants' motion to dismiss as a motion for summary judgment, notwithstanding the absence of "any evidence presented by either party by way of verified pleadings, affidavits, or otherwise." We agree. The trial court erred in granting Defendants' 12(b)(6) motion to dismiss because Plaintiff's complaint sufficiently stated a cause of action upon which relief may be granted.

A trial court's order allowing a Rule 12(b)(6) motion to dismiss is reviewed *de novo*. *Locklear v. Lanuti*, 176 N.C. App. 380, 384, 626 S.E.2d 711, 714 (2006). The standard of review of an order allowing a motion to dismiss is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *New Bar P'ship v. Martin*, 221 N.C. App. 302, 306, 729 S.E.2d 675, 680 (2012) (citation omitted). In ruling upon a motion to dismiss, the complaint is to be liberally construed, viewing all permissible inferences in the light most favorable to the nonmovant, "and the court should not dismiss the complaint unless it appears beyond doubt the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Id.* (citation omitted). A complaint is without merit if: "(1) there is an absence of law to support a claim of the sort made; (2) there is an absence of fact sufficient to make a good claim; or (3) there is the disclosure of some fact which will defeat a claim." *Home Elec. Co. v. Hall & Underdown Heating & Air Conditioning Co.*, 86 N.C. App. 540, 542, 358 S.E.2d 539, 540 (1987) (citation omitted), *aff'd*, 322 N.C. 107, 366 S.E.2d 441(1988).

While homeowners enjoy certain property rights, these rights can be limited through restrictive covenants so that homeowners are restrained from making certain use of their properties. *Hair v. Hales*, 95 N.C. App. 431, 433, 382 S.E.2d 796, 797 (1989). A restrictive covenant is defined as a "private agreement, usually in a deed or lease, that restricts the use or occupancy of real property, especially by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put." *Wal-Mart Stores, Inc. v. Ingles Markets, Inc.*, 158 N.C. App. 414, 420, 581 S.E.2d 111, 116 (2003) (citations omitted). Courts generally enforce restrictive covenants as it would any other valid contractual relationship. *Bodine v. Harris Vill. Prop. Owners Ass'n*, 207 N.C. App. 52, 60, 699 S.E.2d 129, 135 (2010) (citations omitted).

Our Supreme Court has stated, "Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property." *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 554, 633 S.E.2d 78, 85 (2006) (citations omitted). A restrictive covenant is enforceable at law if it is made in writing, properly recorded, and does not violate public policy. *Id.* at 555, 633 S.E.2d at 85 (citation omitted). While "all ambiguities will be resolved in favor of the unrestrained use of land," *J.T. Hobby & Son, Inc. v. Fam. Homes of Wake Cnty., Inc.*, 302 N.C. 64, 70, 274 S.E.2d 174, 179 (1981) (citations omitted), restrictive covenants "must be reasonably construed to give effect to the intention of the parties, and the rule of strict construction may not be used to defeat the plain and obvious purposes of a restriction." *Black Horse Run Prop. Owners Ass'n. v. Kaleel*, 88 N.C. App. 83, 85, 362 S.E.2d 619, 621 (1987).

Our case law has long held a restraint on a homeowner's property may not be effectively imposed except by deed or other writing duly registered in the office of the Register of Deeds. *Davis v. Robinson*, 189 N.C. 589, 601, 127 S.E.2d 697, 703 (1925). Thus, if the restrictive covenant is "contained in a separate instrument or rests in parol and not in a deed in the chain of title and is not referred to in such deed, a purchaser has no constructive notice of it and is not bound." *Hair*, 95 N.C. App. at 433, 382 S.E.2d at 797. Our law has consistently held "registration is the one and only means of giving notice of an instrument affecting title to real estate." *Massachusetts Bonding & Insurance Co. v. Knox*, 220 N.C. 725, 730, 18 S.E.2d 436, 440 (1942). Accordingly, a purchaser of real property "is not required to take notice of and examine recorded collateral instruments and documents which are not muniments of his title and are not referred to by the instruments in his chain of title." *Morehead v. Harris*, 262 N.C. 330, 340, 137 S.E.2d 174, 184 (1964).

"A purchaser is chargeable with notice of the existence of the restriction only if a proper search of the public records would have revealed it, and it is conclusively presumed he examined each recorded deed or instrument in his line of title to know its contents." *Turner v. Glenn*, 220 N.C. 620, 625, 18 S.E.2d 197, 201 (1942) (citations omitted). Therefore, a purchaser "has constructive notice of all duly recorded documents that a proper examination of the title should reveal." *Stegall v. Robinson*, 81 N.C. App. 617, 619, 344 S.E.2d 803, 804 (1986) (citations omitted). Plaintiff's assertions in his complaint, taken as true, allege Defendants had knowledge of the existence of the Declaration from both the title search they commissioned on Lot 32 and the title insurance policy

purchased in association with the purchase of Lot 32, which specifically listed the Declaration as "an insured exception upon that Policy."

Defendants argue the Declaration's "restrictions do not appear in [their] chain of title because [Plaintiff] chose not to refer to the restrictions in [their] deed and chose not to add a legal description or map reference to the Declaration he filed." However, the Declaration is a recorded public record with the Gaston County Register of Deeds. Therefore, a "proper search of the public records pertaining to the subdivision would have revealed" the Declaration applying to the Stoney Brook Estates. *Harborgate Prop. Owners Ass'n v. Mt. Lake Shores Dev. Corp.*, 145 N.C. App. 290, 294, 551 S.E.2d 207, 210 (2001). Furthermore, as Plaintiff notes, Chapter 13 of the Gaston County Unified Development Ordinance mandates that "names of new subdivisions and subdivisions roads shall not duplicate or be phonetically similar to the names of existing subdivisions and road names in Gaston County." Gaston County, N.C., Unified Development Ordinance ch. 13, § 13.13A (2023).

By controlling ordinance, there can only be one Stoney Brook Estates subdivision in Gaston County, the subdivision in question here. There is no ambiguity regarding the identification of the real property intended to be subject to the Declaration when there can be no other subdivisions with that name in Gaston County. The Declaration was made by and recorded by the owner of the lot at issue prior to the conveyance of the lot to Defendants. Thus, because the Declaration appears in Lot 32's chain of title and there are no other subdivisions titled "Stoney Brook Estates" in Gaston County, the pleadings support a reasonable inference that Defendants had constructive notice of the restrictive covenant's existence.

Defendants also contend the Declaration is unenforceable because the subdivision lots in Stoney Brook Estates are not under a uniform plan of development. According to Defendants, because Plaintiff "only owned a portion of the subdivision when the Declaration was recorded, [his] stated purpose in recording the restrictions is impossible. One-third of the subdivision remains unencumbered and unrestricted, undermining any argument that there is a common plan or development." In making this assertion, Defendants rely upon *Reed v. Elmore* for the proposition that a restrictive covenant must be part of a general plan or scheme of development "which bears uniformly upon the area affected." 246 N.C. 221, 233, 98 S.E.2d 360, 369 (1957) (Denny, J., dissenting) (citations omitted). However, Defendants' reliance on *Reed* is misplaced. *Reed* states,

> Uniformity of pattern with respect to a development furnishes evidence of the intent of the grantor to impose

> restrictions on all of the property and when the intent is ascertained it becomes binding on and enforceable by all immediate grantees as well as subsequent owners of any part of the property; but the fact that there is an absence of uniformity in the deeds does not prevent the owner of one lot from enforcing rights expressly conferred upon him by his contract.

Id. at 226, 98 S.E.2d at 364. Furthermore, "[c]ontractual relations do not disappear as circumstances change." *Id.* (citation omitted).

Here, Plaintiff was conveyed all of Integrity's interests in Stoney Brook Estates in 2008. On 10 July 2017, prior to Defendant's purchase of Lot 32, Plaintiff filed the Declaration for all remaining parcels of land in the Stoney Brook Estates. Although Plaintiff did not own five of the lots in Stoney Brook Estates, Plaintiff was permitted to impose restrictions on the eleven parcels he did own. There is no requirement he own all of the lots in Stoney Brook Estates in order to impose restrictions on the lots he does own. The restrictions imposed in the Declaration show his plan to require structures on the eleven lots he owned to have uniform and defined characteristics. We agree with Plaintiff that his decision to make "all of his interest in Stoney Brook Estates subject to the restriction contained in the Declaration shows evidence of a general plan and scheme." Based upon this permissible inference, the pleadings suggest that a general plan and scheme was intended. Thus, the allegations in Plaintiff's complaint, taken as true, are sufficient to state a claim of enforcing the restrictive covenant against Defendant's property. *New Bar P'ship*, 221 N.C. App. at 306, 729 S.E.2d at 680 (citation omitted).

III. Conclusion

Because Plaintiff's complaint sufficiently stated a cause of action upon which relief may be granted, we reverse the order granting Defendants' motion to dismiss and remand to the trial court for further proceedings.

REVERSED AND REMANDED.

Judges DILLON and ZACHARY concur.

HARNETT COUNTY BOARD OF EDUCATION, Petitioner
v.
RETIREMENT SYSTEMS DIVISION, DEPARTMENT OF STATE TREASURER, Respondent

No. COA22-750

Filed 17 October 2023

1. Administrative Law—state employee retirement—contribution-based cap factor—rule-making requirements—substantial compliance

In a contested case filed by a county board of education (petitioner) challenging the validity of the "Cap-Factor Rule" in the Contribution-Based Benefit Cap Act—which established a benefit cap (calculated using a statutory cap factor) on certain members of the Teachers' and State Employees' Retirement System (TSERS) while requiring employers to make additional contributions (also calculated using the statutory cap factor) to cap-exempt employees—the superior court properly ruled against petitioner where the Retirement Systems Division of the Department of the State Treasurer (respondent) had substantially complied with the rule-making requirements of the Administrative Procedure Act (APA) in adopting the Rule. Specifically, where the Rule undisputedly had a "substantial economic impact" as defined under the APA, respondent properly prepared a fiscal note identifying the entities subject to the Rule—namely, all public agencies participating in TSERS—and the types of expenditures they would be expected to make. Additionally, respondent was not required to consider the Rule's impact on every individual school system when crafting the Rule—it was sufficient that respondent had acknowledged the greater impact the Rule would have on school systems compared to other state agencies. Finally, respondent adequately considered potential alternatives to the Rule by considering different values for the cap factor.

2. Administrative Law—state employee retirement—contribution-based cap factor—application—not retroactive

In a contested case filed by a county board of education (petitioner) challenging the validity of the "Cap-Factor Rule" in the Contribution-Based Benefit Cap Act (the Act)—which established a benefit cap for certain state employees while requiring employers to make additional contributions to cap-exempt employees—where the Retirement Systems Division of the Department of the

State Treasurer (respondent) refunded petitioner's additional contribution to an employee after the Rule was declared invalid in a different litigation, validly re-adopted the Rule under the requisite rule-making procedures, and then informed petitioner that it would have to pay the additional contribution under the re-adopted Rule, respondent's actions did not constitute an impermissible retroactive application of the Rule. Rather, under the plain language of the Act, the benefit cap applied to all retirements occurring after January 2015, and therefore respondent properly required petitioner to make an additional contribution where the employee at issue had retired in 2017. Further, petitioner's contention that the Act only applied to retirements occurring after the validly-adopted Rule's effective date in 2019 lacked merit.

Appeal by Petitioner from Order entered 30 June 2022 by Judge James M. Webb in Harnett County Superior Court. Heard in the Court of Appeals 13 February 2023.

Tharrington Smith, L.L.P., by Deborah R. Stagner and Patricia R. Robinson, for Petitioner-Appellant.

Attorney General Joshua H. Stein, by Solicitor General Ryan Y. Park and Special Deputy Attorney General Olga E. Vysotskaya de Brito, for Respondent-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Harnett County Board of Education (Harnett BOE) appeals from an Order entered by the Superior Court on judicial review affirming the Final Decision of the Administrative Law Judge (ALJ) granting Summary Judgment in favor of the Retirement Systems Division, Department of State Treasurer (Retirement System). The Retirement System manages the Teachers' and State Employees' Retirement System (TSERS), which pays eligible retired teachers and state employees a fixed monthly pension calculated by a statutory formula which includes the retiree's four highest-earning consecutive years of state employment. The Final Decision in this case upheld an assessment against Harnett BOE for an additional contribution to the Retirement System to fund a pension for one of Harnett BOE's retired employees pursuant to anti-pension-spiking legislation (Contribution-Based Benefit Cap Act or the Act) applicable to TSERS.

The backdrop of this case is the Opinion of the Supreme Court of North Carolina—and preceding litigation—in *Cabarrus Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 374 N.C. 3, 839 S.E.2d 814 (2020) (the Cabarrus County litigation). There, our Supreme Court described the Contribution-Based Benefit Cap Act:

> In 2014, the General Assembly enacted An Act to Enact Anti-Pension-Spiking Legislation by Establishing a Contribution-Based Benefit Cap, S.L. 2014-88, § 1, 2014 N.C. Sess. Laws 291, which is codified, in pertinent part, at N.C.G.S. § 135-5(a3). The Act establishes a retirement benefit cap applicable to certain employees with an average final compensation of $100,000 or more per year whose retirement benefit payment would otherwise be significantly greater than the contributions made by that retiree during the course of his or her employment with the State. *Id.* In order to calculate the benefit cap applicable to each retiree, the Act directs the Retirement System's Board of Trustees to "adopt a contribution-based benefit cap factor recommended by the actuary, based upon actual experience, such that no more than three-quarters of one percent (0.75%) of retirement allowances are expected to be capped" and to calculate the contribution-based benefit cap for each retiring employee by converting the employee's total contributions to the Retirement System to a single life annuity and multiplying the cost of such an annuity by the cap factor. *Id.* In the event that the retiree's expected pension benefit exceeds the calculated contribution-based benefit cap, the Retirement System is required to "notify the [retiree] and the [retiree's] employer of the total additional amount the [retiree] would need to contribute in order to make the [retiree] not subject to the contribution-based benefit cap." N.C.G.S. § 135-4(jj) (2019). At that point, the retiree is afforded ninety days from the date upon which he or she received notice of the additional payment amount or the date of his or her retirement, "whichever is later, to submit a lump sum payment to the annuity savings fund in order for the [R]etirement [S]ystem to restore the retirement allowance to the uncapped amount." *Id.* The retiree's employer is entitled to "pay[ ] all or part of the . . . amount necessary to restore the [retiree's] retirement allowance to the pre-cap amount." *Id.*

Id. at 4-5, 839 S.E.2d at 815-16. While the Act applies to retirements occurring on or after 1 January 2015, relevant to this appeal, the Act further provides that for retirees who became members of TSERS prior to 1 January 2015, however, the retiree's pension will not be capped; instead, the retiree's last employer must contribute the amount "that would have been necessary in order for the retirement system to restore the member's retirement allowance to the pre cap amount." N.C. Gen. Stat. §§ 135-5(a3); 135-8(f)(2)(f).

Here, Harnett BOE's employee retired in February 2017 and had become a member of TSERS prior to January 2015. There appears to be no dispute in the Record that the Act applies to this retirement. At the time, the Retirement System was using a cap factor of 4.5 to calculate the contribution-based benefit cap, which in turn was used to calculate the additional contribution assessed to Harnett BOE. On 19 April 2017, the Retirement System sent a notice to Harnett BOE requiring payment of $197,805.61 as the additional contribution required to fund Harnett BOE's employee's pension. Harnett BOE paid the assessment in full.

The Cabarrus County litigation began in 2016 when Cabarrus County Board of Education along with several other Boards of Education filed administrative challenges to the validity of cap factors adopted in 2014 and 2015, including the 4.5 cap factor utilized to calculate the 2017 assessment to Harnett BOE. The Boards argued the cap factors were invalid because they had not been adopted through the rule-making process required by the North Carolina Administrative Procedure Act (APA). After a final agency decision against the Cabarrus County Board, the Board petitioned for judicial review, and in May 2017, a Superior Court declared the cap factors invalidly adopted. *See id.*

In the wake of the Superior Court decision, the Retirement System initiated the formal rule-making process to adopt a cap factor in December 2017. After holding a public hearing in January 2018 and receiving written comments on the proposed cap-factor rule, at a 7 March 2018 meeting, the Retirement System's Board of Trustees adopted the cap-factor rule, again setting the cap factor at 4.5. The administrative rule was codified at 20 NCAC 02B .0405 (Cap-Factor Rule).[1]

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1. Shortly after adoption of the Cap-Factor Rule, the General Assembly amended the statute to expressly make clear the cap-factor calculation was not subject to the rule-making provisions of the APA. *See* 2021 N.C. Sess. Laws ch. 70 § 3.2. However, for purposes of this appeal, the parties appear in agreement that amendment does not apply to this case and that the Supreme Court's decision in the Cabarrus County litigation remains controlling. The Cap-Factor Rule itself has been repealed.

Meanwhile, the Cabarrus County litigation continued. On 18 September 2018, this Court issued its Opinion affirming the Superior Court holding that the rule-making provisions of the APA applied to the adoption of cap factors and, thus, assessments made using a cap factor adopted outside of the rule-making process were invalid. *Cabarrus Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 261 N.C. App. 325, 345, 821 S.E.2d 196, 210 (2018). The Supreme Court of North Carolina subsequently affirmed our Court and the trial court in 2020. *Cabarrus Cnty. Bd.*, 374 N.C. 3, 839 S.E.2d 814.

Following this Court's decision in the Cabarrus County litigation, Harnett BOE sought a refund of the 2017 assessment. In October 2020, a Wake County Superior Court ordered the Retirement System to issue a refund to Harnett BOE. On 16 December 2020, however, the Retirement System sent a new invoice notifying Harnett BOE that it again owed $197,805.61 to fund the retirement of its employee. This time the Retirement Division relied on the 4.5 cap factor it had adopted in 2018. Harnett BOE submitted a request to the Retirement System demanding withdrawal of the new assessment, contending it constituted improper retroactive application of the 2018 Cap-Factor Rule to the 2017 retirement. In February 2021, the Retirement System issued a Final Agency Decision rejecting Harnett BOE's demand.

Harnett BOE then filed a Contested Case Petition in the Office of Administrative Hearings. On 10 September 2021, an ALJ denied the Board's Motion for Summary Judgment and granted Summary Judgment to the Retirement System. The ALJ concluded the 2018 Cap-Factor Rule was properly applied retroactively to retirements occurring after 1 January 2015 consistent with the purpose of the Contribution-Based Benefit Cap Act and specifically N.C. Gen. Stat. § 135-5(a). The ALJ also concluded the 2018 Cap-Factor Rule was adopted in substantial compliance with the requirements for adopting a rule under the APA.

On 11 October 2021, Harnett BOE filed a Petition for Judicial Review in Harnett County Superior Court, seeking a declaratory ruling that (1) "20 NCAC 02B .0405 is void and of no effect because of the failure of the . . . [Retirement System] Board of Trustees to comply with the requirement of Chapter 150B of the North Carolina General Statutes"; (2) "[Retirement System]'s assessment against the Board in the amount of $197,805.61 is void and unenforceable because 20 NCAC 02B .0405 was not lawfully adopted"; (3) 20 NCAC 02B .0405 may not be applied retroactively to assess additional amounts for retirements that occurred prior to March 21, 2019"; and (4) [Retirement System]'s assessment against the Board in the amount of $197,805.61 is void

and unenforceable because [Retirement System] improperly applied 20 NCAC 02B .0405 retroactively."

On 13 June 2022, the Superior Court heard arguments by both parties on the Petition for Judicial Review. On 30 June 2022, the Superior Court entered an Order affirming the final decision of the ALJ. Petitioner timely filed Notice of Appeal on 28 July 2022.

Issues

The issues on appeal are whether: (I) the Retirement System substantially complied with the rule-making requirements of the APA in adopting the Cap-Factor Rule; and (II) the Cap-Factor Rule was properly applied to retroactively calculate the amount Harnett BOE owed to fund its employee's retirement under the Contribution-Based Benefit Cap Act.

Analysis

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

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

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> > (1) In violation of constitutional provisions;
> >
> > (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
> >
> > (3) Made upon unlawful procedure;
> >
> > (4) Affected by other error of law;

> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

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

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

N.C. Gen. Stat. § 150B-51(c) (2021).

"The scope of review to be applied by the appellate court under [the APA] is the same as it is for other civil cases." N.C. Gen. Stat. § 150B-52 (2021). "Thus, our appellate courts have recognized that '[t]he proper appellate standard for reviewing a superior court order examining a final agency decision is to examine the order for errors of law.' " *EnvironmentaLEE v. N.C. Dep't of Env't & Nat. Res.*, 258 N.C. App. 590, 595, 813 S.E.2d 673, 677 (2018) (quoting *Shackleford-Moten v. Lenoir Cnty. Dep't of Soc. Servs.*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002)). "Our appellate courts have further explained that 'this "twofold task" involves: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *Id.* (quoting *Hardee v. N.C. Bd. of Chiropractic Exam'rs*, 164 N.C. App. 628, 633, 596 S.E.2d 324, 328 (2004) (citations and quotation marks omitted)). "As in other civil cases, we review errors of law de novo." *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 596, 620 S.E.2d 14, 17 (2005).

In this case, consistent with N.C. Gen. Stat. § 150B-34(e), the ALJ granted Summary Judgment for the Retirement System. *See* N.C. Gen. Stat. § 150B-34(e) (2021). The superior court, in turn, reviewing the ALJ's decision to grant Summary Judgment applied a de novo standard of review and determined Summary Judgment was properly entered for the Retirement System. *See* N.C. Gen. Stat. § 150B-51(d) (2021).

Summary judgment is properly granted "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) (2021). "On appeal, this Court reviews an order granting summary judgment de novo." *Cabarrus Cnty.*, 261 N.C. App. at 329, 821 S.E.2d at 200 (citation and quotation marks omitted). Findings of fact and conclusions of law are not required in an order granting summary judgment, and " '[i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered.' " *Id.* (quoting *Save Our Schs. of Bladen Cnty. v. Bladen Cnty. Bd. of Educ.*, 140 N.C. App. 233, 237-38, 535 S.E.2d 906, 910 (2000)).

I. Substantial Compliance with Rule-Making Requirements

[1] Harnett BOE argues the Superior Court erred in affirming the ALJ's grant of Summary Judgment on the question of whether the Retirement System validly adopted the Cap-Factor Rule as required by our Supreme Court in the Cabarrus County litigation. Specifically, Harnett BOE contends the Retirement System—in adopting the Cap-Factor Rule—failed to substantially comply with the rule-making provisions of the APA.

The purpose of the APA is to establish "a uniform system of administrative rule making and adjudicatory procedures for agencies." N.C. Gen. Stat. § 150B-1(a) (2021). Article 2A of the APA governs the requirements for agency rule-making. *See* N.C. Gen. Stat. § 150B-18, *et seq.* "A rule is not valid unless it is adopted in substantial compliance with this Article [2A]." N.C. Gen. Stat. § 150B-18 (2021). "The necessary procedures for substantial compliance are outlined in G.S. § 150B-21.2[.]" *Jackson v. N.C. Dep't of Hum. Res.*, 131 N.C. App. 179, 184, 505 S.E.2d 899, 902 (1998).

N.C. Gen. Stat. § 150B-21.2(a) provides:

> Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:
>
> (1) Publish a notice of text in the North Carolina Register.
>
> (2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.

> (3) Repealed by S.L. 2003-229, § 4, eff. July 1, 2003.
>
> (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
>
> (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

N.C. Gen. Stat. § 150B-21.2(a) (2021). In this case, Harnett BOE asserts the Retirement System acted contrary to these statutory mandates by: (A) failing to comply with Section 150B-21.2(a)(2) by, in turn, failing to comply with the requirements of Section 150B-21.4 concerning the fiscal note; and (B) failing to comply with the requirements of Section 150B-19.1 related to consideration of the burdens imposed by the proposed rule and alternatives to the proposed rule.

A. Fiscal Note Requirements

Relevant to this case, N.C. Gen. Stat. § 150B-21.4 provides:

> Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency shall prepare a fiscal note for the proposed rule change and have the note approved by the Office of State Budget and Management.

N.C. Gen. Stat. Ann. § 150B-21.4 (2021). A substantial economic impact is an "aggregate financial impact on all persons affected of at least one million dollars . . . in a 12-month period." N.C. Gen. Stat. § 150B-21.4(b1) (2021). N.C. Gen. Stat. § 150B-21.4(b1) further provides:

> In analyzing substantial economic impact, an agency shall do the following:
>
> > (1) Determine and identify the appropriate time frame of the analysis.
> >
> > (2) Assess the baseline conditions against which the proposed rule is to be measured.
> >
> > (3) Describe the persons who would be subject to the proposed rule and the type of expenditures these persons would be required to make.
> >
> > (4) Estimate any additional costs that would be created by implementation of the proposed rule by measuring

> the incremental difference between the baseline and the future condition expected after implementation of the rule. The analysis should include direct costs as well as opportunity costs. Cost estimates must be monetized to the greatest extent possible. Where costs are not monetized, they must be listed and described.
>
> (5) For costs that occur in the future, the agency shall determine the net present value of the costs by using a discount factor of seven percent (7%).

N.C. Gen. Stat. § 150B-21.4(b1) (2021).

Here, there is no dispute that during the rule-making process the Retirement System determined the proposed Cap-Factor Rule would have a substantial economic impact. There is also no dispute the Retirement System did, in fact, prepare a Fiscal Note in accordance with Section 150B-21.4. Likewise, there is no dispute the Fiscal Note was, in fact, approved by the Office of State Budget and Management.

Harnett BOE, however, specifically argues the Retirement System failed to substantially comply with Section 150B-21.4(b1)(3) by failing to identify "the persons who would be subject to the proposed rule and the type of expenditures these persons were required to make." Harnett BOE asserts the Retirement System failed to consider the impact of the proposed Cap-Factor Rule on individual school systems or, indeed, any individual employer. Harnett BOE, however, cites no authority in specific support of its argument.

Indeed, to the contrary, the Fiscal Note prepared by the Retirement System—and approved by the Office of State Budget and Management—acknowledges the contribution-based benefit cap requirement of the anti-pension spiking statute impacts—and protects—all employing public agencies participating in TSERS. The Note "estimates spiking employers will pay $73.6 [million] to the Retirement Systems over 15 years in additional employer contributions . . . while all employers that do not incur additional contributions . . . will avoid bearing a pro-rata share in present value terms of the unforeseen liabilities that these additional contributions serve to offset."

Moreover, the Fiscal Note further expressly acknowledges types of employing agencies subject to the cap including school systems, the UNC system, local governments, community colleges, and state agencies. The Note further recognizes "school systems had incurred $2.8 million by the end of 2016, or 41% of all CBBC liabilities, the largest share among agencies affected by the legislation." Indeed, the Note

also recognizes the Cabarrus County litigation and that, specifically, the four school boards involved in the litigation had been invoiced for a total of $1.8 million incurred from five retirements. Additionally, the Note contemplates the potential impact, not just on the employers, but member-employees, including identifying specific types of employees covered by the Retirement System. As such, we conclude the Retirement System's Fiscal Note is in substantial compliance with N.C. Gen. Stat. § 150B-21.4(b1)(3).

B. Burden Imposed and Consideration of Alternatives

Harnett BOE also contends the Retirement System's rule-making process for the Cap-Factor Rule was contrary to two requirements of N.C. Gen. Stat. § 150B-19.1. This Section sets forth a number of requirements an agency must follow when drafting and adopting a proposed administrative rule. N.C. Gen. Stat. § 150B-19.1(a) provides:

> (a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:
>
> > (1) An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.
> >
> > (2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.
> >
> > (3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.
> >
> > (4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant.
> >
> > (5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).
> >
> > (6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.

N.C. Gen. Stat. § 150B-19.1(a) (2021). Further relevant to this case, N.C. Gen. Stat. § 150B-19.1(f) requires: "If the agency determines that a proposed rule will have a substantial economic impact as defined in G.S. [§] 150B-21.4(b1), the agency shall consider at least two alternatives to the proposed rule. The alternatives may have been identified by the agency or by members of the public." N.C. Gen. Stat. § 150B-19.1(f) (2021).

First, Harnett BOE argues the Retirement System acted contrary to Section 150B-19.1(a)(2) by failing to seek to reduce the burden on those entities who must comply with the Cap-Factor Rule. Specifically, Harnett BOE asserts the Retirement System failed to consider the burden imposed on individual school systems. Harnett BOE cites no specific authority to support its contention that the Retirement System was required to consider the particular impact to every individual school system or entity impacted by the proposed Cap-Factor Rule.

However, the Fiscal Note itself illustrates the Retirement System was grappling with its duty to carry out a statutory mandate, reduce system-wide costs caused by alleged pension-spiking, thus, reducing costs across all impacted agencies and retirees (particularly those not engaged in alleged pension-spiking), and striking a balance by adopting a cap-factor that resulted in a Contribution-Based-Benefit Cap was neither underinclusive nor overinclusive. Again, the Retirement System did acknowledge the anti-pension-spiking legislation had had a greater impact on school systems compared to other agencies. Indeed, as the Retirement System explained through affidavits submitted below and in briefing to this Court, there is simply a tension in adopting a cap-factor between maximizing the effectiveness of the Contribution-Based Benefit Cap Act—with the goal of decreasing the likelihood of higher system-wide employer contributions—and minimizing the burden on specific employers subject to the Act.[2] The Retirement System's analysis, as demonstrated throughout the Fiscal Note, attempts to balance its obligation to reduce the burdens on all agencies and members system-wide with its obligation to fulfill the statutory mandates of the Act. In so doing, the Retirement System relied on the same actuarial information and presentations from consultants used to determine the original 2015 cap-factor prior to the Cabarrus County litigation. Harnett BOE cites no authority for the proposition this information was

2. As a general proposition, adoption of a higher value for the cap factor results in fewer pensions being subject to capping—with the commensurate potential increase in system-wide employer contributions being required—while a lower cap factor would result in more pensions being subject to the cap increasing the burden on individual employers and/or retirees.

improperly considered or that this data was erroneous or invalid. As such, we conclude the Retirement System substantially complied with Section 150B-19.1(a)(2).

Second, and relatedly, Harnett BOE argues the Retirement System failed to comply with Section 150B-19.1(f) by failing to consider at least two alternatives to the cap factor of 4.5. However, the Retirement System—as evidenced both in the data and presentations it considered along with the Fiscal Note—plainly did consider the potential impacts of different values for the cap-factor. The Retirement System considered cap-factors ranging from 4.1 to 5.0. Thus, the Retirement System substantially complied with N.C. Gen. Stat. § 150B-19.1(f).

II. Application of the Cap-Factor Rule

[2] Harnett BOE further contends the 2018 Cap-Factor Rule was impermissibly applied retroactively to the 2017 retirement of its employee. Harnett BOE argues the intent of the Contribution-Based Benefit Cap Act was not to apply to all applicable retirements occurring after 1 January 2015 but only those occurring after a validly-adopted Cap-Factor Rule became effective. Thus, Harnett BOE asserts—because of the Cabarrus County litigation—there was no validly-adopted cap factor in 2017 when its employee retired. Therefore, Harnett BOE argues it should not be subject to the additional contribution for its retired employee in this case at all.

"A statute will not be construed to have retroactive effect unless that intent is clearly expressed or arises by necessary implication from its terms." *In re Mitchell's Will*, 285 N.C. 77, 79-80, 203 S.E.2d 48, 50 (1974). "A statute is not necessarily unconstitutionally retroactive where its application depends in part upon a fact that antedates its effective date. The proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect." *State ex rel. Lee v. Penland-Bailey Co., Inc.*, 50 N.C. App. 498, 503, 274 S.E.2d 348, 352 (1981).

This Court, in a related matter, recently held:

> Here, the Act provides that "every service retirement allowance . . . for members who retire on or after January 1, 2015, is subject to adjustment pursuant to a contribution-based benefit cap[.]" N.C. Gen. Stat. § 135-5(a3). The Act further provides that "the retirement allowance of a member who became a member before January 1, 2015 . . . shall not be reduced; however, the member's last employer . . . shall be required to make an additional contribution[.]" *Id.* The

> plain language of the Act indicates that it applies to any retirement allowance for a member who retires on or after 1 January 2015.

Wilson Cnty. Bd. of Educ. v. Ret. Sys. Div., 290 N.C. App. 226, 240, 891 S.E.2d 626, 635-36 (COA22-1027, filed Aug. 15, 2023). There, we concluded: "Because the employee in this case retired on 1 January 2018, three years after Act took effect, the statute was not retroactively applied to Petitioner." *Id.*

In this case, Harnett BOE's employee retired in 2017, after the 1 January 2015 effective date of the Act. Therefore, by its plain language, the Act applied to the retirement at issue in this case. Thus, there was no retroactive application of the Contribution-Based Benefit Cap Act in this case.

Nevertheless, Harnett BOE contends even if the Act theoretically applies to all retirements occurring after 1 January 2015, the Cap-Factor Rule itself cannot be applied to retirements occurring before its effective date in 2019. Harnett BOE posits this is so because retroactive application of the Cap-Factor Rule would impair Harnett BOE's vested right by interfering with liabilities which had accrued at the time the Cap-Factor Rule took effect. *See Penland-Bailey*, 50 N.C. App. at 503, 274 S.E.2d at 352. Specifically, Harnett BOE asserts that in the absence of a valid cap factor at the time of the 2017 retirement, it could not have known, at that time, either whether its employee's retirement would be subject to the cap or, if so, the amount of its liability.

Harnett BOE's argument fails. Here, again, by its plain language, the Contribution-Based Benefit Cap Act applies to "every service retirement allowance . . . for members who retire on or after January 1, 2015," and makes plain those retirement allowances are "subject to adjustment pursuant to a contribution-based benefit cap[.]" N.C. Gen. Stat. § 135-5(a3) (2021). It further provides that upon the retirement of any employee who became a TSERS member prior to 2015, the employer would be liable for the additional contribution. *Id.*

Here, the Retirement System—by adopting the Cap-Factor Rule and calculating the additional contribution owed by Harnett County BOE for the 2017 retirement—was simply carrying out the statutory mandate of the Contribution-Based Benefit Cap Act. Harnett County BOE was on notice of the Act and on notice that it would apply to determine whether the retirement of its employee in 2017 would be subject to a cap. Harnett BOE's argument that the Retirement System's calculation of the assessment of the additional contribution following adoption of

the Cap-Factor Rule interfered with an already accrued liability does not follow. No liability accrued until the Retirement System—applying a valid cap factor—calculated and invoiced the additional contribution owed as required under the statute.[3]

This Court's prior decision in *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau* is instructive here. There, after this Court had previously vacated an order setting new vehicle insurance rates effective 1 January 1995 and remanded the matter to the Commissioner to set new rates, the Commissioner did so by an order entered in 1997 but made effective 1 January 1995. *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 131 N.C. App. 874, 875-76, 508 S.E.2d 836, 836-37 (1998), *review allowed in part and remanded*, 350 N.C. 850, 539 S.E.2d 10 (1999), and *review allowed in part and remanded*, 543 S.E.2d 482 (1999).

In that case, we acknowledged "the general principle that retroactive rate making is improper." *Id.* at 876, 508 S.E.2d at 837. Nevertheless, we further concluded: "The recalculation of rates, however, pursuant to a remand order of an appellate court and the application of those rates back to the effective date of the Order reversed on appeal does not constitute unlawful retroactive rate making." *Id.* We further observed:

> To hold otherwise essentially would bind the parties, for a period of time between the entry of the appealed Order and the rehearing on remand pursuant to the appellate court, to a rate declared invalid by the appellate court. This cannot represent sound public policy, and, furthermore, is inconsistent with the purpose of the remand order, which is to correct the error requiring the remand.

Id.

Likewise, here, given the statutory mandate that the contribution-based benefit cap apply to every retirement after 1 January 2015, the Retirement System was required to calculate and apply a contribution-based benefit cap to those retirements occurring after that effective date. Following the Cabarrus County litigation which declared the cap factor invalid, the Retirement System was required to validly adopt a cap-factor through rule-making and apply it as required

3. Harnett BOE contends this leads to an absurd result in which the Retirement System may simply and continuously retroactively change the cap factor to apply to post-2015 retirements. However, now that a cap factor has been adopted and applied to those retirements, particularly the one at issue here, the liability has accrued.

by statute to those retirements occurring after 1 January 2015—including the one at issue here. To conclude otherwise would not represent sound public policy—as it would undermine the purpose and express language of the statute to exclude retirements between 2015 and the 2019 effective date of the Cap-Factor Rule from application of the statute. Likewise, applying an invalidly adopted cap factor would be inconsistent with the judicial mandates from the Cabarrus County litigation, including from our Supreme Court. *See id.* As such, we conclude application of the Cap-Factor Rule to calculate the additional contribution owed by Harnett BOE in this case does not constitute an impermissible retroactive application of the cap-factor in this case.

Thus, the Retirement System substantially complied with the rule-making requirements of the APA in adopting the Cap-Factor Rule, and the Rule is properly applied to the retirement of Harnett County's employee in this case. Therefore, the ALJ properly granted Summary Judgment to the Retirement System. Consequently, the Superior Court, correctly applying a de novo review, did not err by affirming the ALJ's Final Decision.

Conclusion

Accordingly, for the foregoing reasons, we affirm the Superior Court's Order entered 30 June 2022 affirming the Final Decision of the ALJ.

AFFIRMED.

Judges MURPHY and STADING concur.

IN THE MATTER OF THE FORECLOSURE OF THE DEEDS OF TRUST OF MICKEY W. SIMMONS AND WAYNE SIMMONS AND HIS WIFE SALLY SIMMONS, GRANTORS, TO J. GREGORY MATTHEWS ORIGINAL DEEDS OF TRUST IN BOOK 1123, PAGE 573, RECORDED ON MAY 2, 2014 AND IN BOOK 1158, PAGE 67, RECORDED JUNE 12, 2015

No. COA21-682-2

Filed 17 October 2023

Mortgages and Deeds of Trust—foreclosure—power of sale—alleged violations of Chapter 45—applicability of Civil Procedure Rules

Where grantors, who had defaulted on a loan, attempted to challenge the foreclosure sale by seeking relief pursuant to Civil Procedure Rule 60(b)—arguing that there were violations of N.C.G.S. §§ 45-10 and 45-21.16(c)—the trial court did not err by denying the motion. Because the General Assembly made Chapter 45 of the General Statutes to be the comprehensive and exclusive statutory framework governing non-judicial foreclosures by power of sale, and because the Rules of Civil Procedure were not specifically engrafted into the statutory sections at issue, Rule 60 relief was not available to grantors.

Appeal by Grantors from order entered 3 May 2021 by Judge Michael D. Duncan in Yadkin County Superior Court. Heard in the Court of Appeals 23 August 2023. Petition for Rehearing allowed 5 December 2022. The following opinion supersedes and replaces the prior opinion filed 4 October 2022.

Blanco Tackabery & Matamoros, P.A., by Chad A. Archer and Henry O. Hilston, for Grantors-Appellants.

Hutchens Law Firm, LLP, by Hilton T. Hutchens, Jr., and Jeffrey A. Bunda, for Petitioners-Appellees.

GRIFFIN, Judge.

Grantors Mickey W. Simmons and Wayne and Sally Simmons appeal from an order denying their motion to vacate and set aside the foreclosure sale filed pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. Grantors argue the trial court erred in denying their motion pursuant to Rule 60(b) as: J. Gregory Matthews improperly served as both the closing attorney for the loan and the foreclosure trustee and

otherwise failed to include a notice of neutrality in the notice of hearing per N.C. Gen. Stat. §§ 45-10 and 45-21.16, respectively; and failed to notice Grantors, Wayne and Sally Simmons, of the 26 November 2019 foreclosure sale. Upon review, we hold the trial court did not err.

I. Factual and Procedural History

In May 2014, Grantors refinanced a loan with Petitioners, Donald and Betty Groce, which was secured by a deed of trust encumbering three tracts of land located at 1708 Rudy Road in Yadkinville, North Carolina. Then, on or about 12 June 2015, Mickey Simmons took out a second loan secured by a deed of trust encumbering the same three tracts of land. Matthews served as trustee in each of these transactions.

On 12 April 2016, Matthews, acting as counsel for Petitioners, sent a letter to Grantors noting Grantors were in default for failing to make payments. On 22 April 2016, Matthews sent a statutory payoff notice. Matthews filed a notice of foreclosure hearing on 22 July 2016 which set the hearing for 18 August 2016. After being continued, the foreclosure hearing was held on 6 October 2016. On 7 October 2016, the Clerk of Superior Court in Yadkin County, Beth Williams Holcomb, entered an order allowing foreclosure. The foreclosure sale was set to occur on 26 November 2016. Subsequently, Grantors filed for bankruptcy three times which stayed the foreclosure proceedings until 23 September 2019.

On 15 October 2019, Matthews filed a notice of sale. The foreclosure sale was held 26 November 2019, at which time Petitioners became the last and highest bidder. On 6 December 2019, the foreclosure sale was confirmed and the rights of the parties became fixed. On 10 December 2019, a trustee's deed was recorded.

On 5 October 2020, Wayne and Sally Simmons attempted to file a "Motion to Vacate the Foreclosure Sale," which the Clerk refused. On 25 November 2020, Mickey Simmons refiled the motion seeking relief from the foreclosure pursuant to Rule 60(b)(1), (3), and (6) arguing: the notice of foreclosure hearing did not contain a statement of neutrality as required under N.C. Gen. Stat. § 45-21.16(c)(7)(b); Matthews served as both Petitioners' attorney and foreclosure trustee in violation of N.C. Gen. Stat. § 45-10; and Wayne and Sally Simmons did not receive notice of the 26 November 2019 foreclosure sale.

On 19 January 2021, Clerk Holcomb entered an order denying the motion. Mickey Simmons appealed to the Yadkin County Superior Court. On 3 May 2021, Judge Michael D. Duncan entered an order denying the motion. On 1 June 2021, Grantors filed notices of appeal.

II. Analysis

Grantors argue the trial court erred in denying the motion to vacate and set aside the foreclosure sale pursuant to Rule 60(b) because Matthews improperly served as both the closing attorney for the loan and the foreclosure trustee, and otherwise failed to include a notice of neutrality in the notice of hearing per N.C. Gen. Stat. §§ 45-10 and 45-21.16, respectively; and failed to notice Wayne and Sally Simmons of the 26 November 2019 foreclosure sale. We disagree.

A. Standard of Review

Typically, this Court reviews the trial court's denial of a motion for relief under Rule 60(b) to determine whether the court abused its discretion. *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). The trial court will be reversed for abuse of discretion "only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citations omitted).

B. Chapter 45 Foreclosure Proceedings and the North Carolina Rules of Civil Procedure

North Carolina law provides for two methods under which a foreclosure proceeding may be brought: civil action or power of sale. *Phil Mech. Constr. Co. v. Haywood*, 72 N.C. App. 318, 321, 325 S.E.2d 1, 3 (1985); *see also Banks v. Hunter*, 251 N.C. App. 528, 534, 796 S.E.2d 361, 367 (2017) (citations omitted). In pertinence, "power of sale is a contractual provision in a deed of trust conferring upon the trustee the power to sell real property pledged as collateral for a loan in the event of default." *In re Worsham*, 267 N.C. App. 401, 407, 833 S.E.2d 239, 244 (2019) (citation omitted). As such, the right to foreclose by power of sale is contractual in nature and "permit[s] parties to expeditiously resolve mortgage defaults [through] a non-judicial [proceeding] if authorized in the parties' mortgage or deed of trust." *In re Frucella*, 261 N.C. App. 632, 635, 821 S.E.2d 249, 252 (2018). Because a power of sale foreclosure is achieved through non-judicial proceedings, our General Assembly has prescribed, in Chapter 45 of our General Statutes, a comprehensive framework governing power of sale foreclosures. *See* N.C. Gen. Stat. § 45 (2021).

Although our North Carolina Rules of Civil Procedure typically "apply in all actions and proceedings of a civil nature[,]" the Rules do not apply "when a differing procedure is prescribed by statute." N.C. Gen. Stat. § 1A-1, Rule 1. In reiterating the essence of this Rule, our Supreme Court in *In re Ernst & Young* pointedly stated: "[w]hen the legislature has prescribed specialized procedures to govern a particular proceeding, the Rules of Civil Procedure do not apply." *In re Ernst & Young*,

363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citation omitted). Drawing from the Court's reasoning in *Ernst & Young*, our Supreme Court in *In re Lucks* explicitly applied this principle to Chapter 45, power of sale foreclosures. *See In re Lucks*, 369 N.C. 222, 794 S.E.2d 501 (2016).

In *Lucks*, our Supreme Court stated: "The General Assembly has crafted Chapter 45 to be the comprehensive and exclusive statutory framework governing non-judicial foreclosures by power of sale." *Id.* at 226, 794 S.E.2d at 505 (citations omitted). Further, the Court clearly stated "[t]he Rules of Civil Procedure do not apply unless explicitly engrafted into the statute[,]" while recognizing the Rules would apply in sections such as 45-21.16(a) where the statute clearly requires notice of the foreclosure hearing as provided by the Rules. *Id.*; *see also* N.C. Gen. Stat. § 45-21.16(a) (2021) ("The notice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure[.]"). Similarly, Justice Hudson, while concurring in result only, specifically noted the Rules did not apply in section 45-21.16(c)(7). *In re Lucks*, 369 N.C. at 230, 794 S.E.2d at 507 (Hudson, J., concurring in result). This idea is supported by the fact that she stated: "I would clarify that since N.C.G.S. § 45-21.16 prescribes a different procedure for the hearing before the clerk, see N.C.G.S. § 45-21.16(c)-(d1) (2015), the Rules of Civil Procedure do not apply[.]" *Id.* at 230, 794 S.E.2d at 508 (Hudson, J., concurring in result).

Here, Grantors sought relief from the foreclosure pursuant to our North Carolina Rules of Civil Procedure, Rule 60(b), contending Matthews improperly served as both the closing attorney for the loan and the foreclosure trustee and otherwise failed to include a notice of neutrality in the notice of hearing per N.C. Gen. Stat. §§ 45-10 and 45-21.16(c). Further, Grantors also sought relief pursuant to Rule 60(b) by arguing that although Mickey Simmons received notice of the 26 November 2019 foreclosure sale, Wayne and Sally Simmons were never noticed.

Under Rule 60(b) of our Rules of Civil Procedure, a trial court may relieve a party from a final judgment, order, or proceeding for, among other reasons: "Mistake, inadvertence, surprise, or excusable neglect; . . . Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . [or] Any other reason justifying relief from the operation of the judgment." N.C. R. Civ. P. 60(b).

Further, our General Statutes, section 45-10, states, in relevant part: "An attorney who serves as the trustee or substitute trustee shall not represent either the noteholders or the interests of the borrower while

initiating a foreclosure proceeding." N.C. Gen. Stat. § 45-10 (2021). This portion of section 45-10 did not exist at the time the foreclosure proceedings here were initiated, as the relevant portion of the statute was amended to include the above statement in 2017. *See* 2017 N.C. Sess. Laws 206. While not in existence at the time of the foreclosure hearing in 2016, the amended portion of the statute was relevant law at the time of the foreclosure sale in 2019. Nevertheless, at no time were the Rules of Civil Procedure specifically engrafted in the statute and therefore do not apply.

Further, section 45-21.16(c) states that notice of foreclosure hearing shall, in relevant part, contain "[a] statement that the trustee, or substitute trustee, is a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding." N.C. Gen. Stat. § 45-21.16(c)(7)(b) (2021). While Matthews concedes the notice did not contain such a statement, the Rules of Civil Procedure are not specifically engrafted in the statute, and therefore Rule 60 does not apply.

In their final contention, Grantors argue Matthews's failure to notice Wayne and Sally Simmons of the foreclosure sale was in contravention of the requirements of service under section 45-21.16(a)—to which the Rules do apply. *See* N.C. Gen. Stat. § 45-21.16(a) (2021) (engrafting the North Carolina Rules of Civil Procedure). However, Grantors' contention does not concern the service itself but is in regard to Wayne and Sally Simmons not being served as required by section 45-21.16(b). Section 45-21.16(b) states notice must be served upon:

> (1) Any person to whom the security interest instrument itself directs notice to be sent in case of default.
>
> (2) Any person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor, and any such person not notified shall not be liable for any deficiency remaining after the sale.
>
> (3) Every record owner of the real estate whose interest is of record in the county where the real property is located at the time the notice of hearing is filed in that county.

N.C. Gen. Stat. § 45-21.16(b) (2021). Here, again, our General Assembly, in section 45-21.16(b), prescribed specific rules as to who should be noticed without engrafting our Rules of Civil Procedure. As such, Rule 60 does not apply.

Although Grantors sought relief from foreclosure pursuant to Rule 60(b) of our North Carolina Rules of Civil Procedure, the Rules do not

apply to foreclosure proceedings such as these, initiated under Chapter 45, unless specifically engrafted into the statute. Because the Rules are not engrafted into N.C. Gen. Stat. §§ 45-10 or 45-21.16(b)-(c), the Rules of Civil Procedure do not apply to those statutes, and therefore, Rule 60 relief can neither be sought nor granted in wake of a violation thereof. Thus, the trial court did not abuse its discretion in denying Grantors' motion to vacate and set aside the foreclosure pursuant to Rule 60(b).

III. Conclusion

We hold the trial court did not err in denying Grantors' motion to vacate and set aside foreclosure.

AFFIRMED.

Judges WOOD and FLOOD concur.

IN THE MATTER OF M.A.C., S.X.C.

No. COA23-30

Filed 17 October 2023

Termination of Parental Rights—subject matter jurisdiction—allegations in verified pleadings—juveniles "found in" judicial district where petition filed—at time of filing

The trial court had subject matter jurisdiction over a private termination of parental rights action, where petitioner-grandparents alleged in their verified petitions that the children were in their legal custody and resided with them in a different county than the one where the petitions were filed, but that the children "were present" in the same county where the petitions were filed at the time of filing. The grandparents' allegations established the jurisdictional requirement under N.C.G.S. § 7B-1101 that the children be "found in" the same judicial district where the petitions were filed; and, because the allegations came from verified pleadings, they were competent evidence for the prima facie presumption that the trial court rightfully exercised jurisdiction in the case. Conversely, respondent-mother's unverified answers to the petitions did not constitute competent evidence rebutting the presumption of rightful jurisdiction.

Judge HAMPSON dissenting.

Appeal by respondent-mother from order entered 30 August 2022 by Judge Jason Coats in Harnett County District Court. Heard in the Court of Appeals 5 September 2023.

Robert L. Schupp for petitioners-appellees.

Jeffrey L. Miller for respondent-appellant mother.

ZACHARY, Judge.

Respondent-Mother appeals from the trial court's order terminating her parental rights to her minor children, "Mona" and "Sid."[1] Respondent-Mother raises no arguments concerning the merits of the trial court's order; rather, she only challenges the trial court's subject-matter jurisdiction over these proceedings. After careful review, we affirm.

I. Background

This case concerns private petitions for the termination of Respondent-Mother's parental rights to Mona and Sid, filed by the juveniles' paternal grandparents ("the Grandparents"). The juveniles have resided with the Grandparents since August 2017, when their son—the juveniles' father—obtained custody of Mona and Sid pursuant to a consent order. Respondent-Mother moved to South Carolina following the entry of the consent order; she has neither seen nor spoken with the juveniles since. The juveniles, meanwhile, have resided exclusively with the Grandparents since their father's death in March 2019. The Grandparents obtained temporary legal custody of the juveniles on 31 August 2020 in another proceeding.

After the trial court dismissed their prior termination petitions for lack of standing, on 24 June 2021, the Grandparents filed verified termination petitions ("the Petitions") in Harnett County for both Mona and Sid. The Grandparents filed amended Petitions on 17 August 2021.[2] In the Petitions, the Grandparents averred that they lived in Delco, North

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1. We use the pseudonyms adopted by the parties for ease of reading and to protect the juveniles' identities.

2. In that the dispositive allegation of fact—that the juveniles were "present in Harnett County, North Carolina as of the time of the filing of this Petition"—is identical in both the original and amended sets of petitions, for ease of reading we refer simply to "the Petitions."

Carolina,[3] that each juvenile resided with them, and that each juvenile was "present in Harnett County, North Carolina, as of the time of the filing of this Petition."

The trial court permitted the Grandparents to serve Respondent-Mother with the Petitions by publication; the requisite notices were published over a three-week period in September and October. On 10 December 2021 and 7 February 2022, Respondent-Mother filed unverified answers that contained motions to dismiss the Petitions for lack of personal jurisdiction, insufficiency of service of process, and failure to state a claim.

On 25 February 2022, the matter came on for hearing in Harnett County District Court. On 30 August 2022, the trial court entered an order denying Respondent-Mother's motions to dismiss. Pertinent to the case before us, the trial court found as fact that "[t]he children were present in Harnett County, North Carolina as of the time of the filing of the Petition[s.]" Consequently, the trial court concluded that it had "jurisdiction over the subject matter and the parties."

The trial court concluded that grounds to terminate Respondent-Mother's parental rights had been established, and that termination was in the juveniles' best interests. Accordingly, the court terminated Respondent-Mother's parental rights to Mona and Sid. Respondent-Mother timely filed notice of appeal.

II. Discussion

On appeal, Respondent-Mother argues that the trial court lacked subject-matter jurisdiction to terminate her parental rights to Mona and Sid. 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). "Absent subject-matter jurisdiction, a trial court cannot enter a legally valid order infringing upon a parent's constitutional right to the care, custody, and control of his or her child." *In re A.L.L.*, 376 N.C. 99, 101, 852 S.E.2d 1, 3–4 (2020). "When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, i.e., as if it had never happened. Thus the trial court's subject-matter jurisdiction may be challenged at any stage

3. Delco is located in Columbus County.

of the proceedings, even for the first time on appeal." *In re J.H.*, 244 N.C. App. 255, 259, 780 S.E.2d 228, 233 (2015) (emphasis omitted) (citation omitted).

Whether "a trial court possesses subject-matter jurisdiction is a question of law that is reviewed de novo." *A.L.L.*, 376 N.C. at 101, 852 S.E.2d at 4. 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) (cleaned up). However, unchallenged findings of fact are binding on appeal. *N.T.U.*, 234 N.C. App. at 733, 760 S.E.2d at 57.

"Although the question of subject[-]matter jurisdiction may be raised at any time where the trial court has acted in a matter, every presumption not inconsistent with the record will be indulged in favor of jurisdiction." *In re N.T.*, 368 N.C. 705, 707, 782 S.E.2d 502, 503 (2016) (cleaned up). "Nothing else appearing, we apply the *prima facie* presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter. As a result, the burden is on the party asserting want of jurisdiction to show such want." *Id.* at 707, 782 S.E.2d at 503–04 (cleaned up).

B. Analysis

Respondent-Mother argues that the trial court lacked subject-matter jurisdiction because "[t]here was no competent or unambiguous evidence in the record to support a finding or conclusion that the juveniles were present in Harnett County at the time of the filing of the Petitions." Her argument is premised on the fact that although both Petitions contain a statement that the relevant child was "present in Harnett County, North Carolina as of the time of the filing of th[e] Petition[,]" it is undisputed that the juveniles resided with the Grandparents in Columbus County at that time.

Under our Juvenile Code, a trial court's subject-matter jurisdiction "arises upon the filing of a properly verified juvenile petition and extends through all subsequent stages of the action." *In re K.S.D.-F.*, 375 N.C. 626, 633, 849 S.E.2d 831, 836 (2020) (cleaned up). "The allegations of a complaint determine a court's jurisdiction over the subject matter of the action." *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009). "A trial court's subject-matter jurisdiction over a petition to terminate parental rights is conferred by [N.C. Gen. Stat.] § 7B-1101." *A.L.L.*, 376 N.C. at 104, 852 S.E.2d at 6. Section 7B-1101 provides, in pertinent part:

> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination

> of parental rights to any juvenile who resides in, *is found in*, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district *at the time of filing of the petition or motion.*

N.C. Gen. Stat. § 7B-1101 (2021) (emphases added).

It is undisputed that at the time of the filing of the Petitions, the juveniles were in the Grandparents' legal custody and resided with them in Columbus County, and that Columbus and Harnett Counties are not in the same judicial district. *See id.* § 7A-133. Therefore, the question presented in the case at bar is whether the juveniles were "found in" Harnett County at the time of the Petitions' filing, and therefore, the Harnett County District Court properly exercised subject-matter jurisdiction. *Id.* § 7B-1101.

We first address Respondent-Mother's assertion that "[b]eing 'present in' is not the same as being 'found in.' " This Court has previously determined that, as used in § 7B-1101, the phrase "found in" means "physically present in[.]" *In re J.L.K.*, 165 N.C. App. 311, 320, 598 S.E.2d 387, 393, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004), *motion to reconsider dismissed*, 359 N.C. 281, 609 S.E.2d 773 (2005).

Our dissenting colleague questions the soundness of this precedent; however, we all agree "that we are bound by the prior decisions of this Court." *In re J.D.M.-J.*, 260 N.C. App. 56, 63, 817 S.E.2d 755, 760 (2018). The concern raised by Respondent-Mother and echoed by our dissenting colleague is for our Supreme Court to consider rather than this Court. "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." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Therefore, we may set aside Respondent-Mother's linguistic distinction and turn to the dispositive question of fact as concerns the proper invocation of the trial court's subject-matter jurisdiction: whether the juveniles were physically present in Harnett County at the time of the filing of the Petitions. This, in turn, raises the issue of whether the trial court's finding of fact to that effect—which supported the trial court's conclusion of law that it had subject-matter jurisdiction under § 7B-1101—was properly supported where the only competent record evidence was the Grandparents' allegations in their verified Petitions that the juveniles were present when the Petitions were filed. We conclude that it was.

A verified pleading containing factual allegations that satisfy the statutory requirements for invoking the trial court's subject-matter

jurisdiction is sufficient to raise "the *prima facie* presumption of rightful jurisdiction" at the time of filing. *N.T.*, 368 N.C. at 707, 782 S.E.2d at 504 (citation omitted). In *Wilson v. Wilson*, this Court held that the trial court properly exercised jurisdiction over the parties' divorce action where the "court's findings [we]re supported by [the] plaintiff's verified complaint," because a verified pleading "may be treated as an affidavit." 191 N.C. App. 789, 792, 666 S.E.2d 653, 655 (2008); *see also Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) ("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 in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein."). Just as § 7B-1104 requires that termination petitions be verified, complaints in divorce actions must also be verified. N.C. Gen. Stat. § 50-8.

Here, the Petitions were verified, as required by § 7B-1104, and each contained a factual allegation sufficient to satisfy the jurisdictional requirement that the juveniles be "found in" the judicial district where the termination action was filed—i.e., Harnett County. N.C. Gen. Stat. § 7B-1101. Petitioners thus successfully invoked "the *prima facie* presumption of rightful jurisdiction" upon the filing of the Petitions. N.T., 368 N.C. at 707, 782 S.E.2d at 504 (citation omitted).[4] Therefore, Respondent-Mother bore the burden of presenting competent evidence to rebut this presumption.

Respondent-Mother cites the well-established principle that "[t]he trial court's factual findings must be more than a recitation of allegations. They must be the specific ultimate facts sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *In re H.P.*, 278 N.C. App. 195, 202, 862 S.E.2d 858, 865 (2021) (cleaned up). However, "[i]t is not *per se* reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party." *Id.* at 202, 862 S.E.2d at 865–66 (cleaned up). Indeed, *Wilson* demonstrates that jurisdictional findings of fact may be properly supported by the factual allegations of a verified pleading.

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4. Although it appears that Petitioners did not introduce the Petitions into evidence at the hearing or that the trial court took judicial notice of them, we note that "[i]t is well-established that a trial court may take judicial notice of its own proceedings." *In re J.C.M.J.C.*, 268 N.C. App. 47, 56, 834 S.E.2d 670, 676 (2019). "Further, while it is the better practice to give express notice to the parties of the intention to take judicial notice of matters contained in the juvenile's file, it is not required." *Id.* (citation omitted). In this case, "the record tends to show the court took judicial notice of the" Petitions. *Id.* at 56, 834 S.E.2d at 676–77.

The heart of Respondent-Mother's argument is that she specifically denied the Grandparents' allegation that the juveniles were "present in Harnett County, North Carolina as of the time of the filing of th[e] Petition[s]" in her unverified answers, thereby "placing the matter of the juveniles' 'presence' in dispute." Thus, according to Respondent-Mother, the trial court erred by "merely recit[ing] the Petitions' allegation without any evidence in the record to support its finding concerning this denied and disputed issue."

Unlike the Grandparents' Petitions, however, Respondent-Mother's answers were *not* verified. "Factual allegations in [Respondent-Mother's] unverified answer[s] are not competent evidence; therefore, we assume the trial court did not consider these and do not consider them on appeal." *Brown v. Refuel Am., Inc.*, 186 N.C. App. 631, 634, 652 S.E.2d 389, 392 (2007). That there was no statutory requirement that her answers be verified is immaterial to the issue of whether the factual allegations in her unverified answers were competent evidence. Moreover, Respondent-Mother did not argue at the hearing that the juveniles were not present in Harnett County at the time of the filings. Therefore, disregarding the denial of the Grandparents' allegation in her unverified response, as we must, *id.*, Respondent-Mother did not properly raise any dispute over the presence of the children in Harnett County at the time of the filing of the Petitions. As a result, Respondent-Mother did not carry her burden to rebut "the *prima facie* presumption of rightful jurisdiction[.]" *N.T.*, 368 N.C. at 707, 782 S.E.2d at 504 (citation omitted).

Our dissenting colleague notes that the "presumption of rightful jurisdiction" applies only when it is "not inconsistent with the record." *Id.* at 707, 782 S.E.2d at 503–04. The dissent contends that "the Record in this case reflects only that the juveniles were in the legal and physical custody of Petitioners in Columbus County—not Harnett County—at the time of the filing of the Petitions." *Dissent* at 45. This much is true, yet it is immaterial to the dispositive question of whether the juveniles were "found in" Harnett County at the time of the filing of the Petitions. As previously discussed, we are bound by precedent to interpret "found in" to mean "physically present in[.]" *J.L.K.*, 165 N.C. App. at 320, 598 S.E.2d at 393. The *only* competent record evidence that directly addresses *the juveniles' physical presence at the time of the filing*—rather than their residence or legal and actual custody—is the Grandparents' allegations in the Petitions.

The dissent cites *In re D.L.A.D.*, in which "there [wa]s no evidence in the record from which we c[ould] determine that D.L.A.D. was found in Surry County the day the Petition was filed[,]" 254 N.C. App. 344, 802

S.E.2d 620, 2017 WL 2950772, at *3 (2017) (unpublished), to distinguish our application of *J.L.K.* However, the Grandparents in this case specifically alleged in the verified Petitions that each juvenile was "present in Harnett County, North Carolina, as of the time of the filing of" the relevant Petition. This distinguishes the case before us from *D.L.A.D.*—an unpublished, and therefore, unbinding decision of this Court—because the juvenile petition in that case contained no such specific allegation. *Id.*

We also note that nothing in this opinion should be construed as applying to a trial court's findings of fact relating to any topic other than subject-matter jurisdiction. As our dissenting colleague astutely notes, "Chapter 7B of the North Carolina General Statutes contains absolutely no provision allowing for the use of a summary judgment motion in a juvenile proceeding" and the trial court maintains "the duty to hear the evidence and make findings of fact on the allegations contained in the juvenile petition." *In re J.N.S.*, 165 N.C. App. 536, 539, 598 S.E.2d 649, 650–51 (2004) (citation omitted).

It is manifest that subject-matter jurisdiction holds a unique position in our law. For example, unlike every other ground upon which a motion to dismiss may be based, "the trial court's subject-matter jurisdiction may be challenged *at any stage of the proceedings*, even for the first time on appeal." *J.H.*, 244 N.C. App. at 259, 780 S.E.2d at 233 (citation omitted); *accord* N.C. Gen. Stat. § 1A-1, Rule 12(h)(3). Furthermore, "unlike a Rule 12(b)(6) motion [for failure to state a claim], consideration of matters outside the pleadings does not convert the Rule 12(b)(1) motion [for lack of subject-matter jurisdiction] to one for summary judgment." *Bassiri v. Pilling*, 287 N.C. App. 538, 543–44, 884 S.E.2d 165, 169 (2023) (cleaned up). Indeed, "the court need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Id.* at 543, 884 S.E.2d at 169 (citation omitted).

Additionally, it is well established that "[t]he allegations of a complaint determine a court's jurisdiction over the subject matter of the action." *K.J.L.*, 363 N.C. at 345, 677 S.E.2d at 837. This is unlike the other allegations of a juvenile petition, which our dissenting colleague correctly observes must be proved "by clear, cogent, and convincing evidence." *In re R.B.B.*, 187 N.C. App. 639, 643, 654 S.E.2d 514, 518 (2007), *disc. review denied*, 362 N.C. 235, 659 S.E.2d 738 (2008). The allegations of a verified juvenile petition that support the trial court's subject-matter jurisdiction, and which remain uncontested by competent evidence throughout the proceedings, may sufficiently determine the threshold

issue of the court's jurisdiction. However, in light of the unique nature of subject-matter jurisdiction, we confine our holding to the sole issue of the sufficiency of competent record evidence to support the trial court's conclusion that it possessed subject-matter jurisdiction.

Lastly, we note that Respondent-Mother has not challenged any of the trial court's findings of fact or conclusions respecting the merits of its determination that termination of her parental rights was in the best interests of the juveniles. As Respondent-Mother has not put forth "any challenge to the merits of the trial court's termination order, we affirm the trial court's order terminating [her] parental rights" to Mona and Sid. *In re C.N.R.*, 379 N.C. 409, 420, 866 S.E.2d 666, 674 (2021).

III. Conclusion

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

AFFIRMED.

Judge FLOOD concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

N.C. Gen. Stat. § 7B-1101 entitled "Jurisdiction" provides "[t]he court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion." N.C. Gen. Stat. § 7B-1101 (2021).

> In matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute. N.C.G.S. §§ 7B-200, -1101 (2007). The existence of subject matter jurisdiction is a matter of law and " ' "cannot be conferred upon a court by consent." ' " *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (quoting *In re Custody of Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967)). Consequently, a court's lack of subject matter jurisdiction is not waivable and can be raised at any time. N.C.G.S. § 1A-1, Rule 12(h)(3) (2007).

In re K.J.L., 363 N.C. 343, 345-46, 677 S.E.2d 835, 837 (2009). "If a petitioner or movant fails to meet all of the requirements for establishing the court's jurisdiction over a termination proceeding, then the court lacks jurisdiction to conduct a termination proceeding, regardless of whether the trial court previously exercised jurisdiction over the child for other purposes." *In re O.E.M.*, 379 N.C. 27, 36, 864 S.E.2d 257, 263 (2021).

Here, Petitioners sought to invoke the subject-matter jurisdiction of the trial court in Harnett County by alleging in their Petitions that the juveniles were present in Harnett County at the time of the filing of the Petitions. While it is true these Petitions were verified, this is required by statute. N.C. Gen. Stat. § 7B-1104 (2021). Respondent filed Answers which denied the Juveniles were present in Harnett County at the time of the filing of the Petitions. It is likewise true these Answers were not verified. However, there is no statutory requirement for these Answers to be verified. *See* N.C. Gen. Stat. § 7B-1108 (2021). To the contrary, the simple denial of "any material allegation of the petition" triggers the trial court's duty to appoint a guardian ad litem to represent the best interests of the child. *Id.*

The majority here relies on the fact the Answers filed by Respondent were unverified to support its determination Respondent failed to create any evidentiary question as to where the children were found or present. However, "Chapter 7B of the North Carolina General Statutes contains absolutely no provision allowing for the use of a summary judgment motion in a juvenile proceeding." *In re J.N.S.*, 165 N.C. App. 536, 539, 598 S.E.2d 649, 650-51 (2004). "In fact, the provisions of Chapter 7B implicitly prohibit such use by imposing on the trial court the duty to hear the evidence and make findings of fact on the allegations contained in the juvenile petition." *Id.* at 539, 598 S.E.2d at 651 (citation omitted). "The burden is on the petitioner to prove the allegations of the termination petition by clear, cogent, and convincing evidence." *In re R.B.B.*, 187 N.C. App. 639, 643, 654 S.E.2d 514, 518 (2007) (citing N.C. Gen. Stat. § 7B-1109(f) (2005)); *see also In re A.M., J.M.*, 192 N.C. App. 538, 542, 665 S.E.2d 534, 536 (2008).

Unlike our Court's earlier decision, *In re J.L.K.*, 165 N.C. App. 311, 320, 598 S.E.2d 387, 393 (2004),[1] where it was "undisputed that at the

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1. As the majority notes, we are bound by the prior panel's decision in *J.L.K.*, which: (a) viewed the jurisdictional question as a waivable venue issue; and (b) suggests the juvenile's momentary physical presence in the county of filing as dispositive of whether the juvenile was "found in" the county of filing. I would at least raise the question of *J.L.K.*'s continued viability in light of our Supreme Court's jurisprudence acknowledging the jurisdictional nature of § 7B-1101. I further question whether the statutory concept of

moment the TPR petition was filed on 11 March 2002, J.L.K. was physically present in Johnston County[,]" here, the juveniles' location at the time of the filing of the Petitions was disputed on the pleadings. *See also In re D.L.A.D.*, 254 N.C. App. 344, 802 S.E.2d 620 (2017) (unpublished) (citing *J.L.K.* and vacating TPR where "there is no evidence in the record from which we can determine that D.L.A.D. was found in Surry County the day the Petition was filed."). In the Answers, Respondent validly denied the jurisdictional allegations in the Petitions. Petitioners presented no evidence to support a finding the juveniles were present in Harnett County at the time of the filing of the Petitions. Therefore, there is no evidence in the Record to support the trial court's finding mirroring the allegations of the Petitions that the juveniles were found in Harnett County at the time of the filing of the Petitions.

The majority applies "the *prima facie* presumption of rightful jurisdiction," however, this presumption applies only when it is "not inconsistent with the record." *In re N.T.*, 368 N.C. 705, 707, 782 S.E.2d 502, 503-04 (2016). Beyond the conclusory allegations of the Petitions,[2] the Record in this case reflects only that the juveniles were in the legal and physical custody of Petitioners in Columbus County—not Harnett County—at the time of the filing of the Petitions. This is inconsistent with the Harnett County trial court's exercise of jurisdiction in this case.

Thus, the trial court's finding the juveniles were present in Harnett County at the time of the filing of the Petitions is not supported by clear, cogent, and convincing evidence in the Record. Therefore, this finding cannot support the trial court's conclusion it had subject-matter jurisdiction in these cases. Consequently, the trial court erred in exercising jurisdiction to terminate Respondent's parental rights. Accordingly, the trial court's Order should be vacated and the Petitions dismissed for lack of subject-matter jurisdiction.

"found in" equates with momentary physical presence of the child in the judicial district. Rather, I would suggest "found in" acknowledges that while a juvenile may reside elsewhere, the juvenile may actually be found in the judicial district where the circumstances giving rise to the petition occurred (e.g., abandonment or abuse). As Respondent points out: to read the statute otherwise would allow a parent to remove a child from their residence in Dare County to Buncombe County and file a petition in Buncombe County seeking to terminate the other parent's rights without Buncombe County having any connection to the parents or child—and then return the child to Dare County pending the termination hearing.

2. It bears mentioning that over the course of these two termination proceedings, Petitioners, through counsel, filed six separate petitions each alleging the presence of the juveniles in Harnett County at the time of the filing of each petition. The trial court effectively found the juveniles were present in Harnett County at the time of the filing of 4 of the 6.

JDG ENVIRONMENTAL, LLC d/b/a ADVANTACLEAN OF OKC, Plaintiff
v.
BJ & ASSOCIATES, INC. d/b/a G.A. JONES CONSTRUCTION and THE COVES AT NEWPORT II ASSOCIATION, INC., Defendants

No. COA21-692

Filed 17 October 2023

Corporations—foreign LLC—transacting business—certificate of authority—summary judgment

In a lawsuit alleging breach of contract, the superior court erred by granting summary judgment—on the basis that the out-of-state plaintiff LLC lacked a certificate of authority to transact business in North Carolina and therefore could not maintain any proceeding in a state court (N.C.G.S. § 57D-7-02(a))—in favor of defendant. Section 57D-7-02(a) requires any foreign LLC transacting business in North Carolina to obtain a certificate of authority prior to trial, and it gives the trial judge (not the summary judgment judge, who might not be the same judge who presides over the trial) the authority to determine the foreign LLC's compliance with the statute; therefore, summary judgment was a premature stage to conclude that the non-moving party had failed to satisfy section 57D-7-02(a). Indeed, plaintiff obtained the requisite certificate of authority before the superior court entered its written order granting defendant's motion for summary judgment.

Judge MURPHY dissenting.

Appeal by Defendant from order entered 26 July 2021 by Judge Clinton Rowe in Carteret County Superior Court. Heard in the Court of Appeals 25 May 2022.

Bell, Davis, & Pitt, P.A., by Joshua B. Durham, for Plaintiff-Appellant.

Harvell & Collins, P.A., by Wesley A. Collins, for Defendant-Appellee BJ & Associates, Inc.

White & Allen, P.A., by Brian Z. Taylor and Christopher J. Waivers, for Defendant-Appellee The Coves At Newport II Association, Inc.

CARPENTER, Judge.

JDG Environmental, LLC ("Plaintiff") appeals from the superior court's grant of summary judgment in favor of BJ & Associates, Inc. ("Defendant BJ") and The Coves at Newport II ("Defendant Coves").[1] On appeal, Plaintiff asserts the superior court prematurely granted summary judgment because Plaintiff maintained an opportunity to obtain a certificate of authority until the beginning of trial. After careful review, we agree with Plaintiff. Therefore, we vacate the superior court's order and remand this case for further proceedings.

I. Factual & Procedural Background

On 13 September 2018, Hurricane Florence damaged Defendant Coves, a residential community in Newport, North Carolina. In order to clean and repair the community, Defendant Coves hired Defendant BJ. Defendant BJ hired Plaintiff, an Oklahoma LLC, as a subcontractor on the project. On 15 May 2020, after a dispute between Plaintiff and Defendant BJ concerning payment, Plaintiff initiated this lawsuit, asserting claims for breach of contract and unjust enrichment.

On 24 March 2021, Plaintiff filed a motion for summary judgment. During a hearing on the motion, Defendant BJ orally moved for summary judgment, arguing that judgment should instead be entered against Plaintiff because Plaintiff lacked a "certificate of authority," a statutory requirement for certain out-of-state companies to litigate in North Carolina courts. Indeed, Plaintiff had yet to obtain a certificate of authority. But on 2 June 2021, Plaintiff obtained a certificate of authority. In an order entered 26 July 2021, the superior court granted Defendant BJ's motion for summary judgment against Plaintiff. Plaintiff timely appealed from the superior court's order. Plaintiff has not challenged that it is was required to register as a foreign entity based on the facts of this case; thus, the trial courts findings and conclusions on this issue are binding on appeal.

II. Jurisdiction

This Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

The issues on appeal are whether the superior court erred by: (1) granting Defendant BJ's motion for summary judgment; (2) failing to make requisite findings of fact in its order granting summary judgment; and (3) dismissing Plaintiff's action with prejudice.

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1. We will refer to Defendant BJ and Defendant Coves collectively as "Defendants."

IV. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

V. Analysis

On appeal, Plaintiff argues the superior court erred in granting Defendants' motion for summary judgment. Plaintiff asserts it had until trial to obtain a certificate of authority, so granting Defendants summary judgment prematurely deprived Plaintiff of its ability to do so. After careful review, we agree with Plaintiff: The superior court erred in granting Defendants summary judgment.[2]

Under N.C. Gen. Stat. § 57D-7-02:

> No foreign LLC transacting business in this State without permission obtained through a certificate of authority may maintain any proceeding in any court of this State unless the foreign LLC has obtained a certificate of authority prior to trial. An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.

N.C. Gen. Stat. § 57D-7-02(a) (2021). In other words, a foreign LLC must obtain a certificate of authority before the trial of its case in North Carolina. *See* N.C. Gen. Stat. § 57D-7-02(a).

Here, Plaintiff is a foreign LLC transacting business in North Carolina. Therefore, Plaintiff is required to obtain a certificate of authority prior to trial. *See* N.C. Gen. Stat. § 57D-7-02(a). Because Plaintiff lacked a certificate of authority at the summary-judgment stage, the superior court granted Defendant BJ's motion for summary judgment, ending the litigation and Plaintiff's ability to obtain the requisite certificate.

Procedurally, summary judgment is "a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). When summary judgment is granted on an issue, that issue is not tried: Receiving summary judgment

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2. For this reason, we need not address Plaintiff's arguments concerning whether the superior court made the necessary findings of fact, or whether it was appropriate for the court to dismiss Plaintiff's case with prejudice.

has the same effect as winning at trial—but without going to trial. *See Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) ("The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue.").

The obligation to obtain a certificate of authority is statutory. *See* N.C. Gen. Stat. § 57D-7-02(a). In statutory interpretation, "[w]e take the statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27, 53 S. Ct. 417, 420, 77 L. Ed. 1004, 1010 (1933). This is because "a law is the best expositor of itself." *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33, 52, 2 L. Ed. 199, 205 (1804). And when examining statutes, words that are undefined by the legislature "must be given their common and ordinary meaning." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202–03 (1974).

Again, N.C. Gen. Stat. § 57D-7-02 states "[n]o foreign LLC transacting business in this State without permission obtained through a certificate of authority may maintain any proceeding in any court of this State unless the foreign LLC has obtained a certificate of authority prior to trial." N.C. Gen. Stat. § 57D-7-02(a) (emphasis added). The phrase "*prior to trial*" is not defined in the statute. *See* N.C. Gen. Stat. § 57D-7-02. Therefore, the phrase must be given its "common and ordinary meaning." *See In re Clayton-Marcus Co.*, 286 N.C. at 219, 210 S.E.2d at 202–03.

Given its ordinary meaning, "prior to trial" means exactly that: any time before the trial commences. Generally, a trial commences when a jury is empaneled. *Pratt v. Bishop*, 257 N.C. 486, 504, 126 S.E.2d 597, 610 (1962).[3] If the General Assembly wants "prior to trial" to mean something other than the generally understood meaning, it must say so. *See Appeal of Clayton-Marcus Co., Inc.*, 286 N.C. at 219, 210 S.E.2d at 202. Otherwise, we must "take the statute as we find it." *See Anderson*, 289 U.S. at 27, 53 S. Ct. at 420, 77 L. Ed. at 1010.

We must also give the last sentence of N.C. Gen. Stat. § 57D-7-02 its ordinary meaning. It reads as follows: "An issue arising under this subsection must be raised by motion and determined by the *trial judge* prior to trial." N.C. Gen. Stat. § 57D-7-02(a) (emphasis added). In North Carolina courts, the judge who hears a summary-judgment motion may

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3. Alternatively, in a bench trial, trial commences when a judge "begins to hear evidence." *See State v. Brunson*, 96 N.C. App. 347, 350–51, 385 S.E.2d 542, 544 (1989). Our analysis, however, remains the same because in a jury trial, the jury must be empaneled before it can hear evidence. In other words, whatever is "prior to" a jury trial is also "prior to" a bench trial.

not be the judge who presides over the trial. In fact, this is quite common. So, when the General Assembly says the "trial judge," we must assume they meant the judge presiding over the trial, and not the judge hearing a summary-judgment motion. *See* N.C. Gen. Stat. § 57D-7-02(a); *In re Clayton-Marcus Co.*, 286 N.C. at 219, 210 S.E.2d at 202–03.

Harold Lang Jewelers, Inc. v. Johnson illustrates how this works in practice. 156 N.C. App. 187, 576 S.E.2d 360 (2003). In *Harold Lang*, this Court wrestled with N.C. Gen. Stat. § 55-15-02(a) (2021), the corporation analogue to N.C. Gen. Stat. § 57D-7-02. *Id.* at 189, 576 S.E.2d at 361; *see also* N.C. Gen. Stat. § 55-15-02(a) ("No foreign corporation transacting business in this State without permission obtained through a certificate of authority under this Chapter . . . shall be permitted to maintain any action or proceeding in any court of this State unless the foreign corporation has obtained a certificate of authority prior to trial."). This Court stated: "On January 7, 2002, the case was called for trial. At that time, Johnson orally raised the defense of Lang's failure to obtain a certificate of authority and requested a hearing on that issue. After hearing evidence and argument, the district court granted the motion and dismissed Lang's action." *Harold Lang*, 156 N.C. App. at 188, 576 S.E.2d at 361. Lang lacked a certificate of authority, and this Court found "the trial court acted within its discretion when it addressed this dispositive issue as it did—prior to commencing trial . . . ." *Id.* at 189, 576 S.E.2d at 361. In *Harold Lang*, the *trial* judge properly ruled on the motion. *Id.* at 189, 576 S.E.2d at 361.

Likewise, this is how N.C. Gen. Stat. § 57D-7-02—the LLC analogue to N.C. Gen. Stat. § 55-15-02(a)—operates. Failure to obtain a certificate of authority "must be raised by motion and determined by the trial judge prior to trial." N.C. Gen. Stat. § 57D-7-02(a). Summary judgment is not necessarily determined by the trial judge. And the plain language of N.C. Gen. Stat. § 57D-7-02 requires the judge presiding over trial—not summary judgment—to determine whether the non-moving party obtained a certificate of authority. *See Harold Lang*, 156 N.C. App. at 188, 576 S.E.2d at 361; N.C. Gen. Stat. § 57D-7-02(a).

Here, Plaintiff could have obtained a certificate any time before the trial court empaneled a jury—which includes time after the summary-judgment stage. *See Pratt*, 257 N.C. at 504, 126 S.E.2d at 610. And Plaintiff did so. Regardless, if Defendant BJ wanted a determination of whether Plaintiff obtained a certificate, it was required to raise a motion to the trial judge, not the summary-judgment judge. *See Harold Lang*, 156 N.C. App. at 188, 576 S.E.2d at 361; N.C. Gen. Stat. § 57D-7-02(a). Defendant BJ did not do so. Thus, granting Defendant

BJ's summary-judgment motion deprived Plaintiff of its legislatively allotted time to obtain a certificate and infringed on the trial judge's statutory authority to determine Plaintiff's compliance with N.C. Gen. Stat. § 57D-7-02(a).

In *Leasecomm*, this Court also addressed N.C. Gen. Stat. § 55-15-02(a). *See Leasecomm Corp. v. Renaissance Auto Care, Inc.*, 122 N.C. App. 119, 122, 468 S.E.2d 562, 564 (1996). The *Leasecomm* Court did not directly address the issue before us: whether a court may grant summary judgment against a non-moving party because the non-moving party lacks a certificate of authority. The issue before the *Leasecomm* Court was whether a court could grant summary judgment to a moving party who lacked a certificate of authority. *See id.* at 121, 468 S.E.2d at 564. Regardless of the precise issue in *Leasecomm*, the Court's reasoning concerning N.C. Gen. Stat. § 55-15-02(a) supports our plain reading of N.C. Gen. Stat. § 57D-7-02(a). *See id.* at 122, 468 S.E.2d at 563. The Court held that under N.C. Gen. Stat. § 55-15-02(a), a moving party lacking a certificate of authority cannot prevail at summary judgment without first obtaining the required certificate of authority. *See id.* at 122, 468 S.E.2d at 564.

The *Leasecomm* holding is based on this premise: If a court grants summary judgment to a moving party that lacks a certificate of authority, the court prematurely assumes the moving party will gain a certificate before trial. *See id.* at 122, 468 S.E.2d at 564. Although our issue was not before the *Leasecomm* Court, it follows that if a lower court grants summary judgment because the non-moving party lacks a certificate of authority, the court also prematurely assumes the non-moving party *will not* gain one before trial. *See id.* at 122, 468 S.E.2d at 564. In other words, just as a moving party lacking a certificate of authority cannot prevail at summary judgment without first obtaining the required certificate of authority, a moving party cannot prevail at summary judgment merely because the non-moving party lacks a certificate of authority. *See id.* at 122, 468 S.E.2d at 564. This is correct because the trial judge must make the certificate-of-authority determination, and both scenarios take the determination away from the trial judge. *See id.* at 122, 468 S.E.2d at 564; *Harold Lang*, 156 N.C. App. at 188, 576 S.E.2d at 361; N.C. Gen. Stat. § 57D-7-02(a).

Here, when the superior court indicated in open court its intention to grant Defendant BJ's motion for summary judgment, the court prematurely assumed Plaintiff would not satisfy N.C. Gen. Stat. § 57D-7-02 before trial. *See Leasecomm*, 122 N.C. App. at 122, 468 S.E.2d at 564. And notably, before the court entered its written order granting Defendant

BJ's motion for summary judgement on 26 July 2021, Plaintiff obtained a certificate of authority. So not only did the superior court not have the authority to grant summary judgment; it purported to do so after Plaintiff actually obtained the requisite certificate of authority. *See* N.C. Gen. Stat. § 57D-7-02(a).

Accordingly, the superior court erred in granting Defendants summary judgment, rather than allowing the trial judge to make the certificate-of-authority determination. Such a judgment contradicts the plain text of the statute and our caselaw. *See* N.C. Gen. Stat. § 57D-7-02; *Leasecomm*, 122 N.C. App. at 122, 468 S.E.2d at 564; *Harold Lang*, 156 N.C. App. at 188, 576 S.E.2d at 361; *Pratt*, 257 N.C. at 504, 126 S.E.2d at 610.

VI. Conclusion

We hold the superior court's entry of summary judgment against Plaintiff was improper. Therefore, we vacate the associated order and remand this case to the lower court. Because the court erred in granting summary judgment, we need not consider whether the requisite findings were made, or whether the case should have been dismissed with or without prejudice.

VACATED AND REMANDED.

Judge ARROWOOD concurs.

Judge MURPHY dissents in a separate opinion.

MURPHY, Judge, dissenting.

While I would also reverse the order of the trial court, I dissent from the Majority's interpretation of N.C.G.S. § 57D-7-02(a) and its conclusions as to the procedural steps that follow the order's reversal. The contention that N.C.G.S. § 57D-7-02(a) allows an uncertified business plaintiff until the moment the jury is empaneled to obtain a certificate of authority is not only impossible to reconcile with the plain text of the whole statute, but also squarely contradicts our holding in *Leasecomm*, conflicts with the official comment to the analogous certification statute regarding corporations, and undermines the statute's own function.

N.C.G.S. § 57D-7-02(a) reads as follows:

> No foreign LLC transacting business in this State without permission obtained through a certificate of authority may

> maintain any proceeding in any court of this State unless the foreign LLC has obtained a certificate of authority prior to trial. An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.

N.C.G.S. § 57D-7-02(a) (2022). N.C.G.S. § 57D-7-02(a) thus contains two provisions pertaining to the timing of certification relative to trial: first, it makes maintaining a proceeding in this State contingent upon "obtain[ing] a certificate of authority prior to trial"; and, second, it provides that "[a]n issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial." *Id.* As the Majority explains, both of these provisions must "be given their common and ordinary meaning." *Appeal of Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219 (1974).

"Prior to trial" means any time before trial commences, and trial commences at the moment the jury is empaneled. *See Pratt v. Bishop*, 257 N.C. 486, 504 (1962). The Majority, without specific analysis, augments this explanation with the unstated proposition that an uncertified business Plaintiff is statutorily *entitled* to a period that runs until the jury is empaneled to receive the certificate. Therefore, as the Majority reads the statute, the trial court may not grant summary judgment against an uncertified business plaintiff until the moment the jury is empaneled. And, using the same interpretation, the plain meaning of the requirement that "[a]n issue arising under [N.C.G.S. § 57D-7-02(a)] must be raised by motion and determined by the trial judge prior to trial" is that the window of time allotted to trial judges to rule on a motion concerning a certification issue is until the moment the jury is empaneled. N.C.G.S. § 57D-7-02(a) (2022).

This interpretation results in a total impasse: the Majority's reading of the statute makes it impermissible for the trial court to *ever* rule on a motion concerning a business plaintiff's lack of certification. Summary judgment, it holds, is rendered "prematurely" if entered against a plaintiff before the moment the jury is empaneled. *See supra*. Likewise, the trial court is statutorily stripped of its ability to render any such judgment the moment the jury is empaneled. Following the Majority's logic to its necessary end, the result is a totally unenforceable statutory scheme.

Perhaps realizing the absurdity of this reading, we have, on multiple occasions in the past, permitted trial courts to enter summary judgment against an uncertified business plaintiff prior to trial. In *Harold Lang Jewelers, Inc. v. Johnson*, for example, we affirmed the dismissal of an

action, prior to trial, by a corporation that failed to satisfy the analogous certification requirement arising under N.C.G.S. § 55-15-02(a):

> [The defendant] argued that [the uncertified corporation] could not sue in a North Carolina court because [it] was transacting business in the state without a certificate of authority to do so. The trial court agreed and dismissed the suit prior to trial.
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> . . . .
>
> [The corporation] contends that the trial court erred when it dismissed the action, arguing that the court should have continued the case to permit [it] to obtain the requisite certificate of authority. The applicable statute, [N.C.G.S.] § 55-15-02, does not specify the procedure in the event of failure to obtain a certificate of authority. The statute simply indicates that an action cannot be maintained unless the certificate is obtained prior to trial. [N.C.G.S.] § 55-15-02(a). [The corporation] has not cited, nor have we found, a case where a continuance has been granted by a court in these circumstances. Moreover, [the corporation] was aware that [the defendant's] motion was pending and could have obtained the certificate in the year and a half that passed between the filing of the motion and the court's dismissal of the case. In the absence of statutory or other authority dictating a continuance, we hold that the trial court acted within its discretion in dismissing the action.

Harold Lang Jewelers, Inc. v. Johnson, 156 N.C. App. 187, 188, 192, *disc. rev. denied*, 357 N.C. 458 (2003); *see also* N.C.G.S. 55-15-02(a) (2022) ("No foreign corporation transacting business in this State without permission obtained through a certificate of authority under this Chapter or through domestication under prior acts shall be permitted to maintain any action or proceeding in any court of this State unless the foreign corporation has obtained a certificate of authority prior to trial. An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial."). Moreover, in *Leasecomm Corp. v. Renaissance Auto Care, Inc.*, we reversed the determination of a trial court that denied a motion for summary judgment against an uncertified corporate plaintiff under the same statute:

> Defendants argue that the trial court erred in granting plaintiff's summary judgment motion because plaintiff

> lacked authority to maintain an action in North Carolina to enforce the foreign judgment. We agree.
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> . . . .
>
> [The] plaintiff had no authority to maintain an action to enforce its foreign judgment in North Carolina because [the plaintiff's assignor] has never been granted authority to do business here . . . . Accordingly, we hold that the trial court erred in granting summary judgment for plaintiff and denying defendant's summary judgment motion.

Leasecomm Corp. v. Renaissance Auto Care, Inc., 122 N.C. App. 119, 121-22 (1996).

The Majority cites *Leasecomm* for the proposition that, "[i]f a trial court grants summary judgment to a moving party that lacks a certificate of authority, the trial court prematurely assumes the moving party will gain a certificate before trial"; and, by extension, that "if a trial court grants summary judgment because the non-moving party lacks a certificate of authority, the trial court prematurely assumes the non-moving party *will not* gain one before trial." Neither of these supposed holdings is apparent from the face of *Leasecomm*, and the attempt to extrapolate them from the opinion obscures its actual, unambiguous holding: that a business plaintiff seeking to register a foreign judgment in North Carolina should, prior to trial, have summary judgment rendered *against* it if it fails to comply with relevant certification requirements. *Leasecomm*, 122 N.C. App. at 122. The Majority's contention that "[t]he *Leasecomm* Court did not directly address . . . whether a court may grant summary judgment against a non-moving party because the non-moving party lacks a certificate of authority" obfuscates the fact that the panel addressing *Leasecomm* treated the grant and denial of summary judgment as two sides of the same legal issue, and its holding is no less binding as to the former than it is the latter.

Similar problems exist with its reading of *Harold Lang*. The Majority cites *Harold Lang* for its position that the incorrect official ruled on Defendant's motion and purportedly as an example of how its own interpretation operates in practice, *see supra*, but *Harold Lang* is fully irreconcilable with its holding. Despite directly quoting *Harold Lang*'s holding that "the trial court acted within its discretion when it addressed this dispositive issue . . . prior to commencing trial[,]" *Harold Lang*, 156 N.C. App. at 189, the Majority's interpretation of N.C.G.S. § 57D-7-02(a) would necessarily dictate that a trial court may *not* dismiss an uncertified business plaintiff's case prior to trial and that the trial court has

no discretion to do so. *See supra* ("[W]hen the [S]uperior [C]ourt indicated in open court its intention to grant Defendant BJ's motion for summary judgment, the court prematurely assumed Plaintiff would not satisfy [N.C.G.S.] § 57D-7-02 before trial. . . . [N]ot only did the [S]uperior [C]ourt not have the authority to grant summary judgment; it purported to do so after Plaintiff actually obtained the requisite certificate of authority."). With both *Harold Lang* and *Leasecomm*, the Majority's attempts to harmonize our precedent with its holding misses the forest for the trees, passing over core procedures and applications of law that contradict its interpretation of N.C.G.S. § 57D-7-02 in favor of magnifying minutiae.

Neither our caselaw nor the meaning of the statute as a whole are reconcilable with the Majority's holding. Neither still can the Majority's holding account for the procedures described in the official comment to N.C.G.S. § 55-15-02, which allow an *optional* stay of proceedings in the event that a foreign corporate plaintiff is deemed to require certification under circumstances analogous to those in N.C.G.S. § 57D-7-02. *See* N.C.G.S. § 55-15-02 (2022) (official comment) ("[S]ection 15.02(c) authorizes a court to stay a proceeding to determine whether a corporation should have qualified to transact business and, if it concludes that qualification is necessary, it may grant a further stay to permit the corporation to do so."). If uncertified business plaintiffs were truly entitled to wait until trial to receive a certificate of authority, a stay of proceedings in such circumstances would be mandatory, not permissive. Finally, while less significant than the interpretive problems discussed above, there is serious reason to doubt that the General Assembly would have drafted a statute affirmatively requiring foreign businesses to comply with a certification requirement in order to access the courts of this State, only to permit the gamesmanship that would inevitably arise from *forbidding* a trial court from taking action to ensure that the requirement is met until the moment the jury is empaneled.[1]

Nothing in the language of N.C.G.S. § 57D-7-02(a) entitles an uncertified LLC plaintiff to wait until the moment the jury is empaneled to receive a certificate of authority or forbids a trial court from taking action to address such a plaintiff's lack of certification. Our caselaw and

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1. Indeed, even setting aside the conflict the Majority's interpretation would create with the statutorily mandated timeframe in which a trial court must resolve certification issues, there are cases—like *Leasecomm* itself—which have no realistic possibility of ever reaching trial. *See Leasecomm*, 122 N.C. App. 119, 121 (concerning the registration of a foreign judgment). If a trial court were not permitted to dismiss until the empanelment of the jury, a foreign business plaintiff would be functionally exempt from certification requirements in any such case.

the analogous procedure described in the official comment to N.C.G.S. § 55-15-02 is instead consistent with a flexible, discretionary approach in which a trial court may, prior to trial, take appropriate action to address a plaintiff's lack of certification. At times, that may result in a stay of proceedings to allow the plaintiff time to obtain a certificate of authority. *See id.*; *cf. Kyle & Assocs., Inc. v. Mahan*, 161 N.C. App. 341, 344 (2003) (affirming the trial court's denial of the defendant's motion to strike on the basis of the plaintiff corporation's lack of certification where the plaintiff received its certificate prior to the hearing on the motion), *aff'd*, 359 N.C. 176 (2004). At others, dismissal or summary judgment may be appropriate. *Harold Lang*, 156 N.C. App. at 192; *Leasecomm*, 122 N.C. App. at 122. In any event, these are matters we have previously recognized as within the discretion of our trial courts so that they can ensure foreign business plaintiffs do not eschew our State's certification requirements before "utilizing the courts of North Carolina." *Kyle & Assocs.*, 161 N.C. App. at 343. While permitting such an exercise of discretion in no way conflicts with such plaintiffs' statutory *obligation* to "obtain[] a certificate of authority prior to trial[,]" N.C.G.S. § 57D-7-02(a) (2022), a reading of the statute that ties the hands of our trial courts renders the entirety of N.C.G.S. § 57D-7-02 a dead letter.

In an attempt to evade the cascade of irreconcilable conflicts with our existing law arising from its interpretation of N.C.G.S. § 57D-7-02(a), the Majority accepts perhaps the most dubious of Plaintiff's arguments: that the "trial judge" should have resolved the matter rather than what Plaintiff terms the "motions judge." Even setting aside the fact that all of the aforementioned problems with its reading of N.C.G.S. § 57D-7-02(a) still exist—*Harold Lang*, as explained previously, would be incorrectly decided by the Majority's logic since the trial court dismissed that plaintiff's case before the jury was empaneled, *see Harold Lang*, 156 N.C. App. at 189—neither the Majority nor Plaintiff point to any controlling cases in which a "trial judge" has meant something other than a judge presiding over the trial court or has constituted limiting language differentiating one judge from another within the same tribunal. And, for Plaintiff's part, the term "motions judge" has never appeared in either our statutes or our caselaw.

What our caselaw does reveal is that, in in judicial writing and statutory construction, just as in practice, "trial court" and "trial judge" are generally synonymous unless it is contextually clear that "judge" refers to the particular official presiding over the court. *See State v. Thompson*, 254 N.C. App. 220, 223 (2017) (marks omitted) ("In reviewing whether a trial judge abused his discretion, we consider not whether we might disagree with the trial court, but whether the trial court's actions are

fairly supported by the record."); *State v. VanCamp*, 150 N.C. App. 347, 354 (2002) ("In *Boykin*, the trial court polled the jurors as to what they had seen, as in the present case, the trial judge asked counsel if they had any questions and they indicated that they did not have any."); *Matter of E.D.*, 372 N.C. 111, 119 (2019) (citations omitted) ("In each of these cases we concluded that there was a statutory mandate that automatically preserved an issue for appellate review when the mandate was directed to the trial court either: (1) by requiring a specific act by the trial judge; or (2) by requiring specific courtroom proceedings that the trial judge has authority to direct."); *State v. Chandler*, 376 N.C. 361, 366 (2020) (same). *But see Daughtridge v. N. Carolina Zoological Soc'y, Inc.*, 247 N.C. App. 33, 36 (2016) (marks omitted) ("[O]ne trial judge may not reconsider and grant a motion for summary judgment previously denied by another judge."). Our best available legal definitions recognize this interchangeability. *Court*, Black's Law Dictionary 444 (11th Ed. 2019) (emphasis added) ("A place where justice is judicially administered; the locale for legal proceedings . . . . *The judge or judges who sit on such a tribunal*[.]"); *Judge*, Black's Law Dictionary 1005 (11th Ed. 2019) (emphasis added in part) ("A public official appointed or elected to hear and decide legal matters in court; a judicial officer who has the authority to administer justice. . . . [I]n ordinary legal usage, the term is limited to the sense of an officer who (1) is so named in his or her commission, and (2) presides in a court. *Judge is often used interchangeably with court.*").

Indeed, North Carolina has, for nearly four decades, rejected the Majority's understanding of the term "trial judge." Between 1970 and 1975, we consistently interpreted "trial judge," as used in N.C.G.S. § 1-282 and Rule 50 of the Rules of Practice in the Court of Appeals, to invalidate orders extending the time for service of cases on appeal by judges who did not personally preside over the trials at issue. *See, e.g.*, *State v. Lewis*, 9 N.C. App. 323 (1970); *State v. Baker*, 8 N.C. App. 588 (1970); *Keyes v. Hardin Oil Co.*, 13 N.C. App. 645 (1972); *State v. Taylor*, 14 N.C. App. 703, *cert. denied*, 281 N.C. 763 (1972); *see also* N.C.G.S. § 1-282 (1969) ("If it appears that the case on appeal cannot be served within the time prescribed above, the trial judge may, for good cause and after reasonable notice to the opposing party or counsel, enter an order or successive orders extending the time for service of the case on appeal and of the countercase or exceptions to the case on appeal."). Our Supreme Court and General Assembly abrogated these cases in 1975 with the repeal of N.C.G.S. § 1-282 and the enactments of Rule 36 of the Rules of Appellate Procedure and N.C.G.S. § 1-283, clarifying that "trial judge," for purposes of our interpretation, means "the judge of

[S]uperior [C]ourt or of [D]istrict [C]ourt from whose order or judgment an appeal has been taken . . . ." N.C.G.S. § 1-283 (2022); cf. N.C. R. App. P. 36(a)(1)-(2) (2023) ("The judge who entered the judgment, order, or other determination from which appeal was taken . . .").[2] The Majority's resurrection of this Court's long-corrected, half-century-old interpretation of "trial judge" solves none of the outstanding conceptual problems with its reading of N.C.G.S. § 57D-7-02 and presents an open invitation for appellants to engage in the type of gamesmanship the 1975 clarifications sought to avoid.

Although the Majority's analysis of N.C.G.S. § 57D-7-02 and perplexing readings of *Leasecomm* and *Harold Lang* do not, in my view, justify our holding, I agree the trial court's order should be reversed because, in order for Plaintiff to have been required to obtain a certificate of authority at all, the trial court must have found sufficient facts on the Record to support its conclusion that Plaintiff was actually "transacting business" in North Carolina. Here, as the trial court's findings on the Record did not support a determination that Plaintiff was transacting business in North Carolina, I would reverse the trial court's order on that basis.

"[T]ransacting business in this State[,]" for purposes of N.C.G.S. § 57D-7-02(a), requires more than an isolated act or acts. N.C.G.S. § 57D-7-02(a) (2022). Without more,

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2. N.C.G.S. § 1-283, entitled "[t]rial judge empowered to settle record on appeal; effect of leaving office or of disability[,]" reads in full as follows:

> Except as provided in this section, only the judge of superior court or of district court from whose order or judgment an appeal has been taken is empowered to settle the record on appeal when judicial settlement is required. A judge retains power to settle a record on appeal notwithstanding he has resigned or retired or his term of office has expired without reappointment or reelection since entry of the judgment or order. Proceedings for judicial settlement when the judge empowered by this section to settle the record on appeal is unavailable for the purpose by reason of death, mental or physical incapacity, or absence from the State shall be as provided by the rules of appellate procedure.

N.C.G.S. § 1-283 (2022). "Although the title given to a particular statutory provision is not controlling, it does shed some light on the legislative intent underlying the enactment of that provision." *State v. James*, 371 N.C. 77, 87 (2018). Here, the recapitulative function of N.C.G.S. § 1-283's title signals that, since the General Assembly and our Supreme Court corrected our jurisprudence with respect to the term "trial judge" in 1975, "trial judge" means "the judge of superior court or of district court from whose order or judgment an appeal has been taken . . . ." N.C.G.S. § 1-283 (2022); *see also id.* (marks omitted) ("[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.").

> a foreign LLC is not considered to be transacting business in this State for the purposes of this Chapter by reason of . . . [m]aintaining or defending any proceeding . . . [,] [t]ransacting business in interstate commerce[,] [or] [c]onducting an isolated transaction completed within a period of six months but not repeated transactions of a similar nature.

N.C.G.S. § 57D-7-01(b)(1), (8), (9) (2022); *see also Quantum Corporate Funding, Ltd. v. B.H. Bryan Bldg. Co.*, 175 N.C. App. 483, 486 (2006) (remarking that, with respect to the analogous registration requirements for corporations, "a foreign corporation need not obtain a certificate of authority in order to maintain an action or lawsuit so long as the company is not otherwise transacting business in this State"). Rather, "[o]ur Court has interpreted transacting business to 'require the engaging in, carrying on or exercising, in North Carolina, some of the functions for which the [business] was created.' " *Harbin Yinhai Tech. Dev. Co. v. Greentree Fin. Grp., Inc.*, 196 N.C. App. 615, 624 (2009) (quoting *Harold Lang*, 156 N.C. App. at 190). "The activities carried on by a corporation in North Carolina must be substantial, continuous, systematic, and regular" to qualify, and "[t]ypical conduct requiring a certificate of authority includes maintaining an office to conduct local intrastate business, selling personal property not in interstate commerce, entering into contracts relating to the local business or sales, and owning or using real estate for general [business] purposes." *Id.*

In its findings of fact, the trial court noted that "Plaintiff entered a contract with The Coves at Newport II Association . . . to perform remediation and repair services for damaged units" and that "Plaintiff . . . contracted with BJ & Associates, Inc., d/b/a G.A. Jones Construction (G.A. Jones), a North Carolina Corporation transacting business in North Carolina[] [and] serv[ing] as general contractor for the Coves." The trial court also remarked that, "[i]n entering the transactions at issue in this litigation, Plaintiff engaged in, carried on, and exercised in North Carolina, the functions for which Plaintiff was created, namely, emergency services for real properties that have incurred water losses, as well as mold testing and remediation, moisture control, restoration services, and air duct cleanings." From this, the trial court concluded as a matter of law that "[t]here is no genuine issue of material fact that Plaintiff is a foreign [LLC] for purposes of [certification], transacting business in North Carolina."

This analysis does not justify the trial court's conclusion. N.C.G.S. § 57D-7-01(b)(10) specifies that "a foreign LLC is not considered to be

transacting business in this State . . . by reason of . . . [c]onducting an isolated transaction completed within a period of six months but not repeated transactions of a similar nature." N.C.G.S. § 57D-7-01(b)(10) (2022). Assuming, *arguendo*, that entering into two distinct contracts in North Carolina qualifies as engaging in "repeated transactions"—which is itself doubtful given that the two contracts were only entered into to secure the completion of a singular project—N.C.G.S. § 57D-7-01(b) is a *non-exhaustive* list of activities a foreign LLC may perform without technically transacting business in North Carolina. *See* N.C.G.S. § 57D-7-01(b) (2022) (emphasis added) ("*Without excluding other activities that may not constitute transacting business in this State*, a foreign LLC is not considered to be transacting business in this State for the purposes of this Chapter by reason of conducting in this State any one or more of the following activities . . ."). By specifying in a non-exhaustive list that "an isolated transaction completed within a period of six months" does not itself qualify as transacting business but excluding "repeated transactions of a similar nature[,]" N.C.G.S. § 57D-7-01(b)(10) is not communicating that any foreign LLC technically engaging in multiple transactions in North Carolina automatically transacts business for certification purposes; rather, it is communicating that those multiple transactions are not *necessarily exempt* from the meaning of "transacting business." N.C.G.S. § 57D-7-01(b)(10) (2022).

The applicable standard remains that "[t]he activities carried on by [an LLC] in North Carolina must be substantial, continuous, systematic, and regular" to qualify as "transacting business." *Harbin Yinhai*, 196 N.C. App. at 624. The trial court's order, which specified only that Plaintiff entered into two contracts in North Carolina in order to complete a single repair project, supported no such conclusion. However, as insufficient information exists in the Record from which we can discern whether Plaintiff's other business activities in North Carolina, if any, either in isolation or in combination with those discussed above, qualify as "substantial, continuous, systematic, and regular," *id.*, or whether "any party [was otherwise] entitled to a judgment as a matter of law[,]" N.C.G.S. § 1-A1, Rule 56(c) (2022), I would reverse the order of the trial court and remand for further findings of fact adequately supporting a determination of whether Plaintiff was transacting business in North Carolina. In the event the trial court found Plaintiff had conducted sufficient activities in North Carolina to require certification, dismissal at this point in the proceedings would be proper. However, if the trial court's factfinding revealed no further instances in which Plaintiff had conducted business activities in North Carolina, Plaintiff would not be required to obtain a certificate of authority.

THERESA PETRILLO, Plaintiff
v.
TIMISHA BARNES-JONES and ANDREW B. STRONG, in their individual capacities and as public employees of the CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Defendants

No. COA23-331

Filed 17 October 2023

1. Appeal and Error—interlocutory order—substantial right—denial of motion to dismiss—public official immunity

In plaintiff's negligence action against a school principal and a school employee regarding an injury sustained on the grounds of a public high school, the trial court's order denying the school principal's second motion to dismiss was immediately appealable as affecting a substantial right where the motion asserted the defense of public official immunity. Further, although the principal's first motion to dismiss (based on governmental immunity) had also been denied, she was not estopped from pursuing her second motion because it asserted a different basis for immunity.

2. Immunity—public official—school principal—negligence action—injury on school grounds—no malice or corruption alleged

In plaintiff's negligence action brought against a school principal in her individual capacity (defendant) regarding an injury sustained on the grounds of a public high school, the trial court erred by denying defendant's motion to dismiss, in which defendant asserted the defense of public official immunity, since defendant was a public official entitled to the protections of that defense and, further, plaintiff did not include allegations of malice or corruption in her complaint that would have overcome the defense.

Appeal by defendant from judgment entered 5 December 2022 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 September 2023.

Ted A. Greve & Associates, PA, by Justin L. Lowenberger, for the plaintiff-appellee.

Charlotte-Mecklenburg Board of Education, by Senior Associate General Counsel Oksana K. Cody, for the defendant-appellant.

TYSON, Judge.

Timisha Barnes-Jones ("Barnes-Jones") appeals the denial of her Rule 12(b)(6) motion to dismiss, in which she asserted public official immunity barred Theresa Petrillo ("Plaintiff" or "Petrillo") from suing her in her individual capacity for negligence purportedly committed in the course and scope of her public employment. We reverse the trial court's denial of Barnes-Jones' motion to dismiss and remand for entry of an order of dismissal.

I. Background

Barnes-Jones was the principal of West Charlotte High School ("WCHS") in 2018. Andrew Strong ("Strong") was a member of the custodial staff at WCHS. Both Barnes-Jones and Strong were public employees.

Petrillo attended the University Instructors' training to become an instructor for their summer camp program, which was held on the campus of WCHS in June of 2018. Petrillo asserts she tripped and fell while walking on an outdoor, concrete pathway between two WCHS buildings.

Petrillo filed a complaint against Barnes-Jones and Strong on 16 June 2021. She alleged the concrete pathway between the two buildings was "raised and unleveled," which caused her to "fall to the ground" and severely injure herself.

Petrillo's complaint alleges she is suing Barnes-Jones "solely in her individual capacity" for negligence that occurred while Barnes-Jones was "acting in the course and scope of her employment, as an agent and public employee" of the Charlotte-Mecklenburg Board of Education and as principal of WCHS.

Petrillo's complaint proffers Barnes-Jones "operated, managed, maintained[,] and supervised the property and premises of WCHS." She also cites Barnes-Jones' and Strong's duty to "exercise ordinary and reasonable care in the maintenance of the property and premises of WCHS[,]" and claims her injuries were "proximately caused by the careless, negligent[,] and unlawful conduct" of Barnes-Jones and Strong.

On 1 April 2022, Barnes-Jones filed a Rules 12(b)(1), 12(b)(2), and 12(b)(6) motions to dismiss the suit pursuant to *governmental* immunity. The trial court denied her motion to dismiss because "the action name[d] Defendant Timisha Barnes-Jones in her individual capacity." *See Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 279 (1993) ("Governmental immunity protects the governmental entity and

its officers or employees sued in their '*official capacity*.' " (emphasis supplied) (citation omitted)).

On 6 October 2022, Barnes-Jones filed a second 12(b)(1), 12(b)(2), and 12(b)(6) motions to dismiss. In her second motions to dismiss, Barnes-Jones asserted Petrillo "fail[ed] to state a claim upon which relief can be granted pursuant to the doctrine of *public official* immunity." (emphasis supplied). The trial court entered an order after hearing, which denied Barnes-Jones' second motions to dismiss on 5 December 2022.

Barnes-Jones filed a notice of appeal on 12 December 2022.

II. Jurisdiction - Interlocutory Appeal

[1] The trial court's 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 to settle and determine the entire controversy." *Bartley v. City of High Point*, 381 N.C. 287, 293, 873 S.E.2d 525, 532 (2022) (citing *Veazey v. City of Durham*, 231 N.C. 354, 357, 362, 57 S.E.2d 377, 381 (1950)). "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).

Interlocutory orders can be immediately appealable "when the appeal involves a substantial right of the appellant[,] and the appellant will be injured if the error is not corrected before final judgment." *N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 47-48, 619 S.E.2d 495, 496 (2005) (citations omitted). *See also* N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a) (2021).

"Orders denying dispositive motions based on the defenses of governmental and public official's immunity affect a substantial right and are immediately appealable." *Thompson v. Town of Dallas*, 142 N.C. App. 651, 653, 543 S.E.2d 901, 903 (2001) (citation omitted); *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999) (explaining "this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review"); *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010) (extending this Court's holding "that a denial of a Rule 12(b)(6) motion to dismiss on the basis of *sovereign immunity* affects a substantial right and is immediately appealable" to allow interlocutory review of a public official asserting *public official immunity* (emphasis supplied) (citing *Price*, 132 N.C. App. at 558-59, 512 S.E.2d at 785)); *Bartley*, 381 N.C. at 293, 873 S.E.2d at 532 ("The

denial of summary judgment on the ground of public official immunity is immediately appealable because it affects a substantial right.”).

“Public official immunity is more than a mere affirmative defense to liability as it shields a defendant entirely from having to answer for his conduct in a civil suit for damages.” *Bartley*, 381 N.C. at 293, 873 S.E.2d at 532 (citations omitted).

“Nevertheless, this Court has declined to address interlocutory appeals of a lower court’s denial of a Rule 12(b)(1) motion to dismiss despite the movant’s reliance upon the doctrine of sovereign immunity.” *Green*, 203 N.C. App. at 265-66, 690 S.E.2d at 760 (citations omitted).

Barnes-Jones seeks review of the trial court’s denial of her Rule 12(b)(6) motion to dismiss asserting public official immunity from Petrillo’s action. Although Barnes-Jones’ appeal is interlocutory, her claim involves a “substantial right.” *Stagecoach Vill.*, 360 N.C. at 47-48, 619 S.E.2d at 496; *Thompson*, 142 N.C. App. at 653, 543 S.E.2d at 903; *Price*, 132 N.C. App. at 558-59, 512 S.E.2d at 785; *Green*, 203 N.C. App. at 266, 273, 690 S.E.2d at 761; *Bartley*, 381 N.C. at 293, 873 S.E.2d at 532.

Petrillo argues collateral estoppel barred Barnes-Jones from bringing her second Rule 12(b)(6) motion to dismiss, in which she asserted public official immunity. “The elements of collateral estoppel . . . are as follows: (1) a prior suit resulting in a *final judgment* on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined.” *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, 657 S.E.2d 55, 61 (2008) (emphasis supplied) (citation and internal quotation marks omitted).

The status of Barnes-Jones’ interlocutory appeal defeats Petrillo’s argument. An interlocutory order is, by definition, not a *final judgment*. *Bartley*, 381 N.C. at 293, 873 S.E.2d at 532. *But see Fox v. Johnson*, 243 N.C. App. 274, 285, 777 S.E.2d 314, 324 (2015) (“It is well settled that ‘[a] *dismissal* under [North Carolina Rule of Civil Procedure] Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice.’ ” (emphasis supplied) (citation omitted)). Further, Barnes-Jones’ second motions to dismiss asserted a different basis of immunity than her first motions. Petrillo’s argument is without merit. *Bluebird*, 188 N.C. App. at 678, 657 S.E.2d at 61.

This court possesses appellate jurisdiction to review Barnes-Jones’ arguments. N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a) (2021); *Stagecoach Vill.*, 360 N.C. at 47-48, 619 S.E.2d at 496; *Thompson*, 142

N.C. App. at 653, 543 S.E.2d at 903; *Price*, 132 N.C. App. at 558-59, 512 S.E.2d at 785; *Green*, 203 N.C. App. at 266, 273, 690 S.E.2d at 761, 765; *Bartley*, 381 N.C. at 293, 873 S.E.2d at 532.

III. Issue

A. Public Official Immunity

[2] Barnes-Jones argues the trial court erred by denying her 12(b)(6) motion to dismiss on the grounds of public official immunity.

1. Standard of Review

We review a Rule 12(b)(6) motion to dismiss *de novo*. *Green*, 203 N.C. App. at 266, 690 S.E.2d at 761.

> The standard of review of an order granting a [motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)] is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true.

Bissette v. Harrod, 226 N.C. App. 1, 7, 738 S.E.2d 792, 797 (2013) (citations omitted).

2. Analysis

The doctrines of sovereign immunity, governmental immunity, and public official immunity overlap and are directly related:

> In general, the doctrine of sovereign/governmental immunity "provides the State, its counties, and its public officials with absolute and unqualified immunity from suits against them in their official capacity." Under the doctrine of *sovereign* immunity, it is the State of North Carolina which "is immune from suit [in the absence of] waiver[,]" whereas under the doctrine of *governmental* immunity, counties and cities are "immune from suit for *negligence* of [their] employees in the exercise of governmental functions absent waiver of immunity."

Wray v. City of Greensboro, 247 N.C. App. 890, 892, 787 S.E.2d 433, 436 (2016) (citations omitted). In other words, whether sovereign immunity or governmental immunity applies depends upon the identity and status of the *defendant*.

Public official immunity is derived and stems from both sovereign immunity and governmental immunity, and its applicability depends upon whether the public official's employment and authority flows from the state *or* from a city or county. If the public employee works for a city or county, their *individual* immunity for acts committed within their scope of employment arises under and from the city or county's *governmental* immunity. *See Fullwood v. Barnes*, 250 N.C. App. 31, 38, 792 S.E.2d 545, 550 (2016) ("The defense of public official immunity is a 'derivative form' of governmental immunity." (citation omitted)); *Bartley*, 381 N.C. at 294, 873 S.E.2d at 533 ("Public official immunity, a judicially-created doctrine, is 'a derivative form' of governmental immunity which shields public officials from personal liability for claims arising from discretionary acts or acts constituting mere negligence, by virtue of their office, and within the scope of their governmental duties.").

If the public official's employment or authority flows from the State or a State agency, whether the official may assert public official immunity as a defense to any *individual* liability for purported negligent acts committed within the scope of their employment derives from the state's *sovereign* immunity. *See Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 203, 468 S.E.2d 846, 850 (1996) (explaining "[a] suit against a public official in his official capacity is basically a suit against the public entity (i.e., the state) he represents" and that "[o]fficial immunity is a derivative form of sovereign immunity" (citations omitted)).

Public official immunity shields individuals, while serving as "public officials," from *individual* liability for negligence, "[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption[.]" *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (citation omitted). "Actions that are malicious, corrupt or outside of the scope of official duties will pierce the cloak of official immunity[.]" *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (citations omitted).

Public official immunity may be asserted by "public officials," but not by "public employees." *Hare v. Butler*, 99 N.C. App. 693, 699-700, 394 S.E.2d 231, 236 (1990) (explaining "[w]hen a governmental worker is sued individually, or in his or her personal capacity, our courts distinguish between public employees and public officials in determining negligence liability" (citations omitted)).

"Officers exercise a certain amount of discretion, while employees perform ministerial duties." *Cherry v. Harris*, 110 N.C. App. 478,

480, 429 S.E.2d 771, 773 (1993) (citation omitted). "Discretionary acts are those requiring personal deliberation, decision[,] and judgment. Ministerial duties, on the other hand, are absolute and involve merely the execution of a specific duty arising from fixed and designated facts." *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999) (citations and quotations omitted).

Whether a public official may assert public official immunity depends upon which *capacity* the public official is being sued. *See Patrick v. N. Carolina Dep't of Health & Hum. Servs.*, 192 N.C. App. 713, 716, 666 S.E.2d 171, 173 (2008) (providing "public official immunity only applies to claims brought against public officials in their *individual* capacities" (emphasis supplied)); *Taylor*, 112 N.C. App. at 607, 436 S.E.2d at 279 (explaining governmental immunity only applies to county or city officials sued in their *official* capacity).

Principals constitute "public officials" and are entitled to assert the absolute defense of public official immunity. *Farrell v. Transylvania Cty. Bd. of Educ.*, 175 N.C. App. 689, 695, 625 S.E.2d 128, 133 (2006) ("[T]his Court has recognized [ ] school officials such as superintendents and principals perform discretionary acts requiring personal deliberation, decision, and judgment." (citing *Gunter v. Anders*, 114 N.C. App. 61, 67-68, 441 S.E.2d 167, 171 (1994))).

Petrillo's complaint specifically alleges she was suing Barnes-Jones "solely in her individual capacity" for negligence that occurred while Barnes-Jones was "acting in the course and scope of her employment, as an agent and public employee" of the Charlotte-Mecklenburg Board of Education and as the principal of WCHS. Under our precedents, Barnes-Jones' employment as a high school principal qualifies her as a public official. *Id.* She may properly assert public official immunity as an absolute defense to suit. *Smith*, 289 N.C. at 331, 222 S.E.2d at 430; *Moore*, 124 N.C. App. at 42, 476 S.E.2d at 421.

Public official immunity shields Barnes-Jones from alleged negligent activities conducted within the scope of her employment, if her official acts were taken without malice or corruption. *Id.* Petrillo's complaint does not specifically allege Barnes-Jones' alleged acts were malicious or corrupt. The trial court erred in denying Barnes-Jones' motions to dismiss based upon assertion of public official immunity.

IV. Conclusion

Barnes-Jones is not collaterally estopped from bringing her second Rule 12(b)(6) motion to dismiss, asserting public official immunity. This interlocutory appeal is properly before us.

Petrillo's failure to allege Barnes-Jones acted with malice or corruption bars and defeats her negligent claim upon proper assertion of public official immunity. *Id. See also White*, 366 N.C. at 363, 736 S.E.2d at 168; *Green*, 203 N.C. App. at 266-67, 690 S.E.2d at 761. The trial judge erred by denying Barnes-Jones' Rule 12(b)(6) motion to dismiss asserting public official immunity. *Id.* We reverse the trial judge's order and remand for entry of an order granting Barnes-Jones' motion to dismiss. *It is so ordered.*

REVERSED AND REMANDED.

Judges COLLINS and WOOD concur.

WILLIE RAY ROBERTS, Plaintiff
v.
JOHN KYLE, Executor of the Estate of CAROLYN GAIL ROBERTS, Defendant

No. COA22-383

Filed 17 October 2023

1. Divorce—equitable distribution—classification of property—subdivision property—marital presumption—rebuttal

In an equitable distribution matter, the trial court did not err by classifying certain real property as plaintiff husband's separate property. Although the deceased wife's son (defendant, who was executor of the wife's estate) argued that Section Two of the subdivision that plaintiff and his cousin had developed together was acquired during marriage through repayment of marital debt and active appreciation, defendant failed to offer evidence to rebut plaintiff's evidence that the subdivision was not purchased or otherwise originally acquired with marital property. Plaintiff's evidence showed that he acquired the property with his separate funds and that he used his separate funds to pay down his portion of the notes secured by the deeds of trust; finally, defendant failed to offer any credible evidence showing the amount or nature of any increase in value of the property during the marriage.

2. Divorce—equitable distribution—classification of property—personal property—evidence—trial court's discretion

In an equitable distribution matter, the trial court did not err by classifying certain personal property as the plaintiff husband's separate property. Although the deceased wife's son (defendant,

who was executor of the wife's estate) argued that he relied to his detriment on plaintiff's pre-trial equitable distribution affidavits and discovery responses describing the items as marital property, plaintiff's trial testimony that he had acquired all of the items before the marriage was competent evidence of the items' status as separate property, and any contradictions in the evidence were for the trial court to resolve. In addition, defendant failed to rebut plaintiff's testimony regarding his pre-marital acquisition of the items.

3. Appeal and Error—abandonment of issues—Rule 28(b)(6)—no authority

In an equitable distribution matter, where defendant provided no authority in support of his argument regarding a debt, the argument was deemed abandoned pursuant to Appellate Rule 28(b)(6).

Appeal by Defendant from order filed 17 August 2021 by Judge Andrew Kent Wigmore in Carteret County District Court. Heard in the Court of Appeals 29 November 2022.

Law Offices of Bill Ward & Kirby Smith, P.A., by Kirby H. Smith, III, for Plaintiff-Appellee.

Valentine & McFadyen, P.C., by Stephen M. Valentine for Defendant-Appellant.

CARPENTER, Judge.

John Kyle ("Defendant"), Executor of the Estate of Carolyn Gail Roberts ("Wife"), appeals from the trial court's "Equitable Distribution Judgment" (the "Judgment"), allocating certain real and personal property to Willie Ray Roberts ("Plaintiff"). Defendant argues the trial court erred in classifying certain real and personal property as Plaintiff's separate property before allocating same to Plaintiff. After careful review, we affirm the Judgment.

I. Factual & Procedural Background

Plaintiff and Wife were married on 24 December 1998 and separated on 1 December 2014. Plaintiff filed a complaint for absolute divorce on 24 March 2017. Wife subsequently answered and counterclaimed for equitable distribution. Plaintiff and Wife were granted an absolute divorce on 12 July 2017,[1] with equitable distribution issues reserved for

1. The order granting absolute divorce is not included in the Record.

hearing at a later date. On 15 April 2018, Wife passed away, and her son, Defendant, entered this matter by substitution on 11 September 2018.

On 19 December 1997, Plaintiff and his cousin, Walter,[2] purchased a 13.9-acre tract of property for $55,600.00, intending to develop a subdivision called “Tar Kiln Ridge.” Plaintiff and Walter paid $11,600.00 down and financed the balance with a note and loan from BB&T, secured by deed of trust. Plaintiff’s portion of the down payment came from his personal savings. Plaintiff’s primary role in the project involved clearing and preparing the land for development with heavy machinery, while Walter handled the surveying and permits. On 16 June 1998, Walter filed his final plan for Section One of Tar Kiln Ridge, which contained seven lots—three developed lots and four designated as “future development.” Plaintiff and Walter sold the first lot on 17 August 1998, prior to Plaintiff’s marriage, and applied the sale proceeds to pay down the initial BB&T note.

On 29 December 1998, four days after Plaintiff’s marriage, Plaintiff and Walter obtained a second BB&T loan for $110,000.00, secured by deed of trust on the remaining unsold lots, to pay off the original loan and fund infrastructure development. The Final Plat for Section Two of Tar Kiln Ridge was recorded on 20 April 1999. Plaintiff and Walter began selling the remaining lots in September 1999, paying down the loan principal with sale proceeds, as evidenced by BB&T release deeds. The second BB&T deed of trust was cancelled on 3 March 2001.

Occasionally, Plaintiff and Walter accepted nearby parcels of land as consideration for the sale of Tar Kiln Ridge lots, acquiring Tracts 8A and 9A in exchange for Lots 15, 19, and 21. Plaintiff and Walter then swapped their interests in certain parcels between themselves to acquire full ownership, which is how Plaintiff acquired 100% ownership of Tract 8A and Lot 13. Plaintiff and Walter each continued to own a 50% undivided interest in an undeveloped residual lot at the northeast corner of Tar Kiln Ridge. Accordingly, Plaintiff acquired the properties at issue, Tract 8A and Lot 13, in his sole name, and a 50% interest in the residual lot with Walter.

Plaintiff’s preliminary equitable-distribution affidavit filed on 22 June 2020 lists certain vehicles and trailers as marital property. Plaintiff’s answers to interrogatories described each disputed vehicle: a 1957 Farmall tractor, a 1963 Farmall tractor, a twenty-two-foot 1995 Core Sounder boat, a 1996 boat trailer, a 1995 Caterpillar

2. Walter D. Roberts, Jr. is named in the Judgment as “Danny” Roberts.

bulldozer, and a 1993 Caterpillar backhoe. Plaintiff's 24 November 2020 amended equitable-distribution affidavit again described all vehicles as marital property.

A bench trial on equitable distribution was held before the Honorable Andrew Kent Wigmore on 30 and 31 March 2021 in Carteret County District Court. The Judgment was filed on 17 August 2021, including, *inter alia*, the following findings[3]:

> **5)** On 19 December 1997, the Plaintiff and his cousin, [Walter,] purchased a 13.9-acre tract of land located on State Road 1140 hereafter known as "Tar Kiln Ridge[.]"
>
> **6)** The purchase price of Tar Kiln Ridge was $55,600. The Plaintiff and [Walter] entered into a deed of trust with BB&T on 19 December 1997 for $44,000. Funds from this loan were used, in part, to purchase said 13.9-acre tract.
>
> **7)** Plaintiff and [Walter] testified to beginning work on a subdivision which they called Tar Kiln Ridge and doing the surveying and land clearing and line cutting themselves, on Tar Kiln Ridge, right after purchasing the property, in the winter, which began by the calendar a couple days after purchase.
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> **8)** There was no evidence to refute [Plaintiff's and Walter's] testimony[ies] that they did all the work themselves on the Tar Kiln Ridge property.
>
> **9)** Too much work had been done on the property prior to DOT's first road inspection of 12 April 1999 to believe that all the work completed had been done solely after the date of marriage, 24 December 1998.
>
> **10)** The first lot sold in Tar Kiln Ridge, Lot #2, was sold on 17 August 1998, prior to the 24 December 1998 date of marriage of the parties.
>
> **11)** The sale of the first lot in Tar Kiln Ridge, Lot #2 on 17 August 1998 is the "defining moment" when the property had become a subdivision, and thus, the time in which the property value increases to the sum of all the lots to be sold.

3. The Findings in the Judgment are not numbered sequentially. The Findings skip numbers 16 and 18, meaning they read, in order, Finding 15, Finding 17, Finding 19, Finding 20 . . . .

12) Further proof of this increased value is BB&T's willingness to loan $110,000.00 – twice the purchase price on the original deed, upon just the signatures of Plaintiff and [Walter] and their collateral which is solely the Tar Kiln Ridge lots.

13) The Deed of Trust for the $110,000.00 loan on 29 December 1998, four days after the marriage, does not include [Wife's] name or signature, nor does it subject the Defendant to a single penny of indebtedness.

14) No marital funds [were] expended to repay the indebtedness as each payment made comes directly from the sale of a Tar Kiln Ridge lot.

15) Therefore, the court finds that the Tar Kiln Ridge Subdivision and its lots, were fully acquired as separate property when the first lot was sold bringing to fruition the subdivision itself, and its increase in separate property value above and beyond the indebtedness later placed on said property by the $110,000.00 loan on 29 December 1998.

17) Therefore, the remaining lots of Tar Kiln Ridge, lot 13 and the [residual lot] are classified as the Plaintiff's separate property as the Plaintiff has overcome the burden of marital property placed on said property by the Defendant's Equitable Distribution claim.

19) During the marriage and prior to the date of separation, the Plaintiff obtained in his separate name a parcel of real estate off Roberts Road in Newport, NC containing 18.41 acres and known as "Tract 8A[.]"

20) Hence, the separate property lots traded for [Tract 8A] without monetary payment or indebtedness of any form, retained the separate property classification previously found in the Tar Kiln lots.

21) Tract 8A is presumed to be marital property because it was acquired during the marriage and prior to the date of separation. However, the Plaintiff has overcome the burden of marital property placed on said property by the Defendant's equitable distribution claim. Therefore, Tract 8A is classified as Plaintiff's separate property.

Based upon its findings, the trial court concluded, *inter alia*:

> **3)** Although the lots in Tar Kiln Ridge (with the exception of Lot #2) were sold during the marriage, [the] court finds the Plaintiff has overcome the presumption that these lots are [marital].
>
> **4)** The court finds that the Plaintiff has overcome the presumption that Tract 8A is a marital asset.
>
> **5)** The court finds that the Plaintiff has overcome the presumption that lot 13 and the residual lot in the Tar Kiln Ridge Subdivision are marital assets.

Defendant filed timely, written notice of appeal on 7 September 2021.

II. Jurisdiction

This Court has jurisdiction over an appeal from a final equitable-distribution judgment pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Issues

The issues before this Court are whether the trial court erred by: (1) classifying Lot 13, the residual lot of Tar Kiln Ridge, and Tract 8A as Plaintiff's separate property; (2) classifying certain vehicles as Plaintiff's separate property; and (3) finding the second BB&T loan did not subject Wife's estate to any financial responsibility.

IV. Standard of Review

The standard of review for a trial court's classification of property during equitable distribution is "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Foxx v. Foxx*, 282 N.C. App. 721, 724, 872 S.E.2d 369, 372–73 (2022) (citing *Carpenter v. Carpenter*, 245 N.C. App. 1, 11, 781 S.E.2d 828, 837 (2016)). "The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Kabasan v. Kabasan*, 257 N.C. App. 436, 440, 810 S.E.2d 691, 696 (2018) (citation omitted). Unchallenged findings of fact "are presumed to be supported by competent evidence and are binding on appeal." *Peltzer v. Peltzer*, 222 N.C. App. 784, 787, 732 S.E.2d 357, 360 (2012).

"While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*." *Carpenter*, 245 N.C. App. at 11, 781 S.E.2d at 837. "Because the classification of property in an equitable

distribution proceeding requires the application of legal principles, this determination is most appropriately considered a conclusion of law." *Romulus v. Romulus*, 215 N.C. App. 495, 500, 715 S.E.2d 308, 312 (2011) (citation omitted). Therefore, we review the trial court's classification of property in this equitable distribution case *de novo*. *See Carpenter*, 245 N.C. App. at 11, 781 S.E.2d at 837.

V. Analysis

A. Classification of Real Property

[1] In his first arguments, Defendant challenges various findings of fact and the trial court's conclusions of law that Lot 13 and the residual lot of Tar Kiln Ridge, as well as Tract 8A, were Plaintiff's separate property.[4] Specifically, Defendant asserts that Section Two of Tar Kiln Ridge was acquired during the marriage through repayment of marital debt and active appreciation; therefore, Lot 13, the residual lot, and Tract 8A—acquired in exchange for Lot 19 of Tar Kiln Ridge and Plaintiff's 50% interest in Tract 9A—are marital property subject to equitable distribution. Plaintiff avers that separate property brought into a marriage remains separate property, and the evidence and findings established that Plaintiff successfully rebutted the marital presumption regarding the disputed real property. There is merit to portions of the arguments raised by each party.

"In an action for equitable distribution, the trial court is required to conduct a three-step analysis: 1) identification of marital and separate property; 2) determination of the net market value of the marital property as of the date of separation; and 3) division of the property between the parties." *Est. of Nelson ex rel. Brewer v. Nelson*, 179 N.C. App. 166, 168, 633 S.E.2d 124, 126–27 (2006), *aff'd*, 361 N.C. 346, 643 S.E.2d 587 (2007). The dispute in this case concerns the trial court's analysis of step one—identifying or classifying the marital and separate property. Our General Statutes define marital property and separate property as follows:

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4. It is apparent Defendant disputes certain findings and conclusions on this issue, but aside from Findings 11 and 15, he failed to specify their respective numbers to aid our review. Given the nature of his argument and authorities cited, we additionally infer his challenges to Findings 17, 20, and 21, and Conclusions 4 and 5. As previously discussed, "findings" which classify property or apply burden-shifting principles are more properly considered conclusions of law. *See Romulus*, 215 N.C. App. at 500, 715 S.E.2d at 312. We review them as such. *See Cox v. Cox*, 238 N.C. App. 22, 31, 768 S.E.2d 308, 314 (2014) ("When this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review.").

> (1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection. . . . *It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection.* It is presumed that all real property creating a tenancy by the entirety acquired after the date of marriage and before the date of separation is marital property. *Either presumption may be rebutted by the greater weight of the evidence.*
>
> (2) "Separate property" means all real and personal *property acquired by a spouse before marriage* or acquired by a spouse by devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. *Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property.*

N.C. Gen. Stat. § 50-20(b)(1)–(2) (2021) (emphasis added). The statute contains a presumption that property acquired after the date of marriage and before separation is marital property, which may be rebutted by a preponderance of evidence. N.C. Gen. Stat. § 50-20(b)(1).

> The burden of showing the property to be marital is on the party seeking to classify the asset as marital and the burden of showing the property to be separate is on the party seeking to classify the asset as separate. A party may satisfy her burden by a preponderance of the evidence. If the party claiming property should be classified as marital property meets the burden by a preponderance of the evidence, then the burden shifts to the other party

> to prove the property is separate. If both parties meet their burdens then the property is separate property.

Atkins v. Atkins, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991).

Moreover, if separate property increases in value during the marriage, such increase may become marital property, depending on whether the increase is due to active efforts or passive forces. The statutory "provision concerning the classification of the increase in value of separate property has been interpreted as referring only to passive appreciation of separate property, such as that due to inflation, and not to active appreciation resulting from the contributions, monetary or otherwise, by one or both spouses." *Lawrence v. Lawrence*, 75 N.C. App. 592, 595, 331 S.E.2d 186, 188 (1985). With respect to active appreciation of separate property, any increase in value between the date of acquisition and the date of separation is presumptively marital property unless it is shown to be the result of passive appreciation. *Conway v. Conway*, 131 N.C. App. 609, 616, 508 S.E.2d 812, 817 (1998).

"In making an equitable distribution determination, all property must be classified as marital or separate, and when property has dual character, the component interests of the marital and separate estates must be identified[.]" *Crago v. Crago*, 268 N.C. App. 154, 159, 834 S.E.2d 700, 705 (2019) (citation and internal quotations omitted), *rev. denied*, 373 N.C. 592, 838 S.E.2d 181 (2020). "North Carolina recognizes the 'source of funds' rule, under which assets purchased with, or comprised of, part marital and part separate funds are considered 'mixed property' for equitable distribution purposes." *Carpenter*, 245 N.C. App. at 11, 781 S.E.2d at 837.

Where separate property is invested along with marital property in an asset during marriage but before separation, such commingling does not necessarily transmute the separate property into marital property; however, commingled separate property may be transmuted into marital property if the party making the separate contribution is unable to trace the initial deposit into its form at the date of separation. *See Carpenter*, 245 N.C. App. at 12, 781 S.E.2d at 837 (citations and internal quotations omitted); *see also O'Brien v. O'Brien*, 131 N.C. App. 411, 418–19, 508 S.E.2d 300, 306 (1998), *rev. denied*, 350 N.C. 98 (1999) (rejecting the common-law theory of transmutation, defined as the creation of a rebuttable presumption that all the property has been transmuted into marital property, after nonmarital property is commingled with marital property).

Here, Defendant failed to offer evidence to rebut Plaintiff's evidence that Tar Kiln Ridge was not purchased or otherwise originally acquired

with marital property. In light of Wife's passing, it is understandable why Defendant encountered difficulties with the applicable burden-shifting principles. *See Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 787.

Defendant's primary argument on this point was Plaintiff's payments on the second deed of trust created marital equity, and thus, ongoing acquisition during the marriage for purposes of equitable distribution. *See Wade v. Wade*, 72 N.C. App. 372, 380, 325 S.E.2d 260, 268–69 (1985) (Acquisition is "the ongoing process of making payment for property or contributing to the marital estate rather than being fixed on the date that legal title to property is obtained.").

In *Wade*, the husband acquired a parcel of undeveloped land before the marriage, and the husband and wife jointly contributed to the construction of a home on the parcel to serve as the marital residence. *See id.* at 377, 325 S.E.2d at 266. Because the husband and wife each contributed to the parcel's increase in value, this Court noted "the marital estate invested substantial sums in improving the real property by constructing a house on it; therefore, the marital estate is entitled to a proportionate return of its investment." *See id.* at 380, 325 S.E.2d at 268. Unlike the facts in *Wade*, no evidence tends to show Wife contributed to the development of Tar Kiln Ridge, and Plaintiff's efforts increased the value of a separate investment property which he jointly-held with a third-party, not a shared marital residence. *Wade* is factually distinguishable on both bases.

On the other hand, Plaintiff provided ample testimony to support his contention and burden to show that Tar Kiln Ridge was acquired exclusively with his separate property: Plaintiff began saving money as a child working on his grandfather's tobacco farm; Plaintiff used personal savings to fund his portion of the down payment of the initial purchase price and a pre-marital personal checking account for his portion of monthly payments on both deeds of trust; and Plaintiff and Wife had kept their finances separate during the marriage.

Here, the trial court's findings carefully traced the timing, source of funds expended and any additional indebtedness, which may have altered the character of Plaintiff's separate property, through acquisition. *See Crago*, 268 N.C. App. at 159–60, 834 S.E.2d at 705. While one could reasonably argue there were two distinct phases to the subdivision development, the trial court determined in Finding 11 that the sale of the first lot before the marriage marked the point at which the value of the subdivision had reached its full potential, as evidenced by the increased BB&T loan, despite ongoing work to complete development. We note Finding 12, discussing the second, substantially larger BB&T

loan which closed four days after the marriage for no additional collateral, is unchallenged and therefore binding on appeal. *See Peltzer*, 222 N.C. App. at 787, 732 S.E.2d at 360. This unchallenged finding also tends to support a portion of the trial court's conclusion labeled as Finding 15, that the pre-marital sale of the first lot on 17 August 1998 was the moment Plaintiff acquired his share of the subdivision as separate property.

Next, in an apparent challenge to Finding 11, Defendant expounds regarding conditions precedent to local government recognition of a subdivision. We do not dispute the legal validity of Defendant's citations to our General Statutes or the Carteret County Subdivision Ordinances; however, Defendant has not provided, nor are we aware of binding precedent holding that a real estate development cannot be acquired as separate property for purposes of equitable distribution before a local governmental entity would formally recognize the development as a subdivision within the meaning of our General Statutes. Although there are various ways to legally subdivide a parcel outside of plat recordation, at the time, the development in this case would not have become a subdivision within the meaning of our General Statutes until it was properly platted and approved by various state and local entities as provided by the applicable county subdivision ordinance. *See* N.C. Gen. Stat. § 153A-330 *et seq.* (1997) (repealed by S.L. 2019-111, § 2.2, as amended by S.L. 2020-25, § 51(b), eff. June 19, 2020). Accordingly, to the extent Finding 11 implies Tar Kiln Ridge became a subdivision as a matter of law on 17 August 1998—before the final plat was approved and recorded—this finding is not supported by competent evidence, and we disregard it on appeal. *See Foxx*, 282 N.C. App. at 724, 872 S.E.2d at 372–73. Nevertheless, for purposes of our equitable-distribution analysis, we discern no prejudicial error in Finding 11 regarding the "defining moment" the property became a subdivision and maximized its potential value.

We similarly do not discern error in the trial court's reasoning in the conclusion labeled as Finding 15, that Tar Kiln Ridge was acquired as Plaintiff's separate property upon the pre-marital sale of the first lot. The record reflects that Plaintiff and Walter invested significant time and resources prior to the marriage in acquiring and improving the land that became Tar Kiln Ridge, including the sale of the first lot to a *bona fide* purchaser for value. Furthermore, Plaintiff's unrebutted testimony established he exclusively used separate, pre-marital funds to pay down his portion of the notes secured by the deeds of trust. Therefore, the trial court properly concluded Plaintiff had rebutted the marital presumption. *See Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 787.

We next consider Defendant's active appreciation argument, in relation to the conclusion contained in the second portion of Finding 11—namely, that the pre-marital sale of the first lot marked "the time in which the property value increase[d] to the sum of all the lots to be sold." For purposes of this argument, we presume, without deciding, Defendant's argument was properly preserved.[5]

"When marital efforts actively increase the value of separate property, the increase in value is marital property and is subject to distribution." *Blair v. Blair*, 260 N.C. App. 474, 491, 818 S.E.2d 413, 424 (2018) (quoting *Conway*, 131 N.C. App. at 615–16, 508 S.E.2d at 817–18). "To demonstrate active appreciation of separate property, there must be a showing of the (1) value of asset at time of acquisition, (2) value of asset at date of separation, (3) difference between the two. . . . In order for the court to value active appreciation of separate property and distribute the increase as marital property, the party seeking distribution of the property must offer credible evidence showing the amount and nature of the increase." *See id.* at 491, 818 S.E.2d at 424.

Plaintiff's and Walter's active efforts ultimately increased the value of the Tar Kiln Ridge lots to a sum in excess of $600,000. At first glance, we were curious as to the evidentiary basis for Finding 11 and the trial court's failure to identify the marital component of Tar Kiln Ridge, in the form of the active appreciation of the disputed lots attributable to Plaintiff's active efforts during the marriage. Because Plaintiff's time and manual labor in constructing the subdivision during the marriage were "contributions, monetary or otherwise, by one or both spouses," any increase in value of the disputed lots due to Plaintiff's efforts during the marriage would normally constitute active appreciation. *See Lawrence*, 75 N.C. App. at 595, 331 S.E.2d at 188. Tar Kiln Ridge may arguably be more properly classified as a divisible or "mixed" asset, *see Carpenter*, 245 N.C. App. at 11, 781 S.E.2d at 837, comprised of a separate (partially-improved land) and a marital (active appreciation during marriage) component as a result of its dual character, *see Crago*, 268 N.C. App. at 159, 834 S.E.2d at 705.

As recognized in unchallenged Findings 8 and 9, Plaintiff and Walter "did all the work themselves on the Tar Kiln Ridge property," and their ongoing work to develop Section Two, where the disputed lots were located, continued well into the marriage. Defendant offered evidence

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5. The transcripts reveal the phrase "active appreciation" was uttered precisely once during the hearing, by Defendant's counsel in the form of a relevance objection.

of the property values on the date of separation and near the date of distribution; however, the record is silent concerning their value until 2014. Critically, no evidence tends to show their value anywhere remotely approaching the date of acquisition, as determined by the trial court, 17 August 1998. Therefore, because Defendant did not "offer credible evidence showing the amount and nature of the increase," the trial court did not reversibly err by failing to value and distribute the purported marital component of Plaintiff's separate, real property. *See Blair*, 260 N.C. App. at 491, 818 S.E.2d at 424.

Because the development of Tar Kiln Ridge was partly funded by a debt incurred by Plaintiff during the marriage, and the disputed properties were still owned on the date of separation, the trial court correctly concluded the marital presumption applied. *See* N.C. Gen. Stat. § 50-20(b)(1). Nevertheless, the trial court properly found that Plaintiff had acquired the property using separate funds and traced his contributions through his subsequent acquisition of Tract 8A during the marriage. *See Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 787.

Based on the evidence of record, the trial court correctly concluded Plaintiff rebutted the marital presumption by the greater weight of the evidence. *See* N.C. Gen. Stat. § 50-20(b)(1)–(2). Furthermore, the trial court did not reversibly err in failing to identify the "dual character" of Tar Kiln Ridge, because Defendant failed to meet his burden to show the amount and nature of the purported increase in value. *See Crago*, 268 N.C. App. at 159, 834 S.E.2d at 705; *Blair*, 260 N.C. App. at 491, 818 S.E.2d at 424.

We affirm the trial court's classification of the disputed real property as Plaintiff's separate property and hold the trial court did not err in failing to value and distribute any purported marital component of the disputed properties where Defendant failed to meet his burden to establish the active appreciation of Plaintiff's separate property. *See Nelson*, 179 N.C. App. at 168, 633 S.E.2d at 126–27.

B. Classification of Personal Property

[2] Next, Defendant argues the trial court erred in classifying the 1957 Farmall tractor, the 1963 Farmall tractor, the 1995 Core Sounder boat, the 1996 boat trailer, the 1995 Caterpillar bulldozer, and the 1993 Caterpillar backhoe as Plaintiff's separate property. Defendant asserts reliance to his detriment on Plaintiff's pre-trial equitable-distribution affidavits and discovery responses describing the items as marital property. We disagree.

Plaintiff testified: he inherited the Farmall tractors from his father and grandfather before the marriage; he acquired the Core Sounder boat and built the trailer in 1995; he acquired the bulldozer in 1994; and he acquired the backhoe in either August or September of 1998—all prior to the marriage.

Defendant's argument fails for several reasons. First, Plaintiff's testimony regarding acquisition of these vehicles—to which Defendant did not object at trial— was competent evidence before the trial court, as were Plaintiff's affidavits and discovery responses. Any contradictions or discrepancies in the evidence were for the trial court to resolve. *See Smallwood v. Smallwood*, 227 N.C. App. 319, 322, 742 S.E.2d 814, 817 (2013) ("Evidentiary issues concerning credibility, contradictions, and discrepancies are for the trial court—as the fact-finder—to resolve[.]"); *see also Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) ("[T]he trial judge, sitting without a jury, has discretion as finder of fact with respect to the weight and credibility that attaches to the evidence.").

Second, Defendant did not rebut Plaintiff's competent testimony regarding his pre-marital acquisition of the disputed vehicles. *See Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 787. Defendant's testimony was limited to the purported value of certain vehicles.

Third, Defendant advances no legal authority tending to support this argument, subjecting the issue to abandonment. *See* N.C. R. App. P. 28(b)(6). We affirm the trial court's classification of the disputed vehicles as Plaintiff's separate property. *See Nelson*, 179 N.C. App. at 168, 633 S.E.2d at 126–27.

C. Marital Debt

[3] Finally, Defendant contends the trial court erred in finding the second BB&T deed of trust did not subject Defendant "to a single penny of indebtedness," a statement located in Finding 13. Specifically, Defendant argues "the debt was incurred during the marriage for a marital purpose[; c]onsequently . . . Defendant *would have* certainly shared responsibility for the debt *had any of the debt remained outstanding* on the date of separation," despite Wife not co-signing the note or deed of trust. (Emphasis added).

Defendant advances no authority in support of this argument, and we deem it abandoned. *See* N.C. R. App. P. 28(b)(6). To the extent this issue is an extension of Defendant's argument regarding the trial court's classification of Tar Kiln Ridge, our analysis is unchanged. Defendant concedes no debt remained outstanding on the date of separation, and

Wife's estate was not subject to any financial responsibility for the second BB&T note and deed of trust.

VI. Conclusion

In sum, the trial court properly concluded the disputed lots were Plaintiff's separate property. Defendant failed to meet his burden to establish a marital component attributable to active appreciation. Furthermore, we affirm the trial court's classification of the disputed vehicles and marital debt. Accordingly, we affirm the trial court's equitable distribution judgment.

AFFIRMED.

Judges TYSON and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
TOMMY LYNN BURLESON

No. COA23-212

Filed 17 October 2023

1. Search and Seizure—motion to suppress—vehicle search—lawfulness—conflicting evidence—sufficiency of findings

In a drug prosecution, the trial court properly denied defendant's motion to suppress evidence of drugs found by law enforcement during the search of a vehicle that had been stopped at a license checkpoint and in which defendant had been riding as a passenger. The court's determination that the vehicle search was lawful—based on consent given by the vehicle's driver—was supported by the unchallenged findings of fact, which in turn were supported by competent evidence and resolved the material conflicts in the evidence.

2. Drugs—possession—constructive—other incriminating circumstances—suspicious actions

The State presented substantial evidence in a drug prosecution from which a jury could conclude that defendant constructively possessed marijuana and methamphetamine that law enforcement discovered in the center console of a truck in which defendant had

been riding as a passenger. While defendant did not have exclusive possession of the vehicle, other incriminating circumstances supported a finding of constructive possession, including that, when defendant gave consent for a pat down of his person after he exited the vehicle, he reached into his pockets, pulled out his cupped hand, turned and made a throwing motion, and admitted to the officer that he had thrown a marijuana blunt.

Appeal by Defendant from judgment entered 3 May 2022 by Judge Peter B. Knight in McDowell County Superior Court. Heard in the Court of Appeals 20 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General G. Mark Teague, for the State-Appellee.

Shawn R. Evans for Defendant-Appellant.

COLLINS, Judge.

Defendant Tommy Lynn Burleson appeals from the trial court's judgment entered upon guilty verdicts of drug-related crimes and having obtained habitual felon status. Defendant argues that the trial court erred by denying his motion to suppress and his motion to dismiss the substantive charges. The trial court did not err by denying Defendant's motion to suppress because the trial court's findings of fact resolved the material conflicts in the evidence and are supported by competent evidence, and those findings of fact support its conclusions of law. Furthermore, the trial court did not err by denying Defendant's motion to dismiss because there was sufficient evidence from which the jury could find that Defendant constructively possessed the controlled substances. Accordingly, we find no error.

I. Background

On 6 April 2021, Defendant and Wesley Rogers were driving from Fairview Road towards Harmony Grove Road in a burgundy truck when they approached a driver's license checkpoint conducted by the McDowell County Sheriff's Department. Rogers was in the driver's seat, and Defendant was in the front passenger seat. McDowell County Sheriff's Deputy Robert Watson asked Rogers if he had a driver's license, and Rogers stated that he did not. Watson told Rogers to pull off into a thrift store parking lot where another officer would issue Rogers a citation.

As the citation was being issued, Watson approached the truck and spoke with Rogers and Defendant. Watson asked if either Rogers or Defendant were on probation; Rogers stated that he was on probation, and Defendant stated that he was not. Watson asked Rogers "if there was anything in the vehicle that was illegal that he should not have and for consent to search the vehicle." Rogers gave Watson verbal consent to search the truck. Watson directed Rogers to exit the truck and Watson conducted a pat down of Rogers for weapons.

Watson then directed Defendant to exit the truck. As Defendant was exiting the truck, Watson noted the odor of marijuana. Watson asked to conduct a pat down of Defendant, and Defendant consented. Defendant then began reaching into his pocket, and Watson observed that Defendant's right hand was cupped. Watson asked Defendant to "open his hands up flat where [he] could see that there was nothing in them." Defendant turned away from Watson and "made a throwing motion with [his] right hand." At that point, Watson detained Defendant "for the safety of officers and other persons on and around the scene." Watson asked Defendant if he had thrown anything, and Defendant stated that he had thrown a marijuana blunt. Watson placed Defendant in front of his patrol car located behind the truck.

McDowell County Sheriff's Deputy Jonathan Carter watched Rogers and Defendant while Watson searched the truck. Watson discovered a small bag of a leafy green substance between the passenger seat and center console; a small bag of a leafy green substance in the top of the center console; and a bag of a white crystalline substance, which was confirmed to be approximately 38 grams of methamphetamine, underneath the center console. Watson advised Defendant that he was under arrest and placed him in the back seat of Carter's patrol vehicle. Defendant told Carter on the way to the magistrate's office that he and Rogers were going to pick up the drugs and sell them but asserted that the drugs belonged to Rogers.

Defendant was indicted for trafficking in methamphetamine by possession, trafficking in methamphetamine by transportation, possession with intent to sell or deliver methamphetamine, and for having obtained habitual felon status. Defendant filed a motion to suppress, alleging that "[t]he detention, questioning and search of the Defendant on the alleged date were conducted by law enforcement officers without valid consent of the owner or any occupant of the vehicle and without reasonable suspicion[.]" After a hearing, the trial court denied the motion by written order entered 28 April 2022.

The matter came on for trial on 2 May 2022. At the close of the State's evidence, Defendant moved to dismiss the charges for insufficient evidence. The trial court denied the motion. The jury returned guilty verdicts on all charges, and the trial court sentenced Defendant to an active term of 117 to 153 months of imprisonment. Defendant appealed.

II. Discussion

A. Motion to Suppress

[1] Defendant argues that the trial court erred by denying his motion to suppress. Specifically, Defendant argues that the trial court erred by failing to address conflicting testimony between him and Watson in its findings of fact.

We review a trial court's denial of a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (quotation marks and 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). A trial court is only required to make findings of fact resolving material conflicts in evidence; a conflict is material if it affects the outcome of the suppression motion. *See State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015).

We review the trial court's conclusions of law de novo. *State v. Wiles*, 270 N.C. App. 592, 595, 841 S.E.2d 321, 325 (2020). Under de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

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

> 8. The court finds the testimony of both Deputy Watson and Deputy Carter to be credible.
>
> . . . .
>
> 10. On April 6, 2021, the Defendant was a passenger in a vehicle driven by Wesley Rogers and that vehicle was stopped pursuant to a checkpoint . . . .
>
> 11. Deputy Watson operated the checkpoint according to the checkpoint plan . . . .

12. The driver, Wesley Rogers, acknowledged to Deputy Watson that he did not have a valid driver's license.

13. Deputy Watson asked Wesley Rogers to pull his vehicle over to the side of the road where they engaged in conversation about the search of the vehicle.

14. Deputy Watson asked if either Mr. Rogers or the Defendant were on probation, to which Mr. Rogers responded that he was, and the Defendant responded that he was not.

15. Wesley Rogers gave Deputy Watson verbal consent to search the vehicle.

16. Mr. Rogers was asked to exit the vehicle and was patted down for weapons, which Mr. Rogers gave Deputy Watson consent to do.

17. Due to the search of the vehicle, Deputy Watson asked the Defendant to exit the vehicle.

18. At that time, Deputy Watson noted the odor of marijuana.

19. The Defendant then consented to a search of his person.

20. Deputy Watson observed the Defendant putting his hands into his garment pockets and that the Defendant's right hand was cupped.

21. Deputy Watson asked the Defendant to open his hand and then the Defendant threw a marijuana blunt onto the ground.

22. At that time, the Defendant was then detained by Deputy Watson for the safety of officers and other persons on and around the scene.

23. The Defendant was then placed in front of Deputy Watson's patrol car.

24. Deputy Watson then continued to search the vehicle pursuant to the consent given by Wesley Rogers.

25. Marijuana was found in the vehicle as well as what appeared to be 38 grams of what appeared to be methamphetamine.

26. At that point, Wesley Rogers was placed under arrest and contested his arrest and placement into custody. Mr. Rogers indicated that the drugs were not his and that he should not be arrested.

. . . .

28. Deputy Carter came to the area where the Defendant was standing in front of the patrol car due to officer safety.

. . . .

30. Deputy Carter heard Wesley Rogers state that he had given consent to the search, allegedly, because "he did not know the drugs were in there".

31. Deputy Watson advised the Defendant that he was being placed under arrest and then placed the Defendant into Deputy Carter's patrol vehicle.

32. On the way to the magistrate's office and without questioning from Deputy Carter, the Defendant made the statement to Deputy Carter that he and Mr. Rogers picked up the drugs and were going to sell them, but that the drugs belonged to Mr. Rogers.

33. However, Deputy Carter did not ask the Defendant any questions to elicit the above statement.

34. The Defendant testified that he heard the deputies ask Mr. Rogers for consent to search the pickup truck driven by Mr. Rogers and occupied by the Defendant.

35. The Defendant testified that Mr. Rogers never gave consent for the officers to search the vehicle, however the court finds his testimony to be noncredible.

36. Paragraph six of the affidavit filed December 6, 2021, signed by the Defendant under oath before the clerk of court, states "Defendant was made to exit the vehicle by Deputy Watson. Without consent of the Defendant, Defendant was patted down and searched by Deputy Watson. Defendant, as well as Wesley Adam Rogers were charged by Deputy Watson with multiple criminal offenses."

37. The testimony of the Defendant is contradictory to the sworn affidavit in that the defendant stated under oath at

> this hearing that he gave Deputy Watson consent to search his person.

Defendant does not challenge any findings of fact and they are thus binding on appeal. *See Fizovic*, 240 N.C. App. at 451, 770 S.E.2d at 720. Rather, Defendant argues that the trial court erred by failing to make additional findings of fact resolving conflicting testimony between Watson and himself.

Watson testified that he asked Rogers or Defendant if either were on probation and whether "there was anything in the vehicle that was illegal that he should not have and for consent to search the vehicle." Defendant testified that while he was still in the truck, Watson asked him, "Are there anything I need to know about in the truck?" Defendant argues that "[t]he trial court made no findings about this, making it impossible for this Court to properly analyze this issue to determine of (sic) Mr. Burleson was detained and whether he was questioned without a *Miranda* warning." However, the trial court found that Watson's testimony was credible and, in doing so, resolved any testimonial conflicts in Watson's favor. Moreover, even assuming arguendo that Watson asked Defendant whether there was "anything [he] need[ed] to know about in the truck[,]" neither Defendant nor Watson testified that Defendant made incriminating statements in response to this question. Rather, Defendant's statement that "he and Mr. Rogers picked up drugs and were going to sell them" was made spontaneously and without questioning from Watson after Watson had searched the truck. *See State v. Burton*, 251 N.C. App. 600, 607, 796 S.E.2d 65, 70-71 (2017) ("It is well established that spontaneous statements made by an individual while in custody are admissible despite the absence of *Miranda* warnings." (quotation marks, brackets, and citation omitted)).

The trial court's findings of fact resolved the material conflicts in the evidence and support the trial court's conclusions of law that "[t]he stop of the vehicle driven by Wesley Rogers and occupied by Tommy Burleson, the Defendant, was lawful" and that "[t]he search of the vehicle by Deputy Watson was authorized and lawful." Accordingly, the trial court did not err by denying Defendant's motion to suppress.

B. Motion to Dismiss

[2] Defendant argues that the trial court erred by denying his motion to dismiss because the State "failed to present sufficient incriminating circumstances which would have allowed a jury to make an inference of constructive possession."

We review a trial court's denial of a motion to dismiss de novo. *State v. Chavis*, 278 N.C. App. 482, 485, 863 S.E.2d 225, 228 (2021). "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. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (quotation marks and citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Rivera*, 216 N.C. App. 566, 568, 716 S.E.2d 859, 860 (2011) (quotation marks and citation omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Chekanow*, 370 N.C. at 492, 809 S.E.2d at 549-50 (quotation marks and citation omitted). Any contradictions or discrepancies in the evidence are for the jury to decide. *State v. Wynn*, 276 N.C. App. 411, 416, 856 S.E.2d 919, 923 (2021).

Here, Defendant was convicted of possession with intent to sell or deliver methamphetamine pursuant to N.C. Gen. Stat. § 90-95(a)(1), and trafficking in methamphetamine by possession and by transportation pursuant to N.C. Gen. Stat. § 90-95(h)(3b). To convict a defendant of possession with intent to sell or deliver methamphetamine, the State must prove that the defendant (1) possessed, (2) methamphetamine, (3) with intent to sell or deliver methamphetamine. *State v. Blagg*, 377 N.C. 482, 489, 858 S.E.2d 268, 274 (2021). To convict a defendant of trafficking in methamphetamine, the State must prove that the defendant (1) knowingly possessed or transported methamphetamine, and (2) that the amount possessed was greater than 28 grams. *State v. Shelman*, 159 N.C. App. 300, 305, 584 S.E.2d 88, 93 (2003).

Possession of a controlled substance may be either actual or constructive. *State v. Nettles*, 170 N.C. App. 100, 103, 612 S.E.2d 172, 174 (2005); *see also State v. Diaz*, 155 N.C. App. 307, 313, 575 S.E.2d 523, 528 (2002). "A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *State v. Ferguson*, 204 N.C. App. 451, 459, 694 S.E.2d 470, 477 (2010) (quotation marks and citations omitted). "Constructive possession occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the substance." *State v. Acolatse*, 158 N.C. App. 485, 488, 581 S.E.2d 807, 810 (2003) (quotation marks and citation omitted).

"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) (citation omitted). "Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation omitted). When determining whether other incriminating circumstances exist to support a finding of constructive possession, we consider, among other things: (1) "the defendant's ownership and occupation of the property"; (2) "the defendant's proximity to the contraband"; (3) "indicia of the defendant's control over the place where the contraband is found"; (4) "the defendant's suspicious behavior at or near the time of the contraband's discovery"; and (5) "other evidence found in the defendant's possession that links the defendant to the contraband." *Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552 (citations omitted).

As Defendant did not have exclusive possession of the truck in which the drugs were found, the State was required to provide evidence of other incriminating circumstances. *Miller*, 363 N.C. at 99, 678 S.E.2d at 594.

When viewed in the light most favorable to the State, the following other incriminating circumstances were sufficient to support a finding of constructive possession: Watson testified at trial that, after Rogers gave consent to search the truck, he directed Defendant to exit the truck and asked for consent to conduct a pat down. Defendant "gave consent and then he immediately began reaching in his pockets." Watson told Defendant to put his hands on the truck and noticed that Defendant's "right hand was in the cupped form folded over like he was trying to hide something." Watson asked Defendant to put his hands flat, and Defendant "turned away and made a throwing motion with his right hand and threw something."

At that time, Watson detained Defendant. Watson asked Defendant what he threw, and Defendant "stated that he threw a blunt." Watson placed Defendant in front of his patrol car and began searching the truck. Watson began his search on the passenger side of the truck and "located a small bag of marijuana, a very small bag of marijuana, on top of the center console area." Watson also found a "small bag of a green leafy substance, believed to be marijuana, that was in between the passenger seat and the center console area[.]" Furthermore, "underneath that console there was a plastic bag with a white crystal like substance that weighed out to be 38 grams believed to be methamphetamine."

Defendant's actions of cupping his hand, making a throwing motion with his back turned, and admitting to throwing a marijuana blunt, when viewed in conjunction with the subsequent discovery of marijuana and methamphetamine in the center console next to the passenger seat in which Defendant was sitting, constitute sufficient incriminating circumstances to support a finding of constructive possession. *See State v. Butler*, 147 N.C. App. 1, 12-13, 556 S.E.2d 304, 312 (2001) (holding that there were incriminating circumstances supporting an inference of constructive possession where the defendant acted suspiciously by fleeing after seeing police, moving around like he was "struggling" at the location where the drugs were later found, and bending down "so that his arms and hands were not visible to the officers").

Accordingly, the trial court did not err by denying Defendant's motion to dismiss.

III. Conclusion

The trial court did not err by denying Defendant's motion to suppress because the trial court's findings of fact resolved the material conflicts in the evidence and are supported by competent evidence, and those findings of fact support its conclusions of law. Furthermore, the trial court did not err by denying Defendant's motion to dismiss because there was sufficient evidence from which the jury could find that Defendant constructively possessed the controlled substances. Accordingly, we find no error.

NO ERROR.

Judges TYSON and WOOD concur.

STATE OF NORTH CAROLINA
v.
RAY SHAWN DANIELS

No. COA23-22

Filed 17 October 2023

Sentencing—prior record level—out-of-state conviction—substantial similarity—federal carjacking and common law robbery

In sentencing defendant for numerous convictions arising from a shooting and high-speed chase, the trial court did not err by concluding that the federal offense of carjacking—which defendant stipulated he had been previously convicted of—and the state offense of common law robbery were substantially similar, resulting in defendant being sentenced at a higher prior record level. Although defendant argued that the two offenses bore substantial dissimilarities—in that the federal carjacking statute required that the stolen property be connected to interstate commerce, the federal carjacking statute contained sentencing enhancements, and the state common law robbery offense was broader in scope (applying to any property)—the offenses nonetheless were substantially similar based on holdings in previous cases.

Appeal by defendant from judgment entered 16 May 2022 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Stuart (Jeb) M. Saunders, for the State.

Richard J. Costanza, for the defendant-appellant.

TYSON, Judge.

Ray Shawn Daniels ("Defendant") appeals from a final judgment entered upon the jury's verdicts for: (1) assault on a law enforcement official with firearm; (2) assault with a deadly weapon with intent to kill; (3) attempted first-degree murder; (4) assault with a deadly weapon with intent to kill inflicting serious injury; (5) attempted first-degree murder; (6) possession of a firearm by a felon; and (7) ten counts of attempted discharge of a firearm into an occupied moving vehicle. Our review reveals no error.

I. Background

Thomas Gilmore ("Gilmore"), a minor child, was waiting at a school bus stop with his friend during the morning of 20 September 2018. (Pseudonym used to protect identity of minor, per N.C. R. App. P. 42(b)). While waiting, Gilmore heard multiple gunshots, and he and his friend ran into a nearby convenience store. After entering the convenience store, Gilmore's friend realized Gilmore was bleeding and had been struck by a bullet. Gilmore was transported to the hospital by ambulance, where it was determined a bullet entered the back of his right thigh and passed through his leg, injuring his thigh and scrotum. Gilmore did not see who had shot him, nor did he observe anyone with a firearm nearby.

That same morning, Mecklenburg County Sheriff's Deputy Corey Thompson ("Deputy Thompson") was wearing his uniform and driving to an off-duty assignment in a marked patrol vehicle. Upon reaching the four-way intersection of West Sugar Creek Road and Reagan Drive, he heard gunshots. On his right, Deputy Thompson saw a crowd of fifteen to twenty people running towards him. He made a right-hand turn and observed a person on the ground and a man wearing a light-colored shirt and blue jeans standing over him.

Deputy Thompson activated his emergency equipment and saw the man, who had been standing, run and jump into the passenger side of a black Cadillac stopped a couple of feet away. The Cadillac sped away from the area, and Deputy Thompson initiated a chase of the vehicle. During the chase, the person occupying the front passenger seat of the Cadillac began shooting a pistol at Deputy Thompson's patrol vehicle. At least ten shots were fired by the shooter. Deputy Thompson slowed to gain distance between himself and the Cadillac, so the projectiles would not hit him. Neither Deputy Thompson nor his patrol vehicle were struck by any bullets fired by the shooter inside the Cadillac. During the chase, the Cadillac reached speeds of "upwards of a hundred" miles per hour and weaved in and out of heavy traffic.

At one point during the chase, the Cadillac pulled into a gas station. A person, who was later identified by Deputy Thompson as the Defendant, attempted to exit the front passenger side of the Cadillac, but he realized Deputy Thompson was nearby. Defendant immediately re-entered the Cadillac, and the chase continued. After a few minutes, Deputy Thompson's superior officer advised him to cease pursuit of the Cadillac. Deputy Thompson stopped his pursuit and deactivated his patrol vehicle's emergency equipment. He had observed the Cadillac exit from Interstate 85. Deputy Thompson took the same exit and patrolled

the area to search for the Cadillac. He located the Cadillac parked in a restaurant parking lot, unoccupied.

The same morning, Mecklenburg County Sheriff's Deputy Joseph Beckham ("Deputy Beckham") was on duty when he heard radio traffic indicating another deputy was involved in a chase. Deputy Beckham testified he activated his lights and sirens and drove to Interstate 85 South towards Graham Street, the suspect's last known location. As he approached the area, he heard radio traffic indicating Charlotte-Mecklenburg police officers were chasing a suspect through an ABC store parking lot. He also saw an officer pointing across the street. He observed a black male with dreadlocks running away from that officer.

Deputy Beckham activated his patrol vehicle's emergency equipment and chased the suspect. He observed the suspect run behind a retail center and through some bushes. Deputy Beckham exited his vehicle, followed the suspect, and found him hiding in the bushes in a "surrendered position." Deputy Beckham held the suspect at gunpoint until other officers arrived. He handcuffed the suspect, who he later determined was unarmed. At trial, Deputy Beckham identified Defendant as the man he had arrested.

Deputy Beckham and his K-9 dog searched the immediate area for a gun. Other officers assisted, including Mecklenburg County Sheriff's Sergeant J.M. Whitmore ("Sergeant Whitmore"). The K-9 dog "found a track" and pursued it. Sergeant Whitmore was walking behind the dog, flipped open a green recycling bin, and found a bulletproof vest inside. A handgun was "sandwiched" in the vest, with an extended magazine protruding "out [of] the butt of the gun."

Forensic DNA testing was conducted on the firearm, which indicated a mixture of DNA from at least three individuals. The Defendant's DNA was the major profile contributor to the mixture. The State Crime Lab's analyst could not determine the identity of the other contributors. Additionally, forensic DNA testing was conducted on the bulletproof vest, also indicating a mixture of DNA from at least three individuals. Again, Defendant's DNA was the major profile contributor to the mixture, and the Lab's analyst was unable to make any determinations regarding the other contributors.

Charlotte-Mecklenburg Police Officer Shannon Foster collected discharged cartridge casings and projectiles at various locations where the shootings had occurred. Gene Rivera, a Charlotte-Mecklenburg Police Department firearm examiner, examined the casings and projectiles and

compared them with the recovered handgun. He determined ten of the projectiles were fired from the handgun, but the remaining two projectiles were too damaged to allow an accurate determination of whether or not they were fired from the recovered handgun. A jury convicted Defendant of all charges.

During the sentencing hearing, the parties stipulated that Defendant had been previously convicted of the federal offense of "carjacking," as codified at 18 U.S.C. § 2119. On 10 March 2009, Defendant pled guilty to Count I of the indictment, which tracked the language of 18 U.S.C. § 2119, alleging Defendant and others while:

> aiding and abetting each other, did knowingly and with intent to cause death and serious bodily harm, take a motor vehicle, that is, a 1989 Chevrolet Caprice, North Carolina Registration WVJ-8022, that had been transported, shipped, and received in interstate and foreign commerce, from the person and presence of another by force and violence by intimidation[.]

Defendant did not stipulate to the finding the carjacking conviction was substantially similar to common law robbery. In addition to the guilty verdicts, the jury also found as an aggravating factor the Defendant possessed a bulletproof vest during the commission of these offenses.

The trial court gave the State and Defendant the opportunity to be heard on the issue of whether the offenses of carjacking and common law robbery are substantially similar. The trial court ruled the State had satisfied its burden of proving by a preponderance of the evidence that the offenses are substantially similar. The trial court stated:

> So U[.]S[.] code 18 – 18 U[.]S[.] code, sections 2119, the offense of carjacking is reflected in State's motion Exhibit 2. The description of that, under the code, is whoever takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person, or presence of another by force and violence, or by intimidation or attempts to do so. And I find that that description, those elements, are substantially similar to North Carolina offense of common law robbery, and that is reflected as a Class G felony on the worksheet[.]

The trial court's finding resulted in the assessment of four sentencing points. The assessment added up to ten sentencing points total. The

trial court consolidated three of Defendant's offenses, including his convictions for attempted first-degree murder, assault on a law enforcement official with firearm, and assault with a deadly weapon with intent to kill, into one sentence. The trial court determined Defendant's attempted first-degree murder conviction would be sentenced under a Class B-1 felony with the addition of the sentencing enhancement. Defendant was sentenced as a prior record level IV offender to an active term of 300 to 372 months, with credit for 1,219 days served in custody.

The trial court also consolidated all of Defendant's other offenses into a separate judgment, which incorporated Defendant's convictions for attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, possession of a firearm by a felon, and all ten counts of attempted discharge of a firearm into an occupied moving vehicle. Defendant's attempted first-degree murder conviction was classified as a Class B-2 felony "with the sentencing enhancement of a B-1." Defendant received a sentence of 300 to 372 months to run consecutively to his previous sentence. Defendant appeals.

II. Jurisdiction

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

III. Issue

Defendant argues the trial court erred as a matter of law when it determined Defendant's federal carjacking conviction was substantially similar to our state's common law robbery, which resulted in the Defendant being sentenced at a higher prior record level.

A. Standard of Review

"The standard of review relating to the sentence imposed by the trial court is whether the sentence is supported by evidence introduced at the trial and sentencing hearing. However, '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' requiring *de novo* review on appeal." *State v. Fortney*, 201 N.C. App. 662, 669, 687 S.E.2d 518, 524 (2010) (citations omitted).

Determining "whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law" and requires comparing the elements of the offenses. *Id.* at 671, 687 S.E.2d at 525 (citation omitted). The trial court "may accept a stipulation that the defendant in question has been convicted of a particular out-of-state

offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction[,]" but it "may not accept a stipulation to the effect that a particular out-of-state conviction is 'substantially similar' to a particular North Carolina felony or misdemeanor[.]" *State v. Bohler*, 198 N.C. App. 631, 637-38, 681 S.E.2d 801, 806 (2009).

B. Analysis

Our State's sentencing statute provides guidance to determine whether a defendant's conviction for an offense committed in another jurisdiction may be calculated in a defendant's prior record level:

> If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2021).

Our precedents define common law robbery as "the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Porter*, 198 N.C. App. 183, 186, 679 S.E.2d 167, 169-70 (2009) (quoting *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270 (1982)).

The federal carjacking statute provides:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and

territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

18 U.S.C. § 2119 (2018).

Both the federal carjacking statute and North Carolina's common law robbery require the forceful and violent taking of property. The federal carjacking statute requires the taking to be accompanied "by force and violence or by intimidation[.]" *Id.* Our State's common law robbery statute similarly requires the taking of property "by means of violence or fear." *Porter*, 198 N.C. App. at 186, 679 S.E.2d at 169-70 (citation and internal quotation marks omitted).

1. State v. Sanders

Defendant, relying on *State v. Sanders*, argues our Supreme Court has adopted an elements comparison test when evaluating whether a foreign conviction is substantially similar to a North Carolina offense. *State v. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014) ("The Court of Appeals has stated, and we agree, that '[d]etermination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense.' " (citation omitted)).

Defendant argues the similarity of the federal carjacking offense and common law robbery fails to pass the test outlined in *Sanders*. In *Sanders*, the Supreme Court found the Tennessee offense of domestic assault was not substantially similar to the North Carolina offense of assault on a female:

> [A] woman assaulting her child or her husband could be convicted of "domestic assault" in Tennessee, but could not be convicted of "assault on a female" in North Carolina. A male stranger who assaults a woman on the street could be convicted of "assault on a female" in North Carolina, but could not be convicted of "domestic assault" in Tennessee.

Id. at 721, 766 S.E.2d at 334.

The Court in *Sanders* found the two offenses were not substantially similar, because the conduct that is criminalized in each offense was different. *Id.* Domestic assault and assault on a female both involve two different, specifically defined victims. *Id.* at 720, 766 S.E.2d at 334 ("The [Tennessee] offense thus requires that the person being assaulted fall within at least one of these six enumerated categories of domestic relationships. The offense does not require the victim to be female or the assailant to be male and of a certain age.").

Here, unlike in *Sanders*, the elements of carjacking and common law robbery require similar conduct, and no elements are mutually exclusive. Both offenses share two essential elements: (1) there is a non-consensual taking and theft of property; and (2) the taking is accompanied by force, violence, fear, or intimidation. 18 U.S.C. § 2119; *Porter*, 198 N.C. App. at 186, 679 S.E.2d at 169-70. When a victim is being dispossessed of property, use of intimidation and force invoke violence or fear, which are requirements of both offenses. It is hard to envision the lack of presence or occurrence of any or all factors in the commission of either crime.

2. Interstate Commerce Requirement

Defendant next argues carjacking and common law robbery are not substantially similar because the federal carjacking offense requires the stolen property be connected to interstate commerce. North Carolina's common law robbery does not contain an interstate commerce requirement, as that element invokes federal jurisdiction.

The State relies on the analysis in *State v. Graham* in arguing the elements of carjacking and North Carolina common law robbery are substantially similar. *State v. Graham*, 379 N.C. 75, 863 S.E.2d 752 (2021). The defendant in *Graham*, like the Defendant in the present case, argued "if the difference between the two statutes renders the other state's law narrower or broader, 'or if there are differences that work in both directions, so that each statute includes conduct not covered by the other, then the two statutes will not be substantially similar[.]' " *Id.* at 81, 863 S.E.2d at 756. Our Supreme Court found this argument unpersuasive and concluded the defendant's position "conflates the requirement that statutes subject to comparison be substantially similar to one other with [the] erroneous perception that the two statutes must have identicalness to each other." *Id.* at 82, 863 S.E.2d at 756.

The Court further concluded "substantially similar" does not mean "literalness," "identicalness," or "exactitude." *Id.* The Court explained:

> Standing alone, neither word—"substantially" or "similar" —connotes literalness; therefore, when these words are combined to create the legal term of art "substantially similar," this chosen phraseology reinforces the lack of a requirement for the statutory language in one enactment to be the same as the statutory language in another enactment in order for the two laws to be treated as "substantially similar." Yet, the dissent here—despite the obvious essential pertinent parallels between the Georgia statute and the North Carolina statute—would withhold a recognition that the two statutes are substantially similar because *all* of the same provisions are not common to each of them. In this respect, although the dissent professes that it understands the difference between "substantially similar" and identicalness, nonetheless it appears that the dissent is so ensnared and engulfed by a need to see a mirrored reflection mutually cast between the two statutes that the dissent is compelled to promote this erroneously expansive approach.

Id. at 82-83, 863 S.E.2d at 756-57.

This Court in *State v. Riley* compared N.C. Gen. Stat. § 14-415.1(a), which criminalizes possession of a firearm by a felon, with its federal counterpart, 18 U.S.C. § 922(g)(1). *State v. Riley*, 253 N.C. App. 819, 820, 802 S.E.2d 494, 495-96 (2017). North Carolina's offense of possession of a firearm by a felon "requires proof that (1) the defendant had been convicted of a felony and (2) thereafter possessed (3) a firearm." *Id.* at 825, 802 S.E.2d at 499 The federal statute, codified in 18 U.S.C. § 922(g)(1), "requires proof that (1) the defendant had been convicted of a crime punishable by more than one year in prison, (2) the defendant possessed (3) a firearm, and (4) the possession was in or affecting commerce." *Id.* at 825, 802 S.E.2d at 498-99.

This Court held the statutes are substantially similar, even though the federal law contains the additional element requiring possession of the firearm "in or affecting commerce" to invoke federal jurisdiction. *Id.* at 825-27, 802 S.E.2d at 498-500. Here, as in *Riley*, Defendant's argument asserting the additional element of interstate commerce distinguishes the crimes fails. *Id.*

3. Sentencing Requirements

Defendant argues the sentencing enhancements in the federal carjacking statute, which are not present in North Carolina common law

robbery, require this Court to hold the two offenses are not substantially similar. *Compare* 18 U.S.C. § 2119(1)-(3) *with Porter*, 198 N.C. App. at 186, 679 S.E.2d at 169-70.

The defendant in *Riley* argued the federal offense of being a felon in possession of a firearm was not substantially similar to the North Carolina offense of possession of a firearm by a felon based upon the sentencing disparities between the two offenses. *Riley*, 253 N.C. App. at 826, 802 S.E.2d at 499. The federal offense required the person to have been previously convicted of a crime "punishable by imprisonment for a term exceeding one year," whereas the North Carolina offense required the person to have previously been "convicted of a felony." *Id.* (internal quotations omitted). Notwithstanding those differences, the Court found substantial similarity existed between the two crimes:

> There may be other hypothetical scenarios which highlight the more nuanced differences between the two offenses. But the subtle distinctions do not override the almost inescapable conclusion that both offenses criminalize essentially the same conduct—the possession of firearms by disqualified felons. Both statutes remained unchanged in the 2012 to 2015 time period, and despite the differences we have discussed, the federal offense of being a felon in possession of a firearm is substantially similar to the North Carolina offense of possession of a firearm by a felon, a Class G felony.

Id. at 827, 802 S.E.2d at 500.

Similarly, in *Graham*, the defendant argued the North Carolina and Georgia offenses for statutory rape were not substantially similar because of how the two statutes treated "the age difference between the two participants." *Graham*, 379 N.C. at 81, 863 S.E.2d at 755. The Georgia statute provided different punishment ranges depending on the age of the offender and the age of the victim, "which impact[ed] the perpetrator's degree of punishment." *Id.* (explaining the Georgia statute provided " '[a] person convicted of the offense of statutory rape shall be punished by imprisonment for not less than one nor more than 20 years; provided, however, that if the person so convicted is 21 years of age or older, such person shall be punished by imprisonment for not less than ten nor more than 20 years; provided, further, that if the victim is 14 or 15 years of age and the person so convicted is no more than three years older than the victim, such person shall be guilty of a misdemeanor' "). The North Carolina statute differentiated between the class of felony an offender could be punished under, depending on the age of

the victim, the age of the offender, and the disparity between the victim's and the offender's ages. *Id.* at 81, 863 S.E.2d at 755-56.

Our Supreme Court held "the statutory wording of the Georgia provision and the North Carolina provision do not need to precisely match in order to be deemed to be substantially similar." *Id.* at 82, 863 S.E.2d at 756. The test in *Sanders* does not "require identicalness between compared statutes from different states and mandate identical outcomes between cases which originate both in North Carolina and in the foreign state." *Id.* at 84, 863 S.E.2d at 757.

Here, the offenses are substantially similar, despite the sentencing enhancements present in the federal carjacking statute, which are not present in North Carolina common law robbery. *Id.*; *Riley*, 253 N.C. App. at 825-27, 802 S.E.2d at 498-500; 18 U.S.C. § 2119; *Porter*, 198 N.C. App. at 186, 679 S.E.2d at 169-70. Defendant's objection and argument is overruled.

4. Broader Scope

Defendant finally argues the two offenses are not substantially similar because the scope of North Carolina common law robbery is broader than the federal carjacking offense. He asserts the common law offense of robbery involves the violent taking of any property, while federal carjacking is limited to forcible theft of a motor vehicle.

In *State v. Key*, this Court found an out-of-state statute was substantially similar to a North Carolina common law offense, despite the absence of an intent element in the sister-state's statute. *State v. Key*, 180 N.C. App. 286, 293-96, 636 S.E.2d 816, 822-23 (2006). The common law offense in North Carolina required the offender to have intended "to deprive the owner of his property permanently." *Id.* at 294, 636 S.E.2d at 823 (citation and internal quotation marks omitted). Both the Maryland statute and North Carolina common law larceny focused on "the perpetrator placing the property under his control and depriving the owner of control over it." *Id.* at 294, 636 S.E.2d at 823. Because the two offenses had similar elements with respect to taking the property, this Court held the two offenses were substantially similar. *Id.*

Here, both the federal carjacking statute and North Carolina common law robbery require a non-consensual taking of property under threat, force, or intimidation. 18 U.S.C. § 2119; *Porter*, 198 N.C. App. at 186, 679 S.E.2d at 169-70. Following the reasoning in *Key*, Defendant's argument that common law robbery and the carjacking statute are not substantially similar, because the scope of common law robbery is

broader, fails and is overruled. *Key*, 180 N.C. App. at 293-95, 636 S.E.2d at 822-23.

IV. Conclusion

The trial court properly concluded federal carjacking is a substantially similar offense to the North Carolina offense of common law robbery, a Class G Felony. Defendant was sentenced as a Habitual Felon at the proper prior record level and has not demonstrated error by the trial court's classification to warrant re-sentencing.

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

NO ERROR.

Judges HAMPSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
WAYNE HANSEN HSIUNG, Defendant

No. COA22-801

Filed 17 October 2023

1. Jury—selection—challenge for cause—failure to preserve issue on appeal—use of peremptory strikes

In a prosecution for felony larceny and felony breaking and entering arising from an incident where defendant—an attorney and animal rights activist—stole a baby goat from a family farm as part of an "open rescue," defendant failed to preserve for appellate review his argument that the trial court erred in denying his request to dismiss a juror for cause (based on the juror's alleged bias against animal rights activists). To preserve his argument, defendant needed to have exhausted all of his peremptory strikes and then attempted to exercise an additional peremptory strike on another juror after this exhaustion. Instead, after the court denied defendant's request to remove the juror for cause, defendant used his last available peremptory strike on that juror and did not attempt to exercise any other peremptory strikes afterward.

2. Larceny—common law—jury instructions—elements—stolen property—value

In a prosecution for felony larceny and felony breaking and entering arising from an incident where defendant—an attorney and animal rights activist—stole a baby goat from a family farm as part of an "open rescue," the trial court did not commit plain error by denying defendant's request for a special jury instruction stating that, to find defendant guilty of larceny, the jury needed to find that the stolen goat had value. Despite older case law stating otherwise, the Supreme Court's more recent (and, therefore, binding) precedent states that the essential elements of common law larceny do not include a requirement that the stolen property have some monetary value.

Appeal by Defendant from judgments entered 6 December 2021 by Judge Peter B. Knight in Transylvania County Superior Court. Heard in the Court of Appeals 9 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert P. Brackett, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

MURPHY, Judge.

To preserve a challenge to the trial court's decision not to dismiss a juror for cause, the defendant must (1) have exhausted all of his peremptory challenges and (2) attempt to exercise another peremptory challenge after this exhaustion. Defendant failed to properly preserve under the second prong, and we accordingly do not consider the merits of his argument on this issue.

To preserve a request for special jury instructions, the defendant must submit his request to the trial court in writing; however, we may review the trial court's jury instructions for plain error. Larceny remains a common law crime in North Carolina, but the essential elements of larceny do not require the subject property to have value. Accordingly, the trial court did not err by denying Defendant's request for special jury instructions regarding the value of a baby goat taken from victim's property.

BACKGROUND

Defendant Wayne Hansen Hsiung is an animal rights activist and an attorney licensed in California who appeals from convictions of felonious breaking or entering in violation of N.C.G.S. § 14-54(a) and felonious larceny after breaking or entering in violation of N.C.G.S. § 14-72(b)(2). Complainant Curtis Burnside is the owner of a 15-acre family farmstead, where he breeds and raises goats and chickens primarily for personal consumption. Burnside raises his baby goats in a barn on the ranch, and he occasionally sells these goats to the community.

On 10 February 2018, based on his personal belief that Burnside's goats were being mistreated, Defendant and three others video-streamed their "open rescue" of a baby goat from Burnside's farm on Facebook Live. They entered Burnside's farm, unlatched a gate, and entered the barn. Defendant and the others found a baby goat (referred to by Defendant as "baby goat Rain") which they believed was ill due to its lethargy and white discharge coming from its eye. Defendant took the goat away with him, accidentally dropping his driver's license at some time during these events. Defendant then gave the goat to an animal rescue that facilitates foster homes and adoptions for animals.

On 11 February 2018, Burnside discovered that the gate was not fastened properly and that a goat was missing. He found Defendant's driver's license and called law enforcement. Both Burnside and law enforcement officers looked online and found a Facebook page, believed to be owned by Defendant, with the video of the livestreamed "rescue." Defendant was charged with felonious breaking or entering under N.C.G.S. § 14-72(a) and felonious larceny after breaking or entering under N.C.G.S. § 14-72(b)(2) in connection with the events.

On 29 November 2021, Defendant's jury trial began. During voir dire, Defendant attempted to challenge a potential juror, Juror Stoll, for cause based on the contention that she was biased against animal rights activists. Prior to this challenge, Defendant had exercised five of his six peremptory challenges. The voir dire of Juror Stoll was as follows:

> [DEFENDANT]: Ms. Stoll, do you have any preexisting views about animal advocates or animal farmers strongly, one way or the other?
>
> [STOLL]: Well, I don't understand a lot of it, you know, what -- . . . they're for, what they're against. You know, we take care of animals. And, you know, I have been in -- my family has killed pigs for years. My brother still does for the hams for Christmas, you know.

[DEFENDANT]: Uh-huh. So your family is involved in, a little bit, in animal production?

[STOLL]: My dad always was, yes. And a coworker I work with, she raises pigs to sell. And she raises fish, you know, and she has had goats, you know. And I've had goats over the years, you know. They are fun animals, you know.

[DEFENDANT]: They are.

[STOLL]: It's what you make out of it, you know.

[DEFENDANT]: Sure. And can you just share a little bit more about -- what family member did you say was raising pigs?

[STOLL]: My brother.

[DEFENDANT]: What is your involvement in that, if any?

[STOLL]: My husband goes and helps me sometimes. And my grandson does. You know, he brings all of the boys out and they do it.

. . . .

[DEFENDANT]: And would you say you have a strong opinion about raising animals and production of animals one way or the other?

[STOLL]: No. I mean, I take care of them, gate them. You know, so a dog or cat, you take care of them in the proper way.

. . . .

[DEFENDANT]: And what is your impression of the critics? Are they usually animal rights activists, people in the community?

[STOLL]: Oh, just people. I never had nothing to do with people that are bad.

. . . .

What -- what they do or what their rights are or how they feel about it. You know, I don't know. I think it's maybe a little foolish maybe, but that's not – that's just my opinion, you know.

[DEFENDANT]: That's fair.

[STOLL]: People mind their business, you know, on both sides, you know.

. . . .

[DEFENDANT]: Do you think you would have a preexisting view of animal rights activists or critics of the industry who, you know --

[STOLL]: A little bit, yes, I guess I do.

[DEFENDANT]: You do? Okay.

[STOLL]: Them not minding their business, you know.

. . . .

I don't think I would be biased. But I don't really know exactly what it's all about yet. So, you know, that -- I mean, you know, it's always that chance, but I don't think I would. I think I just wouldn't say anything, you know.

. . . .

[DEFENDANT]: Do you think you'd have a bias in a case like this involving an animal advocate who removed --allegedly removed a goat from a farm?

[STOLL]: Yes.

[DEFENDANT]: And if the Judge instructed you that you should try to set your opinion aside, would you have a difficult time doing that given your prior experiences in animal farming?

[STOLL]: No.

[DEFENDANT]: You think you could if the Judge instructed you?

[STOLL]: Yeah.

. . . .

[DEFENDANT]: So you think you have a bias, but -- which is understandable, given your family business.

[STOLL]: Yeah. But if the Judge asks me to do my best, I got to do my best.

> [DEFENDANT]: You can do your best?
>
> [STOLL]: Yes, sir.
>
> . . . .
>
> [DEFENDANT]: And so the question is before you know anything about it, do you think you would have a bias, even if a Judge instructed you, that would prevent you from rendering a fair and impartial verdict?
>
> [STOLL]: I guess I would.
>
> [DEFENDANT]: Yeah? So the answer is yes, then?
>
> [STOLL]: Uh-huh. Yes, sir.

After this exchange, Defendant challenged Juror Stoll for cause based on her alleged bias. The trial court denied this challenge after a colloquy with Juror Stoll:

> [COURT]: And the fact that your husband may go and help, your grandchild may go over and help to feed the pigs or otherwise . . . will that have any effect on your ability to listen to the evidence in this case?
>
> [STOLL]: Yeah, I could listen to the evidence, yes, sir.
>
> [COURT]: Will it have any [e]ffect on your ability to listen to the law as I give you the law?
>
> [STOLL]: No, I could listen to the law.
>
> [COURT]: And do you believe that you could consider the facts as you find those facts to be and apply the law that I will give you to those facts as you find those facts to be in arriving . . . at what you say the verdict in this case should be?
>
> [STOLL]: I would do my best, yes, sir.
>
> . . . .
>
> [COURT]: Do you believe that you could set aside anything you know about or any feelings you have about the raising of pigs and consuming those pigs raised by your brother, I'm not saying you have consumed them, I'm just saying any feelings you have about the fact that he raised them for consumption, could you set aside those feelings

> during the course of this trial and, like I said, listen to the evidence?
>
> [STOLL]: I would listen to the evidence, yes, sir.
>
> [COURT]: And can you set aside those -- any feelings you have about it, either -- whatever feelings they are and just listen to the evidence without considering any feelings about your -- about the fact that your brother has raised pigs?
>
> [STOLL]: Yeah. I mean, I would do my best, you know. Yes, sir.
>
> [COURT]: I'll deny the motion at this time, then.

Defendant then addressed Juror Stoll again:

> [DEFENDANT]: So I will say more general, then, in a case involving animal rights activists, it sounds like even if the Judge instructed you, you feel you would have a bias, is that correct, based on these prior experiences?
>
> [STOLL]: Well, I don't know what the person -- it's criminal, I thought, if they took something, if it's about animal cruelty or if it's about stealing something, you know.
>
> . . . .
>
> Yes. Yes, I guess I would be biased against it.
>
> [DEFENDANT]: Even if a judge instructed you, you have to try to get that bias out?
>
> [STOLL]: Yes.

Defendant renewed his challenge of Stoll for cause. The trial court again denied Defendant's challenge, and Defendant used his final peremptory challenge to excuse Stoll from the jury.

At trial, Dr. Sherstin Rosenberg, a doctor of veterinary medicine, testified that white discharge in the baby goat's eyes could indicate it had pneumonia. Dr. Rosenburg also testified that treating a goat for pneumonia would cost between $700.00 and $1,000.00. Burnside had previously testified that the goat was healthy when taken, and that he typically sells a healthy goat for between $250.00 and $300.00. After closing arguments, Defendant orally requested that the trial court modify its pattern felony larceny instruction to include that, in order to find Defendant guilty of felony larceny, the jury must find that the stolen baby goat "had some

value[.]" The trial court denied Defendant's request for a special jury instruction and noted his objection to its final jury instructions.

At the conclusion of the trial, the jury found Defendant guilty of both felonious breaking or entering and felonious larceny after breaking or entering. The trial court sentenced Defendant to serve a sentence of 6 to 17 months, suspended for 24 months, and placed him on supervised probation. Defendant timely appealed.

ANALYSIS

Defendant raises two arguments on appeal: (A) the trial court erred by denying his request to dismiss Juror Stoll for cause based on her bias against animal rights activists and (B) the trial court plainly erred in giving jury instructions which did not require the jury to find that baby goat Rain had "value" in order to find Defendant guilty of larceny.

A. Challenge of Juror Stoll for Cause

[1] "The determination of whether excusal for cause is required for a prospective juror is vested in the trial court, and the standard of review of such determination is abuse of discretion." *State v. Reed*, 355 N.C. 150, 155 (2002) (citation omitted). Abuse of discretion occurs when the trial court's decision is "manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (marks omitted). However, when a challenge for cause is not properly preserved for appeal, we do not review the merits of the appellant's argument. *State v. Clemmons*, 181 N.C. App. 391, 395-96, *aff'd*, 361 N.C. 582 (2007).

Defendant argues that Stoll was unable to render a fair verdict because she stated she was biased against animal rights activists and was unsure if she could set aside her biases at trial. Based on this argument, Defendant requests a new trial. Defendant failed to properly preserve this issue for appeal; accordingly, we do not discuss the merits of Defendant's argument.

N.C.G.S. § 15A-1214 details the proper procedure for preserving an alleged error in denying a party's for cause challenge as follows:

> (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
>
> (1) *Exhausted the peremptory challenges available to him;*

> (2) Renewed his challenge as provided in subsection (i) of this section; and
>
> (3) Had his renewal motion denied as to the juror in question.
>
> (i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:
>
> (1) Had peremptorily challenged the juror; or
>
> (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

N.C.G.S. §§ 15A-1214(h)-(i) (2022) (emphasis added).

Defendant used his last peremptory challenge on Juror Stoll. Under N.C.G.S. § 15A-1214(h), a defendant may seek a new trial only if the trial court refused to grant his motion to excuse a juror for bias *after* the defendant has already exhausted all of his peremptory challenges. N.C.G.S. § 15A-1214(h) (2022). In other words, Defendant would have had to attempt to use another peremptory challenge on another specific juror after exhausting his last peremptory challenge on Juror Stoll to properly preserve the issue for appeal. *Clemmons*, 181 N.C. App. at 395 ("[I]t is clear that a defendant must make a futile effort to challenge a juror after exhausting peremptory challenges in order to demonstrate prejudice. It is insufficient for a defendant to simply challenge a juror for cause, exhaust all peremptory challenges, and then renew his previous challenge for cause in order to preserve his exception."); *see State v. Allred*, 275 N.C. 554, 563 (1969) (holding Defendant must "thereafter assert his right to challenge peremptorily an additional juror"). "The purpose for challenging the additional juror is to establish prejudice by showing that [the] appellant was forced to seat a juror whom he did not want because of the exhaustion of his peremptory challenges." *Clemmons*, 181 N.C. App. at 395 (quoting *State v. Hartman*, 344 N.C. 445, 459-60 (1996)).

Defendant argues that he wished to use additional peremptory strikes against other jurors; however, Defendant did not attempt to exercise any peremptory challenges after using his last permissible challenge on Juror Stoll. Defendant has not preserved the issue for appeal, and we do not analyze Defendant's argument on its merits.

B. Denial of Oral Request for Special Jury Instruction

[2] Defendant next contends that, in order to find a defendant guilty of larceny, the jury must find that the item allegedly taken by the defendant

had monetary value. Defendant argues that the trial court erred by denying his request for special jury instructions regarding the value of baby goat Rain because, "[u]nder the common law, to be the subject to a larceny, property must have some value." Defendant argues that baby goat Rain did not have any monetary value because the cost to treat a goat for pneumonia according to Dr. Rosenburg's testimony—between $700.00 and $1000.00—substantially exceeds the price at which Burnside typically sells a baby goat—between $250.00 and $300.00.

1. Standard of Review

"If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference." N.C. R. Super. and Dist. Cts. Rule 21 (2023). "A request for a . . . deviation from the pattern jury instruction[] qualif[ies] as a special instruction, and would have needed to be submitted to the trial court in writing." *State v. Brichikov*, 281 N.C. App. 408, 414 (citing *State v. McNeill*, 346 N.C. 233, 240 (1997) ("We note initially that [the] defendant's proposed instructions were tantamount to a request for special instructions. . . . [A] trial court's ruling denying requested instructions is not error where the defendant fails to submit his request for instructions in writing. Defendant here did not submit either of his proposed modifications in writing, and therefore it was not error for the trial court to fail to charge as requested."), *aff'd*, 383 N.C. 543 (2022). To preserve his request for special instructions, Defendant must have submitted the request in writing. *See State v. McVay*, 287 N.C. App. 293, 300 (2022) (marks omitted) ("A trial court's ruling denying requested special instructions is not error where the defendant fails to submit his request for instructions in writing."), *disc. rev. denied*, 384 N.C. 671 (2023). However, "[i]f an instructional issue is unpreserved in a criminal case, we may review the trial court's decision for plain error, but only if 'the defendant [] specifically and distinctly contends that the alleged error constitutes plain error.' " *Id.* at 301 (marks and emphasis omitted) (quoting *State v. Lawrence*, 365 N.C. 506, 516 (2012)).

On appeal, Defendant "specifically and distinctly contends" that "[t]he trial court plainly erred because the jury likely would have found that [the goat] had no value at the time of the taking due to needing expensive medical treatment[,] and they would not have convicted [Defendant] of felony larceny." Our Supreme Court has adopted the principle that

> the plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is

> a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

Lawrence, 365 N.C. at 516-17 (marks omitted) (quoting *State v. Odom*, 307 N.C. 655, 660 (1983)).

2. Essential Elements of Larceny

Defendant was convicted of felony larceny under N.C.G.S. § 14-72(b)(2). N.C.G.S. § 14-72 reads in pertinent part as follows:

> (a) Larceny of goods of the value of more than one thousand dollars ($1,000[.00]) is a Class H felony. . . . Larceny as provided in subsection (b) of this section is a Class H felony. . . . Except as provided in subsections (b) and (c) of this section, larceny of property, or the receiving or possession of stolen goods knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than one thousand dollars ($1,000[.00]), is a Class 1 misdemeanor. In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen.
>
> (b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is any of the following:
>
> . . . .
>
> (2) Committed pursuant to a violation of [N.C.G.S. §] 14-51, 14-53, 14-54, 14-54.1, or 14-57.

N.C.G.S. § 14-72 (2022). "The purpose of [N.C.G.S. §] 14-72 is to establish levels of punishment for larceny based on the value of the goods stolen, the nature of the goods stolen or the method by which stolen, not to create new offenses. Thus, larceny from the person and larceny of goods worth more than $1,000[.00] are not separate offenses, but alternative ways to establish that a larceny is a Class H felony." *State v. Sheppard*, 228 N.C. App. 266, 270-71 (2013) (citation and marks omitted). "[T]he

statutory provision [elevating] misdemeanor larceny to felony larceny does not change the nature of the crime; elements of proof remain the same." *State v. Ford*, 195 N.C. App. 321, 323, *disc. rev. denied*, 363 N.C. 659 (2009) (marks omitted). In *Ford*, we held the statute codifying larceny as an offense did not describe its essential elements; accordingly, "in North Carolina, larceny remains a common law crime[.]" *Id.* (marks omitted).

Defendant argues that, "[u]nder the common law, to be the subject to a larceny, property must have some value." For the purposes of elevating a larceny, "value" refers to "fair market value" or its "reasonable selling price." *State v. McCambridge*, 23 N.C. App. 334, 336 (1974); *State v. Dees*, 14 N.C. App. 110, 112 (1972). Defendant contends that the statutory language "without regard to the value of the property in question," N.C.G.S. § 14-72(b) (2022), "does not imply that a thing can be completely lacking in value and nonetheless be the subject of a larceny prosecution." To support his contention, he cites *State v. Butler*, 65 N.C. 309, 309 (1871) (per curiam) ("To cut off and take away the ears or tail of a cow, might be malicious mischief, or might be indictable under [another law]; but it would not be larceny, as they are of no value as articles of property.") and *State v. Bryant*, 4 N.C. 249, 249 (1815) (holding that theft of currency that is not currency of the State is not larceny because the currency has no value within the State). However, Defendant ignores more recent case law from our Supreme Court, which indicates the four essential elements of larceny are "that [the defendant] (a) took the property of another; (b) carried it away; (c) without the owner's consent; and (d) with the intent to deprive the owner of his property permanently." *State v. Jones*, 369 N.C. 631, 633 (2017) (quoting *State v. White*, 322 N.C. 506, 518 (1988)).

Unlike opinions by our Court, under which we are bound by our earliest interpretation of the law, we are bound by our Supreme Court's most recent exposition of the elements of larceny, a common law crime, even if they conflict with its earlier declarations of the elements of larceny. *See In re Civil Penalty*, 324 N.C. 373, 384 (1989) ("[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.") Our Supreme Court's holdings in *Butler* and *Bryant*, which predate its holding in *Jones*, indicate that, at the time these cases were decided, stolen property must have had "value as [an] article[] of property" within our State to be subject to a larceny. *Butler*, 65 N.C. at 309; *see Bryant*, 4 N.C. at 249. However, our Supreme Court's more recent exposition of the elements necessary to prove common law larceny contains no such

requirement. As such, an item's "value" need not be proven for the purpose of establishing that a violation of N.C.G.S. § 14-72(b)(2) occurred. *See Sheppard*, 228 N.C. App. at 270-71.

The trial court did not err when it declined to give Defendant's special jury instructions regarding the value of the baby goat, where the instructions it gave correctly reflected the common law definition of larceny.

CONCLUSION

We dismiss Defendant's argument that the trial court erred by refusing to dismiss Juror Stoll for cause because Defendant did not properly preserve this issue. Furthermore, we find no plain error in the trial court's jury instructions.

DISMISSED IN PART; NO ERROR IN PART.

Judges HAMPSON and WOOD concur.

STATE OF NORTH CAROLINA
v.
QUENTIN JACKSON

No. COA22-984

Filed 17 October 2023

1. Probation and Parole—extension of probation—after expiration of probationary term—finding of good cause

The trial court erred by extending defendant's probation after his probationary term had expired, where the court failed to make a specific finding of good cause pursuant to N.C.G.S. § 15A-1344(f)(3). The matter was vacated and remanded to the trial court for a determination of whether good cause existed.

2. Probation and Parole—special probation—active term—maximum length—statutory deadline

The trial court erred by ordering defendant probationer, who had willfully violated the conditions of his probation, to serve an active term of 45 days as a condition of special probation where the maximum sentence of imprisonment for the convicted offense was 60 days and therefore, pursuant to N.C.G.S. § 15A-1351(a), the

maximum period of confinement that could have been imposed as a condition of special probation was 15 days. Furthermore, at the time the active term of 45 days was imposed as a condition of special probation, two years had already passed since defendant's conviction; thus, the 45-day active term also violated N.C.G.S. § 15A-1351(a)'s deadline for confinement other than an activated suspended sentence.

Appeal by Defendant from order entered 14 March 2022 by Judge Jerry Tillett in Perquimans County Superior Court. Heard in the Court of Appeals 20 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Carolyn McLain, for the State-Appellee.

Hynson Law, PLLC, by Warren D. Hynson, for Defendant-Appellant.

COLLINS, Judge.

Defendant Quentin Jackson appeals from the trial court's order finding that he had willfully violated the conditions of his probation, extending his probation by 12 months, and ordering him to serve a 45-day active term as a condition of special probation. Defendant argues that the trial court erred by extending his probation after his probationary term had expired and by ordering him to serve an active term. The trial court erred by extending Defendant's probation after his probationary term had expired, absent a specific finding of good cause. Furthermore, the trial court erred by ordering Defendant to serve an active term as a condition of special probation. Accordingly, we vacate the order and remand the case to the trial court to determine whether good cause exists to extend Defendant's probation beyond the expiration of his probationary term.

I. Background

Defendant, a town council member, was at a Hertford Town Council meeting on 1 October 2018. At the end of the meeting, Defendant struck another council member in the side of the face following a verbal altercation. Defendant was arrested for assault of a government official and entered an *Alford* plea to simple assault on 16 December 2019. The trial court sentenced Defendant to 60 days of imprisonment, suspended for 24 months of supervised probation. As a condition of special probation, Defendant was required to serve an active term of 15 days. Upon release,

Defendant was required to abide by a curfew from 7 p.m. to 6 a.m., except to attend town council meetings.

Defendant's probation officer filed the following violation reports: on 21 January 2020, alleging that Defendant had violated his curfew and requiring Defendant to submit to electronic monitoring; on 28 January 2020, alleging that Defendant had violated his curfew, left the county without prior approval, and failed to comply with electronic monitoring; on 21 February 2020, alleging that Defendant had violated his curfew; and on 12 March 2020, alleging that Defendant had violated his curfew and left the county without prior approval.

A probation violation hearing was calendared for 27 August 2020 and Defendant moved for a continuance. The trial court granted the motion and entered an order modifying Defendant's probation to require him to comply with his curfew and electronic monitoring and continuing the hearing until 6 October 2020. Defendant's probationary term expired on 16 December 2021. A probation violation hearing was ultimately held on 24 February 2022, and the trial court entered an order on 14 March 2022 finding that Defendant had willfully violated the conditions of his probation in the violation reports filed 28 January 2020 and 21 February 2020. The trial court extended Defendant's probation by 12 months and ordered him to serve an active term of 45 days as a condition of special probation. Defendant appealed.

II. Discussion

A. Probation Extension

[1] Defendant argues that the trial court erred by extending his probation after his probationary term had expired absent a specific finding of good cause.

Whether a trial court has the authority to extend a defendant's probation after the defendant's probationary term has expired is a jurisdictional question, which we review de novo. *State v. Geter*, 383 N.C. 484, 488-89, 881 S.E.2d 209, 213 (2022). 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).

The trial court may extend, modify, or revoke probation after the probationary term has expired if:

> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk

> indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
>
> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
>
> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.
>
> (4) If the court opts to extend the period of probation, the court may extend the period of probation up to the maximum allowed under G.S. 15A-1342(a).

N.C. Gen. Stat. § 15A-1344(f) (2021).

In other words, to extend a defendant's probation after the probationary term has expired, "the trial court must first make a finding that the defendant did violate a condition of his probation." *State v. Morgan*, 372 N.C. 609, 617, 831 S.E.2d 254, 259 (2019). "After making such a finding, trial courts are then required by subsection (f)(3) to make an *additional* finding of 'good cause shown and stated' to justify the [extension] of probation even though the defendant's probationary term has expired." *Id.* A finding of good cause "cannot simply be inferred from the record." *Id.*

Here, Defendant's probationary term expired on 16 December 2021. A probation violation hearing was held on 24 February 2022, over two months after Defendant's probationary term had expired. The trial court's order extending Defendant's probation contains no finding of good cause to do so. Thus, the trial court erred by extending Defendant's probation by 12 months after his probationary term had expired without making a specific finding that good cause exists to extend his probation. *See id.*

We are unable to say from our review of the record that no evidence exists that would allow the trial court on remand to make a finding of good cause under subsection (f)(3). Accordingly, we vacate the order and remand the case to the trial court to determine whether good cause exists to extend Defendant's probation despite the expiration of his probationary term and, if so, to make a finding in conformity with N.C. Gen. Stat. § 15A-1344(f)(3). *See id.* at 618, 831 S.E.2d at 260.

B. Active Term

[2] Defendant also argues that the trial court erred by ordering him to serve an active term of 45 days as a condition of special probation

because "the maximum sentence of imprisonment for the convicted offense was 60 days" and "it results in imprisonment two years past conviction[.]"[1] (capitalization altered).

Although a challenge to a trial court's decision to impose a condition of probation is generally reviewed on appeal for abuse of discretion, an alleged error in statutory interpretation is an error of law, which we review de novo. *State v. Ray*, 274 N.C. App. 240, 246, 851 S.E.2d 653, 658 (2020).

"When a defendant has violated a condition of probation, the court may modify the probation to place the defendant on special probation[.]" N.C. Gen. Stat. § 15A-1344(e) (2021).

> Under a sentence of special probation, the court may suspend the term of imprisonment and place the defendant on probation . . . and in addition require that the defendant submit to a period or periods of imprisonment . . . at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court determines . . . .

N.C. Gen. Stat. § 15A-1351(a) (2021). However, in doing so,

> the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed one-fourth the maximum sentence of imprisonment imposed for the offense, and no confinement other than an activated suspended sentence may be required beyond two years of conviction.

Id. Thus, the statute sets an outside deadline for an active term as a condition of special probation as the end of the probationary term or two years after the date of conviction, whichever comes first. *Ray*, 274 N.C. App. at 247, 851 S.E.2d at 658.

Here, the trial court sentenced Defendant to 60 days of imprisonment, suspended for 24 months of supervised probation. Therefore, under section 15A-1351(a), the maximum period of confinement that could have been imposed as a condition of special probation was 15 days. In the original judgment entered 16 December 2019, the trial

1. The State contends that this argument is moot because "[i]nformation from the Perquiman County's Superior Court clerk's office indicates that defendant served the sentence, beginning on 24 February 2023 and ending 10 April 2023." This information does not appear in the record before us. Nevertheless, Defendant's argument is not moot because his probation violation may be used as an aggravating factor in a subsequent sentencing hearing. *See State v. Black*, 197 N.C. App. 373, 377, 677 S.E.2d 199, 202 (2009).

court ordered Defendant to serve an active term of 15 days as a condition of special probation. By its probation violation order entered 14 March 2022, the trial court ordered Defendant to serve an additional active term of 45 days as a condition of special probation. Thus, the total period of confinement as a condition of special probation was 60 days, a duration in excess of the maximum period of confinement allowed by N.C. Gen. Stat. § 15A-1351(a).

Furthermore, Defendant pled guilty to simple assault pursuant to *Alford* on 16 December 2019. Defendant's probationary term expired on 16 December 2021. Thus, under section 15A-1351(a), the deadline for Defendant to serve an active term as a condition of special probation was 16 December 2021. By its probation violation order entered 14 March 2022, Defendant was ordered to serve an additional active term of 45 days as a condition of special probation, which was after his probation had expired and more than two years after his conviction.

Accordingly, the trial court erred by ordering Defendant to serve an active term of 45 days as a condition of special probation.

III. Conclusion

The trial court erred by extending Defendant's probation by 12 months after his probationary term had expired, absent a specific finding of good cause. Furthermore, the trial court erred by ordering Defendant to serve an active term as a condition of special probation. Accordingly, we vacate and remand to the trial court to determine whether good cause exists to extend Defendant's probation beyond the expiration of his probationary term.

VACATED AND REMANDED.

Judges TYSON and WOOD concur.

STATE v. MOHAMMED

[291 N.C. App. 122 (2023)]

STATE OF NORTH CAROLINA
v.
YOUSEF BARAKAT MOHAMMED, Defendant
1ST ATLANTIC SURETY COMPANY, Surety

No. COA23-198

Filed 17 October 2023

Bail and Pretrial Release—bond forfeiture—petition for relief—statutory requirements—extraordinary circumstances not shown

The trial court's order granting a surety's petition for relief from a final judgment of forfeiture was reversed where there was no showing by the surety or evidence in the record that extraordinary circumstances existed to provide the relief requested. After a prior motion to set aside forfeiture was denied and sanctions were imposed because no documentation supported the bail agent's statement that defendant had died, the surety filed its petition two months later with only a photograph of defendant's death certificate attached. Although the surety argued during the hearing that the bail agent was unable to obtain a copy of the death certificate from the out-of-state county clerk where defendant had died and therefore had to locate defendant's family to get a copy, the bail agent did not appear at the hearing and there was no sworn evidence to support the surety's assertions.

Appeal by Durham Public Schools Board of Education from order entered 16 November 2022 by Judge Clayton Jones, Jr., in Durham County District Court. Heard in the Court of Appeals 20 September 2023.

Tharrington Smith, LLP, by Stephen G. Rawson and Richard A. Paschal, for Durham Public Schools Board of Education-Appellant.

The Law Offices of Elston, Donnahoo & Williams, P.C., by Brian D. Elston, for Surety-Appellee.

COLLINS, Judge.

Durham Public Schools Board of Education ("Board") appeals from an order granting 1st Atlantic Surety Company's ("Surety") petition for relief from a final judgment of bond forfeiture. The Board argues that the trial court abused its discretion by granting relief because Surety failed to make a showing of extraordinary circumstances as required by statute. Because the record contains no evidence that extraordinary circumstances existed, the order is reversed.

I. Background

Yousef Barakat Mohammed ("Defendant") was arrested on 19 February 2020. On 29 February 2020, Defendant was released on $5,000 secured bond under bail agent Ashraf M. Mubaslat ("Mubaslat") and Surety's custody. Defendant failed to appear for court on 13 January 2022, and the trial court issued a bond forfeiture notice on 14 January 2022 with a final judgment date of 16 June 2022.

On 16 June 2022, Mubaslat filed a motion to set aside the forfeiture, indicating that "[t]he defendant died before or within the period between the forfeiture and this Motion, as evidenced by the attached copy of the defendant's death certificate." Mubaslat did not attach a death certificate to the motion, but instead he attached a hand-written note that stated, "Defendant died and we are getting a copy of death certificate." The Board objected to Mubaslat's motion and moved for sanctions against Surety for failure to provide actual documentation of Defendant's death. On 14 July 2022, the trial court denied Mubaslat's motion to set aside the forfeiture. The trial court entered a separate order finding grounds for sanctions and ordering Surety to pay $2,500. Surety paid the bond but did not pay the sanctions.

On 26 August 2022, the State moved to abate the criminal charges against Defendant on the ground that Defendant had died on or about 23 February 2022. The trial court allowed the State's motion and ordered that the case be dismissed. On 29 August 2022, Mubaslat and Surety filed a petition seeking relief from the final judgment of forfeiture, arguing:

> 7. The Defendant died before or within the period between the forfeiture and this Motion, as evidenced by the attached copy of the defendant's death certificate.
>
> 8. Filed Motion to set aside knowing the Defendant had died but was not able to produce documentation.
>
> 9. Surety Paid Bond
>
> 10. Surety was able to produce the death certificate after the final Judgment date and Bond was paid.

A photograph of Defendant's death certificate issued by the Cook County Clerk in Chicago, Illinois, was attached to the petition. On 14 September 2022, Surety withdrew and refiled the petition.[1]

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1. The petition was originally signed by Mubaslat. The refiled petition was signed by counsel for Surety.

The matter was heard on 9 November 2022. At the hearing, Surety's counsel argued that Mubaslat was unable to obtain a copy of Defendant's death certificate and had to find Defendant's family members to get a copy of his death certificate. However, Mubaslat was not present at the hearing, and no sworn testimony or affidavits were presented to the court. On 16 November 2022, the trial court entered an order granting Surety relief from the final judgment of forfeiture. The trial court found, in relevant part:

> 4. On or about February 13, 2022, Defendant Mohammed died.
>
> 5. Surety filed a motion to set aside on June 16, 2022, but did not attach a death certificate to the motion. The Board attorney filed an objection to said motion and motion for sanctions and noticed same for hearing on July 13, 2022. At the July 13, 2022 hearing, the Honorable Judge Dorothy Mitchell entered an order denying the motion to set aside and an order awarding sanctions to the Board in the amount of 50% of the bond for failure to attach the required documentation. Neither of those orders was appealed.
>
> 6. The bond was paid in full on July 15, 2022. The sanctions had not been paid as of November 9, 2022.
>
> 7. On September 14, 2022, counsel for the Surety filed a Petition for Relief from Final Judgment and included a photograph of the death certificate for Defendant Mohammed.
>
> 8. At the November 9, 2022, hearing on Surety's Petition to Remit, counsel for the Surety argued that the bail agent was unable to obtain the death certificate from the Cook County, Illinois clerk in time to attach it to the original motion to set aside, and had to find family members of the deceased in order to get a copy of the record.
>
> 9. The Court finds that the Defendant died during the 150-day period following the failure to appear, and that the Surety's difficulty in getting the death certificate from Cook County along with efforts to contact the Defendant's family to obtain the same represent extraordinary circumstances that entitle the Surety to relief from the final judgment of forfeiture.
>
> 10. Because the July 13, 2022, sanctions order was not appealed, the Court finds that it has no ability to revisit that judgment.

Based upon its findings of fact, the trial court concluded that the 13 July sanctions order should remain in place, but "[t]he circumstances described by Surety constitute extraordinary circumstances . . ., and the Surety is entitled to relief in full from the final judgment of forfeiture." The Board appealed.

II. Discussion

A. Standard of Review

A trial court's decision to grant relief based on the existence of extraordinary circumstances is reviewed for abuse of discretion. *State v. Edwards*, 172 N.C. App. 821, 825, 616 S.E.2d 634, 636 (2005) (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that it[s ruling] was so arbitrary that it could not have been the result of a reasoned decision." *State v. Escobar*, 187 N.C. App. 267, 271, 652 S.E.2d 694, 698 (2007) (quotation marks and citation omitted).

B. Extraordinary Circumstances

The Board argues that the trial court abused its discretion by granting Surety's petition for relief because Surety presented no evidence of extraordinary circumstances that prevented it from obtaining and furnishing Defendant's death certificate with its initial motion to set aside the judgment.

A trial court may grant relief from a final judgment of forfeiture if "extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief." N.C. Gen. Stat. § 15A-544.8(b)(2) (2022). "Extraordinary circumstances in the context of bond forfeiture has been defined as going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee." *Edwards*, 172 N.C. App. at 825, 616 S.E.2d at 636 (quotation marks and citation omitted). "Whether the evidence presented rises to the level of showing extraordinary circumstances is a heavily fact-based inquiry and therefore, should be reviewed on a case by case basis." *Escobar*, 187 N.C. App. at 270, 652 S.E.2d at 697 (quotation marks and citation omitted). "[T]he arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) (citations omitted).

At the hearing on Surety's petition, Surety's counsel argued that Mubaslat was unable to obtain a copy of Defendant's death certificate and had to find Defendant's family members to get a copy of the death certificate. However, Mubaslat was not present at the hearing, and no sworn

testimony or affidavits were presented to the court to support counsel's assertions. The record evidence indicates that Defendant died, and that Surety did not produce evidence of Defendant's death until two months after the bond forfeiture judgment became final. Counsel's arguments were not evidence, and the record is devoid of evidence to support the trial court's finding of "Surety's difficulty in getting the death certificate from Cook County along with efforts to contact the Defendant's family to obtain the same" or any other circumstances "going beyond what is usual, regular, common, or customary . . . of, or relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee," *Edwards*, 172 N.C. App. at 825, 616 S.E.2d at 636 (quotation marks and citation omitted). Without such evidence, the trial court's conclusion that extraordinary circumstances existed could not have been the result of a reasoned decision.

III. Conclusion

For the foregoing reasons, the order granting Surety's petition for relief from the judgment is reversed.

REVERSED.

Judges TYSON and WOOD concur.

JERMOND WILLIAMS, PLAINTIFF
v.
CHARLOTTE-MECKLENBURG SCHOOLS BOARD OF EDUCATION, DEFENDANT

No. COA22-893

Filed 17 October 2023

1. Appeal and Error—interlocutory order—substantial right—denial of summary judgment—Tort Claims Act—sovereign immunity

In a property-damage case filed against a county board of education under the Tort Claims Act, where a bus driver employed by the board accidentally crashed his bus into plaintiff's vehicle while en route to deliver food to students learning remotely during the Covid-19 pandemic, the Industrial Commission's interlocutory order denying the board's motion for summary judgment based on sovereign immunity was immediately appealable because the order affected a substantial right.

2. Immunity—sovereign—waiver—Tort Claims Act—school bus accident—emergency management exception—applicability

In a property-damage case filed against a county board of education under the Tort Claims Act (TCA), where a bus driver employed by the board accidentally crashed his bus into plaintiff's vehicle while en route to deliver food to students learning remotely during the Covid-19 pandemic, the Industrial Commission properly denied the board's motion for summary judgment based on sovereign immunity. Importantly, under the TCA, the State waives sovereign immunity for claims resulting from the alleged negligence "of the driver" of a "school bus," but under the North Carolina Emergency Management Act (EMA), neither the State nor any of its agencies may be sued concerning accidents involving "school buses" used for "emergency-management activity." Here, although it was undisputed that the crash occurred during a state of emergency, a genuine issue of material fact existed as to whether the bus involved in the crash was a "school bus" such that the EMA would apply to the bus driver's conduct in this case.

Appeal by Defendant from the order entered 14 July 2022 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 April 2023.

Jermond Williams, Pro Se Plaintiff-Appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Carl Newman, for Defendant-Appellant.

CARPENTER, Judge.

The Charlotte-Mecklenburg Schools Board of Education (the "Board") appeals from the North Carolina Industrial Commission's (the "Commission's") denial of the Board's motion for summary judgment. After careful review, we affirm the Commission's denial of summary judgment.

I. Factual & Procedural Background

On 10 March 2020, Governor Roy Cooper issued Executive Order 116 and declared a state of emergency because of the Covid-19 pandemic. On 14 March 2020, Governor Cooper issued Executive Order 117, which closed North Carolina schools and ordered "the North Carolina Department of Public Instruction . . . to implement measures to provide

for the health, nutrition, safety, educational needs, and well-being of children during the school closure period." Governor Cooper then issued Executive Order 169, which extended these provisions through 23 October 2020.

On 22 October 2020, Gerald Rand, a bus driver for the Board, drove a bus[1] for the purpose of delivering meals to remote-learning students. That day, Rand's bus collided with Jermond Williams' ("Plaintiff's") parked car in Charlotte, North Carolina. On 7 January 2021, under North Carolina's Tort Claims Act (the "TCA"), Plaintiff filed a property-damage claim with the Commission against the Board. After discovery, the Board moved for summary judgment based on sovereign or governmental immunity.[2] Specifically, the Board argued that it maintained immunity because Rand, pursuant to the North Carolina Emergency Management Act (the "EMA"), was performing an emergency-management activity during the alleged negligence. The Board further argued the EMA explicitly maintains immunity for such incidents. In other words, the Board acknowledged that the TCA and the EMA conflict concerning waiver of immunity, but the Board argued that the EMA should control.

A deputy commissioner denied the Board's motion for summary judgment, and the Board timely appealed to the full Commission. On 14 July 2022, the full Commission panel agreed that the EMA conflicts with the TCA concerning waiver of sovereign immunity for bus-accident claims. Nevertheless, the Commission concluded the Board's immunity is waived by the TCA. Thus, the full Commission affirmed the deputy commissioner's denial of summary judgment. On 15 August 2022, the Board timely appealed to this Court.

II. Jurisdiction

[1] As an initial matter, we must consider whether this Court has jurisdiction over an interlocutory order from the Commission. Under N.C. Gen. Stat. § 143-293 (2021), we conclude that we do. *See Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 383 N.C. 31, 44, 881 S.E.2d 558, 568–69 (2022) (acknowledging appellate jurisdiction of an interlocutory appeal from the Commission's denial of a motion

1. In his complaint, Plaintiff refers to Rand's bus as simply a "bus."

2. Here, the Board is a county agency. Therefore, the applicable immunity is more precisely labeled "governmental immunity." *See Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016). In this case, however, the distinction is immaterial, as "this claim implicates sovereign immunity because the State is financially responsible for the payment of judgments against local boards of education for claims brought pursuant to the Tort Claims Act . . . ." *See id.* at 611, 781 S.E.2d at 284.

to dismiss a TCA claim because the appeal involved a substantial right); *Multiple Claimants v. N.C. Dep't of Health & Hum. Servs., Div. of Facility & Det. Servs.*, 176 N.C. App. 278, 282, 626 S.E.2d 666, 669 (2006) (acknowledging appellate jurisdiction of an interlocutory appeal from the Commission's denial of a motion to dismiss a TCA claim because the appeal involved a substantial right). As we typically lack jurisdiction to address interlocutory appeals from the Commission, we will detail why we have jurisdiction over this case.

Appeals from the Commission concerning claims brought through the TCA are made "under the same terms and conditions as govern ordinary appeals in civil actions." N.C. Gen. Stat. § 143-293. Therefore, our analysis begins with the premise that, as in ordinary civil appeals, there generally 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). Similarly, this Court lacks jurisdiction over interlocutory appeals from the Commission. *See* N.C. Gen. Stat. § 7A-29 (2021); *Vaughn v. N.C. Dep't of Hum. Res.*, 37 N.C. App. 86, 89, 245 S.E.2d 892, 894 (1978) ("No appeal lies from an interlocutory order of the Industrial Commission.") (citing N.C. Gen. Stat. § 7A-29).

There is an exception to this rule, however, when an interlocutory appeal affects a "substantial right." *Sharpe v. Worland*, 351 N.C. 159, 161–62, 522 S.E.2d 577, 579 (1999) (stating that North Carolina's appellate courts have jurisdiction over interlocutory appeals that affect a substantial right). A "[d]enial of a summary judgment motion is interlocutory and ordinarily cannot be immediately appealed." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). But "the denial of summary judgment on grounds of sovereign immunity is immediately appealable, though interlocutory, because it represents a substantial right . . . ." *Id.* at 338, 678 S.E.2d at 354.

This case involves a TCA claim, and the Board appeals from the denial of summary judgment based on sovereign immunity. Because "the denial of summary judgment on grounds of sovereign immunity" affects a "substantial right," this Court has jurisdiction. *See id.* at 338, 678 S.E.2d at 354; *see also* N.C. Gen. Stat. § 143-293; *Cedarbrook Residential*, 383 N.C. at 44, 881 S.E.2d at 568–69. Thus, despite our general rule against hearing interlocutory appeals, this Court has jurisdiction in this case under N.C. Gen. Stat. § 143-293.

III. Issue

[2] The issue on appeal is whether the Commission erred in denying the Board's motion for summary judgment.

IV. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

V. Analysis

On appeal, the Board argues the Commission erred in denying its motion for summary judgment because the Board maintains sovereign immunity under the EMA. After careful review, we disagree: The Commission did not err in denying the Board's motion for summary judgment because genuine issues of material fact remain.

Summary judgment is appropriate when "there is no genuine issue as to any material fact," and a party is "entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, R. 56(c) (2021). Concerning summary judgment, courts "must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). Indeed, "[s]ince this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

Therefore, we must separate factual questions from legal questions to discern the applicability of summary judgment. *See* N.C. Gen. Stat. § 1A-1, R. 56(c). Generally, "[a]ny determination reached through 'logical reasoning from the evidentiary facts' is more properly classified as a finding of fact." *IPayment, Inc. v. Grainger*, 257 N.C. App. 307, 315, 808 S.E.2d 796, 802 (2017) (quoting *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657–58 (1982)). And when an answer requires application of legal principles to the facts, the prompting question is a mixed one of both law and fact. *See Town of Apex v. Rubin*, 277 N.C. App. 328, 332 n.5, 858 S.E.2d 387, 392 n.5 (2021).

The central issue here concerns sovereign immunity. Generally, "[u]nder the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997). "The State and its governmental units" do not waive sovereign immunity except "by a plain, unmistakable mandate of the [General Assembly]." *Orange County v. Heath*, 282 N.C. 292, 296, 192 S.E.2d 308, 310 (1972). Further, "statutes waiving this immunity,

being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537–38, 299 S.E.2d 618, 627 (1983).

The TCA "provides a limited waiver of immunity and authorizes recovery against the State for negligent acts of its 'officer[s], employee[s], involuntary servant[s] or agent[s].' " *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) (quoting N.C. Gen. Stat. § 143-291(a)). Specifically, the State has waived immunity for claims that are the "result of any alleged negligent act or omission of the driver" of a school bus. N.C. Gen. Stat. § 143-300.1(a) (2021).

Under the EMA, however, "[n]either the State nor any political subdivision thereof . . . shall be liable for the death of or injury to persons, or for damage to property as a result of any [emergency management] activity." N.C. Gen. Stat. § 166A-19.60(a) (2021). "Emergency management" includes "[t]hose measures taken by the populace and governments at federal, State, and local levels to minimize the adverse effects of any type of emergency . . . ." N.C. Gen. Stat. § 166A-19.3(8) (2021). "School buses" may be used for "emergency management activity." N.C. Gen. Stat. § 115C-242(6) (2021). But there is a distinction between "school buses" and other buses, like activity buses. *Irving*, 368 N.C. at 615, 781 S.E.2d at 286 ("Therefore, we must conclude that the General Assembly and the State Board have defined and managed school buses, activity buses, and school transportation service vehicles as distinct categories of vehicles."). The General Assembly defines a "school bus" as a:

> vehicle whose primary purpose is to transport school students over an established route to and from school for the regularly scheduled school day, that is equipped with alternately flashing red lights on the front and rear and a mechanical stop signal, that is painted primarily yellow below the roofline, and that bears the plainly visible words "School Bus" on the front and rear. The term includes a public, private, or parochial vehicle that meets this description.

N.C. Gen. Stat. § 20-4.01(27)(n) (2021).

Here, the record tends to show that Rand drove a "bus" to deliver food to students during the Covid-19 pandemic. During his delivery route, Rand collided with Plaintiff's vehicle, and under the TCA, Plaintiff sued the Board, the owner of the bus. It is undisputed that North Carolina was in a state of emergency during the incident, and *school buses* may be used for "emergency management" activity. *See* N.C. Gen.

Stat. § 115C-242(6). Now, the question before us is whether the Board is immune from suit stemming from Rand's alleged negligence.

We start with the premise that, generally, the Board is immune. *See Meyer*, 347 N.C. at 104, 489 S.E.2d at 884. And we acknowledge the TCA clearly waived immunity for school-bus accidents. *See* N.C. Gen. Stat. § 143-300.1(a). That clarity, however, has faded with the passage of the EMA, which says the State is not liable for injury caused during emergency-management activity. *See* N.C. Gen. Stat. § 166A-19.60(a). The TCA waived immunity, *see Heath*, 282 N.C. at 296, 192 S.E.2d at 310, but the EMA qualified the waiver, *see* N.C. Gen. Stat. § 166A-19.60(a). In other words, school boards may be sued in tort concerning school-bus accidents, but they may not be sued concerning accidents involving school buses used for emergency-management purposes.[3]

In this case, however, it is unclear whether Rand's bus was indeed a "school bus" under N.C. Gen. Stat. § 20-4.01(27)(n). Neither party asserts the "bus" is "equipped with alternately flashing red lights," is "primarily yellow below the roofline," that it "bears the plainly visible words 'School Bus' on the front and rear," or that its "primary purpose is to transport school students." *See* N.C. Gen. Stat. § 20-4.01(27)(n). And because N.C. Gen. Stat. § 115C-242 applies to school buses, it is unclear whether the EMA applies to Rand's conduct, and it is therefore unclear whether the Board maintains sovereign immunity. *See* N.C. Gen. Stat. § 115C-242; *Irving*, 368 N.C. at 615, 781 S.E.2d at 286; N.C. Gen. Stat. § 166A-19.60(a).

In our view, discerning the type of "bus" driven by Rand requires an application of legal principles to the facts, so the question is at least a mix of law and fact. *See Rubin*, 277 N.C. App. at 332 n.5, 858 S.E.2d at 392 n.5. Indeed, viewed in a light most favorable to Plaintiff, an answer requires "logical reasoning from the evidentiary facts," so the question tends to be a factual one. *See IPayment, Inc.*, 257 N.C. App. at 315, 808 S.E.2d at 802. Thus, the label of the bus is, at least partly, a remaining issue of fact. *See* N.C. Gen. Stat. § 1A-1, R. 56(c).

Further, the label of Rand's bus is a "material fact" because if the bus was a "school bus" operated for an emergency-management purpose, the Board may maintain sovereign immunity. *See* N.C. Gen. Stat. § 166A-19.60(a). And if it was not a "school bus," the Board likely does not maintain immunity. *See* N.C. Gen. Stat. § 143-300.1(a). Because the

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3. Although we need not reach whether the bus in this case was used for an emergency-management purpose, we think that question is, at least partially, a factual one. *See Rubin*, 277 N.C. App. at 332 n.5, 858 S.E.2d at 392 n.5.

bus's label remains unclear, we think the "drastic" measure of summary judgment is improper. *See Kessing*, 278 N.C. at 534, 180 S.E.2d at 830. Therefore, the Commission did not err in denying the Board's motion for summary judgment because an issue of material fact remains. *See* N.C. Gen. Stat. § 1A-1, R. 56(c).

VI. Conclusion

Accordingly, we hold the Commission did not err in denying the Board's motion for summary judgment.

AFFIRMED.

Judges ZACHARY and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 17 October 2023)

Case	County	Disposition
BRANN v. BRANN No. 22-762	Pitt (18CVD3478)	Affirmed
BRAXTON v. OCEAN VIEW LANDING PROP. OWNERS ASS'N No. 23-177	Brunswick (19CVS1685)	Affirmed
FOXX v. RAMSEY No. 23-202	Mitchell (22CVS135)	Dismissed In Part; Affirmed In Part.
IN RE M.B. No. 23-140	Surry (19JT29-31)	Affirmed
IN RE R.C.D.-T. No. 23-268	Henderson (20JT93)	Affirmed
IN RE V.Z.D.T. No. 23-214	Mecklenburg (17JT155) (17JT211)	Affirmed
KNUDSON v. LENOVO (U.S.) INC. No. 22-955	Wake (22CVS1818)	Modified and Affirmed
MAYMEAD, INC. v. ALEXANDER CNTY. BD. OF EDUC. No. 22-953	N.C. Industrial Commission (TA-29127)	Affirmed
MOORE v. PRITCHARD No. 23-304	Mecklenburg (21CVS650)	Affirmed
STATE v. BARTLEY No. 22-806	McDowell (17CRS51791-93) (17CRS554)	No Abuse of Discretion; No Error.
STATE v. DOBSON No. 23-288	Orange (19CRS51030-31)	No Error
STATE v. FIELDS No. 23-155	Columbus (19CRS662)	No Error
STATE v. JACKSON No. 23-157	Cumberland (17CRS63313)	Affirmed and Remanded
STATE v. KING No. 23-120	Columbus (18CRS52489)	No Error

STATE v. NIEVES No. 22-993	Surry (20CRS52655) (20CRS52711) (20-CRS52712) (20CRS52713) (21CRS3)	No Error
STATE v. PEAK No. 23-312	Buncombe (19CRS83285)	No Error
STATE v. RUFFOLO No. 23-178	New Hanover (21CRS54397) (21CRS54420-23)	No Error
STATE v. SIMPSON No. 23-35	Swain (19CRS50187) (20CRS29-30)	No Error

[291 N.C. App. 136 (2023)]

CRAIG CLAPPER, Plaintiff
v.
PRESS GANEY ASSOCIATES, LLC and
AZALEA PARENT HOLDINGS, LP, Defendants

No. COA23-372

Filed 7 November 2023

1. Appeal and Error—interlocutory order—denying motion to dismiss for improper venue—substantial right—breach of contract action—enforceability of forum selection clauses

In an action alleging breach of contract, fraud, and other claims arising from a set of contracts plaintiff entered into with defendant companies, defendants were entitled to immediate appeal from an interlocutory order in which the trial court denied defendants' motion to dismiss the action for improper venue under Civil Procedure Rule 12(b)(3). A key issue in the case dealt with the enforceability of forum selection clauses found in the contracts between the parties, and therefore the denial of defendants' Rule 12(b)(3) motion affected a substantial right.

2. Venue—motion to dismiss—improper venue—breach of contract—enforceability of forum selection clauses—place of last act

In an action alleging breach of contract, fraud, and other claims arising from a set of contracts plaintiff entered into with defendant companies, including a limited partnership agreement with a forum selection clause identifying Delaware as the venue for any legal disputes arising from the agreement, the trial court erred in denying defendants' motion to dismiss the action for improper venue under Civil Procedure Rule 12(b)(3). Under North Carolina law, the enforceability of a forum selection clause depends on the place where the contract was entered into, which, under the applicable legal test, is defined as the place where the last act "essential to a meeting of minds" was done by either of the parties to the contract. Here, the "last act" was committed in Delaware when the general partners for one of the defendants signed the limited partnership agreement; therefore, the forum selection clause in the agreement was presumptively valid, thereby making North Carolina an improper venue for plaintiff's action.

Appeal by defendants from order entered 2 December 2022 by Judge David L. Hall in Iredell County Superior Court. Heard in the Court of Appeals 18 October 2023.

Blanco Tackabery & Matamoros, PA, by Peter J. Juran, and Chad A. Archer, for the plaintiff-appellee.

Littler Mendelson, P.C., by Stephen D. Dellinger, and Elizabeth H. Pratt, for the defendants-appellants.

TYSON, Judge.

Press Ganey Associates, LLC ("Press Ganey") and Azalea Parent Holdings, LP ("Azalea") (collectively "Defendants") appeal from the trial court's order denying their Rule 12(b)(3) motion to dismiss Craig Clapper's ("Clapper") complaint. We reverse the trial court's order and remand.

I. Background

Press Ganey is an Indiana limited liability company, which is licensed to do business in North Carolina. Azalea is a Delaware limited partnership with a principal place of business located in California.

Clapper entered into an employment agreement with Press Ganey on 1 September 2015. Press Ganey was in the process of entering into a Membership Interest Purchase Agreement between Press Ganey, Healthcare Performance Improvement, LLC ("HPI"), and the owners/members of HPI. Clapper was a member of HPI, and was "the sole employee of Craig Clapper LLC, an Arizona limited liability company[.]"

The exclusive Employment Agreement between Clapper and Press Ganey specified Clapper would perform "consulting services on behalf of HPI" and would have "executive-level duties, responsibilities, expectations, and authority." The Employment Agreement specified a three-year term ending on 31 August 2018, but was automatically extended for an additional one-year term, unless either party gave sixty days' prior written notice to terminate. Clapper and Press Ganey also agreed to bring "any disputes or controversies arising out of or relating to th[e] [Employment] Agreement" in Delaware and to submit to "the exclusive jurisdiction of federal and state courts" in Delaware in the Employment Agreement.

Azalea sought to amend its Initial Agreement to admit additional limited partners, including Clapper. Azalea executed an Amended and Restated Limited Partnership Agreement ("Azalea LP Agreement"),

which provided a jury trial waiver and provisions specifying choice of law, venue, and submission to the jurisdiction of Delaware. Clapper signed the agreement on 23 July 2019, while purportedly residing in North Carolina. Many other limited partners also signed the Azalea LP Agreement. Azalea's general partner signed the letter on 25 July 2021 while in Delaware.

Azalea sent Clapper a letter on 16 March 2020, in which Azalea intended to grant him equity shares in Azalea. Azalea and Clapper executed an agreement ("Grant Agreement") on 8 April 2020. The Grant Agreement provided Clapper would receive 26,851 time-vesting units (also referred to as "Class B Units"). The Class B Units were granted as non-cash compensation to retain qualified employees and operated as an "Incentive Equity Plan."

The time-vesting schedule vested the Class B Units on the following dates: (1) 14,500 units on 16 September 2021; (2) 9,666 units on 16 September 2022; and, (3) 2,685 units on 16 September 2023. The agreement also provided Azalea retained the right "to redeem all or any portion of the vested" units if Clapper's "employment terminate[d] for any reason[.]"

In consideration for the grant of Class B Units from Azalea, Clapper agreed to be bound by additional restrictive covenants. The fair market value at the time of transfer of the units was also listed as $0.00. If Clapper was terminated before all units vested, the unvested units would return to Azalea.

The Grant Agreement does not separately contain an express choice of law or forum selection clause, but it refers to and incorporates by reference the terms of the Azalea LP Agreement, which contains provisions regarding choice of law, jury trial waiver, venue, and submission to the jurisdiction of Delaware.

Press Ganey instructed Clapper on 22 December 2020 to "resign from all positions as an officer and/or director (if any) of each of the entities of the Company and all of its respective affiliates" by 31 December 2020. Press Ganey also intended to transition Clapper to different employment tasks and to terminate Clapper's employment effective 30 September 2021.

Press Ganey, Azalea, and Clapper executed an Amendment to Employment Agreement, Transition Agreement, and Release and Waiver of Claims ("Termination Agreement") on 22 December 2020. The Termination Agreement provided Clapper would receive the 14,500

Class B Units on 16 September 2021, contained the Delaware choice of law and forum selection clauses, and also referenced the original Employment Agreement between Press Ganey and Clapper.

After Clapper's employment was terminated on 30 September 2021, Azalea sent Clapper a letter on 21 December 2021. Azalea intended to exercise its "Call Right" and purchase Clapper's remaining Class B Units and asserted:

> Pursuant to Section 3 of the Class B Unit Award Agreement between you and Azalea Parent Holdings LP (the "Partnership"), dated March 16, 2020 (the [Grant Agreement]), the unvested portion of your Class B Units are automatically forfeited without consideration upon termination of your employment with the Company. Following your termination of employment, you continued to hold 1,300.00 Class A Units and 7,250.00 vested Class B Units in the Partnership.
>
> Further, pursuant to Section 4 of the [Grant] Agreement and Section 10.1 of the Limited Partnership Agreement of Azalea Parent Holdings LP (the "LP Agreement"), this notice letter (the "Call Notice") hereby informs you that on December 21, 2021 the Partnership has elected to exercise its Call Right (as defined in the LP Agreement) with respect to your Class B Units that were vested at the date of your termination of employment. The "Call Price" as defined in the LP Agreement was $0.00 per Class B Unit as of the date the Partnership exercised its Call Right and, accordingly, pursuant to the terms of the LP Agreement these Class B Units respectively are redeemed for an aggregate Call Price of $0.00. As such, no payment will be made in regard to your vested Class B Units. For the avoidance of doubt, this Call Notice constitutes a "Call Notice" for purposes of the LP Agreement.

Clapper filed a complaint against Defendants in the Iredell County Superior Court on 23 June 2022. Clapper asserted claims for breach of contract, breach of the covenant of good faith and fair dealing, fraud, and violation of the North Carolina Wage and Hour Act ("NCWHA"). *See* N.C. Gen. Stat. §§ 95-25.1 to 95-25.25 (2021).

Defendants moved to dismiss Clapper's claims pursuant to Rule 12(b)(3), Rule 12(b)(6), and Rule 9 of the North Carolina Rules of Civil Procedure on 6 September 2022. *See* N.C. Gen. Stat. § 1A-1, Rules 9 and

12 (2021). Defendants' motions asserted Clapper brought his claims in the improper venue; dismissal was warranted because Clapper's claims arose under North Carolina law, which violated the Delaware choice of law provisions in the contracts; and Clapper's fraud claim failed to contain the allegations in the requisite particularity, as required per Rule 9. Defendants also moved to strike Clapper's jury demand pursuant to Rules 12(g) and (f).

The trial court granted Defendants' Rule 9 motion regarding Clapper's fraud claim and dismissed the claim without prejudice for Clapper to refile his fraud claim within thirty days. The trial court denied Defendants' motions regarding Rules 12(b)(3) and 12(b)(6). The trial court deferred ruling on Defendants' motion to strike the jury trial, but Defendants were allowed to renew their claim before the judge assigned to try the case. The trial court's order ruling on each of Defendants' motions was filed on 2 December 2022. The trial court's order does not contain a Rule 54(b) certification as immediately appealable.

Defendants timely filed a notice of appeal on 30 December 2022, seeking review of the trial court's denial of its 12(b)(3) motion to dismiss. Defendants also filed a Petition for Writ of Certiorari ("PWC") on 26 April 2023, seeking this Court to also hear its admittedly interlocutory denial of their Rule 12(b)(6) motion. N.C. R. App. P. 21.

II. Jurisdiction – Interlocutory Appeal

[1] The trial court's 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 to settle and determine the entire controversy." *Bartley v. City of High Point*, 381 N.C. 287, 293, 873 S.E.2d 525, 532 (2022) (citation omitted). "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).

Interlocutory orders, however, can be immediately appealable "when the appeal involves a substantial right of the appellant[,] and the appellant will be injured if the error is not corrected before final judgment." *N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 47-48, 619 S.E.2d 495, 496 (2005) (citations omitted). *See also* N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a) (2021). "N.C. Gen. Stat. § 1-277 allows a party to immediately appeal an order that either (1) affects a substantial right or (2) constitutes an adverse ruling as to personal jurisdiction." *Wall v. Automoney, Inc.*, 284 N.C. App. 514, 519, 877 S.E.2d 37, 44-45 (2023) (citation and quotation marks omitted).

This Court has repeatedly held: "Although a denial of a motion to dismiss is an interlocutory order, where the issue pertains to applying a forum selection clause, our case law establishes that defendant may nevertheless immediately appeal the order because to hold otherwise would deprive him of a substantial right." *Hickox v. R&G Grp. Int'l, Inc.*, 161 N.C. App. 510, 511, 588 S.E.2d 566, 567 (2003); *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566 n.1, 566 S.E.2d 160, 161 n.1 (2002) ("[O]ur case law establishes firmly that an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right that would be lost.").

This Court possesses appellate jurisdiction to review the trial court's denial of Defendants' Rule 12(b)(3) motion to dismiss. *Id.*; N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a).

III. Issue – Improper Venue

[2] Defendants argue the trial court improperly denied their Rule 12(b)(3) motion to dismiss for improper venue.

A. Standard of Review

"Our Court reviews an order denying a motion to dismiss for improper venue in such cases using the abuse of discretion standard." *SED Holding, LLC v. 3 Star Properties, LLC*, 246 N.C. App. 632, 636, 784 S.E.2d 627, 630 (2016) (citation omitted).

B. Analysis

"In general, a court interprets a contract according to the intent of the parties to the contract." *Cable Tel Servs., Inc. v. Overland Contr'g, Inc.*, 154 N.C. App. 639, 642, 574 S.E.2d 31, 33 (2002).

The enforceability of forum selection clauses that specify the parties' disputes must be litigated in another state's courts has varied in North Carolina case law. *Id.* ("Historically, North Carolina case law was unclear about the enforceability of forum selection clauses that fix venue in other states."). Our Supreme Court has stated: "Forum selection clauses do not deprive the courts of jurisdiction but rather allow a court to refuse to exercise that jurisdiction in recognition of the parties' choice of a different forum." *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 93, 414 S.E.2d 30, 33 (1992).

> In recent years, there has been an abundance of state and federal cases enforcing forum selection clauses. The leading case in this area is *Bremen*. In *Bremen*, the United

> States Supreme Court [sic] enunciated a standard for the enforceability of forum selection clauses. The Court held that forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." The Court further held that the forum selection clause in the contract should be enforced "absent a strong showing that it should be set aside . . . [, a] show[ing] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." Additionally, the Court held that a forum selection clause should be invalid if enforcement would "contravene a strong public policy of the forum in which suit is brought."

Perkins v. CCH Computax, Inc., 333 N.C. 140, 144, 423 S.E.2d 780, 783 (1992) (internal citations omitted) (citing *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 10, 15, 32 L.Ed.2d 513, 520, 523 (1972)).

After *Perkins*, our General Assembly enacted legislation regarding whether contracts *entered into within North Carolina* requiring litigation in a forum outside of North Carolina are enforceable: "any provision in a contract *entered into in North Carolina* that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable." N.C. Gen. Stat. § 22B-3 (2021) (emphasis supplied).

This Court has addressed whether the subsequent enactment of N.C. Gen. Stat. § 22B-3 nullifies or limits our Supreme Court's holding in *Perkins*:

> While [N.C. Gen. Stat.] § 22B-3 clearly limits the holding in *Perkins*, the presumption of validity of forum selection clauses, i.e. the test requiring that a plaintiff seeking to avoid enforcement of a choice of governing law or forum clause entered into outside of North Carolina meet a "heavy burden and must demonstrate that the clause was the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable," remains applicable.

Parson v. Oasis Legal Fin., LLC, 214 N.C. App. 125, 135, 715 S.E.2d 240, 246 (2011) (first quoting *Perkins*, 333 N.C. at 146, 423 S.E.2d at 784; then citing *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 501 S.E.2d 353

(1998); and then *Strategic Outsourcing, Inc. v. Stacks*, 176 N.C. App. 247, 625 S.E.2d 800 (2006)).

The initial inquiry regarding whether the holding in *Perkins* or N.C. Gen. Stat. § 22B-3 applies depends on where the contract was entered into. *Szymczyk v. Signs Now Corp.*, 168 N.C. App. 182, 187, 606 S.E.2d 728, 733 (2005) ("The threshold question for determining if the cont[r]act's forum selection clause violates North Carolina law, therefore, is a determination of where the instant contract was formed.").

This test was formulated ninety-two years ago:

> [T]he test of the place of a contract is as to the place at which the last act was done by either of the parties essential to a meeting of minds. Until this act was done there was no contract, and upon its being done at a given place, the contract became existent at the place where the act was done. Until then there was no contract.

Bundy v. Commercial Credit Co., 200 N.C. 511, 515, 157 S.E. 860, 862 (1931) (citations omitted).

This Court relied on *Bundy* when determining whether a contract was formed in Florida and *Perkins* applied:

> In *Bundy*, a contract negotiated by the North Carolina office of a Maryland company was not deemed existent until the final signature was made by the company's officers in Maryland. *Id.* at 514-15, 157 S.E. at 862.
>
> Here, the terms of the franchise agreement were discussed with representatives of defendant and a form agreement was signed by plaintiffs in North Carolina. The contract was then returned to Florida and defendant's president signed the agreement. Just as in *Bundy*, the last act of signing the contract was an essential element to formation. As the contract was formed in Florida, N.C. Gen. Stat. § 22B-3 does not apply to the forum selection clause in the instant agreement.

Szymczyk, 168 N.C. App. at 187, 606 S.E.2d at 733.

Here, the "last act" was committed in Delaware when Azalea's general partners signed the Azalea LP Agreement. *Id.* At the hearing held on 28 November 2022 regarding Defendants' motion to dismiss, Defendants' attorney explained:

> And as a result of that, because that is a Delaware company in which Mr. – in which [Clapper] [is a] member[ ], all parties are in Delaware. And there is nothing to indicate showing that the last act of that was done in North Carolina. In fact, if you look at those 153 pages [of the LP agreement] I just gave you, you will see that Mr. Clapper's signature is somewhere in the middle of that.

Although Clapper signed the agreement on 23 July 2019 while residing in North Carolina, Azalea's general partner did not sign the agreement until 25 July 2021 while located in Delaware. The Azalea LP Agreement provided a jury trial waiver and provisions specifying choice of law, venue, and submission to the jurisdiction of Delaware.

The Grant Agreement, which granted Clapper the Class B Units in Azalea, incorporated the terms of the Azalea LP Agreement. The final page of the Grant Agreement states: "I acknowledge the grant of the Granted Units and all of the terms and conditions set forth in this Agreement, the LP Agreement[,] and the Plan, the receipt of which I acknowledge." The Grant Agreement also required Clapper to acknowledge he had "reviewed the Agreement, the LP Agreement[,] and the Plan and have had the opportunity to raise any questions or concerns with the Company about the Granted Units." Clapper affixed his signature directly below that statement to bind his assent to the contract.

The "last act" was committed in Delaware, as opposed to North Carolina. *Bundy*, 200 N.C. at 515, 157 S.E. at 862. *Perkins* applies instead of N.C. Gen. Stat. § 22B-3. *Perkins*, 333 N.C. at 144, 423 S.E.2d at 783; *Parson*, 214 N.C. App. at 135, 715 S.E.2d at 246; *Szymczyk*, 168 N.C. App. at 187, 606 S.E.2d at 733. Defendants have shown the trial court erred by denying Defendants' Rule 12(b)(3) motion to dismiss. *See Szymczyk*, 168 N.C. App. at 187, 606 S.E.2d at 733.

IV. Conclusion

The trial court should have allowed Defendants' Rule 12(b)(3) motion to dismiss for improper venue. *See id.*; *Perkins*, 333 N.C. at 144, 423 S.E.2d at 783; *Parson*, 214 N.C. App. at 135, 715 S.E.2d at 246; *Bundy*, 200 N.C. at 515, 157 S.E. at 862. The trial court's order is reversed.

Defendants' successful Rule 12(b)(3) argument disposes of all of Clapper's claims against Defendants asserted in North Carolina's courts. It is unnecessary to issue a writ of certiorari. Upon remand, the trial court shall enter an order granting Defendants' Rule 12(b)(3) motion to dismiss without prejudice to Clapper bringing or asserting his claims

against Defendants in an appropriate forum according to the Azalea LP Agreement. *It is so ordered.*

REVERSED AND REMANDED.

Judges DILLON and GRIFFIN concur.

KARIN A. CONROY, Plaintiff
v.
MARK. W. CONROY, Defendant

No. COA23-136

Filed 7 November 2023

1. Child Custody and Support—custody—motion to continue—waiver—duration of hearing

In a child custody modification matter, the trial court did not abuse its discretion by denying the mother's motion to continue where the mother fired her attorney the day before the prior-noticed scheduled date of the hearing. By failing to argue at trial that the denial of the motion to continue denied her the constitutional right to parent her children, the mother waived the constitutional argument on appeal. Furthermore, the appellate court rejected the mother's argument that the trial court abused its discretion by limiting each side to two-and-one-half hours to present evidence, as the duration of the hearing was within the trial court's discretion.

2. Child Custody and Support—custody—modification—findings of fact—substantial evidence

In a child custody modification matter, the appellate court rejected the mother's numerous challenges to the trial court's findings of fact—including those regarding the mother's disdain and contempt for anyone she perceived to be "against" her, an incident in which her children were "beating on the door and crying" because they wanted to travel with their father, and the mother's erratic behavior and poor decisionmaking. Having reviewed the record, the appellate court concluded that substantial evidence supported each of the legally relevant and necessary findings of fact that the mother challenged on appeal.

3. Child Custody and Support—custody—modification—substantial change of circumstances—long history of relational problems—effect on children

In a child custody modification matter—where the mother asserted on appeal that she always had poor interpersonal relationships, that her overall behavior toward the father had been erratic and unpredictable for years, and that she has often made disparaging remarks about the father while the children were present—the trial court did not err by determining that a substantial change of circumstances had occurred affecting the welfare of the children. Notwithstanding the long history of the mother's behavior and the parties' poor communication, there was no error in the trial court's finding that those issues were presently having a negative impact on the children that constituted a change of circumstances. Furthermore, the trial court did not abuse its discretion by awarding primary custody of the children to the father.

Appeal by plaintiff from judgment entered 25 May 2022 by Judge Karen D. McCallum in Mecklenburg County District Court. Heard in the Court of Appeals 4 October 2023.

Plumides, Romano & Johnson, PC, by Richard B. Johnson, for the plaintiff-appellant.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Jonathan D. Feit, Kristin J. Rempe, and Caroline D. Weyandt, for the defendant-appellee.

TYSON, Judge.

Karin Conroy ("Mother") appeals from an order modifying the custody of Mother's and Mark Conroy's ("Father") four children. We affirm.

I. Background

Mother and Father were married on 4 October 2003. Mother and Father are parents of four children: Christopher, born on 25 September 2006; Kathryn ("Kate"), born on 11 August 2008; Daniel, born on 27 December 2009; and Michael, born on 5 February 2012.

Mother and Father legally separated on 7 March 2015. A Judgment of Absolute Divorce was entered on 16 July 2018. On 18 June 2019, the district court entered a Permanent Child Custody Order ("2019 Custody Order").

The 2019 Custody Order found the following facts regarding Mother's behaviors and her relationship with Father:

> 11. Plaintiff/Mother has a concerning history of fractured relationships, particularly with members of her family and Defendant/Father's family. Between 2001, when the parties met, and the parties' date of separation, Plaintiff/Mother was often angry with at least one of her family members or close friends.
>
> 12. In demonstrating said anger, the cause of which was often unknown to others, Plaintiff/Mother refused to speak to the person with whom she was angry, sometimes for months and sometimes for years. Once the minor children were born, Plaintiff/Mother often did not allow the person with whom she was angry to interact with the minor children, despite Defendant/Father's requests for her to do so.
>
> . . .
>
> 16. As of March 2018, Plaintiff/Mother's inappropriate behaviors had not improved. Among other concerning behaviors, Plaintiff/Mother routinely disparaged Defendant/Father directly to and in the presence of the minor children; acted in other ways designed to undermine his role as the minor children's father; unreasonably interfered with Defendant/Father's parenting time; and, in making decisions that impacted the minor children, repeatedly failed to put the minor children's best interests first, but instead often prioritized being disagreeable with Defendant/Father and creating and/or furthering difficult and/or less than ideal circumstances for Defendant/Father, often at times the minor children were in his care.
>
> 17. In March 2018, and in an effort to spend more time with the minor children and have a greater opportunity to combat Plaintiff/Mother's inappropriate behaviors, Defendant/Father informed Plaintiff/Mother that he wished to extend his alternating Sunday overnight through Monday morning. He has routinely done so since March 2018.
>
> 18. Since March 2018, Plaintiff/Mother has repeatedly withheld the minor children from Defendant/Father, sometimes for days and once for Defendant/Father's entire custodial weekend.

> . . .
>
> 23. Plaintiff/Mother dislikes Defendant/Father's family and is not supportive of the minor children's relationships with Defendant/Father's family. Plaintiff/Mother has disparaged Defendant/Father's parents in the presence of the minor children, refuses to speak to Defendant/Father's parents at the minor children's activities (at times they are there), and accuses Defendant/Father of relying on his parents for help with caring for the minor children. The Court does not find that Defendant/Father's parents serve primarily as caregivers when visiting Defendant/Father and the minor children, but instead come to Charlotte to spend quality time with their son and grandchildren.

The 2019 Custody Order granted Mother and Father joint legal custody of the minor children. During the school year, Mother and Father shared parenting time with the children on a nine to five schedule, meaning the children spent nine days out of every two weeks with Mother and five days with Father. During the summer, custody between Mother and Father alternated on a weekly basis, and each parent was allowed to plan two continuous weeks of vacation with the children. School-year breaks and holidays, including Memorial Day Weekend, Labor Day, Halloween, Thanksgiving, Christmas, and Winter Break, were evenly divided between Mother and Father and set on an alternating basis, with Spring Break and Easter being the exception. Father was granted custody of the children for the duration of spring break every year, and Mother was awarded Easter weekend beginning in the afternoon on Good Friday.

Mother was represented by attorney Tiyesha DeCosta ("DeCosta") for the hearings held on 12 and 17 November 2020 regarding her claims for equitable distribution, child support, and attorney's fees. Mother was previously represented by attorneys Gena Morris and Caroline Mitchell, and later by attorney Steve Ockerman, before seeking DeCosta's representation.

Almost two years after the 2019 Custody Order was entered, the Honorable Karen D. McCallum ("Judge McCallum") entered an Order and Judgment on 3 March 2021 regarding Mother's and Father's equitable distribution, child support, and attorney's fees claims. After entry of the 2021 Order, Mother was displeased, as "she believed that Defendant/Father [had] 'won' the equitable distribution and child support trial."

A month after Judge McCallum entered the order, Mother filed a Motion for Emergency Custody, Motion for Modification of Custody, and

Motion for Attorney's Fees on 6 April 2021. Mother asserted Father had physically abused Daniel, and she moved for temporary sole custody of all four children and primary physical custody on a permanent basis.

In the same week Mother filed her motion to modify custody, she left a note in Father's mailbox stating, "HAS LEAVING YOUR FAMILY BEEN WORTH IT?" She also reported Father's alleged abuse to Department of Social Services ("DSS"), which was the third time Mother had alleged abuse and reported Father to DSS.

Father responded to Mother's Motion for Emergency Custody and also filed a Motion to Modify Custody, Motion for Temporary Parenting Arrangement, Motion for Sanctions, Motion to Strike, and Motion for Contempt on 14 April 2021. Father's motion referenced Mother's decision to report unsubstantiated allegations concerning him to DSS, leaving a threatening note in his mailbox, and threatening Father by promising "the litigation 'will never end' and that she will 'never stop trying to ruin' Defendant/Father."

A hearing regarding Mother's Motion for Emergency Custody was held on 15 April 2021. Mother, Father, Daniel, Mother's neighbor, and a Child Protective Services ("CPS") investigative social worker testified. Judge McCallum denied Mother's Motion for Emergency Custody on 21 October 2021.

Judge McCallum found Mother's testimony "completely uncredible[,]" because: (1) it appeared Mother had coached Daniel and Michael; (2) the other children had "purportedly slept through the entire incident, which is not believable if Defendant/Father w[as] really punching Dan[iel] 'repeatedly' in the nose, head, and neck"; (3) Mother admitted she had "encouraged" Daniel to get inside the car with Father after the alleged incident; (4) Mother did not check on the child at school following the alleged incident; (5) Mother did not report the incident to the school or the police; (6) Mother failed to take Daniel to receive any medical treatment; and, (7) Mother had waited four days to report the alleged abuse to DSS. Judge McCallum also noted and found Mother's three prior allegations of Father's actions to DSS each came "on the eve of an important court date[,]" and each of the prior reports were "unsubstantiated."

In the months following the emergency custody hearing, Mother filed many motions, which delayed hearings on some of her motions and Father's motions. Mother filed a Motion to Recuse Judge McCallum on 29 April 2021 ("First Motion to Recuse"). Mother asserted she could not receive a fair and impartial hearing, citing Judge McCallum's purported

facial expressions and remarks she had made during the 15 April 2021 hearing concerning Mother's improper retrieval of documents from DSS, and Mother's unlawful *ex parte* emails to Judge McCallum.

A hearing on Father's claim of contempt was originally scheduled for 2 June 2021. The trial court continued Father's motion for contempt, reasoning Mother's First Motion to Recuse needed resolution before proceeding on any of the other pending motions and issues before the Court. Mother voluntarily dismissed her First Motion to Recuse without prejudice and filed a second Motion to Recuse ("Second Motion to Recuse") at approximately 2:15 p.m. on 2 June 2021, the date of the hearing. The hearing was scheduled to begin at 4:00 p.m. At 4:01 p.m., DeCosta emailed Judge McCallum and Father's attorney, Jonathan Feit ("Feit") a copy of the voluntary dismissal and the Second Motion to Recuse.

DeCosta sought a continuance of the 2 June 2021 hearing in light of dismissal of her Second Motion to Recuse. Father waived prior notice, and Judge McCallum denied Mother's request for continuance. At the hearing, DeCosta explained she had filed the Second Motion to Recuse because Judge McCallum had issued an order for DeCosta to show cause in an unrelated matter, and she believed this order to show cause demonstrated Judge McCallum's "animus" and "bias" towards her as counsel.

Judge McCallum denied Mother's Second Motion to Recuse because: "neither the allegations made nor the evidence presented constitute[d] sufficient evidence to objectively demonstrate that recusal [wa]s warranted[,]" Mother's testimony regarding Judge McCallum's purported denial of DeCosta's request to cross-examine the CPS caseworker was "patently false," and DeCosta had "elicited perjured testimony from her client[.]"

Father rescheduled the hearing on his Motion for Contempt for 3 August 2021. On 20 July 2021, the court continued the 3 August 2021 hearing, per Mother's request, due to a previously scheduled vacation. Father's Motion for Contempt hearing was again rescheduled to 31 August 2021. On 4 August 2021, Mother filed another Motion to Recuse ("Third Motion to Recuse"), citing Father's Attorney's previous representation of Judge McCallum before she was appointed to the bench. Judge McCallum referred Mother's motion to another judge, who heard the matter on 6 August 2021. Mother's Third Motion to Recuse was denied after that judge concluded the court "was unable to find that objective grounds for disqualification" existed, citing *Lange v. Lange*, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003).

On 27 August 2021, Father filed an *Ex Parte* Motion for Emergency Custody Relief. The motion provided:

> Over the past four (4) months, Plaintiff/Mother's behavior and treatment of the minor children has become increasingly violent, erratic, and unstable, culminating in a recent incident, described hereinbelow, in which she hit the parties' daughter, Kate, pulled Kate's hair, took Kate's personal items, choked Kate, and told Kate to "punch me [Plaintiff/Mother] in the face" so that Plaintiff/Mother could call the Department of Social Services ("DSS"), which she has done on multiple occasions in the past. Since the incident, Kate has been in Defendant/Father's exclusive custody, terrified to return to Plaintiff/Mother's residence. Defendant/Father immediately called DSS himself, who, after interviewing Kate, indicated that Kate should be in Defendant/Father's exclusive custody pending further investigation. Although the DSS worker communicated the same to Plaintiff/Mother, Plaintiff/Mother stated that she "expected" Kate home on Friday, August 27 for her regular weekend visitation - in direct contrast with the DSS caseworker's directive.

Judge McCallum granted Father's motion for *ex parte* temporary emergency custody on 30 August 2021.

On 31 August 2021, the third date Father's Motion for Contempt was scheduled for hearing, Mother filed yet another Motion to Recuse ("Fourth Motion to Recuse"). Mother alleged other details regarding Feit's, Father's counsel's, prior professional relationship with Judge McCallum. Judge McCallum denied Mother's Fourth Motion to Recuse because: Feit had "represented Judge McCallum for a relatively brief period of time, terminating their professional relationship in July 2018 (before Judge McCallum was elected to the bench)[,]" and both Feit and Judge McCallum had followed the North Carolina Judicial Standards Commission's directions regarding when Feit was allowed to appear before her.

Father filed an Amended Notice of Hearing on 1 September 2021 for his Motion for Contempt, Motion to Modify Child Custody, *Ex Parte* Motion for Emergency Custody Relief, Alimony and Attorney's Fees. The hearing was calendared for 16 September 2021.

Mother met with DeCosta on 1 September 2021 for more than seven hours to discuss the case. At some point, Mother also met with

another attorney, because she was purportedly dissatisfied with DeCosta's representation.

Father filed a Motion for Sanctions and Motion to Dismiss on 10 September 2021. Mother was required to file a financial affidavit by 7 September 2021 for Father to prepare for the hearing on 16 September 2021 on, among other things, Mother's pending alimony claim. DeCosta emailed Father's attorney on 8 September 2021, asserting she was out of the country on secured leave and would forward the documents upon her return.

Mother fired DeCosta on or around 15 September 2021. DeCosta also filed a Motion to Withdraw from representing Mother on 15 September 2021.

DeCosta attended the virtual hearing on 16 September 2021, per the North Carolina State Bar's instructions. Both Mother and DeCosta petitioned Judge McCallum for a continuance. Judge McCallum denied Mother's motions to continue given the numerous prior continuances, motions, and petitions filed throughout the duration of this case, but she granted DeCosta's motion to withdraw. She also explained Father's Motion to Modify Post-Separation Support would not be discussed at the hearing because it "wasn't calendared" and Mother did not receive "fair notice that [the motion] was going to happen."

Mother proceeded *pro se* for the 16 September 2021 hearing. Although Mother expressed she was able to defend against Father's motion to modify custody, Mother moved to voluntarily dismiss her own motion to modify custody. Mother expressed she was purportedly unaware she had filed a motion to modify custody on 6 April 2021, which had started this entire series and sequence of current legal proceedings.

Mother called several witnesses to testify on her behalf. Throughout the hearing, Mother repeatedly and vehemently expressed her disdain for and belittled attorney DeCosta. Mother stated on numerous occasions that she had fired DeCosta and asked her to exit and "go off the screen" of the virtual hearing. Mother also repeatedly interrupted Father's counsel.

Judge McCallum granted Father's motion for contempt in an order entered on 2 March 2022, finding Mother guilty of criminal contempt for failing to abide by the terms of the custody order. Mother was ordered to spend thirty days in jail, although her sentence would be suspended if she obtained a mental health evaluation. Judge McCallum also granted Father's motion for sanctions and motion dismiss and dismissed Mother's alimony claim on 7 March 2022.

An order modifying custody was entered on 25 May 2022. The trial court found "any trust between the parties ha[d] completely deteriorated" since the entry of the 2019 custody order. The trial court found the following findings of fact regarding Mother's repeated frustration of Father's efforts to co-parent the children effectively:

> a. Plaintiff/Mother has exhibited a disconcerting pattern of unstable interpersonal relationships, which the Court finds has a severe, negative impact on the minor children who are at risk of severe emotional distress. Throughout the trial on this matter, Plaintiff/Mother expressed significant disdain and contempt for [any] person that she apparently perceived to be "against" her, including, but not limited to, multiple DSS workers; various lawyers (including her own); the undersigned Judge; the minor children's teachers and coaches; and, most commonly, Defendant/Father. Plaintiff/Mother even expressed that her thirteen (13) year old daughter, Kate, was to blame for a number of the issues and concerns raised to the Court.
>
> b. Plaintiff/Mother has repeatedly made disparaging remarks about Defendant/Father in front of the minor children, including referring to Defendant/Father as a "Jerk," "f[***]ing loser," and [an] "a[**]hole."
>
> c. Plaintiff/Mother's behavior is erratic and unpredictable. When she becomes angry at Defendant/Father or others, she punishes the minor children, showing a willingness to humiliate them in front of their peers and others. The minor children are suffering because of the unpredictability of Plaintiff/Mother's actions. For example:
>
>> i. Plaintiff/Mother prevented the minor children from traveling on a pre-planned Spring Break trip to Florida with Defendant/Father in April 2021. When Defendant/Father arrived at Plaintiff/Mother's home to pick the minor children up, the minor children had been locked inside, and Defendant/Father could hear them beating on the door and crying to be let out so that they could go with Defendant/Father. Plaintiff/Mother made comments to the minor children that they would "burn" inside the house.
>>
>> ii. Plaintiff/Mother has frequently prevented the minor children from attending their extracurricular

activities when the minor children are in her care. On one (1) occasion, when Kate was riding to soccer practice with Defendant/Father, Plaintiff/Mother threatened to "call the police" and report that Kate had been "kidnapped." She further threatened to "yank" Kate off of the soccer field in front of her friends and coaches. Plaintiff/Mother[ ] [has] caused Kate to become hysterical, ultimately causing Kate to miss her practice.

iii. Likewise, when Plaintiff/Mother has attended the minor children's extracurricular events, she has actively tried to prevent Defendant/Father from attending same and, on occasions, has caused an excessive, unnecessary scene simply because of Defendant/Father's presence. By way of example, on an occasion where Defendant/Father attended [ ] two (2) of the minor children's basketball games (happening at the same time and location), Plaintiff/Mother attempted to have Defendant/Father removed from the premises because of a policy related to the COVID-19 pandemic under which the league only allowed (1) parent to attend games. When Plaintiff/Mother learned that, because of low attendance, the league would allow both she and Defendant/Father to attend the minor children's games, she wrote to multiple of the league officials, accusing them of "sexism."

d. Multiple witnesses described incidents in which the minor children were present, and Plaintiff/Mother displayed a complete lack of judgment regarding the safety and welfare of the minor children.

i. Following the election of Joe Biden in November 20[20], Plaintiff/Mother became offended by a comment made by one of Chris's friends. Plaintiff/Mother responded by telling the child in the presence of her own minor children that he had "no friends;" by calling him names, including a "little shit;" and by confiscating and keeping the child's cell phone. Bizarrely, Plaintiff/Mother brought this child's mother, Karin Simoneau (hereinafter "Ms, Simoneau") in to testify on her behalf. Ms.

Simoneau testified that her son was so afraid of Plaintiff/Mother after the Incident that her husband had to go to Plaintiff/Mother's home to retrieve their son's cell phone on their son's behalf. Throughout her own and Ms. Simoneau's testimony, Plaintiff/Mother completely failed to recognize <u>any</u> problem with her own behavior (directed at a child) and, instead, blamed said child for "provoking" her.

ii. Plaintiff/Mother has destroyed the minor children's electronic devices as a means of punishment on multiple occasions in the minor children's presence by throwing them, cracking them, and hitting them until they shatter. It is not in the minor children's best interests to witness such violent outbursts.

e. Plaintiff/Mother's choices and actions are largely focused on her anger toward and disdain for Defendant/Father, and she fails entirely to recognize how her actions have a negative impact on her children. For example:

i. As mentioned above, Plaintiff/Mother has arbitrarily kept the minor children from attending their extracurricular activities on a number of occasions without any justification or reasoning. At the end of Kate's soccer season, Plaintiff/Mother refused to allow Kate to attend a tournament with her team in which all of the teammates stayed together in a hotel and that acted as an end of the season celebration. Although Defendant/Father both offered to take Kate to the tournament and to pay for lodging for Plaintiff/Mother to take Kate to the tournament, Plaintiff/Mother refused to allow Kate to attend. Plaintiff/Mother seemed to have no understanding or acknowledgement of the minor children's feelings related to arbitrary feelings like this one.

ii. Plaintiff/Mother regularly interferes in the minor children's ability to communicate with Defendant/Father when the children are in her care. She frequently takes the children's electronic devices, requiring Defendant/Father to go through Plaintiff/Mother in order to speak to the children, which

> often involves Plaintiff/Mother verbally berating and/or disparaging Defendant/Father in the minor children's presence. On at least one occasion, Plaintiff/Mother has even unplugged the landline so that the children and Defendant/Father had no way of contacting one another.
>
> iii. Plaintiff/Mother has, on numerous occasions, intentionally interfered in Defendant/Father's time and plans with the minor children. In addition to interference in the Florida spring break trip, described hereinabove, Plaintiff/Mother also interfered in Defendant/Father's summer vacation to Boston with the minor children. When Defendant/Father told Plaintiff/Mother that he needed to pick the minor children up at a specific time to make their flight to Boston, Plaintiff/Mother chose to arbitrarily withhold the children until later in the afternoon, causing the family to miss their original flight.

The trial court also made several findings regarding the ways Mother "presents danger to the minor children's physical and emotional well-being":

> i. On Wednesday, August 25, 2021, the parties' daughter, Kate, began to frantically text Defendant/Father regarding one of Plaintiff/Mother's outbursts, stating that Plaintiff/Mother was "going crazy," "attacking [Kate]," and "throwing my stuff away." Kate further stated "shes (sic) hurting me and I cant (sic) do this anymore she grabbed my throat multiple times and tried to choke me." Defendant/Father immediately drove to Plaintiff/Mother's home, where Kate was standing in the front yard, crying hysterically. As Defendant/Father pulled up, Kate ran to Defendant/Father's car. Defendant/Father learned that Plaintiff/Mother had hit Kate, pulled Kate's hair, took Kate's personal items, choked Kate, and told Kate to "punch me [Plaintiff/Mother] in the face" so that Plaintiff/Mother could call DSS. She further told Kate, as she has on numerous occasions in the past, that Kate is no longer welcome to live in her home and that she should go live with Defendant/Father.
>
> ii. The repeated involvement of DSS is not in the minor children's best interests. The DSS caseworker, Elisa Guarda

("Ms. Guarda"), testified related to her concerns about Kate's well-being specifically, including that Kate expressed that she had to "walk on eggshells" around Plaintiff/Mother. She also expressed concern about the shocking nature of Kate's allegations of Plaintiff/Mother's physical violence.

iii. Plaintiff/Mother has historically focused her anger on one of the minor children at a time, often encouraging the other three (3) children to "gang up" on the child who is currently the object of her ire. Plaintiff/Mother has encouraged her three (3) sons to bully their sister, including allowing, and even encouraging, the three (3) boys to call their sister "fat."

iv. On other occasions, Plaintiff/Mother has told whichever child is her current focus that they are "no longer welcome" in Plaintiff/Mother's home. Since the entry of the 2019 Order, she has, on numerous occasions, dropped one (1) or more of the minor children off at Defendant/Father's house unannounced, stating that that child (or children) are no longer welcome to live with her. She has stated that she will "sign" the children over to Defendant/Father when she becomes angry at the children, including in the presence of one or all of the children.

v. Plaintiff/Mother's emotional outbursts have led her to behave recklessly in front of the minor children. Plaintiff/Mother has waved a gun around while "fake" bullets fall out. Likewise, Plaintiff/Mother has repeatedly destroyed the minor children's property – in the minor children's presence – including smashing at least three (3) iPads by throwing them violently to the ground.

vi. Plaintiff/Mother has resorted to physical discipline in the past, including, beating the minor children with a wooden spoon and digging her nails into the minor children until she draws blood.

The trial court concluded "[a] substantial change in circumstances affecting the best interests of the minor children ha[d] occurred" to warrant a modification of the 2019 Custody order. The court changed the visitation schedule between Mother and Father. Mother was awarded visitation with Chris, Daniel, and Michael every other weekend from Friday evening until Monday morning, as well as dinner each

Wednesday evening. Mother was awarded a FaceTime phone call once each evening. The schedule regarding holidays and school-year breaks remained unchanged and were evenly divided between Mother and Father. The only change in the holidays and school-year breaks schedule was that "Kate [was] allowed, but not required, to follow" the schedule.

Mother filed a timely notice of appeal regarding the custody order on 23 June 2022. Mother's notice of appeal regarding the trial court's denial of two of her motions to recuse, both entered on 21 October 2021, were not timely made, are not properly before us, and are dismissed.

II. Jurisdiction

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

III. Issues

Mother argues: (1) the trial court abused its discretion by denying Mother's motion to continue the 16 September 2021 hearing; (2) erred by not allowing Mother additional time to present her case or rebuttal evidence; (3) the trial court's findings of fact are not supported by the evidence; (4) the trial court erred by determining a substantial change of circumstances had occurred affecting the welfare of the children; and, (5) the trial court abused its discretion by determining the children's best interests were served by placing them in Father's primary custody.

IV. Motion to Continue & Duration of Hearing

[1] Mother argues the trial court abused its discretion by denying her motion to continue and asserts the trial court's failure to allow her motion to continue "denied her [of her] constitutional right to parent her children." She also argues the trial court abused its discretion by limiting each side to two-and-a-half hours to present evidence.

A. Standard of Review

"Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *In re A.L.S.*, 374 N.C. 515, 516-17, 843 S.E.2d 89, 91 (2020) (quoting *State v. Walls*, 342 N.C. 1, 24, 463 S.E.2d 738, 748 (1995)).

When the motion to continue is based on a constitutional right *and asserted before the trial court*, "the motion presents a question of law[,] and the order of the court is reviewable." *Id.* at 517, 843 S.E.2d at 91 (quoting *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970)). If the movant failed to "assert in the trial court that a continuance was

necessary to protect a constitutional right," then the unpreserved constitutional argument is waived, and the appellate court "review[s] the court's ruling on the motion to continue for abuse of discretion." *In re A.M.C.*, 381 N.C. 719, 722-23, 874 S.E.2d 493, 496 (2022) (citations and internal quotation marks omitted).

B. Analysis

Mother cites *Pickard Roofing Co., Inc. v. Barbour* to support her argument that the trial court abused its discretion by failing to continue the hearing due to DeCosta's withdrawal. 94 N.C. App. 688, 381 S.E.2d 341 (1989). Father asserts Mother's reliance on *Pickard Roofing* defeats her claim. In *Pickard Roofing*, the counsel's decision to withdraw "was necessitated by the party's decision to terminate his employment one day before the day on which the party knew his case was scheduled to be tried." *Id.* at 692, 381 S.E.2d at 343.

This Court held the trial court did not abuse its discretion by finding: the defendant "should have made a decision with respect to representation by counsel prior to the eve of trial," and "[n]o circumstances beyond the control of the defendant ha[d] prevented him from appearing in court with an attorney of his choice." *Id.* at 691, 381 S.E.2d at 343.

Similar to the defendant in *Pickard Roofing*, Mother has "overemphasize[d] the fact that h[er] attorney was allowed to withdraw the day before the trial was scheduled to commence[,]" and "simultaneously de-emphasize[d] the reason why the attorney withdrew, because [Mother] terminated h[er] employment." *Id.* at 692, 381 S.E.2d at 343.

The trial court did not abuse its discretion by denying the oral motion on the prior-noticed and scheduled date of the hearing to continue the hearing. *Id. See also Chris v. Hill*, 45 N.C. App. 287, 290, 262 S.E.2d 716, 718 (1980) ("[A] party to a lawsuit must give it the attention a prudent man gives to his important business." (citations omitted)); *Wayne v. Jones*, 79 N.C. App. 474, 475, 339 S.E.2d 435, 436 (1986) ("The defendant received reasonable notice of his attorney's withdrawal as evidenced by the defendant's statement in court that he did not want a lawyer."); *McIntosh v. McIntosh*, 184 N.C. App. 697, 702, 646 S.E.2d 820, 824 (2007) (finding no abuse of discretion in trial court's denial of a motion for continuance "[i]n light of the numerous and lengthy delays in hearing th[e] case"). Mother's argument is without merit.

Mother failed to argue the trial court's denial of her motion to continue denied her the constitutional right to parent her children. Mother's purported constitutional arguments on appeal are waived and dismissed. *In re A.M.C.*, 381 N.C. at 722-23, 874 S.E.2d at 496.

Mother was fully aware of the time constraints the court established. The trial court explained at the beginning of the trial that the duration was set for five hours, divided evenly between the two parties. Mother was also aware she needed to track her time. Mother asked the trial court: "And Ms. – I mean, Your Honor, as far as time goes, how are we doing time?· Is this, like, my time, and I need to start putting down the time that I start speaking?"

The trial court also addressed how long each party should take for lunch to make sure each side had an equal amount of time to present their case.

> MR. FEIT:· And Your Honor, just before Ms. Conroy asks a question, we've got until five o'clock, from a budgeting time perspective. What time would you like to break?· What time would you like to come back, so we can all make sure that we have the – equal, same amount of time.
>
> THE COURT: All right. Do we want to do an hour for lunch, or half hour?
>
> MR. FEIT:· Half hour's fine –
>
> MS. CONROY:· Half hour's fine with me.

Furthermore, while Mother only left five minutes for her closing arguments, the trial court and Feit allowed Mother to give a twenty-minute closing argument. Mother's argument is without merit. *See Watters v. Parrish*, 252 N.C. 787, 791, 115 S.E.2d 1, 4 (1960) ("[T]here is power inherent in every court to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants." (citation omitted)).

V. Findings of Fact

[2] Mother argues several of the court's findings of fact are not supported by the evidence, including the findings that: Mother had "disdain and contempt for any person that she apparently perceived to be 'against' her," including her lawyer, Father's lawyer, Judge McCallum, multiple DSS workers, and the children's teachers and coaches; the children were "beating on the door and crying" to travel for spring break with Father, and Mother said she would let them "burn"; Mother behaved erratically; Mother was "oblivious" to the consequences of her actions; Mother failed to recognize her own "poor decision-making" and "blamed others," including Kate; Mother wrote to multiple league officials saying they were "sexist" when Father was allowed to attend the children's games; Mother displayed a "complete lack of judgment" for

the "safety and welfare" of the children, including the incident with her child's friend about Joe Biden following the 2020 election; and, the DSS worker's concerns about Kate's "well-being" and her shock regarding Mother's "physical violence" towards Kate.

A. Standard of Review

> When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. 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) (citations and internal quotation marks omitted).

The trial court is vested with broad discretion over the admission of and credibility accorded to evidence, because the court has the opportunity to hear and observe the witnesses and to assess credibility. *Id.*; *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998). "As a result, we have held that the trial court's 'findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.' " *Pulliam*, 348 N.C. at 625, 501 S.E.2d at 903 (quoting *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975)).

Unobjected-to findings of fact are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." (citations omitted)). When a challenged finding of fact is not necessary to support a trial court's conclusions, those findings "need not be reviewed on appeal." *See In re C.J.*, 373 N.C. 260, 262, 837 S.E.2d 859, 860 (2020) (citation omitted).

B. Analysis

Here, substantial evidence, through properly admitted testimony and other evidence in the record, exists to support each of the legally relevant and necessary findings of fact Mother challenges on appeal. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. We need not review those portions of the findings of fact unnecessary to support the trial court's conclusions, such as specific evidence of the kids crying and banging on

the door to leave with Father on spring break. *In re C.J.*, 373 N.C. at 262, 837 S.E.2d at 860. Mother's argument is without merit.

VI. Substantial Change & Custody Determination

[3] Mother asserts the trial court erred by determining a substantial change of circumstances had occurred affecting the welfare of the children. Mother argues the trial court erred by finding her behavior constituted a substantial change because: she has always had "poor interpersonal relationships[,]" her "overall behavior" towards Father has been erratic and unpredictable for years, and she has often "ma[de] disparaging remarks about [Father] while the children were present[.]"

Although Mother concedes those alleged behaviors may have made the trial court "unhappy," she asserts all of the behaviors contained in the modification order "existed at the time of the original trial" in 2019. Mother argues those findings of fact cannot serve as a basis for a "substantial change" of circumstances.

Mother also argues the trial court abused its discretion by placing the children in Father's primary custody. If this Court holds a substantial change occurred to warrant a modification of the 2019 Custody Order, she argues the trial court failed to determine how any purported changes affected the welfare of the children.

A. Standard of Review

Wide discretion is vested in the trial judge when awarding primary custody of a minor child. *Shamel v. Shamel*, 16 N.C. App. 65, 66, 190 S.E.2d 856, 857 (1972). "It is well established that 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). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason[,]" or has misapprehended and committed an error of law. *Id.*

A trial court may not modify a permanent child custody order unless it finds a substantial change in circumstances exists affecting the welfare of the child. *Simmons v. Arriola*, 160 N.C. App. 671, 674, 586 S.E.2d 809, 811 (2003). Whether a substantial change in circumstances exists for the purpose of modifying a child custody order is a legal conclusion. *Spoon v. Spoon*, 233 N.C. App. 38, 43, 755 S.E.2d 66, 70 (2014). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations omitted).

B. Analysis

"A trial court may order the modification of an existing child custody order if the court determines that there has been a substantial change of circumstances affecting the child's welfare and that modification is in the child's best interests." *Spoon*, 233 N.C. App. at 41, 755 S.E.2d at 69 (citing *Shipman*, 357 N.C. at 473, 586 S.E.2d at 253); N.C. Gen. Stat. § 50-13.7 (2021). The reason a substantial change of circumstances is required before a trial court may modify a custody order is to prevent dissatisfied parties from relitigating in another court in hopes of reaching a different conclusion. *Newsome v. Newsome*, 42 N.C. App. 416, 425, 256 S.E.2d 849, 854 (1979).

1. Substantial Change

This Court has previously addressed whether two parents' poor communications with and maltreatment of one another constitutes a substantial change in circumstances, notwithstanding the parents' prior longstanding history of conflicts and poor communication with one another:

> It is beyond obvious that a parent's unwillingness or inability to communicate in a reasonable manner with the other parent regarding their child's needs may adversely affect a child, and the trial court's findings abundantly demonstrate these communication problems *and* the child's resulting anxiety from her father's actions. While father is correct that this case overall demonstrates a woeful refusal or inability of both parties to communicate with one another as reasonable adults on many occasions, we can find no reason to question the trial court's finding that these communication problems are *presently* having a negative impact on Reagan's welfare that constitutes a change of circumstances. In fact, it is foreseeable the communication problems are likely to affect Reagan more and more as she becomes older and is engaged in more activities which require parental cooperation and as she is more aware of the conflict between her parents. Therefore, we conclude that the binding findings of fact support the conclusion that there was a substantial change of circumstances justifying modification of custody. This argument is overruled.

Laprade v. Barry, 253 N.C. App. 296, 303-04, 800 S.E.2d 112, 117 (2017) (citing *Shipman*, 357 N.C. at 473-75, 586 S.E.2d at 253-54). *See also Shell v. Shell*, 261 N.C. App. 30, 36-38, 819 S.E.2d 566, 572-73 (2018) (citing *id.*).

The facts before us are similar to those in *Laprade*. While Mother and Father have always had conflicts and struggled to communicate effectively, those "communication problems are *presently* having a negative impact on [the four children's] welfare that constitutes a change of circumstances." *Laprade*, 253 N.C. App. at 304, 800 S.E.2d at 117 (citation omitted).

It is also "foreseeable" that Mother's and Father's inability to communicate and cooperate as parents of minor children are "likely to affect" Daniel, Michael, Christopher, and Kate "more and more as [the children] become[ ] older and [are] engaged in more activities which require parental cooperation and as [they become] more aware of the conflict between [their] parents." *Id.*

The trial court did not err by determining Mother's and Father's continued communication problems and their failure or inability to cooperate and co-parent constituted a substantial change. *Id.*; *Shell*, 261 N.C. App. at 36-38, 819 S.E.2d at 572-73. Mother's argument is overruled.

2. Custody Determination

If a trial court fails to determine whether a change "positively or negatively" affected the child, the custody matter must be remanded to the trial court to determine whether the changes affected the child and, if so, what custody determination is in the child's best interest. *Johnson v. Adolf*, 149 N.C. App. 876, 878, 561 S.E.2d 588, 589 (2002) (citing *Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900).

Here, the trial court made specific findings of fact regarding how Mother's current and more aggressive behaviors had affected the "physical and emotional stability and well-being" of the children and provided a six-part list with specific examples of findings. The trial court also concluded "[a] substantial change in circumstances affecting the best interests of the minor children ha[d] occurred[.]"

The trial court made the necessary and supported findings of fact to find a substantial change of circumstances had occurred and the conclusions of law to warrant a modification of the 2019 Custody Order. The trial court did not abuse its "best interests" discretion by awarding primary custody of the children to Father. *See id.*; *Shamel*, 16 N.C. App. at 66, 190 S.E.2d at 857; *White*, 312 N.C. at 777, 324 S.E.2d at 833. Mother's argument is overruled.

VII. Conclusion

Mother's failure to raise her constitutional parental rights arguments before the trial court on her motions to continue waived her argument on appeal.

Mother's challenge to the trial court's discretionary denial of her untimely and unsupported motion to continue lacks merit. Her actions to undermine and terminate her counsel's representation supports the court's allowance of her counsel's motion to withdraw. Mother had prior notice of the trial court's allowance of five (5) hours for the parties to equally present their evidence and arguments. She was granted additional time to present her closing arguments within the discretion of the trial court.

The evidence supports and the trial court made the necessary findings of fact of a substantial change of circumstances to warrant a conclusion to modify the 2019 Custody Order in the best interests of the minor children. The order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges HAMPSON and CARPENTER concur.

IN THE MATTER OF D.T.P. & B.M.P.

No. COA23-29

Filed 7 November 2023

Termination of Parental Rights—parental right to counsel—forfeiture—egregious, dilatory, and abusive conduct—causing numerous court-appointed attorneys to withdraw—frivolous lawsuits and appeals

In a termination of parental rights proceeding, the trial court did not err by concluding that both parents had forfeited their statutory right to court-appointed counsel where the trial court found, among other things, that the parents had purposefully attempted to delay their court proceedings by causing numerous court-appointed attorneys to withdraw and filing frivolous lawsuits and appeals. Abundant evidence in the record supported these findings, which in turn supported the trial court's conclusion that the parents' actions amounted to egregious, dilatory, and abusive conduct that totally undermined the purpose of the right to court-appointed counsel by effectively making representation impossible and seeking to prevent a trial from happening.

Appeal by Respondents from orders entered 12 September 2022 by Judge Ward D. Scott in Buncombe County District Court. Heard in the Court of Appeals 3 October 2023.

Matthew J. Putnam, Esq., for Petitioner-Appellee Buncombe County Department of Health and Human Services.

Michael N. Tousey for Appellee Guardian ad Litem.

Edward Eldred for Respondent-Appellant Mother.

Garron T. Michael, Esq., for Respondent-Appellant Father.

COLLINS, Judge.

Respondent-Mother ("Mother") and Respondent-Father ("Father") (collectively "Parents") appeal from orders terminating their parental rights to their children Dee and Bea.[1] Parents argue that the trial court erred by determining that Parents had forfeited their statutory right to court-appointed counsel during termination proceedings. Because the trial court's findings regarding Parents' conduct is supported by the record, and because those findings support the trial court's conclusion that Parents' conduct justified forfeiture of their right to court-appointed counsel, we affirm.

I. Background

This matter commenced on 20 July 2017 when the Buncombe County Department of Health and Human Services ("BCHHS") filed a petition alleging that Dee was a neglected juvenile. Parents requested court appointed counsel, and the trial court-appointed Ile Adaramola ("Adaramola") as Mother's counsel and Diane Walton ("Walton") as Father's counsel. Dee was adjudicated a neglected juvenile on 27 February 2018. Walton withdrew as Father's counsel on 28 August 2018, and the trial court appointed Eric Rainey ("Rainey") as Father's counsel.

Bea was born in July 2018. On 21 August 2018, BCHHS filed a petition alleging that Bea was a neglected juvenile. Parents requested court-appointed counsel for Bea's case, and the trial court appointed Adaramola as Mother's counsel and Rainey as Father's counsel.

1. Pseudonyms are used to protect the identities of the children. *See* N.C. R. App. P. 42(b).

Adaramola and Rainey withdrew in October 2018, and Parents retained Mark Upright ("Upright") as private counsel for both cases at the beginning of November. On 29 November 2018, Upright withdrew without objection, and the trial court appointed Terry Young ("Young") as Mother's counsel and Thomas Diepenbrock ("Diepenbrock") as Father's counsel in both cases.

In September 2019, Young moved to withdraw as Mother's counsel due to the relationship becoming irreparably damaged, and the trial court appointed Laura Hooks ("Hooks") to represent Mother. On 3 December 2019, Diepenbrock moved to withdraw as Father's counsel "[b]ased on irreconcilable differences and completely differing views about how [Father's] interests should be represented in these matters[.]" A week later, Hooks moved to withdraw as Mother's counsel because "grounds exist[ed] pursuant to Rule 1.16 of the North Carolina Rules of Professional Conduct." The trial court allowed both attorneys to withdraw and appointed Heidi Stewart ("Stewart") as Mother's counsel and Carol Goins ("Goins") as Father's counsel.

On 8 June 2020, Bea was adjudicated neglected. Parents appealed Bea's adjudication to this Court, which was affirmed by opinion filed on 6 April 2021. *See In re B.M.P.*, No. COA20-794, 2021 WL 1258763 (N.C. Ct. App. Apr. 6, 2021). While Bea's case was on appeal with this Court, BCHHS filed a petition to terminate Parents' parental rights to Dee, which it later dismissed without prejudice. On 7 October 2021, BCHHS filed petitions to terminate Parents' parental rights to both Dee and Bea. Mother, through Stewart, moved to dismiss the termination petition in Bea's case on 30 November 2021. After considering Mother's motion, the trial court issued a memo to counsel for each party stating:

> After review of the applicable law and making such inquiry as the Court deemed appropriate, it is the determination of the Court that the pending motions to dismiss in [this matter] should be dismissed.
>
> [Counsel for BCHHS], please draft a proposed Order for my consideration at your earliest convenience.

Although still represented by Stewart, Mother filed a pro se notice of appeal to this Court from the memo.

On 20 January 2022, Parents, acting pro se, filed a civil action against their own counsel, Stewart and Goins, and several other individuals. On 28 January 2022, the trial court allowed Goins to withdraw as Father's counsel. On 8 February 2022, the trial court allowed Stewart to withdraw as Mother's counsel.

On 8 February 2022, the trial court held a hearing to determine the status of counsel, which Parents appeared pro se. During the hearing, Parents testified that they were aware that filing a lawsuit against Stewart and Goins would result in their withdrawal from representation, and that withdrawal and reappointment of counsel would lead to a continuance in the case. Father also acknowledged that he appealed to the United States Supreme Court, stating, "That was discretionary. I didn't really try to get it[2] into the United States [Supreme Court] because I knew it was just a neglect case. It wasn't an appeal for a [termination of parental rights] yet."

On 10 February 2022, the trial court issued a memo to Parents, counsel for BCHHS, and counsel for the guardian ad litem, stating:

> After review of the Court Files, the credible evidence presented and the applicable law, it is the determination of the Court that the [Parents], by their intentional acts, have forfeited the right to Court appointed counsel.

Termination of parental rights proceedings were held over eight days between March and May 2022, during which parents appeared pro se. On 12 September 2022, the trial court issued orders terminating Parents' rights to Dee and Bea ("Termination Orders"), as well as an order formalizing the trial court's determination that Parents had forfeited their right to court-appointed counsel ("Forfeiture Order"). In the Forfeiture Order, the trial court found:

> 13. The respondent father has had five different court appointed attorneys since the Court became involved with his family. The respondent mother has had six different court appointed attorneys since the Court became involved with her family.
>
> 14. Both respondent parents have exhibited a calculated plan to delay the court proceedings as much as possible. They have filed invalid appeals with the Courts of Appeal of North Carolina. At one point the respondent parents filed an appeal attempting to appeal a memorandum of law issued by the court which had not been reduced to a court order. The respondent parents also filed invalid appeals with the Supreme Court of the United States. While all these attempted appeals were dismissed by the respective

2. The record does not disclose what was appealed to the United States Supreme Court.

> courts, the parents used these tactics as ways to delay the court from moving forward with the Termination of Parental Rights case.
>
> 15. The respondent parents also learned that having an appointed attorney withdraw and a new attorney appointed resulted in the hearing being continued by the court to allow the new attorney time to prepare for the hearing.
>
> 16. The respondent parents have taken advantage of this practice of the court in order to delay the [termination of parental rights] hearing by repeatedly waiting to at or near the time of a hearing to request their counsel to withdraw.
>
> 17. The respondent parents filed a lawsuit in Buncombe County Superior Court for the purpose to make their latest court appointed attorneys withdraw and to delay the trial court in reaching the hearing on the termination of parental rights petition. . . . While this lawsuit was also dismissed with prejudice it shows the lengths the respondent parents were willing to use to frustrate, disrupt, and delay the court process.
>
> 18. The respondent parents have forfeited their right to counsel by engaging in actions which totally undermine the purposes of that right to counsel by making representation impossible and seeking to prevent a trial from happening. This conduct has been egregious, dilatory, and abusive conduct on the part of respondent parents and has disrupted the court from proceeding to trial on the termination case in a timely manner.

From its findings, the trial court concluded that "respondent parents have each separately and together forfeited their right to court appointed counsel by their deliberate acts[,]" and ordered that "respondent parents shall not have new court appointed attorneys appointed in the matters pending before this Court." Parents appealed.

II. Discussion

A. Standard of Review

A trial court's conclusion that a parent waived or forfeited his or her statutory right to counsel in a termination of parental rights proceeding is a question of law and is thus reviewed de novo. *In re K.M.W.*, 376 N.C.

195, 209-10, 851 S.E.2d 849, 860 (2020) (citation omitted). Additionally, when the trial court makes findings of fact, those findings are binding on appeal if they are supported by competent evidence in the record. *See State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation omitted); *see also State v. Simpkins*, 373 N.C. 530, 533 n.3, 838 S.E.2d 439, 444 n.3 (2020) (noting that a trial court's findings of fact regarding whether a defendant forfeited their right to counsel would be entitled to deference (citation omitted)). This is true even if the record could support an alternative finding. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975) (citation omitted); *see also State v. Williams*, 362 N.C. at 632, 669 S.E.2d at 294 ("Even if evidence is conflicting, the trial judge is in the best position to resolve the conflict." (quotation marks and citation omitted)). In such circumstances, this Court determines whether the trial court's findings of fact support its conclusions of law. *State v. Williams*, 362 N.C. at 632, 669 S.E.2d at 294 (citation omitted).

Here, the trial court made findings of fact. Accordingly, we review to determine whether the trial court's findings are supported by competent evidence, and, if so, whether those findings support its conclusion that "respondent parents each separately and together forfeited their right to court appointed counsel by their deliberate acts."

B. Right to Counsel

Parents argue that the trial court erred by concluding that Parents had forfeited their statutory right to court-appointed counsel.

"[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Owenby v. Young*, 357 N.C. 142, 144, 579 S.E.2d 264, 266 (quotation marks and citation omitted). Thus, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures, which meet the rigors of the due process clause." *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397 (1992) (quotation marks and citation omitted). To protect a parent's due process rights in a termination of parental rights proceeding, the General Assembly has created a statutory right to counsel for parents involved in those proceedings. *See* N.C. Gen. Stat. § 7B-1101.1 (2022).

Section 7B-1101.1 provides that, in a termination of parental rights proceeding, "[t]he parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right." *Id.* § 7B-1101.1(a). The statute further provides that "[a] parent qualifying

for appointed counsel may be permitted to proceed without the assistance of counsel only after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary." *Id.* § 7B-1101.1(a1).

The right to court-appointed counsel is not absolute; a party may forfeit the right "by engaging in 'actions [which] totally undermine the purposes of the right itself by making representation impossible and seeking to prevent a trial from happening at all.' " *In re K.M.W.*, 376 N.C. at 209, 851 S.E.2d at 860 (quoting *Simpkins*, 373 N.C. at 536, 838 S.E.2d at 446). A conclusion that a parent has forfeited the right to counsel is restricted to situations involving "egregious dilatory or abusive conduct on the part of the [parent]." *Id.* (quoting *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449).

In *K.M.W.*, our Supreme Court considered whether a parent's behavior was sufficiently egregious to warrant forfeiture of her right to court-appointed counsel. In that case, two children were removed from their mother's care and adjudicated as neglected juveniles. *Id.* at 196-97, 851 S.E.2d at 852. The mother participated in several hearings on the matter alongside court-appointed counsel before indicating that she wished to waive her right to a court-appointed attorney to hire private counsel. *Id.* at 197-200, 851 S.E.2d at 852-54.

Four months later, the mother's private counsel filed a motion seeking leave to withdraw his representation, which was served on the department of social services, but not on the mother. *Id.* at 201, 851 S.E.2d at 854. At the hearing on his motion to withdraw, counsel informed the court that he had attempted to secure the mother's presence in court but had been unable to do so, and that he had been requested to withdraw by the mother. *Id.* The trial court allowed counsel to withdraw without further inquiry. *Id.*

The mother arrived late for the subsequent termination of parental rights hearing, which the trial court conducted without inquiring whether the mother was represented by counsel, whether she wished to have counsel appointed, or whether she wished to represent herself. *Id.* at 201, 851 S.E.2d at 855. Upon hearing the trial court's determination that grounds existed to terminate her parental rights, the mother left the courtroom without any explanation for approximately fifteen minutes before returning and apologizing to the court. *Id.* at 201-02, 851 S.E.2d at 855.

Our Supreme Court held that the trial court erred by allowing the mother to proceed pro se without making any inquiry regarding her

waiver of counsel. *Id.* at 211, 851 S.E.2d at 861. The Court also rejected the guardian ad litem's alternative argument that the mother, through her conduct, had forfeited her right to counsel, holding that "nothing in respondent-mother's conduct had the repeatedly disruptive effect necessary to constitute the 'egregious' conduct that is required to support a determination that respondent-mother had forfeited her statutory right to counsel." *Id.* at 212-13, 851 S.E.2d at 862 (citation omitted).

Here, the trial judge, who has presided over the case at the trial court since its inception in 2017, found that:

> 13. The respondent father has had five different court appointed attorneys since the Court became involved with his family. The respondent mother has had six different court appointed attorneys since the Court became involved with her family.
>
> 14. Both respondent parents have exhibited a calculated plan to delay the court proceedings as much as possible. They have filed invalid appeals with the Courts of Appeal of North Carolina. At one point the respondent parents filed an appeal attempting to appeal a memorandum of law issued by the court which had not been reduced to a court order. The respondent parents also filed invalid appeals with the Supreme Court of the United States. While all these attempted appeals were dismissed by the respective courts, the parents used these tactics as ways to delay the court from moving forward with the Termination of Parental Rights case.
>
> 15. The respondent parents also learned that having an appointed attorney withdraw and a new attorney appointed resulted in the hearing being continued by the court to allow the new attorney time to prepare for the hearing.
>
> 16. The respondent parents have taken advantage of this practice of the court in order to delay the [termination of parental rights] hearing by repeatedly waiting to at or near the time of a hearing to request their counsel to withdraw.
>
> 17. The respondent parents filed a lawsuit in Buncombe County Superior Court for the purpose to make their latest court appointed attorneys withdraw and to delay the trial court in reaching the hearing on the termination of parental rights petition. . . . While this lawsuit was also

> dismissed with prejudice it shows the lengths the respondent parents were willing to use to frustrate, disrupt, and delay the court process.
>
> 18. The respondent parents have forfeited their right to counsel by engaging in actions which totally undermine the purposes of that right to counsel by making representation impossible and seeking to prevent a trial from happening. This conduct has been egregious, dilatory, and abusive conduct on the part of respondent parents and has disrupted the court from proceeding to trial on the termination case in a timely manner.

The trial court's findings are supported by abundant evidence in the record, including Mother's invalid notice of appeal from a memorandum; Father's appeal to the United States Supreme Court, which he acknowledged he did not expect the Court to accept; numerous motions and orders allowing for withdrawal and appointment of counsel; Parents' testimony that they understood withdrawal and appointment of counsel would lead to a continuance; and Parents' pro se lawsuit against Stewart and Goins, which Parents acknowledged was intended, at least in part, to force Stewart and Goins to withdraw. Additionally, these findings are sufficient to support the conclusion that Parents' actions amounted to egregious, dilatory, and abusive conduct, which totally undermined the purpose of the right to court-appointed counsel by effectively making representation impossible and seeking to prevent a trial from happening. Accordingly, the trial court did not err by concluding that "respondent parents have each separately and together forfeited their right to court appointed counsel by their deliberate acts."

III. Conclusion

For the foregoing reasons, the trial court's orders concluding that Parents had forfeited their right to court-appointed counsel and terminating their parental rights are affirmed.

AFFIRMED.

Judges GRIFFIN and THOMPSON concur.

IN THE MATTER OF N.J.R.C.

No. COA23-221

Filed 7 November 2023

Termination of Parental Rights—grounds for termination—sexually related offense resulting in conception of juvenile—indecent liberties with a child

The trial court did not err in determining that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(11) ("the parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the juvenile") to terminate respondent-father's parental rights to his son where the father had been convicted of taking indecent liberties with a child pursuant to N.C.G.S. § 14-202.1—which is a sexually related offense—for the sexual relations with the mother—who was fifteen years old at the time—which resulted in the conception of the child.

Appeal by Respondent-Father from order entered 1 December 2022 by Judge William Helms, III, in Union County District Court. Heard in the Court of Appeals 3 October 2023.

Jeffrey William Gillette for Respondent-Appellant Father.

No brief filed for Petitioner-Appellee Mother.

GRIFFIN, Judge.

Father appeals from the trial court's order terminating his parental rights to Nathan.[1] Father contends the trial court erred in determining grounds existed to terminate his parental rights under N.C. Gen. Stat. § 7B-1111(a)(4), (5), and (11). Specifically, Father argues there was insufficient evidence to support a termination under section 7B-1111(a)(4) and (5), and that neither ground was pled in the petition, thus leaving him without reasonable notice of what would be contested. Further, Father argues there was insufficient evidence to support a termination under section 7B-1111(a)(11) because he was not convicted of a sexually related offense. We hold the trial court did not commit error.

1. We use a pseudonym for ease of reading and to protect the identity of the juvenile. *See* N.C. R. App. P. 42(b).

I. Factual and Procedural Background

In or around January 2019, Father and Mother were twenty-one and fifteen years old, respectively. The couple engaged in sexual relations through which they conceived a child, Nathan, who was born 17 October 2020. As a result of his relations with Mother, Father was convicted, on 16 October 2020, of taking indecent liberties with a child. On 28 June 2022, Mother filed a petition alleging there existed facts sufficient to warrant a determination that Father's parental rights should be terminated, including:

> a. [Father] has not provided any financial support or care to the minor child and has neglected the minor child.
>
> b. [Father] has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the minor child.

The petition came on for hearing in Union County District Court on 17 November 2022. On 1 December 2022, the trial court entered an order terminating Father's parental rights after finding clear, cogent, and convincing evidence to support grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(4), (a)(5), and (a)(11) and that termination would be in Nathan's best interest. On 3 January 2023, Father timely filed a notice of appeal.

II. Standard of Review

Termination of parental rights proceedings are conducted in two phases—an adjudicatory phase and a dispositional phase. *In re I.E.M.*, 379 N.C. 221, 223, 864 S.E.2d 346, 348 (2021). "At the adjudicatory phase, the trial court determines whether any of the statutory grounds for terminating a parent's parental rights delineated in N.C.G.S. § 7B-1111 exist, . . . with the petitioner being required to prove the existence of any applicable ground for termination by clear, cogent, and convincing evidence." *Id.* (citation omitted). Where the trial court determines there exists grounds for termination, the case will move to the dispositional phase where "the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a) (2021). Upon the conclusion of these proceedings, the trial court shall enter an order as to the termination of parental rights. *See id.*

Where such an order is on appeal before this Court with the respondent specifically challenging the court's adjudication decision, we must review the decision to determine "whether the findings of fact are supported by clear, cogent and convincing evidence and whether

[the] findings, in turn, support the conclusions of law." *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 5 (2004) (citations and quotation marks omitted). Further, we review the trial court's conclusions of law de novo. *In re A.S.T.*, 375 N.C. 547, 556, 850 S.E.2d 276, 282 (2020) (citations omitted).

III. Analysis

Father contends the trial court erred in concluding grounds existed to terminate his parental rights under N.C. Gen. Stat. § 7B-1111(a)(4), (5) and (11).[2] Father argues the trial court erred in its conclusion as the crime for which he was convicted, taking indecent liberties with children under N.C. Gen. Stat. § 14-202.1, is not a sexually related offense because it does not require a sexual act. We disagree.

Under our North Carolina General Statutes, section 7B-1111(a)(11), the trial court may terminate a parent's rights upon finding "[t]he parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(11) (2021). Chapter 14, section 202.1, defines the crime of taking indecent liberties with children stating, in relevant part:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> > (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
> >
> > (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1(a)(1), (a)(2) (2021). We recognize this statute, by its plain language, criminalizes certain actions which are not explicitly required to be sexual acts. Moreover, we note this Court has previously stated "[a] lewd or lascivious act constituting an indecent liberty

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2. We recognize "an adjudication of any single ground for terminating a parent's rights under [section 7B-1111(a)] will suffice to support a termination order." *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (citations omitted). Therefore, where we hold the trial court did not err in terminating Father's parental rights under section 7B-1111(a)(11), we need not address Father's contentions regarding § 7B-1111(a)(4) or (a)(5).

need not include [a] sexual act[.]" *State v. Manley*, 95 N.C. App. 213, 216, 381 S.E.2d 900, 902 (1989) (citation and internal marks omitted).

Nevertheless, Father's argument is misplaced. Section 7B-1111(a)(11) does not require a respondent to be convicted of a sexual act or offense, but only of a "sexually *related* offense." *See* N.C. Gen. Stat. § 7B-1111(a)(11) (emphasis added). While neither our Juvenile Code nor our General Statutes specifically state what constitutes a "sexually related offense" as referenced in section 7B-1111(a)(11), Black's Law Dictionary defines "Related" as "[c]onnected in some way; having relationship to or with something else." *Related*, *Black's Law Dictionary* (11th ed. 2019). It is clear section 7B-1111(a)(11) was intentionally drafted in a manner broad enough to encompass not only acts and offenses which may explicitly involve sex, but also offenses associated with sex or that have some sexual component.

A conviction of indecent liberties with children pursuant to N.C. Gen. Stat. § 14-202.1 certainly constitutes a conviction of a "sexually related offense" under section 7B-1111(a)(11) as the crime unequivocally contains a sexual component. Most notably, section 14-202.1(a)(1) requires an act or attempted act to be taken "for the purpose of arousing or gratifying *sexual* desire." N.C. Gen. Stat. § 14-202.1(a)(1) (emphasis added). Similarly, a "lewd or lascivious act," as referenced in section 14-202.1(a)(2), is defined as an act which is "obscene or indecent; tending to moral impurity or wantonness." *Lewd*, *Black's Law Dictionary* (11th ed. 2019). Although section 14-202.1(a)(2) does not explicitly contain language of a sexual nature, our Courts have repeatedly recognized, without distinguishing between the alternative subparts of section 14-202.1, "[t]he offense of taking indecent liberties with children requires proof that the crime be willful and that it be for the purpose of arousing or gratifying sexual desire." *State v. Williams*, 303 N.C. 507, 514, 279 S.E.2d 592, 596 (1981) (internal marks omitted); *see also State v. Elam*, 302 N.C. 157, 162, 273 S.E.2d 661, 663 (1981) ("[N.C. Gen. Stat. § 14-202.1] clearly prohibits sexual conduct with a minor child."); *State v. Wilson*, 87 N.C. App. 399, 402, 361 S.E.2d 105, 108 (1987); *State v. Moir*, 369 N.C. 370, 386, 794 S.E.2d 685, 696 (2016). Additionally, our General Statutes indicate indecent liberties with children, per N.C. Gen. Stat. § 14-202.1, is a sexually related offense. Specifically, N.C. Gen. Stat. § 14-208.6(5), defines "Sexually violent offense[s]" to include, among other offenses, taking indecent liberties with children, specifically citing N.C. Gen. Stat. § 14-202.1. *See* N.C. Gen. Stat. § 14-208.6(5) (2021).

Here, Father concedes he and Mother engaged in sexual relations around January 2019 while he was twenty-one and she was fifteen years

old; that those relations resulted in the birth of their child Nathan; and that he was convicted of taking indecent liberties with a child. Further, the "Related" language provided in the statute, together with our Courts' precedent, indicates the offense of taking indecent liberties with children under N.C. Gen. Stat. § 14-202.1 constitutes a sexually related offense within the meaning of N.C. Gen. Stat. § 7B-1111(a)(11).

Because Father was convicted of taking indecent liberties with children under N.C. Gen. Stat. § 14-202.1—a sexually related offense—and because the relations which resulted in the conception of Nathan also led to Father's conviction under Chapter 14, the trial court did not err in finding grounds for termination of Father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(11).

IV. Conclusion

For the aforementioned reasons, we hold the trial court did not err in terminating Father's parental rights.

AFFIRMED.

Judges COLLINS and THOMPSON concur.

TRACI C. KIRKMAN, AS ADMINISTRATOR OF THE ESTATE OF CHAD WAYNE KIRKMAN, DECEASED, Plaintiff
v.
ROWAN REGIONAL MEDICAL CENTER, INC., D/B/A NOVANT HEALTH ROWAN MEDICAL CENTER; AND MINDY P. FRANCE, LPC., Defendants

No. COA23-282

Filed 7 November 2023

1. Immunity—qualified—hospital and licensed professional counselor—medical malpractice case—no allegation of gross negligence

In a medical malpractice case filed by plaintiff, the wife of a nursing student who committed suicide days after being treated at defendant hospital's emergency room and undergoing a psychiatric evaluation performed by defendant professional counselor, the trial court properly granted defendants' motion for summary judgment based on immunity under N.C.G.S. § 122C-210.1 (providing qualified immunity to health care providers from liability for actions arising

out of their care for individuals with mental health issues, substance abuse issues, or developmental disabilities). Plaintiff's argument that the statute only provides immunity for claims other than medical malpractice claims was meritless, as it was based on inapposite case law. Furthermore, plaintiff failed to include in her complaint an allegation of gross negligence, which was required in order to overcome defendants' statutory immunity.

2. Pleadings—complaint—medical malpractice—motion for leave to amend—to add allegation of gross negligence—undue delay—prejudice

In a medical malpractice case filed by plaintiff, the wife of a nursing student who committed suicide days after being treated at defendant hospital's emergency room and undergoing a psychiatric evaluation performed by defendant professional counselor, the trial court properly denied plaintiff's motion for leave to amend her complaint to add an allegation of gross negligence, which was intended to overcome defendants' assertion of immunity under N.C.G.S. § 122C-210.1 (providing qualified immunity for health care providers from liability for actions arising out of their care for individuals with mental health issues, substance abuse issues, or developmental disabilities). Plaintiff did not seek to amend her complaint until four and a half years after defendants first raised their statutory immunity defense and only three weeks before trial. Further, this undue delay prejudiced defendants given that discovery in the matter had concluded at the time plaintiff filed her motion to amend.

Appeal by plaintiff from orders entered 7 November 2022 by Judge Eric C. Morgan in Rowan County Superior Court. Heard in the Court of Appeals 3 October 2023.

The Law Offices of Wade Byrd, P.A., by Wade E. Byrd, for plaintiff-appellant.

Batten Lee PLLC, by Jaye E. Bingham-Hinch and Leigh Ann Smith, for defendant-appellees.

THOMPSON, Judge.

Plaintiff, as administrator of her deceased husband's estate, appeals from orders entered by the superior court on 7 November 2022 granting defendants' motion for summary judgment and denying plaintiff's

motion to amend her complaint. Plaintiff contends the trial court erred in (1) granting defendants' motion for summary judgment based on immunity under N.C. Gen. Stat. § 122C-210.1, (2) denying plaintiff's motion for leave to amend the complaint, and (3) granting defendants' motion for summary judgment based on proximate causation. After careful consideration, we affirm the trial court.

I. Factual Background and Procedural History

In 2016, decedent Chad Wayne Kirkman was a nursing student at Rowan-Cabarrus Community College. On 13 February 2016, Kirkman and other nursing students were at Rowan Regional Medical Center (RRMC) for clinical instruction when in an unprovoked outburst, Kirkman accused his nursing instructor, Melissa Zimmerman, of being the devil. Kirkman stated, "I have been hunting this mother f****r for years," and, after pulling off a cross he had been wearing around his neck, Kirkman held the cross in Zimmerman's face and touched her arm with it, indicating he wanted her to hold the necklace. Zimmerman further reported that Kirkman began "speaking some sort of unintelligible language[,] his eyes were dilated," and he prevented her from leaving the room. Zimmerman feared for her safety and the safety of others, and immediately filed an Affidavit and Petition for Involuntary Commitment regarding Kirkman. At 9:11 a.m. on the morning of 13 February 2016, a Rowan County magistrate issued a custody order for the involuntary commitment of Kirkman on the basis that Kirkman was likely "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."

On the same morning, plaintiff and Kirkman went to defendant hospital's emergency room, where Kirkman was admitted to the emergency department. Kirkman was examined by Dr. Maria Saffell, an emergency medicine physician who was an independent contractor and not an employee of defendant hospital or Novant Health. Saffell reviewed the involuntary commitment paperwork; performed a physical examination of Kirkman; ordered lab work, medications—including Ativan, a medicine used to treat anxiety—and IV fluids; and medically cleared Kirkman for a psychiatric evaluation.

The mental health assessments at RRMC occurred as telehealth assessments from Forsyth Medical Center Behavioral Health Outpatient Center (Forsyth Medical Center). Mindy France, a licensed professional counselor, performed Kirkman's telemedicine behavioral health assessment. France's examination of Kirkman included, *inter alia*, questions

regarding his sleep, appetite, and moods; his potential risk to self and others; if he had any history of substance abuse; as well as his thought content, mental status, and legal issues. Kirkman reported no history of self-harm or suicide and no thoughts of hurting others but did admit to stress and lack of sleep as a result of his upcoming final exams. In response to France's inquiries regarding anxiety, hopelessness, hallucinations, or being socially withdrawn, Kirkman further denied experiencing any such emotions. Plaintiff was in the room with her husband throughout France's assessment and agreed with Kirkman's answers to the questions posed by France. However, when France inquired whether Kirkman had any firearms in the home, he answered in the negative, although he and plaintiff—who did not amend or correct her husband's denial of owning any guns—were both aware that Kirkman had access to a number of hunting rifles, shotguns, and handguns in their home.

Upon her evaluation of Kirkman, France determined, based on the information available to her at the time, that "there was no indication that he was a current threat to anybody or himself[,]" concluded that Kirkman was suffering from anxiety, and reported these opinions to Saffell. Kirkman had remained calm and compliant throughout his examinations by Saffell and by France, and during the majority of the period in which he was a patient in the emergency department of RRMC. Based on her own observations of Kirkman, her review of the results of his medical examination, and France's telemedicine behavioral health assessment, Saffell diagnosed Kirkman with behavioral outburst and determined that he was not mentally ill or mentally retarded and that he was not a danger to himself or to others. At 3:40 a.m. on 14 February 2016, Kirkman was discharged from RRMC by Saffell. He was immediately taken into custody by the Rowan County Sheriff's Office and at 4:20 a.m., Kirkman was released on bond.

On 15 February 2016, Kirkman appeared in court in connection with the incident involving Zimmerman. He waived his right to the assistance of appointed counsel and after his first appearance, he and plaintiff met with an attorney. Later in the day on 15 February 2016, after refusing to be voluntarily admitted to a behavioral health facility, Kirkman assaulted plaintiff, breaking her nose and hand and causing her to require stitches in her mouth. Plaintiff gave a statement to law enforcement officers at the hospital, and upon her release, plaintiff and her son moved out of the family home.

On 16 February 2016, plaintiff executed involuntary commitment papers against Kirkman which were subsequently denied by the court. Later that day, Kirkman died from a self-inflicted gunshot wound.

On 15 February 2018, plaintiff filed a complaint against RRMC, Saffell, France, and other entities, alleging that during Kirkman's 13–14 February 2016 admission to defendant hospital's emergency department, "each [d]efendant . . . was negligent and deviated from the applicable standard of care . . . and thereby caused, directly, proximately, and in fact, the injury(ies), condition(s) of ill-being to Chad Wayne Kirkman[, and] the death of Chad Wayne Kirkman . . . ." Plaintiff subsequently voluntarily dismissed all defendants aside from RRMC and France, each of whom moved for summary judgment on 26 August 2022.

On 7 November 2022, the trial court entered an order granting summary judgment to defendants on the grounds that defendants were entitled to qualified immunity in accordance with N.C. Gen. Stat. § 122C-210.1 and, alternatively, that plaintiff had presented no forecast of evidence in support of the existence of the essential element of proximate cause. The trial court entered an additional order on 7 November 2022 denying plaintiff's motion to amend her complaint to add claims of gross negligence. Plaintiff timely appealed from the orders of the trial court.

II. Analysis

Plaintiff argues that the trial court erred in entering summary judgment for defendants pursuant to the immunity provided under N.C. Gen. Stat. § 122C-210.1 and abused its discretion in denying plaintiff's motion for leave to amend the complaint to add an allegation of gross negligence. We reject both contentions.

A. Summary judgment

[1] Plaintiff presents a number of inter-related and overlapping contentions in support of her argument that the grant of summary judgment in favor of defendants was improper: that N.C. Gen. Stat. § 122C-210.1 does not apply to medical malpractice actions; that even if the statute did apply to such actions, France "violated accepted professional standards, thereby precluding immunity under the statute"; that a showing of gross negligence is not required to place a defendant outside the immunity from liability provided under the statute; and that, in any event, plaintiff established gross negligence by France and was not required to allege gross negligence "before [d]efendants raised their affirmative defense under the statute."

> 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. R. Civ. P. 56(c). The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. *Singleton v. Stewart,* 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). Moreover, "all 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) (internal quotation marks omitted). The standard of review for summary judgment is de novo. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006).

Forbis v. Neal, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007). A defendant may show entitlement to summary judgment in its favor "by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense." *Wilkins v. Safran*, 185 N.C. App. 668, 671, 649 S.E.2d 658, 661 (2007) (quoting *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (internal quotation marks omitted), *aff'd*, 358 N.C. 131, 591 S.E.2d 521 (2004)).

At the time plaintiff filed her complaint, the portion of Chapter 122C, the "Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985" titled "Immunity from liability" provided:

> *No facility or any of its officials, staff, or employees, or any physician or other individual who is responsible for the custody, examination, management, supervision, treatment, or release of a client and who follows accepted professional judgment, practice, and standards is civilly liable, personally or otherwise, for actions arising from these responsibilities or for actions of the client.* This immunity is in addition to any other legal immunity from liability to which these facilities or individuals may be entitled and applies to actions performed in connection with, or arising out of, the admission or commitment of any individual pursuant to this Article.

N.C. Gen. Stat. § 122C-210.1 (2017)[1] (emphases added).

1. The statute was amended effective 1 October 2019.

Before this Court, plaintiff relies primarily on this Court's decision in *Alt v. Parker*, 112 N.C. App. 307, 435 S.E.2d 773 (1993), *cert. denied*, 335 N.C. 766, 442 S.E.2d 507 (1994), to support her summary judgment arguments. According to plaintiff, *Alt* stands for the proposition "that a defendant is entitled to immunity under N.C.G.S. § 122C-210.1 if the challenged act or omission was a professionally acceptable choice." Plaintiff argues that this language from *Alt* stands for the proposition that the version of N.C. Gen. Stat. § 122C-210.1 applicable in this case only provided immunity from liability to covered health care providers whose acts or omissions conformed to the relevant standard of practice as discussed under the general medical malpractice statute, N.C. Gen. Stat. § 90-21.12(a).[2] In other words, plaintiff appears to assert that N.C. Gen. Stat. § 122C-210.1 only provides immunity for claims other than medical malpractice or where a claim for medical malpractice would already fail based upon a plaintiff's failure to establish negligence under the standard of care set forth in N.C. Gen. Stat. § 90-21.12(a).

Our review of the decision in *Alt* indicates that the case sheds no light on the statute's applicability in medical malpractice cases, rendering it inapposite to the matter at bar. In *Alt*, the plaintiff's appellate arguments were "that the trial court erroneously entered summary judgment on . . . three . . . claims, malicious prosecution, false imprisonment, and deprivation of due process," but the plaintiff had not asserted any claim for medical malpractice. *Alt*, 112 N.C. App. at 310, 435 S.E.2d at 774. Plaintiff's citation to *Alt* comes from the portion of that decision resolving the plaintiff's argument that the trial court had wrongly granted summary judgment in favor of the defendant psychiatrist on the plaintiff's false imprisonment claim. *Id.* at 313, 435 S.E.2d at 776. The Court first held that because "[t]he essence of the tort of false imprisonment is illegal restraint of a person against his will," the plaintiff in *Alt* could not prevail given that he was lawfully restrained, citing *Youngberg v. Romeo*, 457 U.S. 307 (1982) for the proposition that "[a] client in a state institution is not entitled to absolute freedom from restraint; rather, the

2. This subsection provides that in medical malpractice actions, health care providers are not liable for damages unless the plaintiff persuades the fact finder that the defendant provider's care "was not in accordance with the standards of practice among members of the same health care profession . . . ." N.C. Gen. Stat. § 90-21.12(a) (2021). This standard is understood to require a plaintiff to establish ordinary negligence to prevail in a medical malpractice case. *See, e.g.*, *Beaver v. Hancock*, 72 N.C. App. 306, 311, 324 S.E.2d 294, 298 (1985) ("In a medical malpractice case, the plaintiff must prove that defendant was negligent in his care of plaintiff and that such negligence was the proximate cause of plaintiff's injuries and damage. . . . The defendant physician's negligence must be established by showing the standard of care owed to plaintiff and that defendant violated that standard of care.") (citation and internal quotation marks omitted).

client's freedom from restraint must be balanced against the safety of other clients and the client himself." *Id.* at 313, 435 S.E.2d at 776–77 (additional citation omitted).

Then the Court quoted N.C. Gen. Stat. § 122C-210.1 and discussed *Youngberg*'s holding as to what Fourteenth Amendment liberty interests a client in a state hospital retained, before noting:

> Since we are today concerned with the provisions of the North Carolina Constitution, the U.S. Supreme Court's opinion has no direct precedential weight. Nonetheless, we believe that its reasoning is sound and coincides with our reading of N.C.G.S. § 122C-210.1, and we adopt the standard enunciated in *Youngberg*. *Thus, in this case, so long as the requisite procedures were followed and the decision to restrain the plaintiff was an exercise of professional judgment, the defendants are not liable to the plaintiff for their actions.* Plaintiff alleges both that [the defendant] failed to follow the established procedures and that he did not exercise his professional judgment in deciding to restrain plaintiff.

Id. at 313–14, 435 S.E.2d at 777 (emphasis added). Because here, unlike in *Alt*, plaintiff's claims sound in tort and do not implicate any constitutional issue, whether state or federal, we find the above-quoted language from *Alt* inapplicable to plaintiff's case.

Instead, we look to the precedent established by other decisions issued by this Court which do address the impact of N.C. Gen. Stat. § 122C-210.1 in the context of medical malpractice or negligence. For example, this Court has held, in applying the pertinent version of the statute in a medical malpractice case, that "[q]ualified immunity, if applicable, is sufficient to grant a defendant's motion for summary judgment," and moreover, in the specific context of N.C. Gen. Stat. § 122C-210.1, that "*gross negligence must be alleged to overcome the statutory immunity once it attaches.*" *Boryla-Lett v. Psychiatric Sols. of N.C., Inc.*, 200 N.C. App. 529, 533, 685 S.E.2d 14, 18 (2009) (emphasis added). That decision, in turn relies in great part on *Snyder v. Learning Servs. Corp.*, a negligence case in which this Court held that

> [u]nder North Carolina law, "[c]laims based on ordinary negligence do not overcome . . . statutory immunity" pursuant to Section 122C-210.1; a plaintiff must allege gross or intentional negligence. *Cantrell v. United States*, 735 F. Supp. 670, 673 (E.D.N.C. 1988); *see also Pangburn v. Saad*, 73 N.C. App. 336, 347, 326 S.E.2d 365, 372 (1985)

> ("We therefore conclude that G.S. Sec. 122-24 [the precursor to N.C. Gen. Stat. § 122C-210.1] was intended to create a qualified immunity for those state employees it protects, extending only to their ordinary negligent acts. It does not, however, protect a tortfeasor from personal liability for gross negligence and intentional torts.").

187 N.C. App. 480, 484, 653 S.E.2d 548, 551 (2007). We conclude that the precedent established by *Boryla-Lett* and *Snyder*—each of which addresses a negligence claim and the latter of which involves medical malpractice particularly—constitute controlling authority by which we are bound in deciding this appeal. Those decisions make plain that a plaintiff in a malpractice case must allege *gross* negligence by a covered defendant in order to overcome the immunity from liability established by the legislature in N.C. Gen. Stat. § 122C-210.1. Plaintiff here failed to include such an allegation in her complaint. Accordingly, we hold that the trial court did not err in granting summary judgment in favor of defendants here.[3]

B. Motion for leave to amend

[2] Plaintiff next argues that the trial court abused its discretion in denying her motion for leave to amend her complaint to add an allegation of gross negligence. We disagree.

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3. While the absence from plaintiff's complaint of an allegation of gross negligence as required by the statutory immunity provision just discussed fully supports the trial court's summary judgment ruling here, we observe that, even under ordinary negligence precedent, defendants would have been entitled to summary judgment on plaintiff's claims in light of the forecast of evidence regarding proximate cause. *See, e.g.*, *Hawkins v. Emergency Med. Physicians of Craven Cnty., PLLC*, 240 N.C. App. 337, 346, 770 S.E.2d 159, 165 (2015) ("Proximate causation is a cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all of the facts then existing.") (internal quotation marks and citation omitted). Each of plaintiff's four expert witnesses testified that a physician, here Saffell, rather than an LPC, here France, makes the decision regarding whether the patient should be involuntarily committed or discharged. Indeed, the Licensed Professional Counselors Act does not permit an LPC to admit, discharge, or involuntarily commit a patient. N.C. Gen. Stat. § 90-330(3) (2021). Saffell herself agreed that the decision to discharge Kirkman was hers and not France's, a fact further demonstrated by the discharge paperwork. Moreover, given the professional care exercised by Saffell here—including observing Kirkman for more than ten hours, inquiring directly of the patient about any suicidal or homicidal ideations he might have experienced, consulting with plaintiff as Kirkman's wife, and reviewing France's notes on her evaluation—Kirkman's suicide was not reasonably foreseeable and no different assessment by either Saffell or France could have been expected to have prevented Kirkman's suicide two days later. *See Williamson v. Liptzin*, 141 N.C. App. 1, 10–12, 539 S.E.2d 313, 319–20 (2000). Thus, even were we to review the trial court's summary judgment ruling in light of ordinary negligence principles, the result here would be the same.

> According to well-established North Carolina law, after the time for answering a pleading has expired, a motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse. A trial court abuses its discretion in the event that its decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

Azure Dolphin, LLC v. Barton, 371 N.C. 579, 603, 821 S.E.2d 711, 727–28 (2018) (citations and quotation marks omitted).

A "delay in seeking to amend a pleading, and particularly where it causes prejudice to a party, can justify a decision to deny the amendment." *Chappell v. N.C. DOT*, 374 N.C. 273, 280, 841 S.E.2d 513, 519 (2020) (citing *News & Observer Pub. Co. v. Poole*, 330 N.C. 465, 485, 412 S.E.2d 7, 19 (1992) ("Among proper reasons for denying a motion to amend are undue delay by the moving party and unfair prejudice to the non-moving party.")). The trial court here noted both bases for its denial of plaintiff's motion for leave to amend.

We see no abuse of discretion by the trial court in denying plaintiff's motion given that defendants raised the defense of N.C. Gen. Stat. § 122C-210.1 immunity in their answer on 23 April 2018, while plaintiff did not seek to amend her complaint to allege gross negligence until 3 October 2022, four and one-half years after defendants' answer and only three weeks prior to trial. Given the undue delay in plaintiff's decision to move for leave to amend, in conjunction with apparent prejudice to defendants, arising from the fact that discovery in the matter had concluded at the time of plaintiff's motion, we hold that the trial court was justified in denying plaintiff's motion and did not act arbitrarily without reason in so doing. *See id.* Plaintiff's argument to the contrary is therefore overruled.

III. Conclusion

Plaintiff has not shown any error or abuse of discretion by the trial court in connection to either of the lower court's decisions as challenged on appeal. Accordingly, the trial court's orders denying plaintiff's motion for leave to amend and for summary judgment in favor of defendants are affirmed.

AFFIRMED.

Judges COLLINS and GRIFFIN concur.

N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF WATER RESOURCES, Petitioner
v.
N.C. FARM BUREAU FEDERATION, INC., Respondent

NORTH CAROLINA ENVIRONMENTAL JUSTICE NETWORK AND NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Petitioners
v.
N.C. FARM BUREAU FEDERATION, INC.
and
N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF WATER RESOURCES, Respondents.

No. COA22-1072

Filed 7 November 2023

Administrative Law—animal waste management system permitting—new conditions for general permits—rules under NCAPA—required rulemaking process

In a case involving the permitting process for farmers who use certain animal waste management systems, where the North Carolina Farm Bureau filed petitions in the Office of Administrative Hearings alleging that the Division of Water Resources had unlawfully added three new conditions for general permits, the superior court erred by concluding that the challenged general permit conditions were not rules under the North Carolina Administrative Procedure Act (NCAPA). Because the new conditions were regulations (authoritative rules dealing with details of animal waste management systems) of general applicability (intended to be used for most animal waste management systems), the new conditions were rules under the NCAPA and therefore were invalid because they were not adopted through the NCAPA's rulemaking process.

Appeal by Respondent from order entered 20 June 2022 by Judge Mark A. Sternlicht in Wake County Superior Court. Heard in the Court of Appeals 6 September 2023.

North Carolina Farm Bureau Legal Foundation, Inc., by Phillip Jacob Parker, Jr., Steven A. Woodson, & Stacy Revels Sereno, for Respondent-Appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc Bernstein & Assistant Attorney General Taylor Hampton Crabtree, for Petitioner-Appellee.

Southern Environmental Law Center, by Julia F. Youngman, Blakely E. Hildebrand, & Iritha Jasmine Washington, for Appellee-NC Environmental Justice Network, et al.

Irving Joyner, for Appellee-NC Environmental Justice Network, et al.

Lawyers Committee For Civil Rights Under Law, by Edward Caspar, admitted pro hac vice, & Sophia E. Jayanty, admitted pro hac vice, for Appellee-NC Environmental Justice Network, et al.

CARPENTER, Judge.

The North Carolina Farm Bureau Federation, Inc. ("Farm Bureau") appeals from the superior court's order reversing the Office of Administrative Hearing's (the "OAH's") grant of summary judgment for Farm Bureau on one issue and affirming the OAH's denial of partial summary judgment for Farm Bureau on another issue. After careful review, we agree with Farm Bureau concerning the superior court's reversal, and we need not reach the superior court's affirmance. For the reasons explained below, we reverse the superior court's order.

I. Factual & Procedural Background

This case involves a permitting process for farmers. "It is the public policy of the State to maintain, protect, and enhance water quality within North Carolina." N.C. Gen. Stat. § 143-211(b) (2021). To that end, the General Assembly authorized the Environmental Management Commission (the "EMC") to establish a permitting system to regulate animal-waste management systems within North Carolina. *See id.* §§ 143-215.10C(a), 143B-282(a). Specifically, subsection 143-215.10C(a) provides:

> No person shall construct or operate an animal waste management system for an animal operation or operate an animal waste management system . . . without first obtaining an individual permit or a general permit under this Article . . . . The Commission shall develop a system of individual and general permits for animal operations and dry litter poultry facilities based on species, number

> of animals, and other relevant factors . . . . It is the intent of the General Assembly that most animal waste management systems be permitted under a general permit. The Commission, in its discretion, may require that an animal waste management system be permitted under an individual permit if the Commission determines that an individual permit is necessary to protect water quality, public health, or the environment.

Id. § 143-215.10C(a).

In other words, farmers who use certain animal-waste management systems must first obtain either a general or an individual permit ("General Permit" and "Individual Permit," respectively) to do so. *See id.* Although it "is the intent of the General Assembly that most animal waste management systems be permitted under a general permit," the EMC may grant Individual Permits when it deems necessary. *See id.*

The EMC delegated its permitting authority to the Division of Water Resources (the "DWR") of the Department of Environmental Quality (the "DEQ"). *See id.* § 143-215.3(a)(4). In order to enforce permit conditions, the Secretary of Environmental Quality may assess civil penalties for thousands of dollars for failing to comply. *Id.* § 143-215.6A(a).

On 3 September 2014, the North Carolina Environmental Justice Network, along with other nonprofits (collectively, "Complainants"), filed a complaint against the DEQ with the United States Environmental Protection Agency's Office of Civil Rights, alleging that permits issued by the DEQ discriminated on the basis of race. On 3 May 2018, the DEQ settled with Complainants. The settlement agreement included a draft General Permit that included conditions that the DEQ agreed to submit "for consideration during its Stakeholder Process." Farm Bureau participated in the stakeholder process by submitting written comments following stakeholder meetings, providing oral comments at public meetings, and submitting comment letters. The DWR issued final versions of the revised General Permits on 12 April 2019.

On 10 May 2019, Farm Bureau filed three case petitions in the OAH. The OAH consolidated the cases. Farm Bureau contended the DWR unlawfully included three conditions in the General Permits. First, Farm Bureau argued the conditions were not properly adopted as "rules" under the North Carolina Administrative Procedure Act (the "NCAPA"). Second, Farm Bureau argued the DWR was improperly influenced by the settlement agreement.

Through these arguments, Farm Bureau specifically challenged three General Permit conditions: (1) farmers with waste structures within the 100-year floodplain must install monitoring wells; (2) certain farmers must conduct a Phosphorus Loss Assessment Tool ("PLAT") analysis; and (3) all permitted farmers must submit an annual report summarizing the system's operations. The North Carolina Environmental Justice Network and the North Carolina State Conference of the National Association for the Advancement of Colored People (collectively, "Intervenors") moved to intervene in the case, but the OAH denied their motion.

At a summary-judgment hearing on 9 February 2021, the OAH concluded that the three challenged conditions were "rules" under the NCAPA, and because they were not noticed and adopted as such, they were unlawfully included in the General Permits. The OAH also concluded that the DWR was not improperly influenced by the settlement agreement. The OAH did, however, find that "[t]he genesis of the terms of the special conditions under review are part of the Settlement Agreement reached in order to end the Title VI lawsuit." The DWR appealed, contesting the OAH's holding on the rule issue. Intervenors appealed the OAH's denial of their motion to intervene. And Farm Bureau appealed the OAH's conclusion on the settlement-agreement issue. The parties appealed all issues to Wake County Superior Court.

On 20 June 2022, the superior court resolved all of the issues in a single order, reversing the OAH concerning the rule issue and affirming the OAH concerning the settlement-agreement issue. The superior court also held that the OAH improperly denied Intervenors' motion to intervene. Farm Bureau timely appealed from the superior court on 8 July 2022.

The parties have stipulated that intervention is no longer an issue before this Court. As a result, Farm Bureau is the sole appellant; the DWR and Intervenors are co-appellees. On appeal, Farm Bureau challenges the superior court's reversal of the OAH's rule determination and the superior court's affirmance of the OAH's settlement-agreement determination.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

The issues on appeal are whether the superior court erred in concluding: (1) the challenged General Permit conditions are not rules; and

(2) the DWR was not improperly influenced by the settlement agreement when it created the challenged General Permit conditions.

IV. Standard of Review

The purpose of the NCAPA is to "establish[] a uniform system of administrative rule making and adjudicatory procedures for agencies." N.C. Gen. Stat. § 150B-1(a) (2021). The NCAPA governs the review of OAH decisions. *Sound Rivers*, *Inc. v. N.C. Dep't of Env't Quality*, *Div. of Water Res.*, 271 N.C. App. 674, 693, 845 S.E.2d 802, 816 (2020). When reviewing OAH decisions, courts apply different standards based on "the substantive nature of each assignment of error." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004). A reviewing court may:

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

N.C. Gen. Stat. § 150B-51(b) (2021). We review asserted errors under subsections (1) through (4) de novo. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 896. We review asserted errors pursuant to subsections (5) or (6) under the "whole record" test. *Id.* at 659, 599 S.E.2d at 896.

" '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) (quoting *In re Greens of Pine Glen*, *Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

V. Analysis

A. Rules Under the NCAPA

The first issue is whether the conditions within the General Permits are rules under the NCAPA. This is a question of law, which we review de novo. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 896.

In statutory interpretation, "[w]e take the statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27, 53 S. Ct. 417, 420, 77 L. Ed. 1004, 1010 (1933). This is because "a law is the best expositor of itself." *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33, 52, 2 L. Ed. 199, 205 (1804). And when examining statutes, words that are undefined by the legislature "must be given their common and ordinary meaning." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202–03 (1974). Nonetheless, we must follow precedent if our appellate courts have already interpreted a statute. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

The NCAPA defines a "rule" as "[a]ny agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly . . . ." N.C. Gen. Stat. § 150B-2(8a). A rule is invalid "unless it is adopted in substantial compliance with" the NCAPA's rulemaking requirements. *Id.* § 150B-18.

Here, the parties do not dispute that the General Permit conditions "implement[] or interpret[] an enactment of the General Assembly." *See id.* §§ 150B-2(8a), 143-215.10C(a) (authorizing a permitting system to regulate animal-waste management systems within North Carolina). But the parties do dispute whether the challenged General Permit conditions are "regulation[s], standard[s], or statement[s] of general applicability." *See id.* § 150B-2(8a).

1. Whether the General Permit Conditions are Regulations, Standards, or Statements

We begin with whether the conditions are "regulations." The NCAPA does not define "regulation." *See id.* § 150B-2. Therefore, we must discern its "common and ordinary meaning." *See In re Clayton-Marcus Co.*, 286 N.C. at 219, 210 S.E.2d at 202–03. Absent precedent, we look to dictionaries to discern a word's common meaning. *Midrex Techs., Inc. v. N.C. Dept. of Rev.*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016). Merriam-Webster's defines "regulation" as "an authoritative rule dealing with details or procedure." *Regulation*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

Here, any farmer who uses certain animal-waste management systems must obtain a permit and comply with its conditions. *See* N.C. Gen. Stat. § 143-215.10C(a). The challenged General Permit conditions concern details like installation of monitoring wells within the 100-year floodplain, PLAT analysis, and submission of annual reports summarizing waste-management system operations. These conditions are authoritative, as the DWR has the authority to grant permits, which are required to operate the animal-waste systems. *See id.* Further, the Secretary of

Environmental Quality has the authority to assess civil penalties for thousands of dollars if a farmer fails to comply with these conditions. *See id.* § 143-215.6A(a).

Therefore, the General Permit conditions are regulations under the NCAPA because they are "authoritative rule[s] dealing with details" of animal-waste management systems. *See*, Merriam-Webster's Collegiate Dictionary, *supra*; N.C. Gen. Stat. § 150B-2(8a). Because the conditions are "regulations," we need not determine whether the conditions are also "standards" or "statements." *See* N.C. Gen. Stat. § 150B-2(8a). To be a "rule," an agency action only needs to be one of the three. *See id.*

2. Whether a Regulation Must be Generally Applicable

We must now determine whether "general applicability" applies to regulations. Under the last-antecedent canon, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows . . . ." *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 380, 157 L. Ed. 2d 333, 340 (2003). Following that principle, "general applicability" should be read as only modifying "statement." *See id.* at 26, 124 S. Ct. at 380, 157 L. Ed. 2d at 340. Thus, if we apply the last-antecedent canon, all regulations and standards are rules, regardless of applicability. *See* N.C. Gen. Stat. § 150B-2(8a). This Court, however, has not interpreted subsection 150B-2(8a) that way.

Specifically, we did not apply the last-antecedent canon when we interpreted subsection 150B-2(8a) in *Wal-Mart Stores East, Inc. v. Hinton*, 197 N.C. App. 30, 56, 676 S.E.2d 634, 652–53 (2009). There, this Court analyzed an agency "standard" and held that the standard did not have "general applicability" and was, therefore, not a "rule." *Id.* at 56, 676 S.E.2d at 652–53. Bound by our logic in *Wal-Mart*, if a standard requires general applicability, then so does a regulation. *See id.* at 56, 676 S.E.2d at 652–53; *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

In other words, if the last-antecedent canon does not prevent extending "general applicability" to "standard," the canon should not prevent extending general applicability to "regulation," either. *See Wal-Mart*, 197 N.C. App. at 56, 676 S.E.2d at 652–53; N.C. Gen. Stat. § 150B-2(8a); *see also Barnhart*, 540 U.S. at 26, 124 S. Ct. at 380, 157 L. Ed. 2d at 340 (stating that the last-antecedent canon is not absolute).

Therefore, because we do not apply the last-antecedent canon to subsection 150B-2(8a), a "regulation" must have "general applicability" to be a "rule." *See* N.C. Gen. Stat. § 150B-2(8a); *Wal-Mart*, 197 N.C. App. at 56, 676 S.E.2d at 652–53; *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

3. Whether the General Permit Conditions are Generally Applicable

We must now decide whether the General Permit conditions are generally applicable. Again, the NCAPA does not define "general applicability," *see* N.C. Gen. Stat. § 150B-2, so we must discern its "common and ordinary meaning," *see In re Clayton-Marcus Co.*, 286 N.C. at 219, 210 S.E.2d at 202–03. The *Wal-Mart* Court, however, has already discerned the common meaning of "general applicability." *See Wal-Mart*, 197 N.C. App. at 56, 676 S.E.2d at 652–53. So we must adhere to it. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

In *Wal-Mart*, this Court defined "general applicability" in the negative, stating that a rule is not generally applicable if it "is exceptional, and not allowed unless specifically required." *Id.* at 56, 676 S.E.2d at 652–53. In other words, a rule is generally applicable if it is not exceptional and is allowed without specific requirements. *See id.* at 56, 676 S.E.2d at 652–53. Said another way: A rule is generally applicable if it applies to most situations. *See id.* at 56, 676 S.E.2d at 652–53.

Here, General Permits and "general applicability" share the same descriptor: general. And the explicit "intent of the General Assembly [is] that most animal waste management systems be permitted under a general permit." *See* N.C. Gen. Stat. § 143-215.10C(a). On the other hand, Individual Permits are intended to be the second option. *See id.* Individual Permits are exceptional; whereas General Permits are not. *See id.* Aptly named, General Permit conditions have general applicability because the General Permits are to be used for "most animal waste management systems," and the General Permits are applicable notwithstanding special circumstances. *See id.*; *Wal-Mart*, 197 N.C. App. at 56, 676 S.E.2d at 652–53.

The DEQ argues that General Permits are not generally applicable because farmers can obtain Individual Permits instead. First, we question the DEQ's premise that Individual Permits are guaranteed. Allotting Individual Permits under section 143-215.10C is within the DEQ's "discretion." *See* N.C. Gen. Stat. § 143-215.10C(a). Thus, contrary to the DEQ's suggestion, Individual Permits are not automatic. *See id.* Second, if farmers can avoid the challenged General Permit conditions simply by seeking an Individual Permit, all farmers would likely do so. Following the DEQ's reasoning would render General Permits worthless and fly in face of section 143-215.10C: Our General Assembly expressly stated that General Permits are to be used for "most animal waste management systems." *See id.*

Therefore, the conditions within General Permits are generally applicable regulations under the NCAPA. They are rules, and the superior court erred when it held to the contrary. *See id.* § 150B-2(8a). Because rules are invalid "unless [they are] adopted in substantial compliance with" the NCAPA rulemaking requirements, we reverse the superior court on the rule issue. *See id.* § 150B-18. The challenged conditions are invalid until they are adopted through the rulemaking process. *See id.*

B. Settlement Agreement

The second issue on appeal is whether the settlement agreement improperly influenced the DWR in creating the challenged General Permit conditions. We need not reach this issue, however, because the challenged conditions were unlawfully adopted, notwithstanding the settlement agreement. *See id.* Thus, we need not determine whether the superior court erred in affirming the OAH's denial of summary judgment for Farm Bureau on the settlement-agreement issue. *See id.*

VI. Conclusion

The superior court erred in reversing the OAH's grant of summary judgment to Farm Bureau concerning whether the challenged General Permit conditions are rules under the NCAPA. We conclude the challenged conditions are rules, and they must be adopted as such. Therefore, we reverse the superior court's order concerning the rule issue. We need not address the settlement-agreement issue, as the challenged conditions are invalid, regardless of the effect of the settlement agreement.

REVERSED.

Judges TYSON and GORE concur.

HUNTER LEE SMITH (NOW KNOWN AS HUNTER SMITH WILLETTE), PLAINTIFF
v.
REID ALAN DRESSLER, DEFENDANT.

No. COA22-909

Filed 7 November 2023

Child Custody and Support—modification of custody—substantial change in circumstances—previously disclosed events—lack of support

In an action to modify custody, the trial court erred by concluding that a substantial change in circumstances had occurred where it primarily relied on evidence—including that the child's mother had gotten married, had given birth to another child, had gotten honorably discharged from the military, and had moved back to North Carolina—that had been previously disclosed to and considered by the trial court, as shown by facts contained in a prior motion filed by the mother and in the first custody order itself. Without those previously addressed events, the remaining evidence considered by the court—that the child had incurred various injuries, none of which amounted to abuse or neglect according to relevant authorities, and that the father failed to inform the mother that he had tested positive for a viral infection before returning the child to the mother's custody—was insufficient to support modification.

Appeal by defendant from judgment entered 20 January 2022 by Judge Teresa R. Freeman in Halifax County District Court. Heard in the Court of Appeals 9 August 2023.

Tharrington Smith, LLP, by Jeffrey R. Russell, for the plaintiff-appellee.

Wyrick, Robbins, Yates & Ponton, LLP, Charles W. Clanton, K. Edward Greene, and Jessica B. Heffner, for the defendant-appellant.

TYSON, Judge.

Reid Alan Dressler ("Father") appeals an order modifying child custody entered on 20 January 2022, which granted Hunter Lee Smith ("Mother") primary legal custody of Mother's and Father's minor child. We vacate the trial judge's order and remand for entry of an order concluding a substantial change in circumstances was not shown.

I. Background

Mother and Father are the parents of minor child, W.D., born on 14 September 2017. *See* N.C. R. App. P. 42(b) (pseudonyms and initials used to protect the identity of minors). Mother and Father began a romantic relationship in August 2016, while both were undergraduate students at North Carolina State University, which resulted in W.D. being conceived. After W.D.'s birth, Mother's and Father's relationship deteriorated and ultimately ended.

Mother filed a complaint for Child Custody and Child Support on 2 March 2018. At that time, Mother was residing in her parents' home in Halifax County. After a hearing was held in April, the trial court awarded temporary primary custody to Mother on 24 May 2018. Three hearings were held to modify the Order for Temporary Custody and Child Support between July 2018 and June 2019, but the order was only changed to grant Father additional visitation. The Honorable W. Turner Stephenson, III, ("Judge Stephenson") presided over the trial and hearings.

Mother informed Father on 20 October 2019 that she had joined the United States Air Force and would be leaving for basic training in Texas in approximately one week.

On 1 November 2019, Father filed a Motion for Temporary Custody and to Present New Evidence. Father asserted Mother "misled" Father regarding her current employment and pretended she was still employed at Braswell Family Farms. He also included information about Mother's failure to inform Father she had enlisted in the military until approximately one week prior to departing from the state.

Mother filed a motion to stay the proceedings on 18 November 2019 pursuant to section 3932 of the Servicemember Civil Relief Act. *See* 50 U.S.C. § 3932. The trial court postponed the hearing because "it did not have jurisdictional authority to proceed as [Mother] was in basic training and thus was an active-duty member of the United States Air Force." The trial court re-scheduled a hearing for 16 March 2020, but the hearing did not occur due to COVID-19 protocols.

The trial court granted the motion to reopen the evidence and heard testimony from both parties on 15 June 2020. The trial court orally granted Father primary custody of W.D. and visitation with Mother when she exercised military leave. The order, however, was not written, signed, and entered until over six months later on 22 January 2021 ("First Custody Order").

Mother was stationed at McGuire Air Force Base in New Jersey when the evidentiary hearing was held on 15 June 2020. Shortly after the

hearing, Mother married Dylan Willette ("Stepfather") on 18 September 2020, who also served in the Air Force. Sometime in late July or August 2020, Mother and Stepfather conceived a child, who was due in May of 2021. Mother and Stepfather returned to North Carolina and held a wedding ceremony with Mother's family and W.D. on 10 October 2020.

When Mother returned to duty in New Jersey at the end of October, Mother's superior informed her she was eligible for discharge due to her pregnancy. On 30 October 2020, Mother's honorable discharge from the military was approved. Mother's official date of separation was listed as 20 December 2020, as Mother had accumulated twenty-five days of leave. Mother used her twenty-five days towards her "terminal leave" and permanently moved back to North Carolina on 25 November 2020.

When the evidentiary hearing was held on 15 June 2020, Father lived in Hampstead, in Pender County, but he presented evidence indicating he had purchased land in Burgaw and planned to build a house. In fall 2020, Father and W.D. often stayed in Clayton with Father's parents while his house was being built. When Father and W.D. were not staying with Father's parents, they lived in a two-bedroom guest house owned by Father's paternal aunt and uncle. Father's home in Burgaw was completed in July 2021. From July 2021 until January 2022, Father and W.D. lived Burgaw, where W.D. attended pre-kindergarten classes.

Mother's and Father's counsels communicated with each other and the trial court, and they entered several motions between the evidentiary hearing held on 15 June 2020 and the entry of the order issued on 22 January 2021. After the hearing, "counsel for [each of] the parties had agreed that each would write the trial judge in support of their contentions" and to propose orders based upon Judge Stephenson's oral rendition of the order at trial.

Father's trial counsel sent the proposed custody order on 25 September 2020 to: Judge Stephenson, Mother's counsel, and the trial court administrator. The proposed order was in a "redline format showing the differences remaining between counsel as to the language of the order."

Father's proposed custody order contained the following language:

> 2. [Father] is granted primary physical custody of the aforesaid minor child.
>
> 3. [Mother] shall have visitation with the aforesaid minor child away from the residence of [Father] as follows:
>
> > a. She may have a two-week visit with the child from Saturday, July 18, 2020[,] until August 1, 2020. The

child will be flown to the nearest safe airport near the residence of [Mother] by [Father] and the child will be returned by [Father] to Raleigh-Durham Airport to the custody of [Father] at the conclusion of said visitation. Said visitation will begin at the time a morning flight can be arranged to Philadelphia or whatever major airport is closest *to Joint Base McGuire* and is deemed the safest for transportation of a child. The flight shall leave from Raleigh-Durham Airport. The parties will equally split the cost of the child's airline tickets and will each be responsible for the cost of their own tickets.

b. In addition to the two[-]week visitation period granted to [Mother] above for the remainder of this year and in years to come [Mother] is granted visitation with her child *whenever she is on "Military Leave" or at other times when has* [sic] *the ability to return to North Carolina while still serving in the United States Military*. When the [Mother] is on leave, she should give [Father] as much notice as reasonably possible but in no event less than forty-eight hours' notice of her intent to exercise visitation with her child in the State of North Carolina. [Father] is to be given priority for all holiday periods of Thanksgiving, Easter, Fourth of July, and Labor Day if [Mother] can arrange leave for those periods. As to the Christmas holiday, [Father] shall have the child with him every Christmas Eve from 6:00 o'clock P.M. until 12:00 noon on Christmas Day. Other than this part of the Christmas holiday, [Mother] may have the child with her during this holiday period *whenever she can arrange leave.*

. . .

g. As long as [Mother] gives the required 48 hours' notice of her intent *to exercise military leave visitation* with her son this visitation will be preemptive, and she shall be entitled to said vacation unless the child is ill except for Christmas Eve and Christmas Day as set forth above.

When [Mother] *exercises the military leave visitation* or at any other times when she can return to North Carolina for visitation with the minor child *while still serving in the United States Military Service*, she

> shall inform [Father] where she will be staying with the minor child and provide an emergency address for contact.
>
> In *exercising military leave* or at any other times when she can return to North Carolina for visitation with the minor child *while still serving in the United States Military Service*, [Mother] is free to choose the time she may come but she may not visit more than every other weekend unless it is in connection with Labor Day, Fourth of July, Easter, Thanksgiving or Christmas and New Year's vacation which are special times and are set forth above.

(emphasis supplied).

While Father's proposed order was pending before the court, Mother filed a purported Rule 59 Motion on 20 November 2020. Mother sought temporary custody of W.D. and to present new evidence, because the trial judge had not entered the proposed custody order sent to him on 25 September 2020. Mother's new evidence included the following allegations: Mother had married Stepfather in September 2020 and was expecting a child in May 2021; Mother was being honorably discharged from the Air Force at the end of 2020; Mother owned a home in Wilson County and planned to move into the home on 25 November 2020; and, Mother had contacted her former employer, Pfizer, to discuss gaining re-employment in Rocky Mount.

On 7 December 2020, Father filed a motion for entry of the proposed custody order orally announced after the hearing on 15 June 2020. Father attached a revised copy of the proposed custody order, which was nearly identical to the version sent to the trial court on 25 September 2020, except Father deleted the redlined comments and renumbered certain facts and conclusions that were nonsequential in the previous draft. Father also attached a notice of hearing for 21 December 2020. Father's motion also provided the following assertions:

> 11. Again, as she has frequently done in this case, [Mother] lied to [Father] as on November 16, 2020, [Mother] verified a motion to introduce "allegedly" newly discovered evidence in this case and seeking a new custody order granting custody of the aforesaid minor child to [Mother]. She did not discuss or tell [Father] that she had sworn to said motion on November 16, 2020 or that the same had been filed on November 20, 2020 by her attorney. [Father]

> did not find out about the motion until the undersigned attorney returned from his Thanksgiving vacation and notified [Father] of the existence and filing of said motion on November 30, 2020.
>
> 12. Moreover, unlike she stated she would do, [Mother] did not and has not returned the minor child to the custody of the [Father] and for a period of three days would not even tell [Father] where his son was, how his son was doing physically or mentally, or when she was leaving for North Carolina. Indeed, during this period between Wednesday, November 25, 2020, and Friday, November 27, 2020, [Mother] would not respond to any attempted communication from [Father]. Then from Saturday, November 28, 2020, until Monday, November 30, 2020, [Mother] would not respond to any communication attempted by [Father].
>
> 13. On November 30, 2020, [Mother] advised the [Father] in writing that she had been "legally advised to ignore you {sic [Father]} as long as possible."
>
> 14. When the [Father] pointed out the exact wording of the proposed Judgment herein and pointed out the pronouncement of Judge Stephenson, [Mother] replied in text that "that was never filed or signed by a Judge and it is not an order. I am not going to argue with you over texts. I would be more than happy to go over a new schedule for both of us to spend time with [W.D.]. For now, I am going to enjoy my time with him. Please let me know when you would like to discuss this schedule."

No order was entered regarding whether Mother's motion for temporary custody and to present new evidence was granted or denied. The record also does not indicate whether the scheduled hearing on Father's motion for entry of the First Custody Order was held. The trial court, however, entered the First Custody Order granting primary custody to Father and visitation to Mother on 22 January 2021.

While the findings of facts and conclusions of law contained in the twenty-two pages of the First Custody Order are identical to the draft order sent to the trial court on 25 September 2020, the trial court significantly modified the visitation orally announced at trial on 15 June 2020 and explained: "The Court with the consent of the parties having determined that the visitation originally announced in open court on June 15, 2020[,] is no longer in the best interest of the child, determines that [Mother] shall have visitation with the aforesaid minor child away

from the residence of [Father.]" On appeal, both Mother and Father assert the changes to the visitation rendered on 15 June 2020 were not literally consented to.

The trial court's First Custody Order entered on 22 January 2021 included the following language, which was never consented to by the parties, orally announced at trial, or included in the proposed draft order sent to the trial court on 25 September 2020 or in Father's Motion for Entry of Order:

> 3b. [Mother] shall have additional visitation privileges with the aforesaid minor child away from the residence of [Father] as follows:
>
> > 1. Every other weekend during the public school system year of the child as hereinafter defined from Friday beginning a[t] 7:00 P.M. until the following Sunday at 7:00 P.M. Said visitation is to begin on Friday the 5th day of February 2021 and every other weekend thereafter;[ ]however if [Mother's] work schedule is such she has to work on said weekend, then her every other weekend visitation will begin on Friday February 12th 2020 at 7:00 P.M. until the following Sunday and every other weekend thereafter.
> >
> > 2. During the Christmas season of each even numbered year from 2:00 P.M. on Christmas Day until 6:00 P.M. on the day before the public school system of the county wherein[ ]the minor child resides (hereinafter the school system) resumes after Christmas vacation and during the Christmas season of each odd numbered year from 6:00 P.M. on the day that the school system adjourns for the Christmas holiday until 2:00 PM on Christmas Day.
> >
> > [Father] shall have the custody of the child during the Christmas season of each odd numbered year from 2:00 P.M. on Christmas Day until 6:00 P.M. on the day before the school system resumes after Christmas vacation and during the Christmas season of each even numbered years from 6:00 P.M. on the day the school system adjourns for the Christmas holiday until 2:00 P.M. on Christmas Day.
> >
> > The intention of this Order is that the parties should alternate their respective halves of the Christmas holiday.

3. During the Thanksgiving holiday for each odd numbered year from 6:00 P.M. on the day school recess[es] for the school holiday until 6:00 P.M. on the day before school resumes at the expiration of the holiday.

[Father] shall have the minor child with him during the Thanksgiving holiday of each even numbered year.

4. During the spring break holiday of each even numbered year from 6:00 P.M. on the day school recesses for the holiday until 6:00 P.M. on the day before school resumes at the expiration of the holiday.

[Father] will have the child with him during the spring break holiday of each odd numbered year.

5. [Mother] shall always have Mother's Day Weekend and [Father] shall always have Father's Day Weekend regardless of the every other weekend schedule.

6. During the summer vacation of the child from the county school system, the parties will alternate weeks with the child's summer vacation beginning on the last Friday after school adjourns for the summer at 6:00 P.M. and continuing to the following Friday until 6:00 P.M.

During odd numbered years, [Mother] will have the first week and [Father] will have the next week[,] and they will then alternate weeks until the last Friday before school resumes from summer break at 6:00 P.M. at which time the weekend visitation will resume. Although the summer vacation[,] as does the other holiday visitation periods[,] controls weekend visitation, the parties will not change the count or progression of weekend visitation so it will remain constant and known to the child even though not exercised during summer holiday visitations. Thus, the parties shall simply refer to a calendar and know when to resume the weekend visitation at the conclusion of the summer vacation. Summer vacation will be deemed to end on the last Friday on the summer vacation period before the School System resumes.

During even numbered years, [Father] shall have the first week and [Mother] shall have the next week

and they shall then alternate weeks until the last Friday before school resumes from summer break at 6:00 P.M. at which time the weekend visitation will resume.

7. If the parties elect not to have a joint birthday party for the minor child during odd numbered years when the child's birthday is during a weekday[,] the child will celebrate his birthday with [Mother] and during even numbered years with [Father] from the time school is out until 8:00 P.M. During the years when the child's birthday does not fall on a weekend, the parent not with the child may celebrate the child's birthday the day before from the time school is out until 8:00 P.M.

If the child's birthday falls on a weekend, then the child shall be with the parent whose weekend it is and the other parent may have the child to celebrate his birthday from 12:00 P.M. to 8:00 P.M. on the child's birthday during that weekend.

. . .

9. The provisions for Christmas, Thanksgiving, Spring Break, Mother's Day, Father's Day, birthdays, and summer override the weekend visitation privileges granted herein. When there is a conflict of either party's visitation i.e., Christmas, Thanksgiving, Spring Break, Mother's Day, Father's Day, birthdays, or summer with weekend visits, then the weekend visitations will not occur, will not be made up[,] and will be subordinated to and not occur during these other special periods.

4. The party having the child with him or her will allow the child to have telephone, FaceTime, Skype, Zoom, or other communication, if available, with the other parent one time per day between 5:00 P.M. and 6:00 P.M. The parties shall exchange phone numbers to facilitate the ability of the parties to contact the child by phone, FaceTime, or Skype.

5. When either party has the aforesaid child in his or her physical custody and either party plans to be away from home with the child for a period of more than 48 hours,

> then he or she will provide all travel arrangement information including the times of travel and the places to which travel is being made to the other party.
>
> 6. If the child has scheduled academic, athletic, or other events[,] the parent having physical custody will make sure that the child attends these activities.
>
> 7. Each party will make certain that any prescribed medication for the minor child accompanies the child when the child goes to visit [Mother] and the same is returned with the child to [Father].
>
> 8. The parties shall meet and exchange the child on the occasion of each visitation at 1103 North Breazeale Ave, Mount Olive NC 28365. Either party may use a family member related by blood or marriage to provide transportation for the child.
>
> 9. Each party will notify the other party of any emergency concerning the child as soon as reasonably possible.
>
> 10. If the child is ill, [Father] will let [Mother] know and if this illness impedes a regular weekend visitation[,] then said visitation may be made up the next weekend even if this results in two (2) weekends in a row for [Mother].
>
> 11. If [Mother] has an emergency arise or should some other events arise which means that she cannot exercise her visitation with the minor child, she must let [Father] know this as soon as reasonably possible.

Notably, all references to W.D.'s visitation with Mother being related to her serving in the military or while she was exercising "military leave" were removed from the trial court's entered First Custody Order.

W.D. injured his right leg while jumping on a trampoline at Father's parents' home on Christmas Day in December 2020. Father notified Mother about the injury. Mother took W.D. to an orthopedist on 26 December 2020, who diagnosed W.D. with a probable fracture in his tibia. Mother reported W.D.'s injuries to Child Protective Services ("CPS").

CPS notified Father they had commenced an investigation concerning W.D.'s leg injury in January 2021, along with five other alleged instances of cuts, scrapes, bruises, and a possible tooth injury. An independent medical examination prompted by CPS initially noted evidence of potential neglect and abuse. Upon further review, however, the same

medical examiner "altered the diagnosis to state that significant child neglect cannot be made in this case."

Mother filed a motion on 25 February 2021 to modify the First Custody Order, alleging a substantial change in circumstances had occurred. W.D. was three years old when Mother filed the motion. Hearings were held on 29 and 30 June 2021, 5 August 2021, 14 September 2021, and 19 October 2021. At those hearings, Mother produced evidence tending to show several circumstances had changed since the 15 June 2020 hearing.

The alleged changed circumstances largely mirrored the assertions Mother had included in the purported Rule 59 Motion filed on 20 November 2020, i.e., Mother had married another man, was expecting another child, was medically discharged from the military, and was moving from New Jersey back to North Carolina. The 24 February 2021 motion also included allegations W.D. had sustained injuries while in Father's care and allegations Father had deliberately concealed certain cold symptoms before testing positive for COVID-19.

On 20 January 2022, the court found a substantial change in circumstances had occurred. The court modified the existing child First Custody Order, granted primary custody to Mother, and awarded visitation to Father. Father appeals from the trial court's order ("Second Custody Order") filed on 20 January 2022.

II. Jurisdiction

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

III. Modification of an Existing Custody Order

Father asserts the trial court erred by finding a substantial change in circumstances had occurred to support a modification of custody and erred in awarding primary custody to Mother. Father argues the trial court improperly considered evidence of events, which had occurred prior to and were accounted for in the First Custody Order entered on 22 January 2021. Father further argues the trial court's findings were insufficient to support its conclusions of law.

A. Standard of Review

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted).

A trial court may not modify a permanent child custody order unless it finds a substantial change in circumstances has occurred and exists, which affects the welfare of the child. *Simmons v. Arriola*, 160 N.C. App. 671, 674, 586 S.E.2d 809, 811 (2003). Whether a substantial change in circumstances exists for the purpose of modifying a permanent child custody order is a legal conclusion. *Spoon v. Spoon*, 233 N.C. App. 38, 43, 755 S.E.2d 66, 70 (2014). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations omitted).

Wide discretion is vested in the trial judge when awarding primary custody of a minor child. *Shamel v. Shamel*, 16 N.C. App. 65, 66, 190 S.E.2d 856, 857 (1972). "It is well established that 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). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason[,]" or has misapprehended and committed an error of law. *Id.*

B. Analysis

1. Previously Disclosed Circumstances

A *substantial change of circumstances* is required to be shown by the movant before the trial court may modify a permanent custody order. This burden of proof is required to prevent dissatisfied parties from relitigating a permanent custody order in another court in hopes of reaching a different conclusion. *Newsome v. Newsome*, 42 N.C. App. 416, 425, 256 S.E.2d 849, 854 (1979) ("The rule prevents the dissatisfied party from presenting those circumstances to another court in the hopes that different conclusions will be drawn."). "A trial court may order the modification of an existing child custody order if [the movant proves and] the court determines that there has been a substantial change of circumstances affecting the child's welfare and that modification is in the child's best interests." *Spoon*, 233 N.C. App. at 41, 755 S.E.2d at 69 (citation omitted); N.C. Gen. Stat. § 50-13.7 (2021). "[W]hen evaluating whether there has been a substantial change in circumstances, courts *may only consider events which occurred after the entry of the previous order, unless the events were previously undisclosed to the court.*" *Woodring v. Woodring*, 227 N.C. App. 638, 645, 745 S.E.2d 13, 20 (2013) (emphasis supplied) (citation and internal quotation marks omitted).

Our threshold inquiry is whether the events that occurred between 15 June 2020, the day the evidentiary hearing was held and rendition

of the order, and 22 January 2021, the day the First Custody Order was entered, were previously disclosed to and considered by the trial court. *Id.* at 645-46, 745 S.E.2d at 20. Father argues a significant portion of the assertions and evidence Mother included only one month later in her 24 February 2021 motion to modify the First Custody Order was previously disclosed, considered and addressed by the trial court, and the same evidence cannot be used to support a finding that a substantial change had occurred.

The First Custody Order entered in January 2021 contains findings that were disclosed to the trial court before entry of the First Custody Order. Mother's Rule 59 motion to present new evidence, filed 20 November 2020, asserted Mother: had been recently married, was expecting a child, was honorably discharged from the Air Force, planned to return to North Carolina, owned a home in Wilson, and hoped to gain re-employment with Pfizer.

Mother also expressed her dissatisfaction with Father's compliance with Mother's preferred visitation schedule between W.D. and her parents, W.D.'s maternal grandparents.

In the Second Custody Order entered in January 2022, the trial court relied upon assertions contained in Mother's 20 November 2020 Rule 59 motion to support its finding that a substantial change had occurred. The trial court found Mother had: married, given birth to a child, been honorably discharged from the Air Force, returned to North Carolina, acquired a home in Wilson, gained proximity to and more support from her family, and been re-employed by Pfizer.

The trial court also cited Mother's dissatisfaction with Father's decision to refrain from scheduling visitation with certain members of Mother's family. Before Mother returned to North Carolina, she asserted Father would bring W.D. to his maternal grandfather's house, but not to his maternal grandmother's house or his maternal aunt's house. Notably, Mother's desire for W.D. to spend time separately with both of her parents and her maternal aunt was not contained in the First Custody Order, but instead was a self-asserted expectation.

This court has held that when evaluating whether a substantial change in circumstances has occurred, a trial court "may only consider events which occurred *after the entry of the previous order, unless the events were previously undisclosed to the court.*" *Id.* at 645, 745 S.E. 2d at 20 (emphasis supplied) (citation omitted).

Here, the trial court erred when it considered and re-evaluated events which were disclosed to and considered by the trial court prior

to the entry of the First Custody Order. *Id.*; *Lang v. Lang*, 197 N.C. App. 746, 750, 678 S.E.2d 395, 398 (2009) (explaining a trial court properly considered only those events which occurred *after the entry* of the prior custody order when concluding whether a change of circumstances had occurred); *Ford v. Wright*, 170 N.C. App. 89, 96, 611 S.E.2d 456, 461 (2005) ("As the trial court had already considered the parties' past domestic troubles and communication difficulties in the prior order, without findings of additional changes in circumstances or conditions, modification of the prior custody order was in error.").

Any evidence contained in Mother's Rule 59 motion was previously disclosed to and addressed by the trial court, as is demonstrated by the record before us *and* in the First Custody Order itself. That order provides the trial judge considered evidence and the numerous changes in Mother's status, which had occurred after the 15 June 2020 hearing.

Further, the First Custody Order reveals the trial court clearly considered Mother's discharge from the military and relocation to North Carolina, because the trial court: completely removed all references to Mother visiting with the child while serving in the military or while on "military leave"; included an exact address for Mother and Father to exchange W.D.; and provided an extensive, alternating summer break and holiday schedule.

When comparing the proposed custody order submitted to the trial court on 25 September 2020, which reflected the oral decretal on 15 June 2020, to the First Custody Order entered on 22 January 2021, the changes are striking and evident the trial judge considered and addressed Mother's marriage, pregnancy, discharge from the military, and relocation to North Carolina.

The trial court had already considered Mother's changes in her circumstances through the end of 2020 and could not use these factors again as a basis to support a finding and conclusion a substantial change in circumstances had occurred in its entry of the Second Custody Order. *Id.*

2. Substantial Change in Circumstances

Father further argues the remaining evidence before the trial court did not support a substantial change in circumstances to justify modification of the First Custody Order. The only assertions the trial court had not previously considered to trigger a change in the First Custody Order were the injuries W.D. had sustained and the way Father had handled his COVID-19 infection in April 2021.

The trial court noted injuries W.D. had purportedly received over the two years while in Father's custody to constitute a substantial change:

- W.D. fell, scraped his side, and had minor bruising on his leg.
- W.D. fractured his tibia while jumping on the trampoline with his paternal uncle on Christmas Day.
- W.D. slipped on a rug while running in the bathroom, hit his face on the toilet or wall, and injured his tooth.
- W.D. fell outside on a concrete patio, which caused a bloody nose and scabbing and bruising on his knees, legs, and bottom.
- W.D. scratched his leg when jumping into a pool.
- W.D. bumped heads with another child in the pool, injuring his nose.

Expert evidence was entered at trial to address whether W.D. was either neglected or abused. Father testified W.D. was a "wide open four[-] year[-]old little boy who[ ] climbs, jumps[,] and falls" and any injuries were the result of "normal wear and tear." W.D.'s pediatrician testified he noticed various cuts and bruises on W.D. since June 2020, but they were "not abnormal and didn't cause [him] any concern."

W.D.'s pre-kindergarten teacher was questioned about a black eye W.D. allegedly presented with at school, but she could not recall whether W.D. had ever sustained a black eye. W.D.'s daycare teacher similarly testified she never observed anything concerning regarding W.D.'s health, and volunteered she is a "mandatory reporter." CPS also found no evidence of abuse after investigating Father at Mother's behest.

The trial court also found Father had a runny nose and mild headache before W.D.'s weekend visitation with Mother ended on 4 April 2021 and had failed to inform Mother. Father subsequently tested positive for COVID-19. Father did not disclose he had tested positive until the day before Mother's next weekend visit, which began on 16 April 2021. Father testified he did not inform Mother about his positive test earlier, because he was "out of quarantine" by the time he met with Mother to exchange W.D. He was not in W.D.'s presence until he had passed his isolation period.

A "determination of whether changed circumstances exist is a conclusion of law." *Head v. Mosier*, 197 N.C. App. 328, 334, 677 S.E.2d 191,

196 (2009) (citing *Brooker v. Brooker*, 133 N.C. App. 285, 289, 515 S.E.2d 234, 237 (1999)). "[C]ourts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child." *Metz v. Metz*, 138 N.C. App. 538, 540, 530 S.E.2d 79, 81 (2000).

Even where a substantial change of circumstances is shown, the court must still consider whether the change affected the welfare of the child and if a change in custody is in the child's best interest. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253.

Mother relies on *Shipman* and argues the trial court's findings should be upheld, even if they do not "present a level of desired specificity," because the effects of the changes on the welfare of W.D. are self-evident and supported by some evidence. *Id.* at 479, 586 S.E.2d at 256.

She also asserts the combination of W.D.'s purported injuries, Father's handling of his COVID-19 infection, and her change in familial status and relocation to North Carolina collectively affected W.D.'s welfare, which is "self-evident." *Id.*

Father argues evidence of Mother's re-marriage and newborn child, even if these facts were undisclosed or not considered before entry of the First Custody Order, does not constitute a substantial change. Father cites *Hassell v. Means*, 42 N.C. App. 524, 531, 257 S.E.2d 123, 127 (1979) ("Remarriage in and of itself is not a sufficient change of circumstance to justify modification of a child custody order." (citation omitted)) and *Kelly v. Kelly*, 77 N.C. App. 632, 636, 335 S.E.2d 780, 783 (1985) (explaining the birth of new child does not constitute a substantial change).

The evidence previously disclosed and addressed in the prior order, and which the trial court relied upon, does not support a conclusion that a substantial change occurred. *See Shipman*, 357 N.C. at 478, 586 S.E.2d at 255 ("As our appellate case law has previously indicated, before a child custody order may be modified, the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection." (citing *Carlton v. Carlton*, 145 N.C. App. 252, 262, 549 S.E.2d 916, 923 (Tyson, J., dissenting), *rev'd per curiam per dissent*, 354 N.C. 561, 557 S.E.2d 529 (2001), *cert. denied*, 536 U.S. 944, 153 L.Ed.2d 811 (2002))).

The evidence failed to establish W.D. was abused or neglected while in Father's care. Father enrolled W.D. in a private day care and pre-kindergarten programs, and Father adequately provided and cared for W.D. as his primary caretaker for several years. His pediatrician and both of W.D.'s teachers testified. Similarly, this Court has never held the failure to inform another parent of a potential viral infection constituted a substantial change, and more particularly of contacts outside of any quarantine period.

A trial court may not modify an existing custody order unless a substantial change in circumstances has occurred and been proven by the movant. *Spoon*, 233 N.C. App. at 41, 755 S.E.2d at 69. The trial court's conclusion that a substantial change in circumstances had occurred is unsupported and is vacated. This erroneous conclusion was the basis for the trial court to amend the First Custody Order and to enter the Second Custody Order in 2022. We need not address Father's remaining argument that the trial court abused its discretion by granting Mother primary legal custody of W.D., as this argument is moot.

IV. Conclusion

The trial court improperly considered previously disclosed, considered, and addressed events when issuing the Second Custody Order in January 2022. *Woodring*, 227 N.C. App. at 646, 745 S.E.2d at 20; *Lang*, 197 N.C. App. at 750, 678 S.E.2d at 398; *Ford*, 170 N.C. App. at 96, 611 S.E.2d at 461. Without the previously considered evidence, the trial court's findings were inadequate to support a conclusion that a substantial change in circumstances had occurred. *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255; *Spoon*, 233 N.C. App. at 41, 755 S.E.2d at 69.

We vacate the trial court's conclusion that a substantial change in circumstances had occurred and the award of primary custody of W.D. to Mother. We remand for further findings and conclusions in accordance with this opinion.

The parties are free to pursue custody mediation pursuant to N.C. Gen. Stat. § 7A-494 (2021) or the need for appointment of a parenting coordinator pursuant to N.C. Gen. Stat. § 50-90 to 100 (2021) to decrease potential conflicts, recalcitrant conduct, and further litigation. *It is so ordered.*

VACATED AND REMANDED.

Judges CARPENTER and FLOOD concur.

STATE OF NORTH CAROLINA
v.
LEWIS VICTOR BRANCHE, III

No. COA22-768

Filed 7 November 2023

1. Homicide—first-degree murder—premeditation and deliberation—actions of defendant—sufficiency of evidence

The State presented sufficient evidence of premeditation and deliberation in a first-degree murder prosecution, including that defendant and the victim had been seen arguing but not physically fighting on the afternoon that the victim was killed, which indicated that defendant had not become so impassioned as to lose the ability to reason; that defendant, by using a smaller gun than the one he usually carried to shoot the victim, demonstrated some planning because the smaller gun would have been cleaner and quieter; and that the steps taken by defendant after the killing to dispose of the body and conceal his identity as the perpetrator by lying could be seen as part of a planned strategy. Evidence that the victim made threats to arouse defendant's jealousy could have been viewed by the jury as motivation for the murder rather than provocation, and defendant's description of his state of mind that "something clicked off" in his head—which defendant alleged was exculpatory—was offset by the State's other evidence supporting first-degree murder.

2. Evidence—photographs—burial site and condition of victim's body—first-degree murder—plain error analysis

There was no plain error in defendant's trial for first-degree murder by the introduction of over 150 photographs of the area where the victim's body was found and of the victim's remains because the photos were not overly duplicative or irrelevant; they were used to illustrate the State's theories of the case and witness testimony, including how the investigation to find the victim's body unfolded; they did not depict gory or gruesome material; and there was no suggestion that the photos were displayed in a prejudicial manner.

3. Criminal Law—prosecutor's closing argument—comparison of punishments—objection sustained—curative instruction not requested

In defendant's trial for first-degree murder, where the trial court sustained defendant's objection to the prosecutor's statement during closing argument comparing the punishment for second-degree

murder to the punishment for first-degree murder and where defendant did not request a curative instruction, there was no prejudice to defendant given that the objection was sustained and that the court gave the jury a general instruction to disregard material for which an objection had been sustained.

4. Criminal Law—prosecutor's closing argument—right against self-incrimination—reference to lack of witnesses—harmless error

In defendant's trial for first-degree murder, although the prosecutor's statement during closing argument pointing out that defendant did not call any witnesses on his behalf was improper because it was an indirect reference to defendant's failure to testify, any error was harmless where the trial court sustained defendant's objection to the prosecutor's direct statement referencing defendant's failure to testify and where defendant's identity as the perpetrator of the shooting was not in doubt given his admission at trial, through counsel, that he killed the victim.

5. Criminal Law—prosecutor's closing statement—law regarding provocation—curative instruction

In defendant's trial for first-degree murder based on premeditation and deliberation, where, after the prosecutor's request to include a statement in the jury instructions that provocation required more than "mere words" was denied by the trial court, the prosecutor still argued during closing that provocation required more than "mere words," to the extent that the statement was not entirely applicable—because it came from a case that discussed provocation in the context of voluntary manslaughter and not first-degree murder—any misstatement of law was cured by the court's jury instructions explaining what the State had to prove regarding the required state of mind for premeditation and deliberation.

6. Criminal Law—prosecutor's closing argument—defendant's admission of guilt—no reference on failure to plead guilty

In defendant's trial for first-degree murder, the trial court was not required to intervene ex mero motu during the portion of the prosecutor's closing statement regarding defendant's inability to directly admit to his guilt, in which the prosecutor noted that defendant admitted his guilt only through his counsel. The statement did not constitute an improper comment on defendant's failure to plead guilty, but was part of the State's broader argument that defendant had the requisite intent for first-degree murder based on premeditation and deliberation.

Appeal by Defendant from judgment entered 5 April 2022 by Judge Joshua W. Willey, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 24 August 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert C. Montgomery, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for Defendant.

WOOD, Judge.

Lewis Victor Branche, III ("Defendant") admitted at trial, through counsel, to having killed Kristen Bennett ("Bennett"), the mother of his son. A jury convicted Defendant of first-degree murder based on theories of premeditation and deliberation as well as lying in wait. Defendant challenges his conviction based on sufficiency of the evidence. We hold substantial evidence supports his conviction based on premeditation and deliberation. We further hold the trial court did not err by admitting numerous gruesome photographs of the body, and the alleged errors contained in the Prosecutor's closing argument did not prejudice Defendant. Therefore, we uphold Defendant's conviction of first-degree murder.

I. Factual and Procedural History

At his trial, Defendant admitted, through counsel, he shot and killed Bennett on 14 August 2018. At the time of her death, Bennett was twenty-four years old and lived with Defendant and their five-year old son on Hibbs Road. Bennett worked as a waitress at a strip club, and Defendant worked at a car dealership. Defendant routinely carried a nine-millimeter handgun but was not known to carry a .22 pistol. Bennett's father, Chuck Bennett ("Chuck") heard Defendant and Bennett argue about the fact that Bennett worked at a strip club. Defendant voiced his displeasure about Bennett's employment, and Chuck described Defendant as "jealous" about it.

On the day of the murder, Ray Gray, Jr. ("Gray") had shopped at Food Lion in Newport and was driving home when he noticed two people fighting in a yard on Hibbs Road. Gray described the altercation as, "they were scrapping, having a fight." Gray decided he should intervene in the altercation, so he turned his car around and parked in a neighbor's driveway. Gray got out of his car, "walked towards the two that were fighting," and told them to stop. Gray was concerned about

whether Bennett was being assaulted and about two children who were playing in a nearby sand pile. Gray stated Defendant and Bennett were flailing their arms in the air. Bennett was advancing on Defendant, and Defendant was backing up and trying to push Bennett back. Bennett told Gray to "get the F out of here," and Gray was only on the scene for approximately two minutes. All of this occurred sometime between 1:30 p.m. and 1:45 p.m.

A different witness, Robert Taylor ("Robert"), had picked up a sandwich during his lunch break and was returning to work when he noticed a young lady, who was later identified as Bennett, walking along the side of the road. She appeared to Robert to be wiping her face. Another witness, Danny Taylor ("Danny"), was driving down Hibbs Road between 2:00 p.m. and 3:00 p.m. on the day of the murder when he saw a blue car pulled over on the side of the road as well as a woman resembling Bennett. Bennett owned a blue Chevrolet. One of the car doors was open and it looked to Danny like Bennett was getting ready to get into the car.

A camera installed at a church across the street from Defendant's and Bennett's residence captured their residence within its view. The camera captured the altercation between Defendant and Bennett at 1:40 p.m. as well as Gray pulling over and attempting to intervene at 1:43-1:44 p.m. Bennett's car pulled out of the driveway between 2:35 p.m. and 2:37 p.m. with Defendant and the two children inside but not Bennett. Bennett's car returned to the driveway between 2:57 p.m. and 2:58 p.m., and Defendant got out of the car. Finally, at 4:07 p.m., the camera captured Defendant pulling out of the driveway in his truck. According to Defendant, he was leaving to return to work.

A few minutes after 4:00 p.m. on the day of the murder, Defendant called Bennett's mother, Christy Bennett ("Christy"), who lived with Defendant and Bennett at their residence on Hibbs Road, to tell her that he and Bennett had been in an argument and that Bennett threw a bottle of red juice at him which hit Christy's mattress and sprayed everywhere. Defendant told her he took the sheets off the mattress to launder them. Christy found this conversation odd. Two days later, Christy called 9-1-1 on 16 August 2018 to report Bennett's disappearance.

After Bennett's death, Defendant acted as though Bennett were simply missing by putting up missing persons fliers and telling people she left him. Defendant told law enforcement he returned home at approximately 2:30 p.m. on the day of the murder to find Bennett, some of her clothes, and her stripper bag missing. At 5:59 p.m., Defendant texted Bennett, "Hey girl." Later, he texted Bennett's father "to see if [Bennett] had said anything to him."

On 23 August 2018, behind Defendant's property, law enforcement found a very large pile of dead tree limbs piled up as well as fresh dirt and pine straw. Investigators removed the branches and found an indentation in the ground. Investigators used a probe to prod the dirt, and they smelled an odor of decomposition on it. They did not discover a body, but they did find a grave approximately five-foot-three inches long, thirty-four inches wide, and seventeen inches deep. Soil from this shallow grave was found to have trace amounts of blood in it.

Defendant was arrested for Bennett's murder on 4 September 2018. While incarcerated, Defendant had conversations with an inmate named William Greene ("Greene"), who agreed to provide information to law enforcement in exchange for a potential dismissal of his own charges. Greene stated that Defendant told him he and Bennett had a big argument because he had seen texts on her phone to a number he did not recognize and had deleted the number from her phone. Bennett then walked away. Defendant took the kids elsewhere, drove back to pick up Bennett, and then returned to the house where they continued fighting. Defendant stated that Bennett threatened to show him videos of her performing fellatio on other people. Defendant told Greene that after Bennett's threat "something clicked off in his head and he just grabbed the gun that was on the counter and shot her in the back of the head." Greene told law enforcement Defendant said he had "lost it," and it was "out of nowhere." Defendant told Greene the gun he used to kill Bennett was "for shooting animals in the yard. . . . any little animal he would go out back, bang bang[.]" Defendant revealed to Greene he ultimately hid Bennett's body in a burn pit next to a doghouse located at Defendant's grandfather's house.

On 16 July 2019, acting on the information provided by Greene, investigators obtained permission from Defendant's grandfather to dig under the burn pit on his property. Investigators used a backhoe to carefully remove layers of earth. Investigators uncovered heavily decomposed remains wrapped in a tarp. The remains were identified as Bennett's, and the cause of death was a gunshot wound to the back of the head. The entrance wound was in the back of the skull. Bullet fragments found in the skull were determined to be from a .22 caliber gun that could be either a rifle or handgun, but more likely a handgun. There was no other trauma to the bones other than that caused by the bullet.

Defendant's trial was held 29 March to 5 April 2022. At the close of the evidence, Defendant made a motion to dismiss the first-degree murder charge based on premeditation. The trial court denied the motion, finding "the evidence is sufficient to go to the jury on the issue

of premeditation, deliberation." The State then gave notice it would seek to instruct on first-degree murder based on a theory of lying in wait.

At the charge conference, the State sought the lying in wait jury instruction. Defendant objected, arguing the relevant caselaw required facts demonstrating the perpetrator was stalking or following someone, which could not be the case here because Bennett was killed in her own dwelling. Defendant contended the circumstances of this case were no "different than any other domestic shooting that takes place." The trial court overruled Defendant's objections and instructed the jury on first-degree murder based on theories of lying in wait and premeditation and deliberation. The trial court also instructed the jury on second-degree murder.

The jury found Defendant guilty of first-degree murder on theories of both lying in wait and premeditation and deliberation. The trial court sentenced Defendant to a term of life imprisonment without parole. Defendant appealed pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a). All other relevant facts are provided as necessary in our analysis.

II. Analysis

The issues before this Court are: (1) whether there was sufficient evidence for the jury to convict Defendant of first-degree murder based on theories of premeditation and deliberation and lying in wait; (2) whether the trial court erred by instructing the jury on lying in wait; (3) whether the trial court erred by admitting numerous gruesome photographs; and (4) whether certain statements by the Prosecutor during his closing argument prejudiced Defendant's trial. We address each argument in turn.

A. Sufficiency of the Evidence

[1] On the issue of whether there was sufficient evidence to submit the charge of first-degree murder to the jury based on theories of premeditation and deliberation and lying in wait, we adhere to the following standard of review:

> This Court reviews challenges to the sufficiency of the evidence de novo. Upon a 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 the defendant's being the perpetrator of such offense. We review the evidence in the light most favorable to the

> State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Court may consider both direct and circumstantial evidence, even when the evidence does not rule out every hypothesis of innocence.

State v. Elder, 278 N.C. App. 493, 499, 863 S.E.2d 256, 264 (2021) (citations, quotation marks, and brackets omitted).

1. Premeditation and Deliberation

Our Supreme Court has defined "premeditation" and "deliberation" as follows:

> "Premeditation" means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. "Deliberation" means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. . . . "[C]ool state of blood" does not mean an absence of passion and emotion. One may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and, to a large extent, controlled by passion at the time."

State v. Bonney, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991) (citations omitted).

If the victim sufficiently provokes the perpetrator, the killing may not be premeditated. *See State v. Taylor*, 337 N.C. 597, 607, 447 S.E.2d 360, 367 (1994). However,

> [t]he fact that defendant was angry or emotional will not negate the element of deliberation during a killing unless there was anger or emotion strong enough to disturb defendant's ability to reason. Evidence that the defendant and the victim argued, without more, is insufficient to show that the defendant's anger was strong enough to disturb his ability to reason.

State v. Geddie, 345 N.C. 73, 94, 478 S.E.2d 146, 156 (1996) (brackets omitted). Evidence regarding motive is probative of the "degree of the

offense," although motive itself is not an essential element of first-degree murder. *State v. Wiseman*, 178 N.C. 784, 791, 101 S.E. 629, 632 (1919).

Moreover, in reviewing the sufficiency of the evidence as it relates to premeditation and deliberation, this Court considers "the conduct and statements of the defendant before and after the killing." *State v. Rose*, 335 N.C. 301, 318, 439 S.E.2d 518, 527 (1994). As for a defendant's conduct after the killing, "any unseemly conduct towards the corpse of the person slain, or any indignity offered it by the slayer, as well as concealment of the body, are evidence of express malice, and of premeditation and deliberation in the slaying." *Id.* at 318, 439 S.E.2d at 527. For example, the *Rose* court upheld the defendant's conviction of first-degree murder in part because there was "evidence of an elaborate process of removing the body, bloody bedclothes and personal items from the scene of the killing." *Id.* at 319, 439 S.E.2d at 527. In *Rose*, the defendant cleaned the victim's apartment, hid the victim's body in one car before moving it to another, and ultimately transported the body to a remote location and buried it. *Id.* at 319. 439 S.E.2d at 527. The *Rose* court held "Defendant's handling of the body from the time of the killing until the body was finally burned and buried is evidence from which a jury could infer premeditation and deliberation." *Id.* at 319, 439 S.E.2d at 527. Additionally, in *State v. Patel*, this Court concluded, "the evidence of defendant's conduct . . . in disposing of the body after the murder was sufficient for a reasonable juror to conclude that defendant killed [the victim] with premeditation and deliberation." 217 N.C. App. 50, 63, 719 S.E.2d 101, 110 (2011). The *Patel* court reasoned, "the fact that [the victim's] body was burned after she was killed constitutes additional evidence of premeditation and deliberation." *Id.* at 62, 719 S.E.2d at 109. Finally, in *State v. Weathers*, our Supreme Court concluded there was sufficient evidence for the jury to find murder with premeditation and deliberation where:

> Defendant's conduct after the killing provides further evidence of premeditation and deliberation. Defendant went to great lengths to conceal the murder, including disposing of the body and destroying or hiding evidence such as the pipe, the sheets, and the mattress. Defendant's uncaring attitude about the victim, evidenced by killing her and then dumping her nude body by the roadside, could be considered by the jury in finding premeditation and deliberation.

339 N.C. 441, 452, 451 S.E.2d 266, 272 (1994).

Here, the evidence demonstrates Defendant was not "under the influence of a violent passion" to the point of murder during either the fight in the front yard nor at the moment he picked up Bennett while she was walking down the side of the road and brought her home. *Bonney*, 329 N.C. at 77, 405 S.E.2d at 154. Although Bennett advanced toward Defendant during their confrontation in front of the home and Defendant attempted to push her back, they were not physically fighting or attempting to hit one another. Greene testified the couple continued fighting even after Defendant picked her up in the car, and, according to Defendant, Bennett made threats arousing his jealousy after they returned home. However, neither instance demonstrates Defendant was impassioned to the point of losing his ability to reason. *Geddie*, 345 N.C. at 94, 478 S.E.2d at 156. Defendant never physically lashed out at Bennett other than attempting to push her away from him as she advanced on him. As for her efforts to make him jealous, the jury could have—and likely did in this case—consider Bennett's threats to arouse jealousy as evidence showing Defendant's motivation to kill her rather than arousing "lawful or just cause or legal provocation." *Bonney*, 329 N.C. at 77, 405 S.E.2d at 154.

Even if Defendant did not form the specific intent to kill Bennett until some point after they returned to the house, there was sufficient evidence for the jury to conclude Defendant committed murder in the first-degree. First, the evidence Defendant argues supports second-degree murder, such as Bennett's work at a strip club and her verbal threats to Defendant to arouse his jealousy, could have demonstrated to a reasonable jury motive rather than provocation. *See Taylor*, 337 N.C. at 607, 447 S.E.2d at 367; *Wiseman*, 178 N.C. at 791, 101 S.E. at 632.

Second, the State argued the fact Defendant murdered Bennett with a .22 caliber handgun rather than with the nine-millimeter he customarily carried demonstrates some planning on his part. Specifically, the State argues the choice of the .22 caliber handgun to commit the crime was likely because such a gun is smaller and easier to dispose of, quieter, and less likely to make an exit wound and therefore less messy. Defendant argues Greene's testimony demonstrates the .22 caliber handgun just happened to be on the kitchen counter, and so it was just the weapon Defendant happened to grab in the heat of the moment. At trial, forensic scientist Hope Bruehl testified the bullet was a .22 and more likely from a handgun than a rifle because it was all lead and not jacketed. Detective Joshua Phillips testified .22 handguns are normally smaller in size than other handguns and fire more quietly than higher caliber handguns. Viewing the evidence in the light most favorable to

the State, the jury could have accepted the foregoing relevant evidence to support a conclusion that Defendant purposely chose the .22 caliber handgun rather than his nine-millimeter because the .22 is cleaner and quieter. *Elder*, 278 N.C. App. at 499, 863 S.E.2d at 264. Therefore, we conclude Defendant's choice to use the .22 caliber handgun constitutes evidence demonstrating premeditation and deliberation.

Third, and most importantly, Defendant's actions following the murder demonstrate a planned strategy to pretend Defendant had nothing to do with the murder and to avoid detection as the perpetrator. Defendant's actions, taken together, constitute a long-term, well-thought out, and strategic plan to avoid being discovered as the perpetrator. Defendant (1) called Bennett's mother to tell her a story he made up about Bennett throwing a bottle at him and red juice spraying on the bed causing him to do laundry; (2) told people Bennett left him; (3) texted Bennett at almost 6:00 p.m. although he knew she was dead; (4) played dumb in a text to Bennett's father about Bennett's whereabouts; (5) pretended to look for Bennett by posting fliers regarding her disappearance; (6) initially disposed of Bennett's body behind the house; and (7) relocated the body to a burn pit away from his home where it was less likely to be discovered by law enforcement. Defendant's conduct after the murder supports first-degree murder based upon premeditation and deliberation because it shows Defendant "went to great lengths to conceal the murder," including initially burying the body behind his house and then reburying it on his grandfather's property. *Weathers*, 339 N.C. at 452, 451 S.E.2d at 272. Considered together, all of Defendant's carefully planned actions constituted substantial evidence for the jury to find Defendant committed the murder with premeditation and deliberation. *Weathers*, 339 N.C. at 452, 451 S.E.2d at 272.

Finally, Defendant, through counsel, admitted he shot and killed Bennett, constituting substantial evidence Defendant was the perpetrator of the offense. *Elder*, 278 N.C. App. at 499, 863 S.E.2d at 264. Because substantial evidence existed for the jury to determine (1) Defendant committed murder with premeditation and deliberation, and (2) Defendant was the perpetrator of the offense, the trial court did not err in denying Defendant's motion to dismiss.

Defendant argues this Court should not consider acts subsequent to a killing as evidence of premeditation and deliberation because of our Supreme Court's words in *State v. Steele:*

> Subsequent acts, including flight or hiding the body, or burning the bloody clothes and otherwise destroying traces of the crime, are competent on the question

> of guilt. The basis of this rule is that a guilty conscience influences conduct. From time immemorial it has been thus accepted:
>
> "The wicked flee when no man pursueth; but the righteous are bold as a lion." 28 Prov. 1.
>
> "Thus conscience doth make cowards of us all." Hamlet, Act III, scene I.
>
> "Guilty consciences always make people cowards." The Prince and his Minister, Pilpay, chap. III, Fable III.
>
> Flight is not evidence of premeditation and deliberation.

190 N.C. 506, 511, 130 S.E. 308, 312 (1925) (citations omitted). Specifically, Defendant argues the holding in *Steele* is controlling law which prevents this Court from considering acts subsequent to a killing as evidence of premeditation and deliberation and that later cases are misstatements of the law. We disagree. *Steele* holds flight, and flight alone, is not evidence of premeditation and deliberation. The *Steele* court states "subsequent acts" are relevant to guilt, but it does not hold that subsequent acts cannot be considered evidence of premeditation and deliberation. We conclude *Steele* means what it says and nothing more. Our courts have held that a defendant's subsequent acts other than flight are probative of premeditation and deliberation. *Patel*, 217 N.C. App. at 63, 719 S.E.2d at 110; *Rose*, 335 N.C. at 318, 439 S.E.2d at 527; *Weathers*, 339 N.C. at 452, 451 S.E.2d at 272.

Defendant further argues a seemingly exculpatory statement to Greene mandates we vacate his murder conviction based on premeditation and deliberation. Greene testified Defendant told him "something clicked off in his head and he just grabbed the gun that was on the counter and shot her in the back of the head." Indeed, our Supreme Court has held that "[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements." *State v. Carter*, 254 N.C. 475, 479, 119 S.E.2d 461, 464 (1961). The *Carter* court further held the defendant's motion to dismiss should be granted "when the State's evidence and that of the defendant is to the same effect, and tend only to exculpate the defendant." 254 N.C. 475, 479, 119 S.E.2d 461, 464 (1961). "The introduction by the State of exculpatory statements by the defendant, however, does not prevent the State from introducing evidence which shows facts concerning the crime to be different from the incident as described by the exculpatory statements." *State v. Freeman*, 326 N.C. 40, 42–43, 387 S.E.2d 158, 159

(1990) (other evidence presented by the State supported defendant's premeditation and deliberation conviction even though defendant had told someone prior to the shooting that he was thinking of shooting the victim in the shoulder to "keep him under control") (quotation marks omitted). Because the State presented other evidence supporting Defendant's first-degree murder conviction, the holding in *Carter* does not compel us to vacate Defendant's conviction of murder by premeditation and deliberation.

2. Lying in Wait

A first-degree murder verdict as to one theory will stand even if such a verdict as to another theory fails. *See State v. McLemore*, 343 N.C. 240, 249, 470 S.E.2d 2, 7 (1996) (upholding the defendant's conviction based on premeditation and deliberation but finding error in his conviction based on felony murder). Moreover, provided the record demonstrates which "theory or theories the jury relied [upon] in arriving at its verdict," there is no need for a new trial. *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990). Here, the jury marked the verdict form indicating it found Defendant guilty of first-degree murder based on both theories, premeditation and deliberation and lying in wait. Because we uphold Defendant's first-degree murder conviction based on premeditation and deliberation, we need not address the sufficiency of the evidence for the conviction based on lying in wait.

B. Instructing the Jury on Lying in Wait

At trial, the State sought to instruct the jury on lying in wait over numerous objections by Defendant. The trial court ultimately decided to give the instruction. Defendant argues doing so constituted error based on insufficiency of the evidence Defendant committed first-degree murder by lying in wait. Thus, Defendant frames his argument regarding the giving of the instruction essentially in the same manner he argues the evidence was insufficient to convict on lying in wait. Accordingly, based on our discussion above, we need not separately address this argument.

C. Introduction of Numerous Photographs

[2] At trial, the State admitted approximately 150 photographs, including: (1) the tarp containing the body recovered from where Defendant reburied it; (2) tattered, dirty clothes and jewelry removed from the body; (3) the body in its decomposed state and with maggots; (4) arrangements of bones after the body was "rendered"; and (5) numerous photos of the skull, some showing the bullet hole. Defendant argues, based on N.C. R. Evid. 403, many photos were irrelevant, redundant, and prejudicial as they were designed to prey on jurors' sympathies, and there was

a reasonable probability the jury would have reached a different result had it not been subjected to so many such photos. We disagree.

Because Defendant did not object to the admission of photographic evidence at trial, we review for plain error. N.C. R. App. P. 10(a)(4); *see also State v. Miles*, 223 N.C. App. 160, 164, 733 S.E.2d 572, 575 (2012) ("[W]here there is no objection to the admission of the evidence at trial, we are limited to a review for plain error").

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. R. Evid. 403. "[P]hotographs showing the condition of the body and its location when found are competent despite their portrayal of a gruesome spectacle. This holds true even where the photographs depict remains in an advanced state of decomposition, and where the cause of death is uncontroverted." *State v. Harris*, 323 N.C. 112, 127, 371 S.E.2d 689, 698 (1988) (citations omitted). "Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988).

Defendant argues we should reach the same conclusion as in *Hennis*, in which the court held repetitive, "grotesque and macabre" photos "added nothing to the [S]tate's case" and were therefore "only for inflaming the jurors." 323 N.C. at 286, 372 S.E.2d at 528. In *Hennis*, the court also found the manner in which the State presented the photographs compounded their prejudicial effect. Specifically, the *Hennis* court held the "erection of an unusually large screen on a wall directly over defendant's head such that the jury would continually have him in its vision as it viewed the slides" and the "thirty-five duplicative photographs published to the jury one at a time just before the state rested its case" were excessively redundant and "enhanced" the prejudicial effect. *Id.* at 286, 372 S.E.2d at 528.

Here, Defendant argues it was error for the trial court to allow the State to admit a "staggering 150+" photographs. It is not the volume of photographs that pose a potential issue in this case, but rather their content and whether they are overly duplicative or irrelevant. We hold they are not. We note that the vast majority of photos cannot be said to inflame the passion of jurors because they depict unemotional subjects, such as: aerial photos of the burn pit, including one photo which shows only trees and what looks like a field of grass; woods and dirt; investigators digging

into the ground; a brush pile and a dirt hole; and entirely mundane photographs of the home, its yard, and surrounding fence.

Some photographs could be considered distressing but not rising to the level of potentially inflaming jurors, specifically depicting: the tarp in which Bennett's body was wrapped; Bennett's hair sticking out of the tarp; dirty clothes and jewelry; and bones after the body was rendered. Although showing jurors photographs of Bennett's dirty clothes, jewelry, and rendered bones, along with the jurors' knowledge that they were sitting for a murder case, had potential to cause emotion, we cannot say such photographs were "grotesque and macabre," as Defendant argues. The photographs do not depict bloody, gory details of any injuries or any identifiable human features that would arouse jurors' sympathy for Bennett to the point of prejudicing their decision to find Defendant guilty based merely on such photographs. It is true that some photographs depicted Bennett's skull, making visible the bullet hole that killed Bennett. However, these photographs were highly relevant to the State's case in proving the cause of death and had some relevance to the charge of first-degree murder by lying in wait. Our Supreme Court recently stated "[t]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense. Even a stipulation as to the cause of death does not preclude the State from proving all essential elements of its case." *State v. Richardson*, 385 N.C. 101, 145-46, 891 S.E.2d 132, 171 (2023) (citation and quotation marks omitted). Here, then, the danger of unfair prejudice did not substantially outweigh the photographs' probative value.

Certainly, the most distressing photographs depicted Bennett's decomposed body, and maggots were clearly visible in some. However, the photographs were used appropriately as evidence to help the State develop and illustrate testimony regarding the extensive search and efforts required to find Bennett's body and to discover Defendant's actions to conceal it, as well as the breakthrough resulting from the information Greene provided regarding re-burial of the body. Defendant's actions subsequent to the murder, specifically his carefully executed plan to conceal the body, were relevant to the elements of premeditation and deliberation, making the difference between first- and second-degree murder. The photographs presented at trial depicted the culmination of the investigation to locate Bennett's body and provided evidence of premeditation and deliberation. *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526. Therefore, this case is distinguishable from *Hennis* because we cannot say such photographs "added nothing" to the State's case. Also, there are no facts suggesting the State presented the photos

in such a prejudicial manner as in *Hennis*, such as how the photographs in that case were displayed unusually large and directly over the defendant's head, keeping the defendant in the jury's view the entire time. Accordingly, Defendant's argument fails, and we find no plain error in the trial court's admission of the photographs.

D. The State's Closing Arguments

Defendant argues the trial court erred by failing to sustain objections to the Prosecutor's statements when he mentioned the punishment for second-degree murder, mentioned Defendant did not have to testify, and discussed the law regarding provocation. Defendant further argues the trial court erred by failing to intervene *ex mero motu* when the Prosecutor commented on Defendant's failure to plead guilty.

As for the three statements to which Defendant objected, the issue is preserved, and we review the trial court's rulings for abuse of discretion. *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (2003). Specifically, we determine whether "the remarks were improper," then whether "the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* at 101, 588 S.E.2d at 364.

Defendant did not object to the Prosecutor's comment regarding his failure to plead guilty. When a defendant fails to object to a Prosecutor's closing argument at trial, "this Court must determine if the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu*," and specifically whether the trial court should have intervened by "(1) preclud[ing] other similar remarks from the offending attorney; and/or (2) instruct[ing] the jury to disregard the improper comments already made." *Id.*, 357 N.C. at 101, 588 S.E.2d at 364 (quotation marks omitted).

1. Mentioning the Punishment for Second-Degree Murder

[3] Defendant contends the prosecutor appealed directly to the jurors' emotions by mentioning the punishment for second-degree murder as opposed to the punishment for first-degree murder. We note the trial court sustained Defendant's objection to the Prosecutor's mention of the punishment for second-degree murder. During closing argument, the Prosecutor stated:

> [Defendant's counsel] talked about punishment. The punishment is life without parole, first degree murder. What he's going to tell you, your decision is not to be based on what the punishment is or isn't. Saying what the

> punishment is simply impresses upon you the seriousness of your duty, and there's nobody that needs to impress that upon you. You already know that. You have already showed us that.
>
> *You know, if I wanted to really upset you, I could tell you the punishment for second-degree murder, minimum punishment for second-degree murder for this defendant, 93 months.*
>
> [DEFENDANT'S COUNSEL]: Objection.
>
> THE COURT: *Sustained.*

(Emphasis added.) However, following the ruling, the trial court did not give a curative instruction.

A trial court's instructions can cure erroneous statements by a prosecutor. *State v. Buckner*, 342 N.C. 198, 238, 464 S.E.2d 414, 437 (1995). Nevertheless, "it is not error for the trial court to fail to give a curative jury instruction after sustaining an objection, when defendant does not request such an instruction." *State v. Williams*, 350 N.C. 1, 24, 510 S.E.2d 626, 642 (1999). General instructions given at the outset of a trial may be "sufficient to cure any prejudicial effect suffered by [a] defendant regarding evidence to which an objection was raised and sustained." *State v. Gordon*, 248 N.C. App. 403, 412, 789 S.E.2d 659, 666 (2016).

Here, the trial court sustained Defendant's objection. Towards the beginning of the trial, the trial court instructed the jury, "When the Court sustains an objection to a question, you must disregard the question and the answer, if one is being given." The trial court additionally instructed the jury during the jury charge, "The jury should not acquit or convict a defendant based on the severity or lack of severity of punishment that will be imposed for the offense." Given the trial court's instructions, and even presuming the Prosecutor's statement was improper, we conclude the statement did not ultimately prejudice the outcome of Defendant's trial. *Walters*, 357 N.C. at 101, 588 S.E.2d at 364.

2. Mentioning Defendant Did Not Have to Testify

[4] Defendant argues he was prejudiced by the Prosecutor mentioning Defendant did not have to testify because a prosecutor may not comment on a defendant's right not to testify. At trial, the Prosecutor stated in his closing argument:

> The Judge will tell you [Defendant] does not have to testify, and the fact that he does not testify cannot be used

> against him and I want you to make sure you don't use it against him. But that doesn't mean he can't call other witnesses -- any witness.
>
> [DEFENDANT'S COUNSEL]: Objection, Your Honor.
>
> THE COURT: Sustained.
>
> [THE STATE]: Judge, I can argue where are the witnesses.
>
> THE COURT: Well, overruled. Overruled.
>
> [THE STATE]: Where are the witnesses? Where is any witness?

A criminal defendant's privilege against self-incrimination is enshrined in our Constitution and law. N.C. Const. art. I, § 23; N.C. Gen. Stat. § 8-54. Our Supreme Court has held "any direct reference to defendant's failure to testify is error and requires curative measures be taken by the trial court." *State v. Reid*, 334 N.C. 551, 554, 434 S.E.2d 193, 196 (1993). Specifically, the State

> may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State. However, a prosecution's argument which clearly suggests that a defendant has failed to testify is error. . . .
>
> When the State directly comments on a defendant's failure to testify, the improper comment is not cured by subsequent inclusion in the jury charge of an instruction on a defendant's right not to testify.

Id., at 555–56, 434 S.E.2d at 196–97.

Whether a new trial is appropriate depends on the appellate court's determining whether "[c]omment on an accused's failure to testify . . . is harmless beyond a reasonable doubt." *Id.* at 557, 434 S.E.2d at 198. In applying *Reid*, this Court has focused on whether there was doubt as to the guilt of the defendant. *State v. Riley*, 128 N.C. App. 265, 270, 495 S.E.2d 181, 185 (1998). For example, in *Riley*, this Court concluded the prosecutor's statements during voir dire ("if you want that evidence in, you're going to put the defendant on the stand. . . . You have to let the defendant testify to it") constituted error meriting a new trial because there was conflicting evidence at trial about who fired the gunshots. *Id.* at 269, 495 S.E.2d at 184.

Here, the facts are distinguishable from *Reid*. In *Reid*, the prosecutor stated in his closing argument, "Now defendant hasn't taken the stand in this case-" to which the defendant objected, and the trial court *overruled* the objection. *Id.* at 554, 434 S.E.2d at 196. Here, the trial court *sustained* Defendant's objection to the Prosecutor's mention of Defendant's failure to testify but overruled it to allow the Prosecutor to make an argument regarding Defendant's lack of witnesses. There is no doubt the Prosecutor's statement was improper. However, there also is no doubt regarding the identity of the perpetrator because Defendant, through counsel, admitted to having killed Bennett. In view of the trial court's sustaining Defendant's objection, the evidence of Defendant's motive for planning to kill Bennett, his confession, his use of the .22 caliber handgun, and his acts subsequent to the killing, we hold the Prosecutor's remark pertaining to Defendant's decision whether or not to testify is harmless beyond a reasonable doubt. *Reid*, 334 N.C. at 554, 434 S.E.2d at 196.

3. Statement of Law Regarding Provocation

[5] At trial, the Prosecutor sought instructions regarding "mere words" not rising to the level of legal provocation from a case called *State v. Simonovich*, 202 N.C. App. 49, 54, 688 S.E.2d 67, 71 (2010). The trial court denied the State's request. Nevertheless, the Prosecutor proceeded to explain *Simonovich* in his closing argument. Defendant objected, and the trial court overruled the objection. The Prosecutor explained to the jury, "*State versus Simonovich*, Court of Appeals, 2010. Provocation must be more than mere words as language, however abusive, neither excuses, nor mitigates killing. I'm not talking about cursing, flailing. We're talking about absolutely goading somebody into doing it."

Simonovich is inapposite here because it relates to provocation in the context of *voluntary manslaughter*, which is not at issue in this case. *Id.* at 54, 688 S.E.2d at 71. The relevant law regarding provocation in the context of first- versus second-degree murder is as follows:

> "The fact that defendant was angry or emotional will not negate the element of deliberation during a killing unless there was anger or emotion strong enough to disturb defendant's ability to reason. Evidence that the defendant and the victim argued, without more, is insufficient to show that the defendant's anger was strong enough to disturb his ability to reason."

Geddie, 345 N.C. at 94, 478 S.E.2d at 156 (citations, quotation marks, and brackets omitted).

A misstatement of law by a prosecutor may be "cured by proper instructions given by the trial court when it charge[s] the jury." *State v. Barden*, 356 N.C. 316, 366, 572 S.E.2d 108, 140 (2002). Here, although citing law relevant to voluntary manslaughter rather than first- or second-degree murder, the Prosecutor's explanation of the law is not very different from the correct law regarding provocation (*Simonovich*'s "mere words" versus *Geddie*'s arguing, "without more" not being enough to mitigate first-degree murder). Moreover, the trial court properly instructed the jury it could not find Defendant guilty of first-degree murder if Defendant was under the influence of a violent passion. When instructing the jury on the law relevant to what the State must prove regarding malice, the trial court explained the State must prove:

> [D]efendant acted with deliberation, which means that the defendant acted while the defendant was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried out.

This explanation is the proper statement of law regarding the required state of mind for premeditation and deliberation, and we conclude it cured any misstatement of the law by the Prosecutor. *Barden*, 356 N.C. at 366, 572 S.E.2d at 140.

4. Mentioning the Defendant Failed to Plead Guilty

[6] Defendant argues he was prejudiced by the Prosecutor mentioning Defendant admitted to killing Bennett through counsel but failed to plead guilty because a prosecutor may not comment on a defendant's failure to plead guilty or his exercise of the right to be tried by a jury. In his closing argument, the Prosecutor stated,

> The judge is going to tell you about first-degree murder. [Defendant's counsel] was kind enough to admit what his client could not deny, deny what his client could not admit, to being guilty of this. Killing another human being intentionally with malice, malice equals hatred or ill will or infliction of a wound with a deadly weapon to cause a death.
>
> I believe [Defendant's counsel] said that his client acted with malice and killed Kristen Bennett.

Defendant argues this statement constitutes an improper comment on Defendant's failure to plead guilty.

"A criminal defendant has a constitutional right to plead not guilty and be tried by a jury. Reference by the State to a defendant's failure to plead guilty violates his constitutional right to a jury trial." *State v. Degraffenried*, 262 N.C. App. 308, 310, 821 S.E.2d 887, 889 (2018) (brackets omitted). This Court's job is to determine "whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 311, 821 S.E.2d at 889.

Here, the Prosecutor was building an argument regarding premeditation and deliberation, noting Defendant admitted to killing Bennett but not to what was the largest point of dispute at trial—the requisite intent for first-degree murder. For example, the Prosecutor continued: "[D]efendant, of course, caused the victim's death. . . . Okay. Premeditation and deliberation, this is what [Defendant's counsel] did not stipulate to. Because this makes his client guilty of first-degree murder. So we're going to break this down into common sense." We conclude the Prosecutor's comment was directed at what was and was not at issue for the jurors to decide rather than an improper statement regarding Defendant's failure to plead guilty. In any event, the Prosecutor's comment was not so grossly improper that the trial court failed to intervene *ex mero motu* because it was much more clearly a reference to what the jurors were already well aware of (Defendant's admission, through counsel, regarding the killing) than a targeted attack on Defendant's failure to plead guilty.

III. Conclusion

For the foregoing reasons, we hold substantial evidence supported Defendant's jury conviction for first-degree murder based on premeditation and deliberation, and thus, we do not address the sufficiency of the evidence with regard to the theory of lying in wait. We further hold the admission of numerous and graphic photographs did not constitute plain error in a case focused on Defendant's acts subsequent to the murder as they related to premeditation and deliberation. Finally, we hold the alleged improper statements in the Prosecutor's closing argument did not prejudice Defendant. Consequently, we hold Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges ZACHARY and FLOOD concur.

STATE OF NORTH CAROLINA
v.
DESJAUN MONTRE CLAWSON, OMAR SIRREE JACKSON, AND
DAMARCUS JEREMALE WIGGINS

No. COA22-787

Filed 7 November 2023

1. Criminal Law—joinder—multiple defendants—trafficking and conspiracy charges—lack of conflicting defenses

The trial court did not err by granting the State's motion to join the cases of three defendants, who were each charged with the same drug-related trafficking and conspiracy offenses after law enforcement apprehended them in an apartment in which illegal substances and drug paraphernalia were found. There were no confessions, affirmative defenses such as alibi, or conflicting defenses that would have deprived defendants of a fair trial.

2. Evidence—defendant as driver of vehicle—hearsay analysis—personal observation—explanation for subsequent surveillance

There was no error in a drug prosecution by the admission of testimony from detectives regarding their identification of defendant as the driver of a particular vehicle on multiple occasions and their knowledge of previous complaints made about the vehicle. The statements were not hearsay because they were either based on direct knowledge and/or were offered not to prove the truth of the matter asserted but, rather, to explain the reason why law enforcement subsequently targeted that vehicle for surveillance.

3. Drugs—trafficking offenses—possession—constructive—other incriminating circumstances

In a drug trafficking prosecution arising from a search by law enforcement of two apartments, the State presented substantial evidence from which a jury could conclude that two defendants each had constructive possession of the heroin and fentanyl mixture and the cocaine base that were each discovered in both apartments, even though defendants were apprehended in just one of the apartments. Although neither defendant had exclusive possession of the premises in which the substances were found, the State presented other incriminating circumstances of constructive possession, including that each defendant had a large amount of money on their person and that both apartments contained the same illegal substances and similar drug-related items.

4. Conspiracy—criminal conspiracy—to traffic drugs—evidence of agreement—hotel room rental application

In a drug prosecution of three defendants arising from a search by law enforcement of two apartments (all three defendants were apprehended in one apartment, while both apartments contained illegal substances and drug paraphernalia), the State presented substantial evidence from which a jury could conclude that each defendant agreed to participate in a conspiracy to traffic in opium or heroin and in a conspiracy to traffic in cocaine. In addition to the illegal substances found in both apartments, there was sufficient evidence of other incriminating circumstances to prove defendants' constructive possession of the drugs in the unoccupied apartment, and, in the apartment where defendants were found, there was a key and a rental agreement for the other apartment; the rental agreement was signed by one of the defendants and dated the same day the search warrants were executed.

Appeal by Defendants from judgments entered 31 August 2021 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 3 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Nicholas R. Sanders, for the State.

Grace, Tisdale & Clifton, P.A., by Michael A. Grace and Christopher R. Clifton, for Defendant Desjaun Montre Clawson; Anne Bleyman for Defendant Omar Sirree Jackson; and Gammon, Howard & Zeszotarski, PLLC, by Joseph E. Zeszotarski, Jr., for Defendant Demarcus Jeremale Wiggins.

COLLINS, Judge.

Desjaun Montre Clawson, Damarcus Jeremale Wiggins, and Omar Sirree Jackson (collectively, "Defendants") appeal from the trial court's judgments entered upon guilty verdicts of various drug-related offenses. Defendants argue that the trial court erred by allowing the State's motion to join Defendants' cases for trial. Wiggins argues that the trial court erred by admitting certain testimony at trial. Clawson and Wiggins each argue that the trial court erred by denying their motions to dismiss trafficking in opium or heroin and trafficking in cocaine charges. Finally, Defendants each argue that the trial court erred by denying their motions to dismiss conspiracy to traffic in opium or heroin and conspiracy to traffic in cocaine charges. We find no error.

I. Background

The evidence at trial tended to show the following: On 18 October 2018, Detective Matthew Rinehardt with the Haywood County Sheriff's Department received an anonymous phone call alleging that there was drug activity at the Olive View Apartments. The apartment building was formerly a motel which had been converted into efficiency apartments. Rinehardt was familiar with the apartments because there had been numerous complaints concerning "narcotics, people with warrants, things like that."

Rinehardt relayed this information to Detective Jordan Reagan, and Reagan went to the apartments and "put eyes on to start watching and seeing if there was any activity moving, any vehicles coming and going, or anything that we could act on." Reagan parked his unmarked patrol vehicle about one-tenth of a mile away from the apartments and used binoculars to observe the property. While conducting surveillance, Reagan observed a black Dodge Charger parked in front of the apartments. The Charger had a silver "swoop that follows the contour of the body." Reagan was familiar with the vehicle as it had been the subject of previous complaints and was being watched for "possibly being involved in narcotics[.]" Rinehardt had seen Wiggins operating the vehicle on multiple occasions.

Reagan also observed traffic in and out of the last two apartments, Rooms 14 and 15. Several vehicles would pull up, "[s]ometimes just one person would get out" and "[t]he driver would stay in the vehicle[,]" and "[t]he person would meet with people at the apartments, stay for a minute or go inside the apartment and leave[.]" On two occasions, Reagan witnessed "two black males come out of Apartment 14 and walk into 15, stay for a couple minutes, [and] come back out." One of the black males had a "tall, skinnier-type build with dreads, and the other black male was short and heavier set, short hair and had a bright pair of pants."

Reagan called officers from the criminal suppression unit for assistance. Several officers began conducting traffic stops of vehicles exiting the apartments based on information from Reagan, including "occupants of the vehicle, description of the vehicle, make, model, color, and the direction of travel." At some point, Reagan observed a female leave Room 14, get into the black Charger, and drive out of the parking lot. An officer conducted a traffic stop of the vehicle near the Dollar General, and Reagan arrived on the scene for backup. Upon searching the vehicle, the officer discovered a mirror with a white powdery residue and a needle.

Based upon the information gathered, search warrants were issued for Rooms 14 and 15, and separate teams of law enforcement conducted the searches simultaneously. Room 15 was unoccupied, but the bed was "askew as if someone had been in it[.]" Rinehardt requested a K-9 search of the room, and the K-9 alerted to the dresser. In the top drawer of the dresser, a Bojangles bag was found containing 58.4 grams of a gray chalky substance, 27.2 grams of a tan rock substance, 37.2 grams of a white powdery substance, and two digital scales, which "are used to take quantities of drug and break them down into a smaller quantity." The substances found in the Bojangles bag were chemically analyzed; the gray chalky substance was determined to be a heroin and fentanyl mixture, the tan rock substance was determined to be cocaine base, and the white powdery substance was determined to be cocaine hydrochloride.[1]

Room 14 was occupied by Clawson, Jackson, Wiggins, and Craig Hambrick, and they were sitting in the living area smoking a joint. The officers detained the four men and patted them down for weapons. Rinehardt patted Wiggins down and found $2,175 in his front pants pocket. The cash was not consistently folded or in a single stack, but rather was "in a wad" and "kind of all jumbled up in his pocket." Another officer patted Clawson down and found a total of $5,330 on his person.

Plastic bags containing 3.3 grams of a gray chalky substance and .9 grams of a tan rock substance were found on the floor of Room 14. The substances were chemically analyzed; the gray chalky substance was determined to be a heroin and fentanyl mixture and the tan rock substance was determined to be cocaine base. A document appearing to be a rental application for the Olive View Apartments was found in the kitchenette area. Jackson's name and driver's license number appeared at the top of the document, and "a signature that appeared to be consistent with the name Omar Jackson" appeared at the bottom of the document. The rental application was dated 18 October 2018, the same day the search warrants were executed. A key to Room 15 was found next to the rental application.

The following items were also found in Room 14: multiple Bojangles bags, boxes, and cups throughout the room; a rolled-up dollar bill on the futon; a lighter and tin foil on the floor near the futon; a hide-a-can in the kitchenette area, which "has the actual identical weight, label, and look of a soda can, but if you twist the top, the top actually breaks off . . . [a]nd then there is a hollow portion on the inside where things can be

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1. Cocaine base is "sometimes called crack cocaine[,]" whereas cocaine hydrochloride is "a salt form" and is "more powdery, and it will dissolve more readily in water than cocaine base will."

hidden"; two razor blades with a white powdery residue in the kitchenette area; a large plastic bag containing smaller plastic bags in the kitchenette area; a Pyrex dish containing a butter knife, tongs, and "crystal substance and residue in the bottom" in the kitchenette area; a safe with the word "dope" written on it containing Narcan kits[2] in the bedroom; and a black Coach bag containing Wiggins' identification card in the bedroom.

Defendants were indicted for trafficking in opium or heroin, conspiracy to traffic in opium or heroin, trafficking in cocaine, and conspiracy to traffic in cocaine.[3] The matter came on for trial on 23 August 2021. The State moved to join Defendants' cases for trial, and the trial court allowed the State's motion over Defendants' objections.[4] At the close of the State's evidence, Defendants moved to dismiss the charges for insufficient evidence. The trial court denied the motions.

The jury returned guilty verdicts on all charges against Clawson; the trial court consolidated the convictions and sentenced him to 225 to 282 months of imprisonment. The jury returned guilty verdicts on all charges against Wiggins. The trial court consolidated Wiggins' convictions for trafficking in opium or heroin and conspiracy to traffic in opium or heroin and sentenced him to 225 to 282 months of imprisonment; the trial court consolidated Wiggins' convictions for trafficking in cocaine and conspiracy to traffic in cocaine into a separate judgment and sentenced him to a consecutive term of 35 to 51 months of imprisonment. The jury returned not guilty verdicts on the trafficking charges and guilty verdicts on the conspiracy charges against Jackson; the trial court consolidated the convictions and sentenced him to 225 to 282 months of imprisonment. Defendants appealed.

II. Discussion

A. State's Motion for Joinder

[1] Defendants first argue that the trial court erred by allowing the State's motion to join Defendants' cases for trial.

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2. A Narcan kit is "either given nasally or through an injection to reverse the effects of an overdose on heroin or opiates[.]"

3. Jackson was also indicted for two counts of maintaining a dwelling for the purpose of keeping or selling controlled substances, but the State dismissed these charges prior to trial.

4. Hambrick was also indicted for trafficking in opium or heroin, conspiracy to traffic in opium or heroin, trafficking in cocaine, and conspiracy to traffic in cocaine. The State initially included Hambrick in its motion for joinder. However, Hambrick was tried separately from Defendants and is not a party to this appeal.

Under N.C. Gen. Stat. § 15A-926(b)(2)(a), charges against two or more defendants may be joined for trial where "each of the defendants is charged with accountability for each offense[.]" N.C. Gen. Stat. § 15A-926(b)(2)(a) (2021). However, section 15A-927(c)(2)(a) requires the trial court to deny a motion for joinder "[i]f before trial . . . it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants[.]" *Id.* § 15A-927(c)(2)(a) (2021). "Even though the defendants in a joint trial may offer antagonistic or conflicting defenses, that fact alone does not necessarily warrant severance. The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." *State v. Lowery*, 318 N.C. 54, 59, 347 S.E.2d 729, 734 (1986) (quotation marks and citations omitted).

"Whether defendants should be tried jointly or separately pursuant to these provisions is a matter addressed to the sound discretion of the trial judge." *State v. Rasor*, 319 N.C. 577, 581, 356 S.E.2d 328, 331 (1987) (citation omitted). "Absent a showing that defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed on appeal." *Id.* (citation omitted).

Here, Defendants were indicted for trafficking in opium or heroin, conspiracy to traffic in opium or heroin, trafficking in cocaine, and conspiracy to traffic in cocaine stemming from the same incident on 18 October 2018. There were "no statements or confessions which [the State] intend[ed] to offer at this trial," and there were "no affirmative defenses such as alibi or other matters which might impact the ability of the defendants to be joined at this trial." Because there were no antagonistic or conflicting defenses that would deprive Defendants of a fair trial, the trial court did not err by allowing the State's motion to join Defendants' cases.

B. Admission of Certain Evidence and Testimony

[2] Wiggins argues that the trial court erred by admitting testimony that law enforcement had seen him operating the black Charger on multiple occasions, that the vehicle had been the subject of previous complaints, and that the vehicle was being watched for possibly being involved in narcotics.[5]

---

5. Within Clawson's argument that the trial court erred by denying his motion to dismiss, he asserts that the trial court erred by admitting "evidence of [the] monies found in Clawson's pocket at the time of the bust" and by admitting testimony regarding the anonymous phone call. However, Clawson failed to cite any supporting authority for these assertions and any argument is thus deemed abandoned. N.C. R. App. P. 28(b)(6).

"The standard of review for admission of evidence over objection is whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence." *State v. Gayles*, 233 N.C. App. 173, 176, 756 S.E.2d 46, 48 (2014). An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. *Id.*

Hearsay is a statement other than one made by the declarant while testifying at trial that is offered in evidence to prove the truth of the matter asserted. N.C. Gen. Stat. § 8C-1, Rule 801. "Out-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) (citation omitted). "Specifically, statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *Id.*

Here, Rinehardt testified as follows:

> [RINEHARDT]: The black Dodge Charger was known to me. We had gotten previous complaints on it, and I had --
>
> . . . .
>
> [RINEHARDT]: And I had been following it and conducting surveillance on the Olive View Apartments prior to this date.
>
> [THE STATE]: Okay. Were you familiar with this vehicle?
>
> [RINEHARDT]: I was.
>
> . . . .
>
> [THE STATE]: And do you have personal knowledge of who the operator of that vehicle was at a relevant time to this investigation?
>
> [RINEHARDT]: I do.
>
> [THE STATE]: And how do you have that knowledge?
>
> [RINEHARDT]: I observed Mr. Wiggins driving the black Dodge Charger.
>
> [THE STATE]: Okay. And was that here in our community?
>
> [RINEHARDT]: Yes, sir.
>
> [THE STATE]: And was that on one time or more than one time?

[RINEHARDT]: More than one time.

Rinehardt testified that he had personal knowledge of the black Charger and that he had seen Wiggins operating the vehicle on multiple occasions. As these statements were based on Rinehardt's personal knowledge, they were not hearsay. Furthermore, his statement that "[w]e had gotten previous complaints on it" was not offered for the truth of the matter asserted, but instead was offered to explain his subsequent surveillance of the Charger; accordingly, it was not hearsay. *See id.*

Furthermore, Reagan testified as follows:

> [THE STATE]: . . . Do you recognize the building or any vehicles depicted in State's Exhibit 2?
>
> [REAGAN]: Yes, sir. This is the Olive View Apartments, and that's the black Dodge Charger sitting in front of it.
>
> . . . .
>
> [THE STATE]: Were you familiar with that vehicle?
>
> [REAGAN]: Yes, sir.
>
> [THE STATE]: How were you familiar with that vehicle?
>
> [REAGAN]: Just from other officers advising me of that vehicle and who had been riding around in it.
>
> [THE STATE]: I understand. So officers generally share information with each other?
>
> [REAGAN]: Yes, sir.
>
> [THE STATE]: That was a vehicle that was being watched?
>
> [REAGAN]: Yes, sir.
>
> [THE STATE]: By your agency?
>
> [REAGAN]: Yes, sir.
>
> . . . .
>
> [THE STATE]: Why were y'all watching that vehicle?
>
> [REAGAN]: For possibly being involved in narcotics --

Reagan's statements were not hearsay because they were offered to explain his subsequent conduct. *See id.* After Reagan observed the black Charger and traffic in and out of Rooms 14 and 15, he "contacted Sergeant Mark Mease . . . on [the] criminal suppression unit with

Haywood County . . . , advised him of what [he] had been watching and observing, and they came and set up in marked patrol cars and started conducting traffic stops on vehicles leaving this area." As these statements were offered to explain Reagan's subsequent conduct, they were not hearsay.

Accordingly, as the challenged statements were not hearsay, the trial court did not err by admitting the testimony.

C. Motion to Dismiss

Defendants each argue that the trial court erred by denying their motion to dismiss at the close of the State's evidence. Specifically, Clawson and Wiggins argue that the trial court erred by denying their motions to dismiss the charges of trafficking in opium or heroin and trafficking in cocaine, and Defendants each argue that the trial court erred by denying their motion to dismiss the charges of conspiracy to traffic in opium or heroin and conspiracy to traffic in cocaine.

We review a trial court's denial of a motion to dismiss de novo. *State v. Chavis*, 278 N.C. App. 482, 485, 863 S.E.2d 225, 228 (2021). "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. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (quotation marks and citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Rivera*, 216 N.C. App. 566, 568, 716 S.E.2d 859, 860 (2011) (quotation marks and citation omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Chekanow*, 370 N.C. at 492, 809 S.E.2d at 549-50 (quotation marks and citation omitted). Any contradictions or discrepancies in the evidence are for the jury to decide. *State v. Wynn*, 276 N.C. App. 411, 416, 856 S.E.2d 919, 923 (2021).

1. *Trafficking in Opium or Heroin and Trafficking in Cocaine*

[3] Clawson and Wiggins were convicted of trafficking in opium or heroin and trafficking in cocaine.

Under North Carolina law, "[a]ny person who sells, manufactures, delivers, transports, or possesses four grams or more of opium, . . . including heroin, or any mixture containing such substance, shall be guilty of

a felony which felony shall be known as 'trafficking in opium, opiate, opioid, or heroin[.]' " N.C. Gen. Stat. § 90-95(h)(4) (2021). Furthermore, "[a]ny person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine . . . shall be guilty of a felony, which felony shall be known as 'trafficking in cocaine[.]' " N.C. Gen. Stat. § 90-95(h)(3) (2021).

Possession of a controlled substance may be either actual or constructive. *State v. Nettles*, 170 N.C. App. 100, 103, 612 S.E.2d 172, 174 (2005). "A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *State v. Ferguson*, 204 N.C. App. 451, 459, 694 S.E.2d 470, 477 (2010) (quotation marks and citations omitted). "Constructive possession occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the substance." *State v. Acolatse*, 158 N.C. App. 485, 488, 581 S.E.2d 807, 810 (2003) (quotation marks and citation omitted).

"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) (citation omitted). "Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation omitted). When determining whether other incriminating circumstances exist to support a finding of constructive possession, we consider, among other things: (1) "the defendant's ownership and occupation of the property"; (2) "the defendant's proximity to the contraband"; (3) "indicia of the defendant's control over the place where the contraband is found"; (4) "the defendant's suspicious behavior at or near the time of the contraband's discovery"; and (5) "other evidence found in the defendant's possession that links the defendant to the contraband." *Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552 (citations omitted).

Because neither Clawson nor Wiggins had exclusive possession of Room 15 where the substances were found, the State was required to show other incriminating circumstances sufficient for the jury to find that each defendant constructively possessed the contraband. *Miller*, 363 N.C. at 99, 678 S.E.2d at 594.

a. Room 15

A Bojangles bag containing 58.4 grams of a gray chalky substance, 27.2 grams of a tan rock substance, 37.2 grams of a white powdery

substance, and two digital scales were found in the top drawer of a dresser in Room 15. The substances were chemically analyzed; the gray chalky substance was determined to be a heroin and fentanyl mixture, the tan rock substance was determined to be cocaine base, and the white powdery substance was determined to be cocaine hydrochloride.

b. Room 14

Clawson, Jackson, Wiggins, and Hambrick occupied Room 14. Bojangles bags, boxes, and cups were found throughout the room. Plastic bags containing 3.3 grams of a gray chalky substance and .9 grams of a tan rock substance were found on the floor. The substances were chemically analyzed; the gray chalky substance was determined to be a heroin and fentanyl mixture and the tan rock substance was determined to be cocaine base.

c. Clawson's Person

After Clawson was detained, an officer conducted a pat down and found $5,330 on his person.

d. Wiggins' Person

Rinehardt conducted a pat down of Wiggins and found $2,175 in his front pants pocket. The cash was not consistently folded or in a single stack, but rather was "in a wad" and "kind of all jumbled up in his pocket." Furthermore, a black Coach bag containing Wiggins' identification card was found in the bedroom of Room 14.

The Bojangles bags found in both Rooms 14 and 15; the gray chalky substance that was determined to be a heroin and fentanyl mixture found in both Rooms 14 and 15; the tan rock substance that was determined to be cocaine base found in both Rooms 14 and 15; and the large amount of cash found on Clawson's person was sufficient evidence of other incriminating circumstances from which the jury could find that Clawson constructively possessed the contraband found in Room 15. Likewise, the Bojangles bags found in both Rooms 14 and 15; the gray chalky substance that was determined to be a heroin and fentanyl mixture found in both Rooms 14 and 15; the tan rock substance that was determined to be cocaine base found in both Rooms 14 and 15; and the large amount of cash found on Wiggins' person was sufficient evidence of other incriminating circumstances from which the jury could find that Wiggins constructively possessed the contraband found in Room 15.

Accordingly, the trial court did not err by denying Clawson's and Wiggins' motions to dismiss the trafficking in opium or heroin and trafficking in cocaine charges.

2. Conspiracy to Traffic in Opium or Heroin and Conspiracy to Traffic in Cocaine

[4] Defendants were convicted of conspiracy to traffic in opium or heroin and conspiracy to traffic in cocaine.

"A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *State v. Winkler*, 368 N.C. 572, 575, 780 S.E.2d 824, 826-27 (2015) (quotation marks and citation omitted). "This evidence may be circumstantial or inferred from the defendant's behavior." *State v. Shelly*, 176 N.C. App. 575, 586, 627 S.E.2d 287, 296 (2006) (citation omitted). "The crime of conspiracy does not require an overt act for its completion; the agreement itself is the crime." *Id.* "Proof of a conspiracy is generally established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Jenkins*, 167 N.C. App. 696, 700, 606 S.E.2d 430, 433 (2005) (quotation marks, brackets, and citation omitted).

To convict Defendants of conspiracy to traffic in opium or heroin, the State was required to prove that Defendants entered into an agreement to possess four grams or more of opium, including heroin, or any mixture containing such substance. N.C. Gen. Stat. § 90-95(h)(4). Furthermore, to convict Defendants of conspiracy to traffic in cocaine, the State was required to prove that Defendants entered into an agreement to possess 28 grams or more of cocaine. N.C. Gen. Stat. § 90-95(h)(3).

In addition to the above evidence of Clawson's and Wiggins' constructive possession of the contraband found in Room 15, a document appearing to be a rental application for the Olive View Apartments was found in the kitchenette area of Room 14. Jackson's name and driver's license number appeared at the top of the document, and "a signature that appeared to be consistent with the name Omar Jackson" appeared at the bottom of the document. The rental application was dated 18 October 2018, the same day the search warrants were executed. A key to Room 15 was found next to the rental application. This evidence, when taken collectively, was sufficient to establish that Defendants entered into an agreement to traffic in opium or heroin and to traffic in cocaine.

Accordingly, the trial court did not err by denying Defendants' motions to dismiss the conspiracy to traffic in opium or heroin and conspiracy to traffic in cocaine charges.

III. Conclusion

The trial court did not err by allowing the State's motion to join Defendants' cases for trial. Furthermore, the trial court did not err by admitting certain testimony at trial. Finally, the trial court did not err by denying Defendants' motions to dismiss. Accordingly, we find no error.

NO ERROR.

Judges GRIFFIN and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
MANUEL HARPER

No. COA23-206

Filed 7 November 2023

Sentencing—double jeopardy—convictions for offense and lesser-included offense—judgment arrested—resentencing not required

Where defendant was convicted of driving while impaired (DWI), felony hit and run, felony serious injury by vehicle, and habitual felon status, the trial court erred by failing to arrest judgment on defendant's conviction for DWI, because it is a lesser-included offense of felony serious injury by vehicle. Accordingly, the appellate court arrested judgment on the DWI conviction; however, the matter did not need to be remanded for resentencing because the trial court had consolidated defendant's convictions for DWI, felony hit and run, and habitual felon status together and sentenced defendant in the presumptive range, then sentenced defendant in the presumptive range for his felony serious injury by vehicle and habitual felon status convictions, and then ordered both sentences to run concurrently.

Appeal by defendant from judgment entered 9 February 2022 by Judge Cy A. Grant in Pitt County Superior Court. Heard in the Court of Appeals 4 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew E. Buckner, for the State.

Law Office of Sandra Payne Hagood, by Sandra Payne Hagood, for the defendant-appellant.

TYSON, Judge.

Manuel Harper ("Defendant") appeals from judgment entered after a jury convicted him of one count of driving while impaired ("DWI"), one count of felony failure to stop with injury, and one count of felony serious injury by vehicle. Defendant also pled guilty to attaining habitual felon status. Our review discerns no error.

I. Background

Deborah Sheppard ("Sheppard") was driving her 2016 Nissan from her son's birthday party at her mother's house in Snow Hill back to Greenville at 9:00 p.m. on 15 August 2020. Her best friend's daughter was a passenger inside the vehicle. Sheppard was traveling on US Highway 13 when she saw a Buick vehicle traveling in the opposite direction cross over into her lane of travel. The vehicle in front of Sheppard swerved out of the way and missed the oncoming Buick. Sheppard was unable to avoid the collision.

The Buick impacted her Nissan on the front driver's side. All airbags deployed inside her car. The damage from the collision to her vehicle was "very impactful." Sheppard could not open the driver's side front door.

Sheppard looked over to the Buick and observed a black male wearing a white t-shirt seated in the driver's seat. The driver was the only person present inside the Buick. Sheppard watched the Buick's driver turn on the overhead light inside the vehicle, exit, and walk away from the scene of the collision.

Logan Latham ("Latham") was driving behind Sheppard's vehicle and witnessed the collision. Latham pulled onto the side of the highway, called 911, and went to check on the occupants of both the Nissan and Buick. Latham observed the Nissan was damaged on the driver's side. The occupants had exited the Nissan on the passenger's side.

Latham went to check on the Buick. Latham observed a black male wearing a white t-shirt and gym shorts inside of the vehicle. The driver appeared to Latham to be "intoxicated and out of it." The Buick's driver turned on his vehicle's interior light, looked around, and attempted to re-start the car. The driver exited the Buick and began walking towards Greenville. Latham testified the Buick's driver appeared unbalanced as he walked away from the accident.

North Carolina Highway Patrol troopers responded to the call reporting the collision at approximately 9:03 p.m. Sergeant Phillip Briggs was traveling away from Greenville towards the scene of the collision on US Highway 13. Sergeant Briggs was advised a black male wearing a white t-shirt was walking away from the scene of the collision. Sergeant Briggs observed a man matching the description walking along the shoulder of US Highway 13 towards Greenville.

Sergeant Briggs turned his vehicle around, pulled behind the man, and activated his blue lights. When Sergeant Briggs activated his blue lights, the man looked backed at them, reached into his pocket, pulled out a cigarette and lit it. Sergeant Briggs exited the vehicle, approached the man, and began to question him. The man pulled a pack of cigarettes and a black and chrome key from inside his pockets.

Sergeant Briggs noticed the man had a slight abrasion on the right side of his forehead, had glassy eyes, was unstable on his feet, and had slurred speech. Sergeant Briggs smelled alcohol mixed with cigarette smoke on the man's breath. Sergeant Briggs asked the man to accompany him back to the scene of the collision, and the man agreed.

Trooper Joshua Proctor also responded to the scene of the collision. Trooper Proctor observed several vehicles on the shoulder of the roadway and a couple of vehicles involved in the collision located partially in the roadway. Trooper Proctor spoke with Sheppard and Latham. Sergeant Briggs arrived on the scene of the collision and removed Defendant from his car. Sheppard was transported to Vidant Hospital where she was treated for her seat belt injury, extreme soreness, difficulty walking, and knots in her right leg.

Trooper Proctor spoke with Defendant. Trooper Proctor also smelled a strong odor of alcohol emitting from Defendant's breath, his eyes were very red and glassy, and he displayed a dark-in-color mark across his chest.

Sergeant Briggs went to the Buick involved in the accident. A wallet with a photo identification card therein was found on the center console of the Buick. Sergeant Briggs confirmed the North Carolina photo identification card contained Defendant's name. Defendant confirmed to Sergeant Briggs that wallet belonged to him. Defendant also confirmed his name to Trooper Proctor.

Trooper Proctor conducted a horizontal gaze nystagmus test. Defendant exhibited six out of six clues of impairment. Defendant told Sergeant Briggs he had consumed a 40-ounce beer. Trooper Proctor

asked Defendant to submit to a portable breath test, Defendant submitted, with both tests positive for alcohol.

Trooper Proctor placed Defendant under arrest for impaired driving. Defendant was transported to Pitt County Detention Center, where he complained of chest pain, and was then taken to Vidant Hospital. Trooper Proctor attempted to obtain a blood sample from Defendant, but he refused. Trooper Proctor then obtained a search warrant for Defendant's blood and returned to Vidant Hospital where Defendant's blood was drawn. Defendant's blood sample contained 0.17 grams of alcohol per hundred (100) milliliters.

Defendant was indicted for one count of DWI, one count of felony hit and run, two counts of felony serious injury by motor vehicle, one count of operating a vehicle without insurance, and having attained habitual felon status. Defendant was also charged with operating a vehicle with a fictitious or altered registration card or tag and driving with a revoked license.

Defendant's trial began on 7 February 2022. At the close of the State's evidence Defendant's counsel moved to dismiss all charges. The trial court dismissed one count of felony serious injury by motor vehicle, operating a vehicle without insurance, operating a vehicle with a fictitious or altered registration, driving with a revoked license, and reckless driving.

Defendant was convicted of DWI, felony hit and run, and one count of felony serious injury by vehicle. Defendant pleaded guilty to having attained habitual felon status. Defendant was sentenced as a prior record level V with 14 prior record level points.

The trial court consolidated Defendant's convictions for DWI, felony hit and run, and attaining the status of a habitual felon and sentenced him to an active term of 89 to 119 months. Defendant was also sentenced to an active term of 101 to 134 months for his felony serious injury by vehicle conviction and attaining habitual felon status. The trial court ordered both sentences to run concurrently. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issue

Defendant argues the trial court erred by entering judgments against him for convictions of felony serious injury by vehicle and for DWI.

IV. Standard of Review

This Court reviews double jeopardy issues *de novo*. *State v. Hagans*, 188 N.C. App. 799, 804, 656 S.E.2d 704, 707 (2008).

V. Double Jeopardy

Defendant argues error in the judgments against him for felony serious injury by vehicle and for DWI. Defendant asserts the trial court should have arrested judgment on the DWI conviction because DWI is a lesser-included offense of felony serious injury by vehicle. *See* N.C. Gen. Stat. § 20-141.4(a3) (2021).

During the sentencing phase of Defendant's trial, the State informed the trial court:

> [THE STATE]: The DWI merges with the felony by operation of law because it's an element of the felony serious injury by vehicle. So there will not [be] a separate judgment for the impaired driving conviction.
>
> THE COURT: There would be?
>
> [THE STATE]: There is not because it merges with the greater felony offense/ [sic] And that's what the statute and case law says, Judge.

"Both the fifth amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution prohibit multiple punishments for the *same* offense absent clear legislative intent to the contrary." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987) (citation omitted).

In *Etheridge*, our Supreme Court articulated the test to determine whether double jeopardy attaches in a single prosecution as "whether each statute requires proof of a fact which the others do not." *Id.* (citing *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed 306 (1932); *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982)). The Supreme Court held:

> By definition, all the essential elements of a lesser included offense are also elements of the greater offense. Invariably then, a lesser included offense requires no proof beyond that required for the greater offense, and the two crimes are considered identical for double jeopardy purposes. If neither crime constitutes a lesser included offense of the other, the convictions will fail to support a plea of double jeopardy.

Etheridge, 319 N.C. at 50, 352 S.E.2d at 683 (citation omitted).

As the State correctly noted at trial, DWI is a lesser included offense of felony serious injury by vehicle. *See State v. Mumford*, 364 N.C. 394, 401, 699 S.E.2d 911, 916 (2010) ("In the present case defendant was found guilty of the greater offense of felony serious injury by vehicle but acquitted of the lesser offense of driving while impaired."). The State on appeal does not argue the charge of DWI is not a lesser included of felony serious injury by vehicle. The State argues Defendant was not prejudiced by the violation because Defendant's convictions were consolidated into two separate judgments. Arresting judgment on the DWI conviction would not alter or reduce the total time Defendant is required to serve, because the trial court ordered his sentences to run concurrently.

Defendant was sentenced as a habitual felon in the presumptive ranges of 101 to 134 months for his Class C conviction for felony serious injury by vehicle and to 89 to 119 months for his combined DWI and Class D conviction for felony hit and run. "When the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing[.]" *State v. Hardy*, 242 N.C. App. 146, 160, 774 S.E.2d 410, 420 (2015) (citation omitted). This Court normally remands after arresting judgment if we were "unable to determine what weight, if any, the trial court gave to each of the separate convictions[.]" *State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124, 127-28 (1990).

In *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) our Supreme Court remanded a defendant's convictions for resentencing when one, but not all, of the convictions consolidated for judgment had been vacated, holding:

> Since it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated.

Id.

In *Cromartie*, this Court had arrested judgment due to potential collateral consequences, but did not remand for resentencing because the defendant received the lowest possible *sentencing in the mitigated range*. *State v. Cromartie*, 257 N.C. App. 790, 797, 810 S.E.2d 766, 772 (2018). "[W]e do not remand for resentencing where Defendant has

already received the lowest possible sentence because remanding when one of the convictions of a consolidated sentence is in error is based on the premise that multiple offenses probably influenced the defendant's sentence." *Id.* (citation omitted).

Unlike in *Wortham* and *Cromartie*, Defendant's convictions were consolidated into two distinct concurrent judgments with presumptive range sentences. While Defendant was sentenced in the presumptive range for his consolidated DWI and felony hit and run judgment, he was also sentenced in a separate judgment in the presumptive range for his felony serious injury by vehicle to a longer sentence of 101 to 134 months.

Defendant is serving this longer concurrent sentence. As the State argued at trial, the DWI conviction is properly arrested, but it is unnecessary to remand for resentencing. The properly-arrested DWI conviction was consolidated with the felony hit and run conviction, and that judgment specified the shorter of the two concurrent sentences.

VI. Conclusion

The trial court erred by failing to arrest judgment on Defendant's conviction for DWI, as it is a lesser-included offense within the conviction for serious injury by vehicle. We arrest judgment on Defendant's conviction for DWI in 20 CRS 05490. *See generally State v. Fields*, 374 N.C. 629, 636, 843 S.E.2d 186, 191 (2020) (discussing when this Court should arrest judgment rather than vacate a judgment).

However, the presence of Defendant's separate conviction for felony serious injury by vehicle and judgment for a longer concurrent presumptive sentence does not require remand for resentencing. Defendant's conviction for felony hit and run, and his judgment and sentence for felony serious injury by vehicle, remain undisturbed, as does Defendant's guilty plea to attaining habitual felon status. *It is so ordered.*

JUDGMENT ARRESTED: 20CRS05490.

NO PREJUDICIAL ERROR: 21CRS05491 AND 21CRS192.

Judges HAMPSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
LAKETTA HUSSAIN, Defendant

No. COA22-1024

Filed 7 November 2023

1. Obstruction of Justice—altering court documents—lack of evidence—conviction vacated

In a case involving forgery, residential mortgage fraud, and related offenses regarding a home loan application, the trial court erred by denying defendant's motion to dismiss the charge of altering court documents where, as the State conceded, no evidence was presented that defendant altered an official court document, as required by N.C.G.S. § 14-221.2, since the Florida child support order that she had submitted with her loan application as documentation of her income was a copy that she had altered, while the official order remained unaltered. The conviction was vacated and, where the offense had been consolidated with other convictions and defendant did not receive the lowest possible sentence in the presumptive range, the matter was remanded for resentencing.

2. False Pretense—obtaining property by false pretenses—home loan—elements—actual deception

In defendant's trial for forgery, residential mortgage fraud, and related offenses regarding a home loan application and subsequent mortgage modification requests, the State presented substantial evidence of each element of the offense of obtaining property by false pretenses to send the charge to the jury, including that the credit union was actually deceived by altered paystubs and a child support order which defendant submitted—first, to illustrate her income for a loan and, later, to show loss of income to receive forbearance of her mortgage payments. There was no merit to defendant's argument that, because the credit union had flagged the documents as suspicious, it was not actually deceived, since defendant's loan was contingent upon verification of her income, and the loan was granted only after the credit union received the flawed and altered documentation.

3. Damages and Remedies—restitution—fraud and false pretense—evidence of monetary loss—proximate cause

In a case involving forgery, residential mortgage fraud, and obtaining property by false pretenses regarding a home loan

application, the trial court did not err in ordering defendant to pay restitution to a credit union in the amount of $25,061.46, where there was sufficient evidence that defendant's wrongdoing—by submitting false documentation in order to obtain a loan and, later, forbearance of mortgage payments—was a direct and proximate cause of the credit union's monetary loss in issuing the original loan and granting subsequent forbearance requests.

4. Damages and Remedies—restitution—mortgage fraud case—ability to pay

In a case involving forgery, residential mortgage fraud, and obtaining property by false pretenses regarding a home loan application, the trial court did not err in ordering defendant to pay restitution to a credit union in the amount of $25,061.46, where, despite defendant's argument that the trial court failed to take into consideration defendant's ability to pay, the record reflected that the court was aware of defendant's marital status, childcare obligations, and employment status and that the court extended the length of defendant's probation to allow her more time to pay back the amount of restitution.

5. Probation and Parole—extended term imposed—based on restitution award

Where the trial court properly imposed a restitution award against defendant after her conviction of forgery, fraud, and obtaining property by false pretenses—based on her submission of false documents to a credit union in order to obtain a home loan and, later, to receive forbearance of mortgage payments—the trial court's imposition of an extended term of probation pursuant to N.C.G.S. § 15A-1343.2(d) was proper.

Appeal by Defendant from judgments entered 2 March 2022 by Judge Jason C. Disbrow in Brunswick Country Superior Court. Heard in the Court of Appeals 6 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Hilary R. Ventura, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for Defendant.

GRIFFIN, Judge.

Defendant Laketta Hussain appeals from judgments entered after a jury found her guilty of three counts of forgery, four counts of uttering forged paper, altering court documents, residential mortgage fraud, and obtaining property by false pretense. Defendant argues the trial court erred in: denying her motion to dismiss the charges of altering court documents and obtaining property by false pretense; ordering restitution; and imposing an extended term of probation. We hold the trial court erred in denying Defendant's motion to dismiss the charge of altering court documents. We otherwise affirm the trial court's denial of Defendant's motion to dismiss the charge of obtaining property by false pretenses; ordering restitution; and imposing an extended term of probation.

I. Factual and Procedural Background

In 2016, Defendant applied for a home loan through State Employees Credit Union. On 19 August 2016, Defendant's loan was approved, contingent on SECU receiving documentation verifying Defendant's income. Defendant provided pay stubs from her full-time employer, New Hanover County Department of Social Services, and her alleged part-time employer, Fundays. Defendant also provided a Florida court order illustrating her income derived from child support payments. On 4 October 2016, the loan was finalized. SECU issued payment of the funds on 1 November 2016 with Defendant's first payment becoming due on 1 December 2016.

On 9 December 2016, Defendant requested forbearance for her first mortgage payment stating she lost her part-time job at Fundays and was no longer receiving child support payments. Defendant provided documentation of her continued full-time employment with DSS and forbearance was approved for a four-month period. In April 2017, Defendant applied for an additional four-month forbearance, submitting similar documentation, which was also granted.

On 2 August 2017, Defendant applied for a third forbearance, submitting purported paystubs from her employment with DSS and her husband's part-time employment with Sands Beach Wear. SECU financial services officer, G. Davis, suspected the documents submitted with Defendant's third forbearance application were fraudulent. Per company policy, Davis notified A. Bailey, a SECU fraud and security investigator. Bailey reviewed all documentation provided by Defendant. Upon investigation, it was determined there were numerous inconsistencies in the documentation provided to obtain the original loan and subsequent forbearances. Specifically, Bailey found Defendant's husband was employed by Fundays, not Defendant, and that Defendant had altered the dates on the paystubs from DSS and Sands Beach Wear. Further

Bailey discovered the Florida child support order had been altered to include Defendant's name as the parent who was receiving income when the child listed on the order did not belong to Defendant and was not in her care. The third application for forbearance was denied and SECU foreclosed on Defendant's home.

At the close of her investigation, Bailey contacted Brunswick County Sheriff's Office and filed a police report. On 1 March 2021, Defendant was indicted and charged with: three counts of common law forgery; four counts of common law uttering forged paper; altering court documents; residential mortgage fraud; and obtaining property by false pretense. Defendant's case came on for jury trial on 28 February 2022 in Brunswick County Superior Court before the Honorable Jason C. Disbrow. On 2 March 2022, the jury returned a verdict finding Defendant guilty on all charges.

The trial court consolidated the charges and sentenced Defendant to 6 to 17 months' imprisonment, suspended for 30 months' supervised probation. The trial court then extended the probationary term to 60 months in order to give Defendant additional time to make restitution as Defendant was ordered to pay $25,061.46. Defendant gave timely notice of appeal.[1]

II. Analysis

Defendant argues the trial court erred in: (A) denying her motion to dismiss the charges of altering court documents and obtaining property by false pretense; (B) ordering restitution; and (C) imposing an extended term of probation.

A. Motion to Dismiss

Defendant argues the trial court erred in denying her motion to dismiss the charges of altering court documents and obtaining property by false pretense as the State failed to introduce substantial evidence of the essential elements of the charged offenses.

In ruling on a motion to dismiss, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser included offense therein, and (2) of the defendant's being the perpetrator of such offense[.]" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations

1. Defendant filed a petition for writ of certiorari requesting this Court grant appellate review if Defendant's right to appeal was lost by failure to give timely notice of appeal. We hold Defendant gave timely notice of appeal pursuant to N.C. R. App. P. 4 and therefore dismiss Defendant's petition.

omitted). *See State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (internal marks and citations omitted)). All evidence, competent or incompetent, must be considered with any contradictions or conflicts being resolved in favor of the State. *See State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347 (2012) (internal marks and citations omitted). On appeal, we review "the trial court's denial of a motion to dismiss *de novo*." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citations omitted).

1. Altering Court Documents

[1] Defendant argues, and the State concedes, the trial court erred in denying her motion to dismiss the charge of altering court documents as the State failed to introduce evidence that Defendant altered the official Florida child support order as is required to obtain a conviction under N.C. Gen. Stat. § 14-221.2.

Under North Carolina General Statute, section 14-221.2, a defendant is guilty of altering court documents where she intentionally, materially alters an official case record without lawful authority. *See* N.C. Gen. Stat. § 14-221.2 (2021). As the State is required to prove each essential element of section 14-221.2 in order to obtain a conviction of altering court documents, the State has failed to meet its burden where it does not introduce substantial evidence of the defendant having altered *official* court records. S*ee id.*; *see also Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455. Moreover, when a conviction is entered despite the State having failed to meet its burden, the conviction has been entered in error. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

Here, Defendant was charged with altering official court documents upon making changes to a Florida court's child support order. However, Defendant argues the State failed to introduce any evidence concerning the official case record. Specifically, Defendant contends the State neglected to introduce any evidence as to the contents of the official file, any documents from the file, or any witness who had personally seen the file.

The evidence at trial suggested only that Defendant altered a copy of an order illustrating income derived from child support and provided the altered copy to SECU as verification of income while the official order remained unaltered. The State concedes there was error as there was insufficient evidence of Defendant having altered official court records—an essential element of the crime of altering court documents. Nonetheless, the State argues this Court need not remand the matter to

the trial court for resentencing as removing the vacated charge would not have changed the trial court's judgment.

However, "[w]hen the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing[,]" but only where this Court is "unable to determine what weight, if any, the trial court gave to each of the separate convictions[.]" *State v. Cromartie*, 257 N.C. App. 790, 797, 810 S.E.2d 766, 772 (2018) (internal marks and citations omitted). Further, "we do not remand for resentencing where [the] [d]efendant has already received the lowest possible sentence because remanding when one of the convictions of a consolidated sentence is in error is based on the premise that multiple offense[s] probably influenced the defendant's sentence." *Id.*

Here, in sentencing Defendant, the trial court stated:

> THE COURT: All right. Consolidate for purposes of judgment—based on the unanimous verdict of jury of her peers, consolidate 18 CrS 865 [(altering court documents; uttering forged paper)], 18 CrS 866 [(residential mortgage fraud; obtaining property by false pretense)], and 18 CrS 867 [(two counts of common law forgery)] into one Class H judgment, Level I. Six months minimum to 17 months maximum in the Department of Adult Correction. That sentence is suspended.

This statement gives no indication as to what weight, if any, the trial court gave to each of the separate convictions. Further, Defendant did not receive the lowest possible sentence as she was sentenced at the top of the presumptive range. *See* N.C. Gen. Stat. § 15A-1340.17(c) (2021) (showing the top of the presumptive range for a Class H felony, with prior record level I, as 6-17 months' imprisonment).

Because we are unable to determine what weight, if any, the trial court gave to each of Defendant's convictions, and because Defendant was sentenced at the top of the presumptive range of sentences rather than the lowest, we must remand to the trial court for resentencing. Thus, we are only vacating Defendant's conviction of altering court documents and remand to the trial court for resentencing. We recognize the judgment may remain the same and leave that to the discretion of the trial court.

2. Obtaining Property by False Pretense

[2] Defendant argues the trial court erred in denying her motion to dismiss the charge of obtaining property by false pretense as the State

failed to introduce evidence that SECU was, in fact, deceived by the altered documents. Defendant specifically cites to issues concerning the paystubs from New Hanover County, Sands Beach Wear, and Fundays; and the Florida child support order in support of her contention.

In order to be convicted of obtaining property by false pretense pursuant to N.C. Gen. Stat. § 14-100, the State must prove, beyond a reasonable doubt, the defendant made "(1) a false representation of a past or subsisting fact or a future fulfillment or event, (2) which [was] calculated and intended to deceive, (3) which [did] in fact deceive, and (4) by which the defendant obtain[ed] or attempt[ed] to obtain anything of value from another person." *State v. Compton*, 90 N.C. App. 101, 103, 367 S.E.2d 353, 354 (1988) (citations omitted).

As to the paystubs from New Hanover County and Sands Beach Wear, Defendant argues Bailey became involved only after the paystubs were flagged. Further, Defendant notes Bailey believed the paystubs were not genuine and SECU denied her third mortgage modification request and foreclosed on her home. This, Defendant argues, is evidence which affirmatively shows SECU was not deceived by the paystubs. Similarly, as to the Fundays paystub, Defendant argues the State only presented evidence that SECU contacted Fundays to confirm whether Defendant was employed there which, in itself, suggested SECU believed the paystub may not have been genuine, and therefore, was not deceived. Additionally, Defendant argues, regarding the Florida child support order, there was no evidence as to how SECU considered the order, if at all, in their mortgage origination process and the mere presence of the order in the file cannot prove SECU was deceived by the order.

Although Bailey only became involved when Defendant's paystubs were flagged after her third forbearance application, SECU was still deceived, as Defendant's first two forbearance applications were granted based on Defendant's claims that she lost her alleged part-time job at Fundays and was no longer receiving child support payments as indicated in the falsified Florida court order. Further, Bailey testified:

> A: When we originate a mortgage, we can call the employer using an independent source, such as Google or the white pages or phone book, to find the company's phone number. We can call and confirm verbally if a member is employed by that employer.
>
> Q: So this would be the report done by whoever verbally confirmed her employment at Fundays?

> A: Yes.

This testimony suggests calling Defendant's alleged employer, Fundays, was common practice and not done solely upon suspicion of fraud. Similarly, Davis testified as to SECU's consideration of the child support order noting:

> A: To my recollection the first one was because she was no longer receiving child support, and so she needed that assistance. Because that was a large part of her income. That. And her second job was no longer in play.

This evidence suggests SECU considered Defendant's loss of the child support income in granting both the loan and the subsequent forbearance requests.

Further, our Courts, in considering the sufficiency of bills of indictment, have repeatedly recognized an indictment need not specifically allege the victim was deceived by the false pretense where the facts in the indictment are sufficient to suggest the victim surrendered something of value as a result of the false pretense. *See State v. Hinson*, 17 N.C. App. 25, 27, 193 S.E.2d 415, 416 (1972). Notably, our Supreme Court in *State v. Cronin* stated, "[i]f the false pretense caused the victim to give up his property, it logically follows that the property was given up because the victim was in fact deceived by the false pretense." 299 N.C. 229, 238, 262 S.E.2d 277, 283 (1980). Although our Courts have only applied this concept when considering the sufficiency of bills of indictment, the same can be applied in cases, such as the instant case, where the defendant challenges the sufficiency of the evidence introduced at trial. Moreover, we hold that where the State presents substantial evidence which tends to show the victim gave up his property to the defendant in reliance on the false pretense, it logically follows that the property was surrendered because the victim was deceived by the false pretense.

Because the State introduced substantial evidence which tended to show SECU was, in fact, deceived by Defendant as Defendant's home loan was contingent upon verification of her income, and only upon receiving flawed and altered documentation of income did SECU issue the loan, the trial court did not err in denying Defendant's motion to dismiss the charge of obtaining property by false pretense.

B. Restitution

Defendant contends the trial court erred in ordering she pay $25,061.46 in restitution as (1) the record did not contain evidence tending to show Defendant's alleged misconduct caused SECU's monetary

loss, and (2) the court failed to consider Defendant's ability to pay the restitution.

We review the trial court's imposition of restitution *de novo*—determining whether there is competent evidence to support the trial court's restitution award. *See State v. Clagon*, 279 N.C. App. 425, 435, 865 S.E.2d 343, 349 (2021). However, we review issues concerning whether the trial court "properly considered a defendant's ability to pay when awarding restitution" for abuse of discretion. *State v. Hillard*, 258 N.C. App. 94, 98, 811 S.E.2d 702, 705 (2018) (internal marks and citations omitted). Further, a trial court's restitution award "will be overturned only when the trial court did not consider any evidence of [the] defendant's financial condition." *State v. Crew*, 281 N.C. App. 437, 444, 868 S.E.2d 351, 356 (2022) (citing *Hillard*, 258 N.C. App. at 98, 811 S.E.2d at 705 (internal marks, citations, and emphasis omitted)).

1. Defendant's Alleged Misconduct and SECU's Monetary Loss

[3] Defendant argues the trial court erred in ordering her to pay restitution as the record was void of evidence tending to show her alleged misconduct caused SECU's monetary loss. Specifically, Defendant contends there is insufficient evidence in the record to show her submission of false documentation in the mortgage lending process was the proximate cause of SECU's monetary loss, noting "there is no evidence in the record that SECU would not have issued the mortgage" absent the submission of the documents.

Our North Carolina General Statutes, section 15A-1340.34, authorizes the trial court to order a defendant to "make restitution to the victim or the victim's estate for any injuries or damages arising directly and proximately out of the offense committed by the defendant." N.C. Gen. Stat. § 15A-1340.34(b), (c) (2021). Our Court has defined proximate cause as a cause,

> (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. Pierce, 216 N.C. App. 377, 381, 718 S.E.2d 648, 652 (2011) (citation omitted). Thus, we recognize the trial court's restitution award must be supported by competent evidence in the record which tends to

suggest Defendant both directly and proximately caused SECU's injuries. *See id.*; *see also* N.C. Gen. Stat. § 15A-1340.34(b), (c) (2021).

Here, Defendant was undoubtedly the proximate cause of SECU's monetary loss. SECU required all applicants, including Defendant, to sign a document verifying they provided information accurately and to the best of their ability. While Defendant did sign the document, she did so after submitting falsified documents in the original loan application and continued to do so throughout the forbearance process. Evidence at trial tended to show Defendant submitted a paystub from Fundays claiming it was her part-time employer while it was actually her husband's. Further, Defendant provided a copy of a Florida child support order which was altered to include her name as the recipient of child support payments when the child listed neither belonged to her nor was in her care. Defendant also altered the dates on both her husband's paystubs from Sands Beach Wear and her paystubs from DSS. Both Graves and Bailey provided testimony at trial suggesting SECU relied upon these falsified documents in issuing the original loan and subsequent forbearances, and that the submission of such documents is what led to SECU issuing and extending Defendant's forbearance.

Because the record is replete with competent evidence suggesting Defendant was the proximate cause of SECU's monetary loss, the trial court did not err in imposing restitution.

2. Defendant's Ability to Pay Restitution

[4] Defendant argues the trial court erred in ordering her to pay restitution as the court failed to consider whether Defendant was able to pay restitution. Specifically, Defendant notes the record reflects the trial court "entirely failed to consider [Defendant's] ability to make restitution" as the court did not make any inquiries about Defendant's income, expenses, or ability to pay SECU.

Our General Statutes require the trial court, in determining the amount of restitution to be made by a defendant, to "take into consideration the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution[.]" N.C. Gen. Stat. § 15A-1340.36(a) (2021). The trial court is not required to make findings of fact or conclusions of law regarding a defendant's ability to pay, nor is the court required to modify the amount of restitution owed on such basis. *See id.*; *see also State v. Tate*, 187 N.C. App. 593, 598–99, 653 S.E.2d 892, 897 (2007).

Here, the record reflects the trial court was aware of, among other things: Defendant's marital status; Defendant's past and present employment statuses; and Defendant having three children. Further, Defendant did not present any evidence suggesting she was, in any way, unable to pay the restitution amount, but instead stated: "[Defendant] is satisfied with a probationary sentence that the State is recommending." Moreover, the trial court, in ordering Defendant make restitution, extended the length of Defendant's probation so as to allow her more time to pay back the amount, thereby indicating the trial court's consideration of Defendant's ability to pay.

Because the trial court was undoubtably aware of circumstances affecting Defendant's ability to pay restitution, and further considered those circumstances in extending Defendant's probation to allow her more time to make restitution, the trial court did not err.

C. Extended Term of Probation

[5] Defendant argues the trial court erred in imposing an extended term of probation as the extended term was improperly based on the "erroneous restitution award."

Our General Statutes allow for the extension of an original period of a defendant's probation where it is necessary to complete a program of restitution. *See* N.C. Gen. Stat. § 15A-1343.2(d) (2021).

Here, Defendant argues the trial court erred in extending her probationary period only because the restitution award, in itself, was erroneous. However, as we noted above, the trial court's restitution order was not erroneous as the court both recognized and considered Defendant's ability to pay restitution. *See Supra* II.B.2. Because the restitution order was not made in error, the trial court did not err in extending Defendant's probationary period to allow her to make restitution.

III. Conclusion

For the aforementioned reasons, we hold the trial court erred in denying Defendant's motion to dismiss the charge of altering court documents but did not err in denying Defendant's motion to dismiss the charge obtaining property by false pretense; ordering restitution; or imposing an extended term of probation. Therefore, we vacate the charge of altering court documents and remand for resentencing.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judges WOOD and STADING concur.

STATE v. KING

[291 N.C. App. 264 (2023)]

STATE OF NORTH CAROLINA
v.
RICHARD JAMES KING

No. COA23-322

Filed 7 November 2023

1. Drugs—trafficking by possession—constructive possession—knowingly possess—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of trafficking in methamphetamine by possession, where the State presented substantial evidence that defendant knowingly, constructively possessed two packages of methamphetamine that were hidden inside the taillights of a car. Specifically, the evidence showed that defendant regularly used that car and was driving it when law enforcement arrested him for a different drug crime; upon searching the vehicle, law enforcement found a duffel bag belonging to defendant and containing thousands of dollars and a set of digital scales; and, in a phone call he made from jail, defendant instructed another individual on where to find the hidden packages of methamphetamine and how to retrieve them.

2. Drugs—trafficking by transportation—elements—knowingly transporting drugs—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of trafficking in methamphetamine by transportation, where the State presented substantial evidence that defendant knowingly transported two packages of methamphetamine that were hidden inside the taillights of a car that he was driving when law enforcement arrested him (for a different drug crime). The fact that the packages were not discovered until days after defendant's arrest did not support a finding that he lacked knowledge of their existence. To the contrary, the evidence showed that defendant made a phone call from jail in which he described the hidden location of the packages to another individual and instructed that individual on how to properly extract them from the car.

3. Drugs—maintaining a vehicle—for keeping or using controlled substance—sufficiency of the evidence

The trial court properly denied defendant's motion to dismiss a charge of maintaining a vehicle for unlawfully keeping and/or using a controlled substance where sufficient evidence showed that, based on a totality of the circumstances, defendant maintained the

car he was driving when law enforcement arrested him (for a different drug crime) for the purpose of keeping controlled substances, including two packages of methamphetamine that were hidden in the car's taillights. Factors supporting the "maintaining" element included: upon arrest, defendant admitted to possessing marijuana located in the center console of the car; a duffel bag belonging to defendant and containing thousands of dollars and a set of digital scales was found inside the trunk of the car; although the two packages of methamphetamine were not discovered until a few days after defendant's arrest, evidence showed that the bags were already hidden inside the car when defendant was driving it; and defendant made a phone call from jail in which he described the hidden location of the packages to another individual and instructed that individual on how to properly extract them from the car.

4. Conspiracy—to commit trafficking in methamphetamine—sufficiency of the evidence

The trial court properly denied defendant's motion to dismiss a charge of conspiracy to commit trafficking in methamphetamine where the State presented sufficient evidence to submit the charge to the jury. According to the evidence, law enforcement saw defendant repeatedly enter and leave a motel room along with three other individuals, each of whom were later found with methamphetamine in their possession; one of the three individuals was a known drug dealer who was seen taking a large box out of a car that was parked outside the motel and bringing the box to the motel room; law enforcement found defendant driving the car where the drug dealer had retrieved the large box; at the time of his arrest, defendant had thousands of dollars and a set of digital scales in his possession; and, days later, two hidden packages of methamphetamine were retrieved from the car that defendant was driving.

Appeal by defendant from judgment entered 26 August 2022 by Judge Steve R. Warren in Haywood County Superior Court. Heard in the Court of Appeals 18 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Ronnie K. Clark, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David S. Hallen, for the defendant-appellant.

TYSON, Judge.

Richard James King ("Defendant") appeals from judgments entered after a jury convicted him of: conspiracy to commit trafficking in methamphetamine by possessing 28 grams or more, but less than 200 grams; one count of trafficking methamphetamine by possessing 400 grams or more; one count of trafficking methamphetamine by transporting 400 grams or more; and, one count of maintaining a vehicle for a controlled substance. Our review shows no error.

I. Background

Haywood County Sheriff's Detectives Micah Phillips and Jordan Reagan ("Detectives") were called to jail to speak with an inmate, Thomas Andrew Clark, on 30 April 2021. Clark agreed to provide information about the drug trade in Haywood County. Detective Phillips knew Clark to be a low-level drug dealer. Clark was in jail awaiting trial. Clark spoke with the Detectives around 12:30 p.m.

The Detectives drove to the America's Best Value Inn in Canton around 2:00 p.m. based upon Clark's information. Detective Phillips observed James Welch's vehicle parked in the Inn's parking lot. Welch was known to both Detectives to be involved in drug dealing in Haywood County.

The Detectives observed Welch exit room 213 at the Inn, retrieve a large box out of the trunk of a Pontiac sedan, and return to the room. Detective Phillips estimated Welch spent approximately twenty seconds reaching inside the trunk of the Pontiac. Ten minutes later the Detectives observed Defendant, Welch, and Welch's daughter, Ashley Maggard, leave room 213 and enter the parking lot. Defendant returned to room 213. Welch and Maggard entered a red vehicle and left the property.

Sheriff's Sergeant Craig Campbell effected a stop of the red vehicle. A short time later officers with a canine arrived to assist with the vehicle's stop. Maggard told the officers a marijuana pipe was inside her purse. Welch was asked to step out of the vehicle. He complied, and the officers conducted a pat down, and conducted a search of the vehicle.

The officers located 2.5 to 2.8 grams of methamphetamine within Maggard's pants. The officers also located a bag of methamphetamine in Welch's pants and a bag of methamphetamine inside his underwear.

Detectives Phillips and Reagan continued to monitor the motel. Defendant and Samantha Rich left room 213, entered the Pontiac, and left the property. Rich was also known to Detective Phillips, due to her involvement in the Haywood County drug trade.

The Detectives followed Defendant as he drove into the parking lot of a Dairy Queen restaurant. The Detectives activated their blue lights

and conducted a stop of the Pontiac. Detective Phillips had confirmed prior to the surveillance that Defendant's driver's license was revoked. Rich immediately exited the Pontiac and began walking away. Detective Reagan stayed with Defendant, while Detective Phillips went to ensure Rich did not destroy any evidence.

Defendant admitted to possessing marijuana located in the center console of the Pontiac. The Detectives located a Marlboro cigarette package containing marijuana inside the center console. The Detectives also located a duffel bag inside the vehicle containing $3,900 in currency, a set of digital scales, and men's clothing. Deputy Hayden Green arrived with his canine and conducted a canine sniff test around the Pontiac. The canine alerted to the presence of narcotics, but the officers were unable to locate any additional contraband.

Defendant was arrested for conspiracy to traffic methamphetamine and was incarcerated at the jail. A search warrant was executed for room 213 at the Inn on 30 April 2021. No contraband or currency was found inside the room, but a methamphetamine pipe and portable air conditioner were found inside of Welch's truck located in the parking lot.

Defendant called Rebecca McMahan from the jail's telephone on 3 May 2021. Defendant asked McMahan about the Pontiac and told her to bring her toolbox. Defendant contacted McMahan the next day and suggested McMahan go to a carwash or someplace covered because it was raining. Defendant told McMahan "[t]here's two. There's one big and one small." Defendant instructed McMahan to open the trunk and remove the passenger side taillight. Law enforcement monitored these conversations.

McMahan picked up the Pontiac from the Sheriff's impound lot, and she drove the car to her friend's house located in Candler. Once there, she removed the taillight and found a magnetic box. McMahan placed the magnetic box underneath the passenger side of her vehicle. The same evening, Detective Phillips contacted McMahan, pretending to be an associate of Defendant, but McMahan denied having any knowledge of the package during the conversation. Detective Phillips went to McMahan's house and presented her with the information he knew and asked her to cooperate with the investigation. McMahan agreed to cooperate. She told Detective Phillips she had located only the magnetic box and gave it to him. She took Detective Phillips to the Pontiac parked in Candler and allowed him to search the Pontiac.

Detective Phillips opened the magnetic box and discovered a large bag of methamphetamine inside, which he estimated to weigh approximately 50 grams. Detective Phillips removed both taillights from the

Pontiac and was able to see a second package stuck in the center of the void between the taillights. The package contained a large quantity of methamphetamine and some needles. Defendant was charged with trafficking in methamphetamine by possession of more than 400 grams and trafficking in methamphetamine by transporting more than 400 grams.

Defendant contacted Tina Hill, his cousin, from jail and told her he was charged with trafficking because of his phone calls made from jail. Defendant also told Hill he was "trying to tell [McMahan] where it was at." Defendant contacted McMahan a few months later from jail and asserted Welch had placed the two packages into the back of the Pontiac.

Defendant was indicted and tried for conspiracy to commit trafficking in methamphetamine by possessing 28 grams or more, but less than 200 grams; one count of trafficking methamphetamine by possessing 400 grams or more; one count of trafficking methamphetamine by transporting 400 grams or more; and, one count of maintaining a vehicle for unlawfully keeping and/or using controlled substances. At the close of the State's evidence, Defendant moved to dismiss all charges. The trial court denied Defendant's motion. Defendant presented evidence and testified on his own behalf. The jury returned guilty verdicts on all charges.

Defendant was sentenced as a prior record level V with 14 prior record level points to 225 to 282 months for trafficking methamphetamine by possessing 400 grams or more, 225 to 282 months for trafficking methamphetamine by transporting 400 grams or more, 70 to 93 months for conspiracy to traffic methamphetamine, and 7 to 18 months for maintaining a vehicle for unlawfully keeping and/or using controlled substances. All sentences were ordered to run consecutively. Defendant appeals.

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 erred by denying his motion to dismiss for conspiracy to commit trafficking in methamphetamine by possessing 28 grams or more, but less than 200 grams; one count of trafficking methamphetamine by possessing 400 grams or more; one count of trafficking methamphetamine by transporting 400 grams or more; and, one count of maintaining a vehicle for unlawfully keeping and/or using controlled substances.

IV. Defendant's Motion to Dismiss

A. Standard of Review

"When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 222 (1994) (citation omitted).

"[A]ll evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *State v. Fisher*, 228 N.C. App. 463, 471, 745 S.E.2d 894, 900 (2013) (citation omitted). "Whether the evidence presented at trial is substantial evidence is a question of law for the court." *Id.* (citation omitted). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *Id.* (citation omitted).

"[I]t is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Poole*, 24 N.C. App. 381, 384, 210 S.E.2d 529, 530 (1975) (citation omitted). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (citation omitted).

"Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* at 597, 573 S.E.2d at 869 (citation omitted). 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) (citation omitted).

B. Trafficking by Possession

[1] Defendant argues the trial court erred by denying his motion to dismiss the charge of trafficking methamphetamine by possession. Defendant asserts he did not "knowingly possess[ ] methamphetamine." The essential elements of trafficking by possession are: "(1) knowingly possessed [a controlled substance], and (2) that the amount transported was greater than [the statutory threshold amount]." *State v. Christian*, 288 N.C. App. 50, 53, 884 S.E.2d 492, 497, *disc. rev. denied*, 385 N.C. 315, 891 S.E.2d 267 (2023). The " 'knowing possession' element of the offense of trafficking by possession may be established by showing either: (1) the defendant had actual possession; (2) the defendant had constructive

possession; or, (3) the defendant acted in concert with another to commit the crime." *Id.* at 53-54, 884 S.E.2d at 497 (citation omitted).

The State's evidence asserted Defendant constructively possessed methamphetamine. "Constructive possession [of methamphetamine] occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the controlled substance." *State v. Alston*, 193 N.C. App. 712, 715, 668 S.E.2d 383, 386 (2008), *aff'd*, 363 N.C. 367, 677 S.E.2d 455 (2009). Constructive possession can be shown with evidence tending to show a defendant has "exclusive possession of the property in which the drugs are located." *State v. Lakey*, 183 N.C. App. 652, 656, 645 S.E.2d 159, 161 (2007) (citation omitted). Constructive possession can also be shown with evidence tending to show a defendant's "nonexclusive possession of the property where the drugs are located" if there is also other incriminating evidence "connecting the defendant to the drugs." *Id.* (citation omitted).

Our Supreme Court has articulated factors of "other incriminating circumstances" to establish constructive possession:

> (1) the defendant's ownership and occupation of the property . . . ; (2) the defendant's proximity to the contraband; (3) indicia of the defendant's control over the place where the contraband is found; (4) the defendant's suspicious behavior at or near the time of the contraband's discovery; and (5) other evidence found in the defendant's possession that links the defendant to the contraband.

State v. Checkanow, 370 N.C. 488, 496, 809 S.E.2d 546, 552 (2018).

This Court has held a large amount of currency can be evidence tending to establish constructive possession. *Alston*, 193 N.C. App. at 716, 668 S.E.2d at 386 (citation omitted). Evidence of conduct by a defendant indicating his knowledge of the presence of a controlled substance is also sufficient for a jury to find constructive possession. *Id.*

Viewed in the light most favorable to the State, the evidence tends to show Defendant regularly used the Pontiac vehicle. He had prior access to and was driving the Pontiac the day he was pulled over, arrested, and the vehicle was impounded. Defendant's duffel bag containing $3,900 in currency and a set of digital scales were found inside the trunk. Defendant was aware of the location of the packages of methamphetamine, instructed McMahan, and attempted to have her remove the hidden packages from the vehicle. A jury could reasonably

conclude Defendant knowingly trafficked methamphetamine by possession. Defendant's argument is overruled.

C. Trafficking by Transportation

[2] Defendant argues the trial court erred when it denied his motion to dismiss the charge of knowingly trafficking methamphetamine by transportation. He denies knowingly transporting methamphetamine. The essential elements of trafficking methamphetamine by transportation are: "(1) knowingly . . . transported methamphetamine, and (2) that the amount possessed was greater than 28 grams." *Christian*, 288 N.C. App. at 57, 884 S.E.2d at 499 (citation omitted).

Transportation requires a "substantial movement" of contraband and can be defined as "real carrying about or [movement] from one place to another." *Id.* (citation omitted). Even very slight movement may be real or substantial enough, "depending upon the purpose of the movement and the characteristics of the areas from which and to which the contraband is moved." *State v. McRae*, 110 N.C. App. 643, 646, 430 S.E.2d 434, 436 (1993) (citation omitted). Merely witnessing a drug transaction in a vehicle stationary in a parking lot is not movement when the officers did not witness the vehicle in motion. *State v. Williams*, 177 N.C. App. 725, 729, 630 S.E.2d 216, 220 (2006).

Viewed in the light most favorable to the State, the evidence tends to show the Detectives observed Defendant driving the Pontiac from the America's Best Value Inn to the Dairy Queen parking lot, where he was arrested and the Pontiac was searched and impounded. Defendant called McMahan from jail, asked her about the Pontiac, and instructed her how to access the methamphetamine hidden within the vehicle. The fact that all the containers were not discovered until days later does not suggest a lack of knowledge given the hidden location of the packages and the Defendant's knowledge of the location of and extraction method for the packages. A jury could reasonably conclude Defendant knowingly trafficked methamphetamine by transportation. Defendant's argument is overruled.

D. Maintaining a Vehicle for Controlled Substances

[3] Defendant argues the trial court erred by denying his motion to dismiss the charge of maintaining a vehicle for unlawfully keeping and/or using controlled substances. He asserts he did not maintain the Pontiac for the purpose of unlawfully keeping and/or using controlled substances. He also argues he lacked exclusive access to the areas where the methamphetamine was found, and he did not knowingly possess

the methamphetamine. Defendant's arguments are without merit. As explained above, a jury could reasonably conclude Defendant knowingly possessed methamphetamine.

N.C. Gen. Stat. § 90-108(a)(7) prescribes a Class I felony for a person to intentionally and knowingly keep or maintain a vehicle, "which [is] resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article." N.C. Gen. Stat. § 90-108(a)(7) (2021).

In *State v. Mitchell*, our Supreme Court held the State had presented insufficient evidence of maintaining a vehicle, despite the fact "the defendant had two bags of marijuana while in his car, that his car contained a marijuana cigarette the following day, and that his home contained marijuana and drug paraphernalia[.]" *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 31 (1994).

Similarly, in *State v. Lane*, this Court held the State had presented insufficient evidence of maintaining a vehicle for unlawfully keeping and/or using controlled substances where the defendant possessed eight Ziploc bags of cocaine only once inside of the vehicle. The statute does not prohibit the mere temporary possession of [controlled substances] within a vehicle. *State v. Lane*, 163 N.C. App. 495, 500, 594 S.E.2d 107, 111 (2004) (citing *Mitchell*, 336 N.C. at 32-33, 442 S.E.2d at 30).

Upon arrest, Defendant admitted to possessing marijuana located in the center console of the Pontiac which was recovered by the Detectives. The Detectives also located a duffel bag inside the vehicle containing $3,900 in currency and a set of digital scales. The State presented other evidence tending to show both bags of methamphetamine were present inside the vehicle on 30 April 2021 and on 4 May 2021. Whether sufficient evidence was presented of the "keeping or maintaining" element depends upon a totality of the circumstances, and no single factor is determinative. *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30.

The State presented evidence of other factors, including Defendant's knowledge and actions to access and dispose of the methamphetamine within the Pontiac, which indicated Defendant kept the vehicle for the purpose of keeping controlled substances. The trial court did not err in denying Defendant's motion to dismiss for maintaining a vehicle for the unlawful keeping and/or using of controlled substances. N.C. Gen. Stat. § 90-108(a)(7). Defendant's argument is overruled.

E. Conspiracy to Commit Trafficking in Methamphetamine

[4] Defendant argues the trial court erred by denying his motion to dismiss the conspiracy to commit trafficking in methamphetamine. "[C]riminal conspiracy is an agreement between two or more persons to do an unlawful act . . . [and] no overt act is necessary to complete the crime of conspiracy. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *State v. Bindyke*, 288 N.C. 608, 615-16, 220 S.E.2d 521, 526 (1975).

"The State need not prove an express agreement;" rather, "evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citation omitted). Direct or circumstantial evidence may be used to establish the existence of a conspiracy, although it is generally "established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Worthington*, 84 N.C. App. 150, 162, 352 S.E.2d 695, 703 (1987) (citation omitted). "Mere passive cognizance of the crime or acquiescence in the conduct of others will not suffice to establish a conspiracy. The conspirator must share in the purpose of committing [the] felony." *State v. Merrill*, 138 N.C. App. 215, 221, 530 S.E.2d 608, 612 (2000) (citation and internal quotation marks omitted).

Viewing the evidence in the light most favorable to the State on a motion to dismiss, sufficient evidence tended to show and supported submitting the conspiracy charge to the jury. The alleged co-conspirators, Welch, Maggard, and Rich were all found with methamphetamine after leaving the motel. Defendant had $3,900 in currency and a set of digital scales with his clothing in the vehicle at the time of his arrest. The trial court did not err in denying Defendant's motion to dismiss the charge of conspiracy to traffic methamphetamine. Defendant's argument is overruled.

V. Conclusion

The State's evidence, taken as a whole, is sufficient for a reasonable jury to find and conclude Defendant is guilty of conspiracy to commit trafficking in methamphetamine by possessing 28 grams or more, but less than 200 grams; one count of trafficking methamphetamine by possessing 400 grams or more; one count of trafficking methamphetamine by transporting 400 grams or more; and, one count of maintaining a vehicle for keeping and/or using a controlled substance.

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

NO ERROR.

Judges DILLON and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
ANTON M. LEBEDEV, Defendant

No. COA23-249

Filed 7 November 2023

Criminal Law—expungement—eligibility—multiple unrelated charges—guilty plea to lesser-included offenses

The district court did not err by denying defendant's petition to expunge multiple unrelated speeding misdemeanors pursuant to N.C.G.S. § 15A-146 where, for each charge, defendant had pleaded guilty to lesser-included offenses. Contrary to defendant's argument on appeal, pleading guilty to a lesser-included offense does not equate to a "dismissal" of the original charge for purposes of the expungement statute; further, because this argument was meritless, the superior court did not abuse its discretion by denying defendant's petition for a writ of certiorari.

Appeal by *pro se* defendant from orders entered 7 December 2022 by Judge C. Todd Roper in Orange County District Court and from order entered 18 January 2023 by Judge R. Allen Baddour Jr. in Orange County Superior Court. Heard in the Court of Appeals 20 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. O'Brien and Assistant Attorney General Reginaldo Enrique Williams, for the State-appellee.

Law Offices of Anton M. Lebedev, by Anton M. Lebedev, for pro se defendant-appellant.

GORE, Judge.

Defendant Anton Mikhailovich Lebedev appeals pursuant to this Court's 20 March 2023 Order allowing his petition for writ of certiorari for the purpose of reviewing: (1) the three orders entered 7 December 2022 by the Orange County District Court denying his "Petition and Order of Expunction Under G.S. 15A-146(a) OR G.S. 15A-146(a1)" and (2) the order entered 18 January 2023 in Orange County Superior Court denying his petition for writ of certiorari.

Defendant argues the district court erred by denying his petition to expunge multiple unrelated traffic misdemeanors pursuant to N.C. Gen. Stat. § 15A-146. Additionally, defendant asserts the superior court abused its discretion by summarily denying his petition for writ of certiorari and declining to permit review of the district court's orders.

Upon review, we affirm. Defendant is not eligible for expunction under section 15A-146; he cites no authority supporting his view that pleading to a lesser included offense somehow equates to a "dismissal." Moreover, considering defendant's argument is meritless, the superior court could not have abused its discretion in denying his petition for writ of certiorari.

I.

On 29 April 2009, defendant was charged with speeding (66 mph in a 45 mph zone). Defendant, on 15 July 2009, ultimately pled responsible to a lesser included charge: speeding (54 mph in a 45 mph zone).

On 16 March 2010, defendant was charged with speeding (64 mph in a 35 mph zone). On 2 August 2010, defendant pled responsible to the lesser included charge of exceeding a safe speed.

On 29 April 2011, defendant was charged with speeding (52 mph in a 35 mph zone). Defendant again pled responsible to a lesser included charge—improper equipment (speedometer)—on 17 August 2011.

On 24 November 2022, defendant filed three separate expungement petitions, each one seeking expunction as to one of the above traffic charges. The district court denied all three, finding that they did not show defendant was charged with "multiple offenses," as required by the statute.

On 15 December 2022, defendant petitioned the superior court for a writ of certiorari to review the expungement denials. The superior court denied the writ on 18 January 2023.

II.

Considering the district court's orders denying expungement relief, our resolution of the instant appeal hinges upon the statutory interpretation of N.C. Gen. Stat. § 15A-146. "Questions of statutory interpretation are questions of law," which this Court reviews de novo. *State v. Lamp*, 383 N.C. 562, 569, 881 S.E.2d 62, 67 (2022). "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 omitted).

We review the superior court's decision to grant or deny a petition for writ of certiorari for an abuse of discretion. *See State v. Ricks*, 378 N.C. 737, 740, 862 S.E.2d 835, 838 (2021). "The test for abuse of discretion requires the reviewing court to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *State v. Locklear*, 331 N.C. 239, 248, 415 S.E.2d 726, 732 (1992) (cleaned up).

III.

"The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013) (citation omitted).

> [W]hen the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. In these situations, the history of the legislation may be considered in connection with the object, purpose and language of the statute in order to arrive at its true meaning. However, [w]hen the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.

Applewood Props., LLC v. New S. Props., LLC, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013) (alterations in original) (citation omitted).

North Carolina General Statutes section 15A-146(a1) provides, in pertinent part, that "[i]f a person is charged with multiple offenses and any charges are *dismissed*, then that person or the district attorney may petition to have each of the *dismissed* charges expunged." N.C. Gen. Stat. § 15A-146(a1) (2022) (emphasis added). And, within Chapter 15A, the legislature provided several ways a criminal charge may be

dismissed. *See*, *e.g.*, § 15A-931 (permitting a prosecutor to voluntarily dismiss criminal charges).

In this case, defendant was charged with three unrelated misdemeanor speeding charges between 2009-2011. It is undisputed that the State did not formally dismiss any charges, as defined under Chapter 15A. *Cf.* § 15A-931(a) ("[T]he prosecutor may dismiss any charges stated in a criminal pleading . . . ."). While defendant correctly notes Chapter 15A does not statutorily define "dismissal," he reads ambiguity into the statute where there is none. In keeping with our well-established principles of statutory interpretation, we conclude that the term "dismissal" is an unambiguous word that "has a definite and well known sense in the law." *Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 19, 803 S.E.2d 142, 148 (2017) (quotation marks and citation omitted). The plain meaning of "dismissal" is the "[t]ermination of an action, claim, or charge without further hearing . . . esp., a judge's decision to stop a court case through the entry of an order or judgment that imposes no civil or criminal liability on the defendant with respect to that case." *Dismissal*, Black's Law Dictionary (11th ed. 2019). "In the event that the General Assembly uses an unambiguous word without providing an explicit statutory definition, that word will be accorded its plain meaning." *Fid. Bank*, 370 N.C. at 19, 803 S.E.2d at 149.

As such, by its plain language, defendant is not entitled to expunction under section 15A-146. Nevertheless, defendant insists he qualifies for relief because, in his view, "the legislature nonetheless intended defendants to be able to petition to expunge misdemeanor charges that did not ultimately result in a conviction." Any conclusion otherwise, defendant continues, would "lead to the absurd result of forbidding the expungement of charges after the State abandoned its prosecution of the same."

While defendant's interpretation of section 15A-146 is certainly imaginative, it incorrectly conflates the concept of pleading down to a lesser included offense with that of an actual dismissal. Moreover, defendant's broad interpretation of section 15A-146 drastically exceeds the scope of the plain language used by the legislature as it appears in the statute. *See Dickson*, 366 N.C. at 344, 737 S.E.2d at 371 (quotation marks and citation omitted) ("We presume that the General Assembly 'carefully chose each word used' in drafting the legislation.").

As this Court has already noted, amending a charging document to instead charge a lesser included offense does not equate to a dismissal, as contemplated by Chapter 15A. *See State v. Goodson*, 101

N.C. App. 665, 668-69, 401 S.E.2d 118, 121 (1991) (holding that because "[t]he record clearly shows that the State's request for a dismissal on the charge of first degree murder was predicated on its request for a charge of second degree murder[,] . . . [t]he court's dismissal of the charge of first degree murder was not a final dismissal of the criminal proceeding . . ." within the meaning of section 15A-931(a)."). And, consistent with our precedent, "dismissal" results in "no civil or criminal liability on the defendant with respect to that case." *Dismissal*, Black's Law Dictionary (11th ed. 2019). Applying these principles here, defendant pled down to lesser included crimes, and he still retained liability as to the charges he pled responsible for. *See* § 20-141 (2023) (specifying penalties associated with various traffic violations). The State did not dismiss the original misdemeanor charges, and defendant did not evade criminal liability. Both the plain language of section 15A-146 and this Court's precedent preclude defendant's arguments to the contrary. *See State v. Hooper*, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004) ("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.").

Accordingly, we affirm the district court's orders on grounds that each petition for expunction only listed one charge to be expunged, not multiple, and that section 15A-146(a1) plainly does not provide defendant with relief.

Considering defendant's expunction argument is without merit, the superior court could not have abused its discretion by denying his petition for writ of certiorari. Further, defendant cites no authority to support his contention that the superior court erred when it "summarily denied the petition without even requesting the State to respond." Upon review of defendant's petition and in the appropriate exercise of its discretion, the superior court permissibly declined to issue the writ based on defendant's failure to show "merit, or that probable error was committed" below. *In re Snelgrove*, 208 N.C. 670, 672, 182 S.E. 335, 336 (1935).

IV.

For the foregoing reasons, we affirm the superior court's order.

AFFIRMED.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
MARIO WILSON, DEFENDANT

No. COA21-34

Filed 7 November 2023

1. Identification of Defendants—first-degree murder—witness testimony—evidentiary impossibility—sufficiency of evidence

In a prosecution for first-degree murder and other charges arising from an incident in which a hooded gunman entered a house and shot multiple people, killing two, the trial court properly denied defendant's motion to dismiss where the State presented sufficient evidence to allow a jury to conclude that the sole witness who identified defendant as the shooter was physically located where she could make that identification. Although defendant argued that the identification was an evidentiary impossibility, the testimony was not inherently incredible as being in conflict with physical facts or laws of nature, and any contradictions in the evidence or issues with the witness's credibility were for the jury to resolve.

2. Jury—selection—Batson challenge—third step of inquiry—insufficient findings

In defendant's first-degree murder trial, the trial court erred by overruling defendant's *Batson* challenge—regarding the State's exercise of peremptory challenges to excuse two African-American female prospective jurors—without meeting the procedural requirements of *State v. Hobbs*, 374 N.C. 345 (2020). Where the trial court's determination that defendant had not established a prima facie case of racial discrimination during jury selection was made only after hearing the State's race-neutral reasons for its challenges, the court, by effectively engaging in steps two and three of the *Batson* inquiry, was required to make findings of fact explaining how it weighed various factors regarding purposeful discrimination, including a comparative juror analysis between those who were excused and those alleged to have been similarly situated. The matter was remanded for the trial court to conduct a full analysis of defendant's arguments that the State engaged in purposeful discrimination.

Judge DILLON concurring by separate opinion.

Judge STADING concurring in part and dissenting in part.

Appeal by Defendant from judgments entered 5 March 2020 by Judge Todd Pomeroy in Cleveland County Superior Court. Heard in the Court of Appeals 5 October 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary K. Dunn, for the State.

Marilyn G. Ozer for defendant-appellant.

MURPHY, Judge.

This appeal arises out of Defendant Mario Wilson's convictions of two counts of first-degree murder, one count of attempted first-degree murder, one count of attempted robbery with a dangerous weapon, and one count of conspiracy to commit robbery with a dangerous weapon. On appeal, Defendant argues (A) the trial court erred in denying his motion to dismiss all charges based on sufficiency of the evidence to support his being the perpetrator and (B) the trial court made inadequate *Batson* findings in light of *State v. Hobbs*. 374 N.C. 345 (2020).

As explained more fully below, viewing the evidence in the light most favorable to the State, the trial court correctly denied Defendant's motion to dismiss the charges. His specific arguments, which concern the alleged physical impossibility of witness testimony, do not actually establish the evidence at issue was impossible. However, because we agree that the trial court's *Batson* findings were procedurally inadequate under *Hobbs*, we reverse and remand for further proceedings consistent with the procedure set forth by our Supreme Court.

BACKGROUND[1]

In early October of 2016, two friends—Stevie Murray and Miranda Woods—reunited via the internet. At some point after reuniting, Woods asked whether she and her partner, a drug dealer named Jerrod Shippy, could come to Murray's house to weigh and package drugs. Murray agreed; and, when Woods and Shippy arrived at Murray's house, they were introduced to Aubre Sucato and Morris Abraham, a couple who frequently spent the night at Murray's house.

At various points throughout the evening of 26 October 2016, Murray, Woods, Shippy, Sucato, and Abraham began spending time at Murray's

1. As the details of the crimes with which Defendant was charged are material only to the arguments concerning his motion to dismiss, we present the evidence of those events in the light most favorable to the State. *State v. Irwin*, 304 N.C. 93, 98 (1981).

house, drinking alcohol and taking drugs until the early morning hours of 27 October 2016. Murray's three-year-old son, Liam, and ten-month-old baby were in the house, the former of whom was watching television in the living room where some of the adults were spending time. Abraham left just as Shippy arrived, and the two exchanged a moment of hostility. Shippy was armed with a handgun.

Later in the evening, the four remaining in the house—Murray, Woods, Shippy, and Sucato—went to sleep. Sucato went to one of the bedrooms, Woods fell asleep in another bedroom, and Murray and Shippy remained in the living room with Liam. While in bed, between 6:00 a.m. and 7:00 a.m., Sucato received three calls from Abraham in which Abraham expressed a desire to rob Shippy of his drugs. During the second call, Sucato got up and passed the phone to Murray, to whom Abraham also expressed that he wanted to rob Shippy. Both Sucato and Murray told Abraham not to rob Shippy because there were children in the house. During these calls, Defendant—Abraham's brother and former sexual partner of Murray—was audible in the background.

Twenty minutes after the third call, a man in a large hoodie wielding a handgun entered the house at the living room where Murray, Shippy, and Liam were resting. The hooded gunman fired at least 18 shots at Shippy after Shippy fired one shot at the hooded gunman. Shippy was left permanently paralyzed from the wounds he sustained in the gunfire, and two of the hooded gunman's shots connected with Liam's head, killing the toddler almost instantly.

Murray, awakened by the shots, began screaming and fled to the room where Sucato was sleeping, waking Sucato. Sucato then went to the living room, where she recognized Defendant as the hooded gunman. Sucato asked where Abraham was, and the hooded gunman replied that Abraham was not there.

After this exchange, Woods stopped in a hallway between the room she had been staying in and the living room to observe what was happening. Upon seeing her, the hooded gunman placed the barrel of his gun inches from her face and fired, killing her instantly.

Defendant's trial began on 17 February 2020. At trial, the State exercised two peremptory challenges to excuse African-American[2] female prospective jurors after another was removed for cause at the State's request. Defendant raised a *Batson* objection after the State's

2. For consistency with the Record, we use the term "African-American" in this opinion, though we use it interchangeably with the term "black" referenced in our caselaw.

exercise of its peremptory challenges, alleging that the State had vetted African-American female jurors more aggressively than similarly situated white jurors. Without ruling on whether Defendant had made a prima facie case of discrimination through these allegations, the trial court asked the State for its input, at which point the State responded that it had exercised peremptory challenges against the two jurors for knowing a witness and not paying attention, respectively. The trial court then stated it did not "believe [there had] been a prima facie case for a *Batson* challenge."

At trial, the State presented a variety of evidence of the events that took place on 26 October 2016, including, in relevant part, testimony from responding officers, Murray, Shippy, and Sucato, as well as expert testimony from a forensic pathologist. The forensic pathologist testified that the shot that killed Woods was fired no more than six inches from her face, and likely no more than two to three inches, and one of the responding officers testified that a shell casing near the location where Woods died was found "in the threshold of the bedroom[.]" Of the evidence presented, only Sucato's testimony expressly identified Defendant as the hooded gunman.

Defendant moved to dismiss all charges against him for insufficiency of the evidence at the close of the State's evidence, at the close of all evidence, and after sentencing. The trial court denied each of these motions.

Defendant was found guilty on all charges on 5 March 2020 and appealed in open court. Between 13 December 2021 and 6 April 2023, we held this case in abeyance pending our Supreme Court's resolution of *State v. Campbell*, 384 N.C. 126 (2023).

ANALYSIS

On appeal, Defendant argues that (A) the trial court erred in denying his motion to dismiss the charges and (B) the trial court's response to his *Batson* objection was procedurally inadequate.

A. Motion to Dismiss

[1] Defendant offers several bases for his argument that the trial court erred in denying his motion to dismiss for insufficient evidence,[3] all of

3. All of Defendant's arguments relate to his being the perpetrator of the crimes alleged and not to whether sufficient evidence of the elements of the crimes themselves had been satisfied. *See State v. Winkler*, 368 N.C. 572, 574 (2015) (emphasis added) (remarking that, when ruling on a motion to dismiss, "the trial court need determine only whether

which pertain to the alleged physical impossibility of the testimony of Aubrey Sucato, the only witness identifying Defendant as the hooded gunman. As a result of these deficiencies, Defendant contends, the denial of his motion to dismiss amounted to a denial of his right to due process. Reviewing the matter de novo, *see State v. Bagley*, 183 N.C. App. 514, 523 (2007), we disagree.

"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. Call*, 349 N.C. 382, 417 (1998). As to his argument concerning impossibility, however, Defendant appears to misunderstand when the concept of evidentiary impossibility applies. Our Supreme Court has long held that "evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury." *State v. Cox*, 289 N.C. 414, 422-23 (1976) (quoting *Jones v. Schaffer*, 252 N.C. 368, 378 (1960)). However, it remains the case that "[t]he credibility of a witness's identification testimony is a matter for the jury's determination, and only in rare instances will credibility be a matter for the court's determination." *State v. Green*, 296 N.C. 183, 188 (1978) (citation omitted).

North Carolina appellate courts have reserved the application of the principle of evidentiary impossibility for cases where there is no "reasonable possibility" of the evidence being reconcilable with basic physical facts or laws of nature, *see State v. Miller*, 270 N.C. 726, 732 (1967), such that the evidence is "inherently incredible[.]" *State v. Coffey*, 326 N.C. 268, 283 (1990). However, all cases applying this standard have done so on an ad hoc basis without further clarification as to the specific principles animating the distinction between impossible evidence and evidentiary conflicts susceptible to resolution by a jury. *See Miller*, 270 N.C. at 732; *Cox*, 289 N.C. at 423; *State v. Wilson*, 293 N.C. 47, 52 (1977); *State v. Sneed*, 327 N.C. 266, 273 (1990). As such, we turn to the existing caselaw to determine more precisely when evidence is deemed inherently incredible.

Inherent incredibility, in the criminal context, has most often related to the positioning of a witness and the surrounding environment *vis-à-vis* the witness's physical ability to perceive the subject of the testimony at issue. *Compare Miller*, 270 N.C. at 732 (finding witness

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there is substantial evidence of each essential element of the crime *and* that the defendant is the perpetrator").

testimony to be impossible evidence where the witness purported to identify the defendant, a stranger, as the perpetrator at a distance of 286 feet before any crime had been committed), *with Cox*, 289 N.C. at 423 (holding "there [was] a reasonable possibility of observation sufficient to permit subsequent identification" where a witness observed the defendant at multiple points for prolonged periods of time despite the defendant often wearing a mask throughout the duration), *and Coffey*, 326 N.C. at 283 ("[T]he defendant argues that the evidence at trial was insufficient to support his conviction because the testimony of all of the witnesses who purported to identify him as the man with the victim was inherently incredible. He contends this is so because of the extended period between the time when the witnesses observed him at the scene of the crime and their identification of him at trial and because the witnesses were very young and some of them viewed him at a distance. We do not agree."). In this way, the inquiry is typically closer to one of competency[4] than one of credibility *per se*, the latter of which remains solely for the jury. *See State v. Bowman*, 232 N.C. 374, 376 (1950) ("The defendant insists [the evidence] was incredible in character, and that the trial court ought to have nonsuited the action on the ground that the witnesses giving it were unworthy of belief. This argument misconceives the office of the statutory motion for a judgment of nonsuit in a criminal action. In ruling on such motion, the court does not pass upon the credibility of the witnesses for the prosecution, or take into account any evidence contradicting them offered by the defense."); *see also State v. Green*, 295 N.C. 244, 248-49 (1978) (rejecting a purported evidentiary impossibility argument where the basis for the argument related to the mental capacity and honesty of the witness). And, while some criminal cases have involved questions of evidentiary impossibility that did not relate to a witness's ability to perceive the subject of testimony, our research, even including unpublished cases,[5] reveals no such case where such an argument has actually succeeded

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4. Despite this similarity, evidentiary impossibility remains an issue of sufficiency and not of admissibility. *See Sneed*, 327 N.C. at 272 ("*Miller* was not, strictly speaking, a case involving the admissibility of evidence. Instead, *Miller* concerned the question of whether the State's evidence was sufficient to withstand a motion to dismiss (at that time denominated a motion for nonsuit).").

5. While we remain observant of the rule that "unpublished opinion[s] establish[] no precedent and [are] not binding authority," *Long v. Harris*, 137 N.C. App. 461, 470 (2000), we nonetheless find the above-cited cases useful as illustrations, in part, of the general patterns of reasoning employed to distinguish between impossible evidence and evidentiary conflicts susceptible to resolution by a jury. In light of the scarcity of caselaw on the topic of evidentiary impossibility generally, we mention these cases for this illustrative purpose and not for the purpose of attempting to alter or expand their precedential weight.

on appeal. *State v. Scriven*, COA12-1188, 226 N.C. App. 433, 2013 WL 1314774, *2 (unpublished) (rejecting an evidentiary impossibility argument where the victim's testimony allegedly conflicted with physical evidence presented by the State); *State v. Green*, COA02-1357, 160 N.C. App. 415, 2003 WL 22145857, *3-4 (unpublished) (rejecting an evidentiary impossibility argument where the defendant contended the evidence suggested a police officer moved out of the way of Defendant's vehicle and fired two shots with superhuman speed); *see also State v. Windsor*, COA09-713, 206 N.C. App. 332, 2010 WL 3001945, *4 (unpublished) ("However unlikely it may seem that an adult woman could be asphyxiated by an adult man's taping a plastic bag over her head, we do not view it as a physical impossibility."), *disc. rev. denied*, 364 N.C. 607 (2010).

Bearing this background in mind, we find it clear that, at least in a criminal context,[6] evidence is only inherently incredible where the alleged impossibility *fundamentally* undermines the reliability of the evidence as opposed to creating conflicts at the margins.[7] For this

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6. We note that the precursors to the notion of evidentiary impossibility in our jurisdiction were civil suits where contributory negligence was at issue, many of which applied the concept to discrepancies between details. *See*, *e.g.*, *Atkins v. White Transp. Co.*, 224 N.C. 688, 691 (1944) (reasoning from the rate of speed at which the plaintiff was driving and his proximity to a nearby bus that it was impossible for him to avoid a collision); *Jones*, 252 N.C. at 377-78 (1960) (performing similar calculations to determine which party, if any, was negligent in a multi-vehicle wreck at an intersection); *Powers v. S. Sternberg & Co.*, 213 N.C. 41, 41 (1938) (determining that a driver was contributorily negligent based on the force with which he rammed into another vehicle and the scale of the ensuing destruction). However, we further note that this type of analysis has never been employed in a criminal matter since evidentiary impossibility was first applied in a criminal context in *State v. Miller*. *See generally Miller*, 270 N.C. 726. This is perhaps attributable to the inherent tension between these types of arguments and the long-held principle that "[c]ontradictions and discrepancies in the [evidence in criminal cases] are to be resolved by the jury," *State v. Simpson*, 244 N.C. 325, 331 (1956), as well as the understanding in our caselaw that summary judgment on the issue of contributory negligence, by contrast, necessarily requires a judicial determination of an issue ordinarily reserved for the finder of fact. *Cone v. Watson*, 224 N.C. App. 241, 245 (2012) ("The existence of contributory negligence is ordinarily a question for the jury[.]"). In light of this divide between doctrinal norms, these civil cases predating our established evidentiary impossibility jurisprudence, while helpful to contextualize the doctrine, do not directly inform our analysis of its application in criminal cases.

7. This is, in part, why a significant subset of criminal cases in which evidentiary impossibility is at issue reference the doctrine as pertaining exclusively to witness identification of the defendant. *See*, *e.g.*, *State v. Turner*, 305 N.C. 356, 363 (1982) (marks omitted) ("According to *Miller*, the test to be employed to determine whether the identification evidence is inherently incredible is whether there is a reasonable possibility of observation sufficient to permit subsequent identification. Where such a possibility exists, the credibility of the witness' identification and the weight given his testimony is for the jury to decide."); *State v. Hoff*, 224 N.C. App. 155, 161 (2012) (citing *Miller* as applicable only

reason, and in keeping with the language of the *Cox* standard itself, a defendant must establish that the comparison point against which he argues evidence is inherently incredible does, in fact, amount to a "physical fact[] or law[] of nature . . . ."[8] *Cox*, 289 N.C. at 422-23. A conclusory allegation of physical impossibility, even together with some conflict in the evidence, is not sufficient to reverse a trial court's denial of a defendant's motion to dismiss on appeal absent a showing of what physical fact or law of nature was established and how that rendered the evidence at issue impossible. *E.g.*, *Bowman*, 232 N.C. at 376 (rejecting a defendant's evidentiary impossibility argument where the alleged conflict was a matter of credibility, not physical impossibility); *Green*, 295 N.C. at 248-49 (rejecting a purported evidentiary impossibility argument where the basis for the argument was the mental capacity and honesty of the witness rather than a conflict with physical facts or laws of

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to witness identification of a defendant), *disc. rev. denied*, 367 N.C. 211 (2013); *State v. Jackson*, 215 N.C. App. 339, 346-47 (2011) (same). While we do not hold that evidentiary impossibility in criminal cases can *only* apply in cases where a witness's ability to perceive the subject of testimony is physically impossible, we observe from the existing caselaw that only the rarest of criminal cases would see it apply outside that context.

8. The only case seemingly contesting this notion is *State v. Gamble*, in which we remarked that "[t]he witness's credibility is a matter for the court when the only testimony justifying submission of the case to the jury is inherently incredible and in conflict with the State's own evidence[,]" omitting mention of physical impossibility entirely. *State v. Gamble*, 243 N.C. App. 414, 423 (2015) (marks omitted). However, for two reasons, the language in *Gamble* does not alter our reading of the governing standards with respect to evidentiary impossibility.

First, the language in *Gamble*, despite appearing to deviate from the governing standard set out in *Cox* and *Miller*, was actually a truncated quotation to *Wilson*, the full relevant language of which reads as follows: "While ordinarily the credibility of witnesses and the weight to be given their testimony is exclusively a matter for the jury, this rule does not apply when the only testimony justifying submission of the case to the jury is inherently incredible and in conflict with *the physical conditions established by* the State's own evidence." *Wilson*, 293 N.C. at 51 (emphasis added). The standard established by our Supreme Court has therefore remained unchanged.

Second, and more importantly, *Gamble* did not actually purport to change the applicable standard in evidentiary impossibility cases. Despite the omission of critical language in *Wilson*, the use of the truncated quote in *Gamble* was immediately followed by a reiteration of the principle that evidentiary conflicts are to be resolved by the finder of fact and a rejection of the defendant's evidentiary impossibility argument. *See Gamble*, 243 N.C. App. at 423 ("No such conflict exists here. Any issue concerning Detective Russell's credibility, or the weight to be given to his testimony, was a matter for the jury. The trial court therefore did not err, much less commit plain error, in admitting this testimony."). Accordingly, there is no actual conflict between *Gamble* and the foundational principle that evidentiary impossibility arguments must be grounded in "physical facts or laws of nature . . . ." *Cox*, 289 N.C. at 422.

nature); *supra* at footnote 7 and accompanying citations. To hold otherwise would undermine the bedrock principle that "[c]ontradictions and discrepancies, even in the State's evidence, are for the jury to resolve . . . ." *Cox*, 289 N.C. at 423 (citing *State v. Mabry*, 269 N.C. 293, 296 (1967)); *see also Wilson*, 293 N.C. at 51 ("[O]rdinarily the credibility of witnesses and the weight to be given their testimony is exclusively a matter for the jury[.]").

Turning to the case at hand, we think only some of Defendant's arguments, if true, would render Sucato's testimony inherently incredible. Defendant makes three specific arguments: first, Sucato's testimony conflicts with other witness testimony; second, Sucato's testimony is internally inconsistent; and, third, Sucato's testimony that the hooded gunman shot Miranda Woods while standing in the living room places her at a vantage point that conflicts with the State's other evidence. Of these, only the last, if true, would amount to evidentiary impossibility.

The first alleged conflict—conflict between Sucato's testimony and that of other witnesses—does not, even if true, render Sucato's testimony impossible. The specific conflict alleged by Defendant in connection with this argument is that neither Murray nor Shippy saw Sucato despite the fact that, if all of their testimony were to be believed, they would have necessarily crossed paths. However, conflict between witness testimony does not necessarily amount to "conflict with indisputable physical facts or laws of nature[,]" and this specific conflict in testimony amounts only to a discrepancy between individuals' recollection and perspectives. *Cox*, 289 N.C. at 422. Defendant points us to no physical fact or law of nature that Murray or Shippy's testimony established that Sucato's testimony, in turn, violated. Defendant has therefore not established that Sucato's testimony was inherently incredible on this basis, and any associated contradictions and discrepancies in the evidence were for the jury to resolve. *Id.* at 423.

The second alleged conflict—internal inconsistency in Sucato's testimony—also does not, if true, render Sucato's testimony impossible. With respect to this issue, the specific conflict alleged is that Sucato claims to have been able to identify Defendant as the hooded gunman despite having not looked at his face or being able to identify key details about Defendant's appearance from memory. However, this argument is also not predicated on impossibility; rather, it relates to the witness's credibility in light of her inability to recall previously observed details of Defendant's appearance. As Defendant has not argued that this testimony is actually in conflict with a physical fact or law of nature,

Defendant cannot establish on this basis that the evidence was inherently incredible and, by extension, impossible.[9]

This brings us back to the third alleged conflict—discrepancy between the vantage point at which Sucato claims to have been standing when she observed Defendant and the location where the State's other evidence would have placed Defendant. This argument is divided into two further sub-arguments that Sucato's testimony "places [Defendant] at a distance from [] Woods which is incompatible with [Woods's] autopsy" and that Sucato's testimony "places [Defendant] in the living room when he fired the gun, while the shell casing was located in the back bedroom requiring the shooter to have been standing next to the bedroom at the end of the hallway[.]" Unlike the other alleged conflicts, Defendant relies on the structure of the house, pathologist testimony, photographic evidence, and ballistics evidence to support the proposition that Sucato was in a location where her observing Defendant

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9. We note that this argument, unlike the other arguments in this section of Defendant's brief, does not explicitly reference evidentiary impossibility as the basis for the allegation that the trial court erred. To the extent Defendant intended this argument as a freestanding argument that his identification was unsupported by substantial evidence, we still disagree. *State v. Stallings*, which Defendant primarily relies upon for the argument that Sucato's testimony was too internally inconsistent to qualify as substantial evidence, concerned the testimony of a witness who identified a suspect as the defendant using only general characteristics:

> [The witness] testified that defendant was a regular customer. She never positively identified [the] defendant as the robber, however. She testified that [the] defendant's eyes were blue, but failed to identify them as the same distinctive eyes. Ms. King did not match [the] defendant's voice with the robber's. She stated that the robber had an unusual walk, and that [the] defendant had a "similar walk."
>
> . . . .
>
> [The witness's testimony] alone did not suffice to carry the issue of defendant's identity to the jury. Although she testified that she clearly remembered the robber's voice, walk and eyes, she never positively identified defendant by these characteristics despite extensive examination and opportunity. Taking her evidence in the light most favorable to the State, the most that can be inferred is that defendant and the robber walked similarly and had blue eyes. Such limited and equivocal evidence, standing alone, will not withstand a timely motion to dismiss.

State v. Stallings, 77 N.C. App. 189, 190 (1985), *disc. rev. denied*, 315 N.C. 596 (1986). Here, *Stallings* is inapposite because, while Sucato testified she only recognized the shooter as Defendant by his voice, build, and walk, this testimony was further contextualized by a prior phone conversation about robbing Shippy in which Defendant was audible and a verbal exchange between the hooded gunman and Sucato that implied a familiarity with Abraham, Defendant's brother. Even as a standalone argument, then, the trial court did not err on this basis.

would have been physically impossible. As these arguments are based on "physical facts[,]" *Cox*, 289 N.C. at 422, they may, if true, support a conclusion that Sucato's testimony constituted impossible evidence.

Notwithstanding the requisite foundation of physical impossibility, this argument does not withstand scrutiny. With respect to the shooting of Woods, Defendant contends that Sucato could not have been standing between the hooded gunman and the front door—a location where she testified she was standing at the time she spoke to him—when Woods was shot. He argues this is the case because the physical evidence, supported by pathologist testimony, placed the hooded gunman no more than a few feet, if not inches, from the victim when the shot was fired, rendering Sucato's testimony inherently incredible by virtue of the positioning discrepancy. However, Defendant's interpretation of the testimony only creates a discrepancy under the assumption that the hooded gunman remained in a fixed location in the living room between the time he spoke to Sucato and the time he shot Woods. Sucato's testimony contains no such statement, and Defendant points us to no portion of Sucato's testimony inconsistent with Defendant having moved toward Woods before he shot her.

Similarly, with respect to the ballistics evidence, Defendant points to photographic evidence and expert testimony indicating the shell casing from the bullet that killed Woods was found in a bedroom in the hallway, a location where it could not have landed if Defendant had been in the living room when he shot Woods. As with Defendant's previous argument, though, nothing in Sucato's testimony indicates Defendant did not move before shooting Woods. Moreover, despite Defendant characterizing the shell casing as having been "a few feet inside the bedroom[,]" the uncontradicted evidence was that the shell casing was found "in the threshold of the bedroom," a location consistent with Sucato's ability to observe Woods and the hooded gunman.

Consequently, the trial court did not err in denying Defendant's motion to dismiss on this basis.

B. *Batson* Objection

[2] Defendant also argues the trial court made inadequate *Batson* findings in light of *State v. Hobbs*. 374 N.C. 345 (2020). Under *Batson v. Kentucky*,

> a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such

> a case, the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.
>
> . . . .
>
> Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging [jurors of the excluded class].

Batson v. Kentucky, 476 U.S. 79, 96, 97 (1986) (marks and citations omitted); *see also Powers v. Ohio*, 499 U.S. 400, 409-410 (1991) (applying the principles of *Batson* even where the stricken juror's race did not match the defendant's), *cert. denied*, 558 U.S. 851 (2009). Put differently, a *Batson* analysis consists of a three-step process: "First, the defendant must make a prima facie showing that the [S]tate exercised a race-based peremptory challenge." *State v. Taylor*, 362 N.C. 514, 527 (2008). Second, "[i]f the defendant makes the requisite showing, the burden shifts to the [S]tate to offer a facially valid, race-neutral explanation for the peremptory challenge." *Id.* "Finally, the trial court must decide whether the defendant has proved purposeful discrimination." *Id.*

In *State v. Hobbs*, our Supreme Court held that a trial court is required to consider on the record factors weighing for and against findings of discrimination in order to sufficiently respond to a *Batson* challenge where the trial court moved to *Batson*'s second step without ruling on the defendant's prima facie case. *Hobbs*, 374 N.C. at 360 ("On remand, considering the evidence in its totality, the trial court must consider whether the primary reason given by the State for challenging [the stricken juror] was pretextual. This determination must be made in light of all the circumstances, including how [the stricken juror's] responses during voir dire compare to any similarly situated white juror, the history of the use of peremptory challenges in jury selection in that county, and the fact that, at the time that the State challenged [the stricken juror], the State had used eight of its eleven peremptory challenges against

black potential jurors."). Moreover, it reiterated the principle that, "[w]here the State has provided reasons for its peremptory challenges, thus moving to *Batson*'s second step, and the trial court has ruled on them, completing *Batson*'s third step, the question of whether a defendant initially established a prima facie case of discrimination becomes moot." *Id.* at 354 (citing *State v. Robinson*, 330 N.C. 1, 17 (1991)). Thus, the overall effect of *Hobbs* was to clarify the procedural requirements for a trial court responding to a *Batson* objection not only in cases where the trial court actually finds a prima facie case has been shown, but also in cases where the trial court proceeds to the second and third steps of *Batson*, thereby mooting the first step.

These principles were further elaborated upon in *State v. Campbell*, 384 N.C. 126 (2023), in which our Supreme Court further clarified under what circumstances a trial court's analysis of the first step of *Batson* becomes moot. In that case, the trial court sought, purportedly during the first step of *Batson*, race-neutral reasons from the State for its peremptory challenges to two African-American jurors. *Id.* at 127. The trial court denied the defendant's *Batson* challenge on the basis that there had been no prima facie showing. *Id.* However, despite the trial court having already ruled on the *Batson* objection and the State cautioning the trial court that offering race-neutral reasons at that stage in the proceedings "could be viewed as a stipulation that there was a prima facie showing," the trial court "ordered the State to proceed as to stating a racially-neutral basis for the exercise of the peremptory challenges." *Id.* at 128. After hearing the State's race-neutral reasons, the trial court stated that it "continue[d] to find[] . . . that there ha[d] not been a prima facie showing as to purposeful discrimination." *Id.* at 130.

Ultimately, our Supreme Court reasoned that, because the trial court had already announced its ruling as to the first step of *Batson*, its own analysis on appeal was limited to whether the trial court had clearly erred in determining the defendant failed to establish a prima facie case. *Id.* at 136; *see also State v. Augustine*, 359 N.C. 709, 715 (2005) (marks and citations omitted) ("The trial court's [*Batson*] ruling is accorded deference on review and will not be disturbed unless it is clearly erroneous."), *cert. denied*, 548 U.S. 925 (2006). However, it further remarked that "[t]he State appropriately objected to the trial court's attempt to move beyond step one[,]" clarifying that the reservation of its analysis to the first step of *Batson* was based on the fact that "the trial court clearly ruled there had been no prima facie showing *before* the State articulated its reasons[.]" *Id.* (marks omitted) (emphasis added) (quoting *State v. Hoffman*, 348 N.C. 548, 552 (1998)).

Here, the full exchange between the trial court, the State, and Defendant following Defendant's *Batson* objection reads as follows:

> THE COURT: All right. So what is the objection?
>
> [DEFENDANT'S COUNSEL]: Your Honor, this is a *Batson*. So far, what I've seen is the State, I believe, has used two peremptory challenges and both were African-Americans that she struck, especially the first juror, [Juror No. 9].
>
> THE COURT: Right, who knew one of the relatives of the defendant. They went to high school.
>
> [DEFENDANT'S COUNSEL]: Yes, they did, but the State passed on others who knew some members. And Juror No. 4, although it was for cause, she was also an African-American female. Now, she has struck [Juror No. 9] who is an African-American female. [Juror No. 10], other than—she did not know any of the family members. And all I heard was that she had issues with the child care, which [Juror No. 11] also had issues with child care, and she passed on her.
>
> THE COURT: Okay. Does the State want to be heard?
>
> [THE STATE]: Your Honor, I am not sure that the Court can consider Juror No. 4 because it was for cause and there was no objection. I really liked [Juror No. 9], but, of course, I'm concerned that she points out someone who's sitting on the front row. She points out [Defendant's family member] as someone that she knows. I'm not going to keep anybody that knows—unless I absolutely have to—that knows a member of the defendant's family. There's too strong of a feeling there.
>
> In my past experience, even if it is tangential—we went to the high school; tie to the family—I do not keep that. In all honesty, I probably would have stricken Juror No. 4 because her daughter dated [Defendant's family member's] son and she knew two of [Defendant's] relatives. Just to be honest with the Court, that would have been the reason there.
>
> The reason that I attempted to strike [Juror No. 10] is when she came up and sat down, she immediately began to yawn. She's yawned several times throughout the brief

> period of time I talked to her. That concerns me. I have had jurors fall asleep and not listen to the evidence before.
>
> And when I asked her about paying the fine, she said "I have the baby and I don't have time to come up here and mess with anything like an open container." So I do have real concerns about her commitment to paying attention, to being awake and alert, and to how serious this proceeding is. Those are my reasons for striking her.
>
> THE COURT: Yes, sir, anything else?
>
> [DEFENDANT'S COUNSEL]: I understand knowing someone in the family. However, knowing the family of—[Defendant's family member], his family is well known in the community. And you will strike a lot of African-Americans just because the family is African-American, which although it may not be systematic in its nature although it does sound race neutral. But and [sic] another thing I would like to point out is there are several people on the jury that has said they know [the prosecutor] and she passed on them.
>
> THE COURT: All right. I don't believe there's been a prima facie case for a *Batson* challenge. The Court is going to deny that challenge[.] [A]nything else we need to address[?]
>
> [THE STATE]: Not from the State.
>
> THE COURT: For the record, the juror in question is a black female. Juror No. 6 was left on the jury and he is a black African-American male. The State has not targeted race as a component of its questioning. The Court did note the demeanor of Juror No. 10 during questioning and certainly was concerned about her.

Unlike in *Campbell*, the trial court in this case immediately sought the State's input upon hearing Defendant's argument under *Batson*'s first step, issuing no preliminary ruling on whether Defendant had made a prima facie case. And, although the trial court's ruling nominally concerned whether Defendant had established a prima facie case, the fact that it issued the ruling after hearing the State's race-neutral reasons made the ruling, in substance, a ruling on the third step of *Batson*. *Hobbs*, 374 N.C. at 355 ("The facts of this case are governed by the rule as stated by this Court in *Robinson* because the trial court here did consider the prosecution's race-neutral reasons for excusing jurors [],

ultimately concluding that there was no racial discrimination."). Thus, under the clear command of *Hobbs*, "[w]here the State has provided reasons for its peremptory challenges, thus moving to *Batson*'s second step, and the trial court has ruled on them, completing *Batson*'s third step, the question of whether a defendant initially established a prima facie case of discrimination becomes moot." *Id.* at 354 (citing *Robinson*, 330 N.C. at 17).

As the trial court issued its ruling after soliciting input from the State, it was required, pursuant to *Hobbs*, to engage in a full analysis of Defendant's arguments that the State employed its peremptory strikes in a racially discriminatory manner. *Id.* at 355, 356 (marks and citations omitted) ("[W]hether a defendant has established a prima facie case of discrimination in a Batson challenge becomes moot after the State has provided purportedly race-neutral reasons for its peremptory challenges and those reasons are considered by the trial court. . . . A defendant may rely on all relevant circumstances to support a claim of racial discrimination in jury selection. It follows, then, that when a defendant presents evidence raising an inference of discrimination, a trial court, and a reviewing appellate court, must consider that evidence in determining whether the defendant has proved purposeful discrimination in the State's use of a peremptory challenge."). Evidence on which a defendant may rely in arguing the State discriminated on the basis of race includes, but is not limited to, the following:

> - statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
>
> - evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
>
> - side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
>
> - a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
>
> - relevant history of the State's peremptory strikes in past cases; or
>
> - other relevant circumstances that bear upon the issue of racial discrimination.

Id.

Here, Defendant has only argued at trial, and only argues on appeal, that the State's use of peremptory challenges was discriminatory for the following reasons: (1) both of the State's peremptory challenges at that point had been used on African-American prospective jurors; (2) the State used a peremptory strike to excuse Juror No. 9 for knowing Defendant's relative, but did not use strikes on similarly situated white jurors who knew individuals connected with the case; (3) the State moved to strike for cause Juror No. 4, another African-American prospective juror, for childcare-related reasons but did not make a similar motion with respect to Juror No. 11, a white juror who also had childcare-related concerns; and (4) the State did not move to strike for cause, or exercise a peremptory challenge against, any juror who knew the prosecutor.[10]

At trial, the entirety of the trial court's analysis of these arguments was as follows:

> For the record, the juror in question is a black female. Juror No. 6 was left on the jury and he is a black African-American male. The State has not targeted race as a component of its questioning. The Court did note the demeanor of Juror No. 10 during questioning and certainly was concerned about her.

Under *Hobbs*, these findings are inadequate. "[T]he trial court did not explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges," nor did it conduct a comparative analysis between the stricken African-American jurors and the other jurors alleged to have been similarly situated. *Hobbs*, 374 N.C. at 358. Indeed, many of Defendant's arguments went completely unaddressed.

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10. At trial, Defendant also remarked of the family member known to Juror No. 9 that "his family is well known in the community. And you will strike a lot of African-Americans just because the family is African-American, which although it may not be systematic in its nature although it does sound race neutral." We note that the wording of this argument makes his point somewhat unclear; and, although Defendant also mentions this argument on appeal, he does not elaborate beyond what was said at trial.

To the extent Defendant argues for the expansion of *Batson* to cases where the State exercises strikes in a manner that incidentally, rather than purposefully, results in disproportionate exercises of peremptory strikes by race, the requisite showing in *Batson* cases remains "purposeful discrimination." *Campbell*, 384 N.C. at 135 (2023). Thus, this argument will not factor further into our analysis, as it is predicated on the incorrect legal standard.

Ordinarily, where a Defendant appeals a trial court's ruling on a *Batson* objection, we conduct a comparable analysis to that of the trial court in order to determine whether the ruling at issue was clearly erroneous. *Id.* at 356 ("[W]hen a defendant presents evidence raising an inference of discrimination, a trial court, and a reviewing appellate court, must consider that evidence in determining whether the defendant has proved purposeful discrimination in the State's use of a peremptory challenge."); *see also Augustine*, 359 N.C. at 715 (marks and citations omitted) ("The trial court's [*Batson*] ruling is accorded deference on review and will not be disturbed unless it is clearly erroneous."). However, here, Defendant has not sought our review of the trial court's substantive ruling; rather, he argues only that "the trial court [] failed to conduct a comparative juror analysis as required by *Hobbs*" and that "this case must be remanded to the trial court for further proceedings[.]" Accordingly, we reverse and remand to the trial court for further proceedings consistent with those set out in *Hobbs*. *Hobbs*, 374 N.C. at 360 ("The trial court is instructed to conduct a *Batson* hearing consistent with this opinion, to make findings of fact and conclusions of law, and to certify its order to this Court within sixty days of the filing date of this opinion[.]").

CONCLUSION

We are unpersuaded by Defendant's argument that the trial court erred in failing to dismiss the charges against him. However, we reverse and remand for a new *Batson* hearing in light of the trial court's procession to *Batson*'s third step and subsequent failure to conduct an analysis satisfactory under the procedural requirements established in *State v. Hobbs*.

In the event that the trial court conducts an adequate *Batson* hearing and determines no purposeful discrimination occurred, Defendant's conviction will remain undisturbed as no error will have occurred at trial. However, in the event the trial court rules in Defendant's favor on his *Batson* challenge, Defendant shall receive a new trial. *State v. Alexander*, 274 N.C. App. 31, 47 (2020). Pursuant to Rule 32(b) of our Rules of Appellate Procedure, we direct that the mandate of this Court will issue to the trial court in five business days following the filing of this Opinion. N.C. R. App. P. 32(b) (2023).

NO ERROR IN PART; REVERSED AND REMANDED IN PART.

Judge DILLON concurs.

Judge STADING concurs in part and dissents in part.

DILLON, Judge, concurring.

I concur in the majority. I write separately regarding Defendant's *Batson* challenge. The trial court stated that it had determined that there had not been a *prima facie* showing of discrimination during jury selection, thereby implying that it had not moved beyond step one of the *Batson* analysis. And, based on the Record before us, I would hold that the trial court would not be in error for so determining.

Certainly, the State may be heard during step one. For instance, assume a defendant points to the fact that the State excused a number of black jurors to make out its *prima facie* case during step one. In such a case, the State could point out that it had also objected to several white potential jurors and had not otherwise objected to other black jurors without ever moving to step two. But, even if the State on its own mentions "step-two" evidence, showing race-neutral reasons why it excused certain black jurors, the trial court could ignore this step-two evidence and make a ruling on whether a *prima facie* showing had been made.

But, here, it appears the trial court did consider at least some of the State's step-two evidence. For instance, the trial court mentioned how one juror was inattentive as a race-neutral reason for this juror being excused. Therefore, it appears from the Record that the trial court moved beyond step one. Based on our current jurisprudence, we must hold that the trial court must conduct a full *Batson* inquiry.

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

I concur with the majority's decision that the trial court did not err in denying defendant's motion to dismiss. However, I respectfully dissent from the majority's holding that the trial court failed to meet necessary procedural requirements imposed by *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (2020).

Defendant argues, and the majority agrees, that the question of whether defendant established a prima facie case of discrimination became moot when the State volunteered its reasoning for challenging the prospective jurors. The majority opinion turns on *Hobbs*, in which the trial court first determined that the defendant "had not made out a prima facie case of discrimination." *Id.* at 348, 841 S.E.2d at 496. "However, [then] the trial court asked the State, for purposes of the record, to explain the State's use of peremptory challenges. . . ." *Id.*

On appeal, the North Carolina Supreme Court held that "[w]here the State has provided reasons for its peremptory challenges, thus moving to *Batson*'s second step, *and the trial court has ruled on them*, completing *Batson*'s third step, the question of whether a defendant initially established a prima facie case of discrimination becomes moot." *Id.* at 345, 354, 841 S.E.2d at 499 (citation omitted) (emphasis added). In holding the inquiry of a prima facie showing of discrimination moot, the *Hobbs* opinion cited *Hernandez v. New York*: "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges *and the trial court has ruled on the ultimate question of intentional discrimination*, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Id.* at 354, 841 S.E.2d at 500 (citing *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 1866 (1991) (emphasis added)).

The majority also maintains that an application of *State v. Campbell* to this case supports the proposition that the first step of the trial court's *Batson* analysis was moot. 384 N.C. 126, 884 S.E.2d 674 (2023). In that case, the defendant argued to the North Carolina Supreme Court that our Court erred in affirming the trial court's determination that he failed to make a prima facie showing of discrimination under *Batson*. *Id.* at 135, 884 S.E.2d at 682. At trial, the prosecutor in *Campbell* was careful to remind the trial court to rule on the first step of the *Batson* analysis before offering an argument in furtherance of the second step. *Id.* at 128, 884 S.E.2d at 677. The trial court then ruled that the defendant failed to establish a prima face case. *Id.* at 128, 884 S.E.2d at 678. Nonetheless, the trial court ordered "the State to proceed as to stating a racially-neutral basis for the exercise of the peremptory challenges." *Id.* Ultimately, the Court held that "[t]he State appropriately objected to the trial court's attempt to move beyond step one" and precluded a consideration of the step two response at a step one analysis. *Id.* at 136, 884 S.E.2d at 682. However, the Court did not speak to whether the State's response to step two would have precluded the trial court judge from issuing a ruling on step one of the *Batson* analysis.

In the matter presently before us, after concluding the State's response compelled the trial court to proceed to the third *Batson* step, the majority deemed the trial court's findings inadequate to conduct a comparative-juror analysis. While the record may lack substance to survive the third *Batson* step, such an inquiry presumes that step one is moot. However, in the instant case, a determination of the first *Batson* step is not moot. Thus, engagement in a step three analysis is premature since the trial court determined that defendant did not meet his burden at step one. *State v. Hoffman*, 348 N.C. 548, 554, 500 S.E.2d 718, 722–23

(1998) ("We do not proceed to step two of the *Batson* analysis when the trial court has not done so.").

The record shows that it was not the trial court, but the State, that proceeded to step two of the *Batson* inquiry. *See id.* Once defendant raised the *Batson* challenge and stated his grounds, the trial court invited the State to respond. The State prematurely sought to address the second prong of the *Batson* inquiry—an act which was beyond the control of the trial court. Existing case law does not impute the actions of the parties or their counsel to the trial court in conducting a legal analysis under *Batson*. Unless the trial court itself improperly proceeds beyond the initial inquiry in its analysis—as was done in *Hobbs*—precedent does not dictate that the trial court forfeits the ability to redirect the proceedings back to an earlier analytical step. *Batson* provides trial courts broad latitude in assessing discriminatory inferences as such judges "experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination. . . ." *Batson v. Kentucky*, 476 U.S. 79, 97, 106 S. Ct. 1712, 1723 (1986). A holding to the contrary takes the power of prescribing when the first step of a *Batson* inquiry ends out of the hands of the trial court judge and into the power of a party—the State in this case—effectively allowing it to control the direction of the proceedings.

Our precedent establishes that a trial judge may invite the State to comment before issuing a ruling on the preliminary step of a *Batson* analysis—which is what the trial judge did here. *See State v. Smith*, 351 N.C. 251, 262, 524 S.E.2d 28, 37 (2000) ("[T]he trial court concluded that defendant had not made a prima facie showing that the peremptory challenge was exercised on the basis of race, but the trial court permitted the State to make any comments for the record that it chose to make."). Unlike *Hobbs*, in this case, the trial court judge did not ask the State for the reasons underlying its peremptory challenges because the judge had not yet made a ruling on them. *See Hobbs*, 374 N.C. at 348, 841 S.E.2d at 496; *Smith*, 351 N.C. at 262, 524 S.E.2d at 37 ("[O]ur review is limited to whether the trial court erred in finding that defendant failed to make a *prima facie* showing, even if the State offers reasons for its exercise of the peremptory challenges."). Once the State provided comment, the trial court permitted defendant to respond. *Cf. Hoffman*, 348 N.C. at 554, 500 S.E.2d at 723 (noting that, as to a *Batson* first-step inquiry, "although the State was given an opportunity to articulate its reasons for its peremptory challenges, defendant was not given an opportunity to respond. Defendant must be accorded this opportunity. . . ."). Defendant then remarked that his family was "well known in the community" and

mentioned the prosecutor's passing on potential jurors who knew the prosecutor. Following defendant's response, the trial court directed the proceedings back to step one and ruled "I don't believe there's been a prima facie case for a *Batson* challenge. The Court is going to deny that challenge. . . ."

After hearing the State's comments and defendant's response, the trial court concluded that defendant failed to meet the prima facie case necessary for a *Batson* challenge. Moreover, a review of the record shows that the trial court already made this determination on step one of the analysis prior to offering any commentary on juror demeanor. Discerning no error, I find that the trial court's *Batson* ruling falls within the parameters of the great deference afforded to trial judges. *See, e.g.*, *State v. Floyd*, 343 N.C. 101, 104, 468 S.E.2d 46, 48, *cert. denied*, 519 U.S. 896, 117 S. Ct. 241, 136 L.Ed.2d 170 (1996) ("[T]he trial court's ruling . . . must be accorded great deference by a reviewing court."); *Hoffman*, 348 N.C. at 554, 500 S.E.2d at 722–23. Accordingly, I concur with the majority's decision that the trial court did not err in denying the defendant's motion to dismiss. But I respectfully dissent from the majority's holding that the trial court's step one *Batson* determination was moot.

STEVEN URVAN, II, PLAINTIFF
v.
CASSANDRA LYNN ARNOLD, DEFENDANT

No. COA22-957

Filed 7 November 2023

1. Appeal and Error—preservation of issues—custody standard—different theory argued on appeal

In a custody dispute, the child's father failed to preserve for appellate review the issue of whether the trial court erred by determining custody based on the best interests of the child rather than the substantial change of circumstances standard, where he argued exclusively before the trial court that best interests would determine the outcome. Even assuming the argument was properly preserved, it had no merit because the appealed-from order was an initial custody determination for which best interests was the appropriate standard.

2. Child Custody and Support—custody—final decision-making authority—effect of parties' inability to communicate

In a custody dispute, the trial court did not err by granting the child's mother (who was the primary custodial parent) final decision-making authority regarding major decisions affecting the parties' child in the event the parties could not reach a mutual decision, where the court's award was supported by findings of fact detailing the parties' past contentious communications and the negative effect that such communications would have on the child.

Appeal by Plaintiff from order entered 11 April 2022 by Judge Jena P. Culler in Mecklenburg County District Court. Heard in the Court of Appeals 3 October 2023.

Connell & Gelb PLLC, by Michelle D. Connell, for Plaintiff-Appellant.

Plumides, Romano & Johnson, PC, by Michael Romano, for Defendant-Appellee.

COLLINS, Judge.

Plaintiff Steven Urvan II appeals from the trial court's order awarding Defendant Cassandra Arnold primary physical custody of their minor child and final decision-making authority regarding major decisions affecting their minor child. Plaintiff argues that the trial court erred by determining child custody based on the best interests of the child rather than using a substantial change of circumstances standard, and that the trial court abused its discretion by awarding Defendant final decision-making authority. Plaintiff failed to preserve for appellate review his argument that the trial court erred by using the best interests of the child standard. Even assuming arguendo that this issue is properly before us, the trial court did not err by determining child custody based on the best interests of the child. Furthermore, the trial court did not err by granting Defendant final decision-making authority because the findings of fact support the trial court's decision. Accordingly, we dismiss in part and affirm in part.

I. Background

Plaintiff and Defendant met in Georgia and began a romantic relationship in 2010. The parties began living together in Cornelius,

North Carolina, in 2011. Defendant gave birth to their son, Sean,[1] on 5 November 2018 in Charlotte, North Carolina. While Defendant was pregnant with Sean, she spent a lot of time in Georgia with her parents and traveled between Georgia and North Carolina. After Defendant gave birth, she continued to travel between North Carolina and Georgia with Sean. Defendant and Sean moved to Georgia on 10 January 2019.

That same day, Plaintiff filed suit in Mecklenburg County District Court seeking temporary and permanent legal and physical custody of Sean.[2] Plaintiff subsequently filed a motion for temporary parenting arrangement. The trial court granted Plaintiff's motion and scheduled a hearing for 10 June 2019. Defendant filed an answer and counterclaims for child custody and temporary and permanent child support.

The parties completed an Administrative Office of the Courts form AOC-CV-220, Memorandum of Judgment/Order ("Memorandum"). Handwritten in the space provided for the terms and conditions of the agreement is the following:

> The parties have one (1) minor son, namely [Sean], born November 5, 2018. The parties have resolved temporary legal and physical custody. The parties attach hereto and incorporate herein Exhibit "A" as their agreement on temporary legal and physical custody.

Exhibit A was a print out of an email which provided for "Temporary Joint Legal Custody" and "Graduated Temporary Physical Custody," and set forth a weekly and holiday custody schedule. The Memorandum also provided, "A formal judgment/order reflecting the above terms will be prepared by and submitted no later than _________ for signature by a judge[.]" The date "June 24, 2019" is handwritten in the blank space. The Memorandum was file stamped by the Clerk of Court on 10 June 2019. However, the record does not contain a "formal judgment/order . . . sign[ed] by a judge[.]"

Plaintiff filed a motion for contempt and a show cause order on 13 December 2021, alleging that Defendant had failed to abide by certain terms of the Memorandum. The trial court held a hearing on the parties' claims for custody and Plaintiff's contempt motion on 24 and 25 March 2022. By written order entered 11 April 2022, the trial court concluded,

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1. We use a pseudonym to protect the minor child's identity.

2. The parties filed various other motions that were decided by the trial court, none of which are relevant to the issues on appeal.

in relevant part, that "it is in the best interest of the child to live primarily with [Defendant] during the school year beginning in August 2022 and to have time with [Plaintiff]" and that "[i]t is in the best interest of the child that the primary custodial parent has the final decision making authority regarding major decisions affecting the child in the event a mutual decision cannot be reached between the parties." Plaintiff appealed.

II. Discussion

A. Child Custody Determination

[1] Plaintiff first argues that the trial court erred by determining child custody based on the best interests of the child rather than using a substantial change of circumstances standard because the parties' Memorandum was a permanent custody order. Plaintiff's argument is unpreserved and otherwise lacks merit.

"[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). It is well settled that "the law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Accordingly, where an appellant presents a different theory on appeal than was argued in the trial court, the appellate argument is not properly preserved for our review. *Angarita v. Edwards*, 278 N.C. App. 621, 625, 863 S.E.2d 796, 800, *appeal dismissed*, 379 N.C. 159, 863 S.E.2d 601 (2021).

Here, Plaintiff argued exclusively in the trial court that child custody should be determined based on the best interests of the child. In an initial discussion with the trial court, Plaintiff indicated that the trial court should determine the best interests of the child:

> [PLAINTIFF]: You're certainly able to make rulings about summer and school. I mean, it happens all the time.
>
> [DEFENDANT]: Yeah.
>
> [PLAINTIFF]: But something is going to happen in the summer (inaudible) school and so especially –
>
> THE COURT: Yeah.
>
> [PLAINTIFF]: -- since it's a small window, *I think it would essentially be finding now that this is in the best interest.* [emphasis added]

> [DEFENDANT]: Yeah, I would agree with that.

During closing arguments, Plaintiff again argued that the best interests of the child standard applied:

> [PLAINTIFF]: . . . You know, but I -- I do think that little [Sean] is a very lucky child. He has two parents that clearly love him very much. Both parents clearly want to provide for him and want him to grow up to be well-developed and well-loved and I don't think there's any question from anyone that these two parents love their child.
>
> The hard part, of course, is that *when you're making a decision about custody, you're making a decision about best interest* . . . . [emphasis added]
>
> . . . .
>
> So we would be asking for primary custody during the school year with substantial visitation to [Defendant] both during the breaks and during the summer . . . .

At no point did Plaintiff argue in the trial court that child custody should be determined using the substantial change of circumstances standard. To the contrary, it is abundantly clear from the record and transcript that Plaintiff advocated that it was in the best interests of the child for Plaintiff to be given primary custody. Accordingly, Plaintiff's argument that the trial court erred by determining child custody based on the best interests of the child rather than the substantial change of circumstances standard is not preserved for appeal and is dismissed.

Even assuming arguendo that this issue is properly before us, Plaintiff's argument is without merit.

A custody agreement is a contract that "remains modifiable by traditional contract principles unless a party submits it to the court for approval or if a court order specifically incorporates the [custody] agreement." *Peters v. Pennington*, 210 N.C. App. 1, 14, 707 S.E.2d 724, 734 (2011) (citation omitted). A trial court's "initial custody determination requires a custody award to such person 'as will best promote the interest and welfare of the child.' " *Senner v. Senner*, 161 N.C. App. 78, 80, 587 S.E.2d 675, 676 (2003) (quoting N.C. Gen. Stat. § 50-13.2). "Subsequent modification of a custody order requires a 'showing of changed circumstances[.]' " *Id.* (quoting N.C. Gen. Stat. § 50-13.7).

Here, the parties executed the Memorandum resolving temporary legal and physical custody and filed it with the Clerk of Court. However,

there is no record evidence that the Memorandum was presented to or approved by the trial court, or that the Memorandum was specifically incorporated into a court order. Accordingly, the Memorandum was not the trial court's initial custody determination, *see Peters*, 210 N.C. App. at 14, 707 S.E.2d at 734 (holding that a separation agreement which included child custody provisions was not incorporated or approved by the trial court, and therefore the trial court was not required to find changed circumstances in its child custody order), and the trial court's order entered 11 April 2022 was an initial custody determination requiring the trial court to determine child custody based on the best interests of the child. *See Senner*, 161 N.C. App. at 80, 587 S.E.2d at 676. The trial court thus did not err by determining child custody based on the best interests of the child.[3]

B. Final Decision-Making Authority

[2] Plaintiff next argues that the trial court erred by "giving the primary custodial parent final decision-making authority where the findings of fact did not establish the 'actual effect' the parties' communications had on the minor child." (capitalization altered).

Legal custody generally refers "to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." *Diehl v. Diehl*, 177 N.C. App. 642, 646, 630 S.E.2d 25, 27 (2006) (citations omitted). "Our trial courts have wide latitude in distributing decision-making authority between the parties based on the specifics of a case." *Peters*, 210 N.C. App. at 17, 707 S.E.2d at 736 (citation omitted). "This grant of latitude refers to a trial court's discretion to distribute certain decision-making authority that would normally fall within the ambit of joint legal custody to one party rather than another based upon the specifics of the case." *Diehl*, 177 N.C. App. at 647, 630 S.E.2d at 28 (citations omitted). "While we review a trial court's deviation from pure joint legal custody for abuse of discretion, a trial court's findings of fact must support the court's exercise of this discretion." *Eddington v. Lamb*, 260 N.C. App. 526, 535, 818 S.E.2d 350, 357 (2018) (quotation marks and citations omitted). "Accordingly, this Court must determine whether, based on the findings of fact below, the

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3. Furthermore, even if the Memorandum were considered an initial custody determination by the trial court, the Memorandum was temporary based on its plain and unequivocal language and did not convert to a permanent order based on the passage of time primarily during the COVID-19 pandemic. *See Miller v. Miller*, 201 N.C. App. 577, 580-81, 686 S.E.2d 909, 912 (2009) (holding that a period of 30 months did not convert a temporary custody order to a permanent custody order because "the child custody matter did not lie dormant after the . . . consent order was entered").

trial court made specific findings of fact to warrant a division of joint legal authority." *Hall v. Hall*, 188 N.C. App. 527, 535, 655 S.E.2d 901, 906 (2008).

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

> 20. The parties have difficulty communicating effectively with each other. At exchanges interaction between the two can be curt and rude. That is not in the best interest of the child. The way the parties communicate is problematic not just at exchanges. The court has in evidence multiple communications between the parties in the form of emails. Of the emails offered into evidence, [Plaintiff's] way of talking to [Defendant] is condescending and demanding. . . . It honestly comes across like he is talking to a child he is disciplining. The court has other examples of communications between the parties in the form of emails. . . . The court has concern about [Plaintiff's] comments that he will tell the child that [Defendant] is to blame for him not getting to do what he wants. It is not healthy or in the best interest of the child for the child to be put in the middle and have either parent tell him it is the other's fault he can't get his way.
>
> 21. In Defendant's Exhibit 9 [Plaintiff] says to [Defendant] in an email, "You have been the sole and exclusive cause of every single "traumatic" situation my son has been through. You provoke conflict, you cause scenes, you act badly in virtually every situation. You are an unhealthy mix of unintelligent, unworldly, and uneducated, but aggressive and extremely belligerent and I consider you to be dangerous to my son's health and well-being. Your life would be so much better if you would stop trying to provoke fights with me." In another message he describes where she lives as a hillbilly town that lacks decent medical facilities.
>
> 22. [Plaintiff] testified a few times when asked about such toned emails, that it was not his finest moment. There are a lot of examples of [Plaintiff] not acting in his finest moments in the way he talks to [Defendant]. Based on testimony, the court is confident that [Defendant] has also communicated with [Plaintiff] in a derogatory manner at times.
>
> . . . .

> 24. [Defendant] points out that [Plaintiff] has not provided her with information about all of the nannies he has utilized either. [Plaintiff] has used nannies and he cannot give an exact answer as to how many. He has used part time nannies and two full time nannies. [Plaintiff] sees a preschool and a nanny as two different things; one being education and one being childcare. After an incident where [Plaintiff] accused [Defendant] of being rude, aggressive and demanding with one of the nannies, he instructed [Defendant] that she is not to have direct contact with his people. There is a subtle difference in viewing one as child care and the other as education and instruction, but the basic issue is that both parties are entitled to have information about where the child is and who the child is with.
>
> . . . .
>
> 30. The court finds, considering all the evidence, that it is in the best interest of the child to live primarily with [Defendant] during the school year beginning in August 2022 and to have time with [Plaintiff] as set forth herein. Before August 2022, it is best for the parties to continue to each have significant time, simplify the schedule to week on week off to give [Plaintiff] an extra day and to have exchange times and methods more well defined.
>
> 31. It is in the best interest of the minor child to have a method of resolving conflict when mutual decisions for major issues affecting the child cannot be reached. It is in the best interest of the child that the primary custodial parent has the final decision making authority regarding major decisions affecting the child in the event a mutual decision cannot be reached between the parties.

Based on these findings of fact, the trial court awarded Defendant, as the primary custodial parent, final decision-making authority regarding major decisions affecting the child "[i]n the event a mutual decision cannot be reached after meaningful good faith discussion between the parties[.]" As required by *Diehl*, the trial court found that it is in the best interests of the child for Defendant to have final decision-making authority in the event that a mutual decision cannot be reached between the parties and found facts as to why Defendant should have such authority. As required by *Hall*, the trial court found facts detailing past disagreements by the parties which illustrate their inability to communicate and the effect their contentious communications will have on the child,

including that "[Plaintiff] will tell the child that [Defendant] is to blame for him not getting to do what he wants" and that the child will "be put in the middle and have either parent tell him it is the other's fault he can't get his way."

Accordingly, the trial court did not err by awarding Defendant final decision-making authority regarding major decisions affecting the child "[i]n the event a mutual decision cannot be reached after meaningful good faith discussion between the parties[.]"

III. Conclusion

Plaintiff failed to preserve for appellate review his argument that the trial court erred by using the best interests of the child standard. Even assuming arguendo that this issue is properly before us, the trial court did not err by determining child custody based on the best interests of the child. Furthermore, the trial court did not err by granting Defendant final decision-making authority because the findings of fact support the trial court's decision. Accordingly, we dismiss in part and affirm in part.

DISMISSED IN PART; AFFIRMED IN PART.

Judges GRIFFIN and THOMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 7 November 2023)

ALBERT v. CITY OF RALEIGH No. 23-241	Wake (21CVS11380)	Affirmed
BULLIARD v. HIGHLAND GATE HOMEOWNERS ASS'N, INC. No. 23-452	Buncombe (21CVS4057)	Affirmed
FRANKLIN v. PALMER No. 23-481	Macon (22CVD521)	Reversed and Remanded
HEDGEPETH v. SMOKY MOUNTAIN COUNTRY CLUB No. 23-222	Swain (22CVS272)	Dismissed
IN RE A.F.G.T. No. 23-317	Surry (21JT6)	Affirmed
IN RE A.R. No. 23-98	Wake (22JA47) (22JA48)	Affirmed
IN RE A.W. No. 23-37	Jones (21JA5)	Affirmed
IN RE APPEAL OF SHANNON No. 23-289	Property Tax Commission (20PTC0328)	Affirmed
IN RE B.L.G. No. 23-354	Surry (22JT122)	Affirmed
IN RE D.J.W. No. 22-1013	McDowell (21JA57) (21JA58)	Affirmed
IN RE E.P. No. 22-873	Durham (20J136)	Affirmed in part and vacated in part.
IN RE E.W. No. 23-74	Durham (18JT141) (18JT142) (18JT143)	Affirmed
IN RE FORECLOSURE OF HEDGEPETH No. 23-226	Swain (22SP33)	Affirmed

IN RE FORECLOSURE OF SORRELL No. 23-183	Wake (14SP3203)	Affirmed
IN RE J.P.E. No. 23-161	Guilford (17JT292-296) (19JT468-469)	Affirmed
IN RE K.C. No. 22-775	Johnston (20JA127) (21JA75)	Affirmed in Part; Remanded in Part
IN RE K.P.W. No. 23-205	Wilkes (18JT108)	Vacated
IN RE N.M.C. No. 23-173	Guilford (19JT119)	Affirmed.
LOWDER v. LOWDER No. 23-105	Stanly (19CVD63)	Other - Dismissed in part; reversed in part and remanded
SAM'S COM. PROPS., LLC v. TOWN OF MOORESVILLE No. 22-1006	Iredell (21CVS2693)	Reversed and Remanded
SANDERFORD v. DARK No. 23-142	Chatham (20CVS341)	Affirmed
STATE v. ALEX No. 23-133	Mecklenburg (20CRS14501) (20CRS206326-27) (20CRS206329)	No Error
STATE v. BROWN No. 23-150	Bertie (19CRS349) (19CRS50008)	No Error
STATE v. HALL No. 23-234	Montgomery (21CRS50211)	No Error
STATE v. MARTIN No. 22-501	Randolph (19CRS52131)	No Error
STATE v. McLEOD No. 23-174	Johnston (21CRS1337) (21CRS52858) (21CRS52861)	Affirmed
STATE v. POWELL No. 22-1065	Brunswick (20CRS52520)	Dismissed

STATE v. SCOTT No. 22-1066	Wake (20CRS214316)	No Error
STATE v. SLUSS No. 22-895	Wake (20CRS866)	No Error.
STATE v. SMITH No. 23-413	Anson (19CRS51024)	No Error
STATE v. WOODRING No. 23-293	Watauga (21CRS50745-46)	No Error
UNION CNTY. BD. OF EDUC. v. RET. SYS. DIV. No. 23-167	Union (21CVS2842)	Dismissed

MELANIE ANN EVANS, Plaintiff
v.
RAY ALLEN MYERS, Defendant
v.
ALLEN AND CHRISTINE MYERS, Intervenors

No. COA22-952

Filed 21 November 2023

1. Child Custody and Support—custody—awarded to grandparents—factual findings—evidentiary support

The trial court did not err in awarding custody of plaintiff-mother's minor daughter to the child's paternal grandparents where clear and convincing evidence supported the court's findings of fact, including that: the mother failed to ensure that her child regularly attended school, which caused the child's academic performance to suffer; the conditions of the mother's home were unsafe and unsuitable for the child; the mother once took her daughter to play in the park at night despite the dangers of doing so; and the child had expressed to others that she did not want to be with her mother. Furthermore, these findings supported the court's conclusion that the mother had acted inconsistently with her constitutionally protected status as a parent.

2. Child Visitation—parent's visitation—limited to twice a year—required finding—unfitness or best interests of the child

In a child custody matter, where the trial court awarded primary custody of a mother's minor daughter to the paternal grandparents, the court erred by denying the mother her right to reasonable visitation—limiting her to only two visits per year—without entering a finding that the mother was an unfit person to visit the child or that visitation with the mother was not in the child's best interests.

Appeal by Plaintiff from order entered 19 May 2022 by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 18 October 2023.

Barton & Doomy Law Firm, PLLC, by Matthew J. Barton, for Plaintiff-Appellant.

No brief for Defendant.

Connell & Gelb PLLC, by Michelle D. Connell, for Intervenors-Appellees.

COLLINS, Judge.

Plaintiff Melanie Evans appeals from the trial court's order granting Christine and Allen Myers legal and physical custody of her minor child and awarding her extremely limited visitation. Plaintiff argues that the trial court erred by awarding Intervenors custody of the minor child and by restricting Plaintiff's visitation to two days a year. The trial court did not err by awarding Intervenors custody of the minor child because the findings of fact are supported by clear and convincing evidence and the findings of fact support the conclusions of law. However, the trial court erred by denying Plaintiff reasonable visitation absent a finding that Plaintiff is an unfit person to visit the child or that visitation with Plaintiff is not in the best interest of the child. Accordingly, we affirm in part, reverse in part, and remand to the trial court for further proceedings.

I. Background

Plaintiff Melanie Evans and Defendant Ray Myers were in a relationship from June 2009 until March 2017 but were never married.[1] The parties share one minor child, Callie,[2] who was born on 18 April 2013.

Plaintiff filed a complaint for child custody in January 2017. The trial court entered a consent order on 14 September 2017, which stated that "the parties are hereby granted joint legal and physical custody of the minor child . . . with the parties exercising week on, week off visitation," and that "[t]he parties shall enroll the minor child into Rowan-Salisbury Schools in the school closest to Plaintiff's home, unless otherwise agreed upon by the parties." Plaintiff filed a motion for a show cause order on 28 December 2018, alleging that Defendant failed to abide by the consent order because "the child is suppose to go to a Rowan school closest to Plaintiff but Plaintiff resides in Cabarrus County now & request the child be in that school district."

Christine and Allen Myers ("Intervenors"), who are the paternal grandparents of Callie, filed a motion to intervene and modify custody, alleging that there had been a substantial change of circumstances since the entry of the consent order, and that "it would be in the best interest of the minor child to award both temporary and permanent sole legal custody and primary physical custody of the minor child to the Intervenors and secondary physical custody, with appropriate visitation to the Plaintiff & Defendant." Intervenors specifically alleged that

1. Defendant is not a party to this appeal.

2. We use a pseudonym to protect the identity of the minor child.

"[w]hen the Plaintiff-mother has custody of the minor child, the child is not transported to school in Rowan County and thereby misses school every other week"; that "Plaintiff and Defendant have been served with truancy papers related to the child's repeated and extended absences from school"; and that "[t]he minor child has expressed fear and 'hate' for her mother, and has exhibited symptoms consistent with emotional distress, including screaming 'don't hit me' in the middle of the night, wetting her pants, and worrying about not getting enough to eat at her mothers."

After a bench trial on 21 May 2019, the trial court entered a custody order on 13 June 2019, ordering that:

> 1. Intervenors, Allen and Christine Myers, shall have legal and physical custody of the minor child . . . .
>
> 2. Defendant shall have visitation with the minor child as mutually agreed and as follows:
>
> > a. Up to two consecutive weeks at the close of school for the summer with thirty days prior written notice to Intervenors of the two weeks Defendant wants to exercise his visitation; and
> >
> > b. After the child has spent two consecutive weeks during the summer with Intervenors following Defendant's first two consecutive week period, Defendant shall have the child for up to fourteen days (two weeks) after Intervenors two weeks in the summer as long as it does not conflict with the resumption of school for the minor child.
>
> 3. Plaintiff shall have visitation with the minor child the first weekend of Defendant's first two-week period of visitation during the summer. Plaintiff's weekend shall be from Friday at 6:00 p.m. until Sunday at 6:00 p.m.

Plaintiff and Defendant appealed. On appeal, this Court held that "the grandparents alleged sufficient facts to confer standing to seek custody[,]" but that "the trial court's findings of fact are insufficient to support the court's conclusion that the parents forfeited their constitutionally protected status as parents." *Evans v. Myers*, 281 N.C. App. 627, 867 S.E.2d 424 (2022) (unpublished). Accordingly, this Court vacated the trial court's order and remanded to the trial court to "enter a new order on the existing record or conduct any further proceedings the court deems necessary in the interests of justice." *Id.* The trial court on remand entered a new order on the existing record with additional

findings of fact but left the custody award and visitation schedule unchanged. Plaintiff appealed.

II. Discussion

A. Custody Award

[1] Plaintiff argues that the trial court erred by awarding Intervenors legal and physical custody of Callie because the findings of fact are not supported by clear and convincing evidence, and the findings of fact do not support the conclusions of law.

"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." *Best v. Gallup*, 215 N.C. App. 483, 485, 715 S.E.2d 597, 599 (2011). "A parent loses this paramount interest if he or she is found to be unfit or acts inconsistently with his or her constitutionally protected status." *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 503 (2010) (quotation marks and citation omitted). "[T]here is no bright line beyond which a parent's conduct meets this standard." *Id.* (citation omitted). The analysis of whether a biological parent's conduct is inconsistent with the parent's protected status is a "fact-sensitive inquiry" and such a determination must be made on a case-by-case basis. *Id.* at 550, 704 S.E.2d at 503.

"[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citation omitted). "In a custody proceeding, the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003) (citations omitted). Unchallenged findings of fact are binding on appeal. *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011). We review the trial court's conclusions of law de novo. *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008).

1. Findings of Fact

Plaintiff specifically challenges findings of fact 18, 23, 24, 26, 37, 39, 40, 46, 47, 58, 60, 63, 64, 84, and 85. We address each finding in turn.

a. Findings of Fact 18, 23, 24, 26, 37, 39, 40

> 18. On or about October 26, 2018, Defendant-Father informed Plaintiff-Mother of the child's enrollment [at Morgan Elementary School in Rowan County].

> . . . .
>
> 23. Plaintiff-Mother had access to another vehicle during the relevant time period that the child was absent and tardy while in her care.
>
> 24. Plaintiff-Mother continued to travel to and from her work at Amazon during the relevant time period that the child was absent and tardy while in her care. In particular, Plaintiff-Mother generally began work at 7:00 a.m. and would have lost two hours of work to transport the child to and from school.
>
> . . . .
>
> 26. Plaintiff-Mother had the ability and means to take the child to school during the relevant time period that the child was absent and tardy while in her care but willfully elected not to do so.
>
> . . . .
>
> 37. Defendant-Father's election to take no action on the large number of absences and tardies was a substantial factor to the decline of the child's academic performance.
>
> . . . .
>
> 39. Plaintiff-Mother and Defendant-Father each failed to exercise reasonable and appropriate measures to ensure the child's regular attendance in school.
>
> 40. The large number of absences and tardies was a substantial factor in the decline of the child's academic performance. In particular, the child was required to play catch-up in her studies due to the same.

Finding of fact 18 is supported by Defendant's testimony that he informed Plaintiff "the day of" that he enrolled Callie in school, which was 26 October 2018. Furthermore, finding of fact 23 is supported by Defendant's testimony that "[Plaintiff] had access to a vehicle[,]" and by Plaintiff's testimony that she has had a vehicle "since February." Finding of fact 24 is supported by Defendant's testimony that "[Plaintiff] had access to a vehicle[,]" and by Plaintiff's testimony that she has had a vehicle "since February" and that "[she] ha[s] to be at work by 7:00, and it's really difficult to change [her] schedule at Amazon, and -- so [she] lose[s] two hours of work to accommodate for [Callie] to get there

on time." Finding of fact 26 is supported by the same testimony and is further supported by the following testimony:

> [DEFENSE COUNSEL]: And since you discovered she was enrolled in school in November, do you know how many absences she's had from that date until the present?
>
> [PLAINTIFF]: Well, we do it every other week. Oh, boy. At least 20 days.
>
> [DEFENSE COUNSEL]: So it's -- it's fair to say that on the weeks that you have [Callie], you don't take her to school?
>
> [PLAINTIFF]: No, because he was in contempt of court.
>
> [DEFENSE COUNSEL]: That's --
>
> [PLAINTIFF]: Our papers --
>
> [DEFENSE COUNSEL] – "no," you didn't take her to school?
>
> [PLAINTIFF]: I know.
>
> [DEFENSE COUNSEL]: -- is that the answer? Okay.
>
> [PLAINTIFF]: Because our papers that he signed said that our -- he was in contempt of court because she is supposed to be enrolled in a school closest to me, not him.

Finding of fact 37 is supported by Callie's paternal grandmother's testimony:

> [INTERVENORS' COUNSEL]: Are you concerned about the fact that [Defendant] did nothing to make sure that the child went to school even on [Plaintiff's] time? Are you concerned about that?
>
> [CHRISTINE MYERS]: Well I'm concerned that [Defendant] didn't step in and immediately -- I don't know what the legal recourse would be. File for full custody. I – I said to him, time and again, "Ray, what are you waiting for? This can't go on, you know, please do something." And I don't know what the hesitation was, but I wish he had immediately acted upon that.

Finding of fact 39 is supported by Defendant's testimony that "[Plaintiff] had access to a vehicle"; by Plaintiff's testimony that she has had a vehicle "since February" and that she did not take Callie to school because

"[she] ha[s] to be at work by 7:00, and it's really difficult to change [her] schedule at Amazon, and – so [she] lose[s] two hours of work to accommodate for [Callie] to get there on time"; and by Callie's paternal grandmother's testimony that "[Defendant] didn't step in" to make sure that Callie went to school when she was with Plaintiff. Finally, finding of fact 40 is supported by Callie's paternal grandmother's testimony that "[Callie's] missed so much school. I'm sure she's missing, you know, valuable teaching time; and it's broken up, so she's there for a week, and then she misses the next week, so she's behind and has to catch up."

Accordingly, findings of fact 18, 23, 24, 26, 37, 39, and 40 are supported by clear and convincing evidence.

b. Findings of Fact 46, 47, 58, 60

> 46. At the time of the hearing, Plaintiff-Mother willfully elected to not provide bedding for the child's bed or a pillow case for her pillow without justification.
>
> 47. The child asked Intervenor-Step-Grandmother what bedding was after seeing the same on the child's bed when staying with Intervenors. The home conditions of Plaintiff-Mother and Defendant-Father are unsafe and unsuitable for the child's age, amounting to unfitness and causing substantial harm to the child.
>
> . . . .
>
> 58. On October 1, 2018, Plaintiff-Mother willfully elected to transport the child to play at a park at night, a known risk for injury or other danger. Intervenors' Exhibit No. 17 is incorporated herein by reference as if fully set forth.
>
> . . . .
>
> 60. However, in December 2018, Plaintiff-Mother had access to snow boots for the child which had been gifted by Intervenors but willfully elected not to have her wear them.

Findings of fact 46 and 47 are supported by Plaintiff's Facebook post showing Callie lying in a bed without sheets or a pillowcase, and by Callie's paternal grandmother's testimony that "when [Callie] was with [her], and [she] pulled the top sheet over [Callie] and she was like, what's this. This is a sheet, honey." Furthermore, finding of fact 58 is supported by Plaintiff's Facebook post showing her, Callie, and another child sitting in a car at night with the caption, "[T]he kids wanted to go to park

at this time of night before bed so I took them we got there they started thinking how hard to play in the dark[.]" Finally, finding of fact 60 is supported by Plaintiff's Facebook post showing Callie playing in the snow with bags on her feet and Callie's paternal grandmother's testimony that Intervenors bought Callie winter boots.

Accordingly, findings of fact 46, 47, 58, and 60 are supported by clear and convincing evidence.

c. Findings of Fact 63, 64, 84, 85

> 63. The child has expressed to others that she hates and does not want to be with Plaintiff-Mother.
>
> 64. [Plaintiff]-Mother's actions and inactions described herein were contributing factors for the child's expression to others.
>
> . . . .
>
> 84. Cumulatively, the conduct of Plaintiff-Mother and Defendant-Father demonstrated that the child (1) did not receive proper care and support and (2) was exposed to substantial risks of harm.
>
> 85. Additionally, the actions and inactions of Plaintiff-Mother and Defendant-Father, viewed cumulatively, and their past misconduct detrimentally impacted the present (as of the original hearing) and could impact the future of the child. Among other considerations, the academic performance and substantial risk of harm of the child all detrimentally impacted the child and could do so in the future.

Findings of fact 63 and 64 are supported by Callie's paternal grandmother's testimony that "[Defendant] has said [Callie] hates her mother. And that way didn't want to -- and that she didn't want to go with her mother." Finally, findings of fact 84 and 85 are supported by the same clear and convincing evidence that supported the above findings of fact.

Accordingly, the trial court's findings of fact are supported by clear and convincing evidence.

2. Conclusions of Law

Plaintiff argues that the findings of fact do not support the trial court's conclusion of law that she acted inconsistently with her constitutionally protected parental status.

In addition to the supported findings detailed above, the trial court made the following relevant and unchallenged findings:

> 19. From on or about October 26, 2018, through May 21, 2019, the child was enrolled at Morgan Elementary School.
>
> 20. Since the child's enrollment, she has been absent thirty-six (36) days and received thirteen (13) tardies.
>
> 21. The majority of the child's absences occurred while the child was in Plaintiff-Mother's custody.
>
> . . . .
>
> 28. Plaintiff-Mother willfully elected to not take the child to school during the relevant time period because she believed Defendant-Father had violated the then-controlling Order.
>
> . . . .
>
> 30. At the time of the original hearing, Plaintiff-Mother [and] Defendant-Father had pending charges in Rowan County for School Attendance Law Violations relating to the child's large number of absences.
>
> . . . .
>
> 33. The child began school at Morgan Elementary in the second quarter of the 2018-2019 school year.
>
> 34. The child's grades continued to decline throughout that school year.
>
> . . . .
>
> 61. [Plaintiff]-Mother had a history of screaming [at] the child rather than utilizing appropriate punishment methods.

The findings of fact support the trial court's conclusions of law that:

> 6. By clear, cogent, and convincing evidence, Plaintiff-Mother and Defendant-Father are unfit to have care, custody, and control of the child.
>
> 7. By clear, cogent, and convincing evidence, Plaintiff-Mother and Defendant-Father have exhibited parental behavior inconsistent with the parental duties and responsibilities regarding the care of the child, waiving their constitutionally protected status and warranting placement of the child with Intervenors.

> 8. It is in the best interest and welfare of the child for her custody to be placed with Intervenors.

Accordingly, the trial court did not err by awarding Intervenors legal and physical custody of Callie.

B. Visitation Schedule

[2] Plaintiff argues that the trial court abused its discretion by "restrict[ing] [Plaintiff] to a conscience shocking two days a year of visitation."

"A noncustodial parent's right of visitation is a natural and legal right which should not be denied unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child." *Paynich v. Vestal*, 269 N.C. App. 275, 278, 837 S.E.2d 433, 436 (2020) (quotation marks and citations omitted). "In awarding visitation privileges[,] . . . the best interest and welfare of the child is the paramount consideration." *Id.* (quotation marks and citation omitted). In determining matters involving a parent's visitation rights, the trial court is granted "wide discretionary power." *Swicegood v. Swicegood*, 270 N.C. 278, 282, 154 S.E.2d 324, 327 (1967). "However, a trial court's discretionary authority is not unfettered." *Paynich*, 269 N.C. App. at 278, 837 S.E.2d at 436 (quotation marks and citation omitted). N.C. Gen. Stat. § 50-13.5(i) provides:

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

N.C. Gen. Stat. § 50-13.5(i) (2021). "The statutory language is straightforward and unambiguous and requires that if a trial court does not grant reasonable visitation to a parent, its order must include a finding *either* that the parent is 'an unfit person to visit the child' *or* that visitation with the parent is 'not in the best interest of the child.' " *Respess v. Respess*, 232 N.C. App. 611, 616, 754 S.E.2d 691, 696 (2014). Where visitation is severely restricted, there must be some finding of fact, supported by competent evidence in the record, warranting such restriction. *Johnson v. Johnson*, 45 N.C. App. 644, 647, 263 S.E.2d 822, 824 (1980).

Here, the trial court's order provides, "Plaintiff-Mother shall have visitation with the child the first weekend of Defendant-Father's first two-week period of visitation during the summer. Plaintiff-Mother's

weekend shall be from Friday at 6:00 p.m. until Sunday at 6:00 p.m." The trial court denied Plaintiff the right of reasonable visitation by restricting her visitation to two days a year absent a finding that she was "an unfit person to visit the child or that such visitation rights are not in the best interest of the child." N.C. Gen. Stat. § 50-13.5(i). Accordingly, we reverse in part and remand to the trial court.

III. Conclusion

We affirm the portion of the trial court's order awarding Intervenors custody of Callie because the findings of fact are supported by clear and convincing evidence, and the findings of fact support the conclusions of law. However, the trial court erred by denying Plaintiff reasonable visitation absent a finding that Plaintiff is an unfit person to visit the child or that visitation with Plaintiff is not in the best interest of the child. We therefore reverse in part and remand to the trial court for further proceedings.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges GORE and FLOOD concur.

IN RE A.G.J.

No. COA23-323

Filed 21 November 2023

Juveniles—delinquency—disposition—statutory factors—insufficient findings

In a juvenile delinquency matter in which a minor admitted to simple affray and unauthorized use of a motor vehicle, the trial court's disposition order was vacated for failure to make written findings addressing each of the five factors in N.C.G.S. § 7B-2501(c). The deficiency of the findings were not overcome by the court's incorporation of the predisposition report, risk assessment, and needs assessment, or by the inclusion of "other findings," which provided details of the juvenile's difficulties with her living situation but did not relate to the offenses or the juvenile's degree of culpability.

Chief Judge STROUD dissenting.

Appeal by juvenile-defendant from order entered 19 September 2022 by Judge Christopher Freeman in Rockingham County District Court. Heard in the Court of Appeals 19 September 2023.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for juvenile-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Bettina J. Roberts, for the State.

FLOOD, Judge.

Juvenile-Defendant, A.G.J. ("Annie"),[1] appeals from the trial court's 19 September 2022 disposition order, arguing the trial court erred by failing to include written findings demonstrating it considered the factors listed in N.C. Gen. Stat. § 7B-2501(c) (2021). For the reasons that follow, we agree.

I. Factual and Procedural Background

On 6 June 2020, juvenile petitions against Annie were approved for filing by the Chief Court Counselor for Rockingham County District Court for simple affray and unauthorized use of a motor vehicle. The petition alleging simple affray was based on an incident that occurred on 10 November 2021, where Annie and another schoolmate were in a physical altercation in the school cafeteria. During the altercation, Annie and her schoolmate both punched each other with closed fists. The petition alleging unauthorized use of a motor vehicle stemmed from an incident on 15 May 2022 where Annie took her adoptive mother's car without permission.

An adjudication hearing was held on 8 August 2022. At the adjudication hearing, Annie admitted fault to both charges and was adjudicated as a delinquent juvenile.

On 19 September 2022, a disposition hearing was held. Following the disposition hearing, Annie was sentenced to twelve months' probation and placed in the custody of Rockingham Department of Social Services. On 28 September 2022, Annie filed timely notice of appeal.

1. Pseudonym used to protect the identity of the juvenile and for ease of reading.

II. Jurisdiction

While Annie filed timely notice of appeal, her attorney failed to indicate the court to which she was appealing. Under the North Carolina Rules of Appellate Procedure, a notice of appeal is required to specify "the court to which appeal is taken[.]" N.C. R. App. P. 3(d). Rule 3(d) is a jurisdictional rule, and failure to comply is a jurisdictional default mandating dismissal. *See Dogwood Dev. and Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) ("A jurisdictional default, therefore, precludes the appellate court from acting in any manner other than to dismiss the appeal.").

To cure this procedural defect, Annie has filed a Petition for Writ of Certiorari ("PWC") pursuant to North Carolina Rule of Appellate Procedure 21(a)(1). This Court "maintains broad jurisdiction to issue writs of certiorari[.]" *In re R.A.F.*, 384 N.C. 505, 507, 886 S.E.2d 159, 161 (2023). The issuance of a writ is generally supported where "the right of appeal has been lost through no fault of the petitioner[.]" *In re Z.T.W.*, 238 N.C. App. 365, 368, 767 S.E.2d 660, 663 (2014); *see also State v. Hammonds*, 218 N.C. App. 158, 163, 720 S.E.2d 820, 823 (2012) (issuing a writ where it was "readily apparent that [the] defendant has lost his appeal through no fault of his own, but rather as a result of sloppy drafting of counsel").

Here, Annie's counsel's failure to include a designation as to which court the appeal was being made was not Annie's fault. As such, this Court elects to allow Annie's PWC and review her claim on the merits. *See Hammonds*, 218 N.C. App. at 163, 720 S.E.2d at 823.

III. Analysis

This Court reviews a trial court's "alleged statutory errors *de novo*." *In re K.C.*, 226 N.C. App. 452, 462, 742 S.E.2d 239, 246 (2013). "Under a *de novo* review, [this] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation and internal quotation marks omitted).

"The dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-2512(a) (2021). "Appropriate findings of fact" are those that consider the following:

> In choosing among statutorily permissible dispositions, the court shall select the most appropriate disposition in both terms of kind and duration for the delinquent

> juvenile. Within the guidelines set forth in [N.C. Gen. Stat. §] 7B-2508, the court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile based upon:
>
> (1) The seriousness of the offense;
>
> (2) The need to hold the juvenile accountable;
>
> (3) The importance of protecting the public safety;
>
> (4) The degree of culpability indicated by the circumstances of the particular case; and
>
> (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2021).

At the outset, we note that "[w]here 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 court." *State v. Davis*, 198 N.C. App. 443, 447, 680 S.E.2d 239, 243 (2009). This Court's precedents have made it clear that the trial court is required to make written findings in a disposition order entered in a juvenile delinquency matter, demonstrating it considered *all* the factors in Section 7B-2501(c). *See In re J.J.*, 216 N.C. App. 366, 375, 717 S.E.2d 59, 65 (2011) (finding error when the trial court did not make any written findings of fact); *see also In re V.M.*, 211 N.C. App. 389, 391–92, 712 S.E.2d 213, 215 (2011) (reversing the trial court's disposition order for failure to properly consider *all* of the factors required); *In re I.W.P.*, 259 N.C. App. 254, 261, 815 S.E.2d 696, 702 (2018) ("The plain language of Section 7B-2501(c) compels us to find that a trial court must consider each of the five factors in crafting an appropriate disposition."). "The purpose of the requirement that the [trial] court make findings of those specific facts which support its ultimate disposition . . . [is] to allow a reviewing court to determine . . . whether the judgment and the legal conclusions which underlie it represent a correct application of the law." *In re W.M.C.M.*, 277 N.C. App. 66, 77, 857 S.E.2d 875, 881 (2021) (first and third alteration added) (citation omitted).

We recently reaffirmed this proposition in *In re N.M.*, COA23-100, 2023 WL 6066497 (N.C. Ct. App. Sept. 19, 2023). In *In re N.M.*, the trial court used a pre-printed disposition order and checked the box noting it considered the predisposition report, risk assessment, and needs assessment. *Id.* at *2. The trial court did not make any other written findings of fact. *Id.* at *2. This Court concluded that, while the factors may be included in the reports, the trial court has the responsibility to make

written findings of fact showing it considered the factors in Section 7B-2501(c). *Id.* at *3 (holding the "[other findings] section must be filled with findings made by the trial court regarding the five factors required by the statute, otherwise it is reversible error").

In this case, Annie argues the trial court failed to consider all of the factors and make relevant findings of fact when entering the disposition order. We agree.

In the pre-printed disposition order filed by the trial court, it found Annie had been given a Class I disposition on 19 September 2022; checked the box noting Annie's juvenile delinquency history level was low; and checked the boxes noting it had received, considered, and incorporated the contents of the predisposition report, risk assessment, and needs assessment. Then, in the section of the pre-printed dispositional order labeled "other findings," the trial court added the following:

> Based on the evidence, the [trial court] make [sic] the following findings of fact: [Annie] appeared in court late. Her counsel and adoptive mother were present. The [trial court] had to withdraw a secure custody order after [Annie] appeared in court late. The adoptive mother stated that she had no contact with [Annie] for an extended period of time and there were allegations of [Annie] being involved in drug activity. The adoptive mother has other juveniles in her home and refuses for [Annie] to return to her home until she is enrolled in some type of drug counseling. It is impossible to do this instantaneously, therefore, [Annie] is left without a place to go. Additionally, counsel for [Annie] indicated that [Annie] is unwilling to return to the adoptive mother's home. Pursuant to statute, the [trial c]ourt changes custody of [Annie[from [her] adoptive mother to Rockingham County Department of Social Services.

As in *In re N.M.*, incorporating the reports by reference is insufficient to meet the statutory requirements set forth in Section 7B-2501(c). *See In re N.M.* at *2. Further, we fail to see how the "other findings" detailed above show the trial court considered the five factors in Section 7B-2501(c). The written findings the trial court made do not relate to the offenses detailed in the petitions, but seem to solely relate to Annie's difficulties with her living situation. We also fail to see, as the dissent posits, how the "other findings" detailed above show Annie's culpability. The Record shows Annie and another female schoolmate were in

a physical altercation in the school cafeteria where they both punched each other with closed fists. Even though Annie admitted fault at the adjudication hearing, the trial court did not indicate that it took into account the other girl's role in the altercation, to demonstrate to this Court that it considered Annie's culpability when sentencing her to twelve months' probation. *See* N.C. Gen. Stat. § 7B-2501(c)(4).

We note this Court has given a more deferential reading of disposition orders in the past. *See In re I.W.P.*, 259 N.C. App. at 264, 815 S.E.2d at 704 (concluding the trial court addressed in the disposition order (1) the need to hold the juvenile accountable by imposing a twelve-month probationary sentence; and (2) the importance of protecting public safety and the rehabilitative needs of the juvenile by imposing probationary conditions). Given our more recent decision in *In re N.M.*, however, we decline to give the disposition order in the instant case such a deferential interpretation, as doing so would render the requirement that a trial court make written findings meaningless. *See In re N.M.* at *3.

For this same reason, we also decline to conclude, as the State argues we should, that the designation of the offense as a "Class 1 misdemeanor" shows the trial court considered "the seriousness of the offense." This alone does not show this Court that the trial court considered the seriousness of the offense; it merely shows the trial court knew the classification of the offense.

Without written findings addressing the factors in Section 7B-2501(c), the disposition order is deficient and constitutes "reversible error." *See In re N.M.* at *3.

IV. Conclusion

We conclude the trial court failed to make written findings of fact showing it considered the factors set forth in N.C. Gen. Stat. § 7B-2501(c). Accordingly, we vacate the disposition order and remand for a new disposition hearing and entry of an order that includes findings of fact addressing all of the required factors.

VACATED AND REMANDED.

Judge MURPHY concurs.

Chief Judge STROUD dissents in separate writing.

STROUD, Chief Judge, dissenting.

Because the trial court's disposition order demonstrates the trial court considered and made findings addressing each of the factors as required by North Carolina General Statute Section 7B-2501(c), and the order is fully sufficient to allow for proper appellate review, I dissent. We review orders based upon their substance, not technical form. *See In re A.U.D.*, 373 N.C. 3, 11, 832 S.E.2d 698, 703 (2019) (noting a remand for findings on uncontested issues would elevate "form over substance and would serve only to delay the final resolution of this matter for the children"). Trial courts are not required by North Carolina General Statute Section 7B-2501(c) to follow a specific format or wording for their findings of fact. *See generally* N.C. Gen. Stat. § 7B-2501(c); *see generally also In re D.E.P.*, 251 N.C. App. 752, 758, 796 S.E.2d 509, 513 (2017) ("*Ferrell* did *not* address the degree to which a court's findings must specifically reflect consideration of the factors listed in N.C. Gen. Stat. § 7B-2501(c), and did *not* set out any rule regarding this issue." (emphasis in original)).

Here, the trial court's disposition order demonstrates full consideration of each factor in North Carolina General Statute section 7B-2501(c). Therefore, while I agree with the facts as laid out by the majority, I write separately to address the majority's misplaced reliance on *In re: N.M.*, 290 N.C. App. 482, 892 S.E.2d 643 (2023). Because I conclude the trial court made sufficient findings of fact to satisfy North Carolina General Statute Section 7B-2501(c), I would affirm.

I. North Carolina General Statute Section 7B-2501(c)

The issue of what is required to satisfy North Carolina General Statute Section 7B-2501(c) has been addressed in many prior published cases, including *In re I.W.P.*, which noted:

> In fact, this Court has previously held the trial court must consider each of the factors in Section 7B-2501(c). *See In re Ferrell*, 162 N.C. App. 175, 177, 589 S.E.2d 894, 895 (2004); *In re V.M.*, 211 N.C. App. 389, 391-92, 712 S.E.2d 213, 215 (2011); *K.C.*, 226 N.C. App. 452, 462, 742 S.E.2d 239, 246; and *In re G.C.*, 230 N.C. App. 511, 519, 750 S.E.2d 548, 553 (2013). However, this Court recently held, contrary to precedent, that the trial court does not need to consider all of the Section 7B-2501(c) factors when entering a dispositional order. *In re D.E.P.*, ___ N.C. App. ___, ___, 796 S.E.2d 509, 514 (2017). This

> inconsistency has created a direct conflict in this Court's prior jurisprudence and must be reconciled.

In re I.W.P., 259 N.C. App. 254, 261–62, 815 S.E.2d 696, 703 (2018). The main question in the cases cited in *I.W.P.* is generally how much detail the trial court must include in the findings of fact and the extent of the trial court's reliance on incorporation by reference of reports and other documents into the order. *See id.* Prior cases addressing Section 7B-2501(c) tend to fall into three groups, based upon the characteristics of the order on appeal.

A. Orders with No Additional Findings

In the first category of cases, this Court has generally remanded for further findings of fact because the trial court made no additional findings of fact, whether by incorporation of documents or not. *See*, *e.g.*, *In re J.J.*, *Jr.*, 216 N.C. App. 366, 376, 717 S.E.2d 59, 66 (2011) (vacating and remanding in part, without mention of incorporation, due to the trial court's failure "to state any written findings of fact"); *In re V.M.*, 211 N.C. App. 389, 392, 712 S.E.2d 213, 215-16 (2011) (reversing and remanding because documents were incorporated by reference but "no additional findings of fact" were made). *J.J.*, *Jr.* and *V.M.* indicate that while incorporation by reference of additional documents is allowed, the trial court must make some additional findings of fact which indicate the trial court exercised its own discretion and reasoning upon the case. *See J.J.*, *Jr.*, 216 N.C. App. at 376, 717 S.E.2d at 66; *V.M.*, 211 N.C. App. at 392, 712 S.E.2d at 215-16.

B. Orders with Some Findings of Fact

In the second category of cases, this Court has again generally remanded the case when the trial court made some additional findings, but those findings were either (1) not sufficient to address all of the factors or (2) not supported by the evidence. *See*, *e.g.*, *In re K.C.*, 226 N.C. App. 452, 461, 742 S.E.2d 239, 245 (2013) (remanding a disposition order, without mention of incorporation, because though additional findings were made, they were not sufficient); *In re Ferrell*, 162 N.C. App. 175, 177, 589 S.E.2d 894, 895-96 (2004) (remanding, without mention of incorporation, because the evidence did not support a finding of fact). *K.C.* and *Ferrell* indicate that while incorporation by reference of additional documents into the order is appropriate, the trial court must still make sufficient additional findings of fact to satisfy the requirements of North Carolina General Statute Section 7B-2501(c). *See K.C.*, 226 N.C. App. at 461, 742 S.E.2d at 245; *Ferrell*, 162 N.C. App. at 177, 589 S.E.2d at 895-96.

C. Orders with Sufficient Findings of Fact

In the third category of cases, where the orders are often affirmed, the trial court made additional findings of fact with or without incorporation by reference of other documents. *See*, *e.g.*, *D.E.P.*, 251 N.C. App. at 759, 796 S.E.2d at 514 (affirming, without mention of incorporation, because there were sufficient findings of fact); *In re G.C.*, 230 N.C. App. 511, 521, 750 S.E.2d 548, 555 (2013) (affirming, without mention of incorporation, in part because there were sufficient written findings of fact). *D.E.P.* and *G.C.* indicate that incorporation by reference along with additional findings of fact, may be sufficient to satisfy the requirements of North Carolina General Statute Section 7B-2501(c). *See D.E.P.*, 251 N.C. App. at 759, 796 S.E.2d at 514; *G.C.*, 230 N.C. App. at 521, 750 S.E.2d at 555.

D. *In re N.M.*

Turning to the majority's primary analysis, in *N.M.*, the trial court incorporated documents by reference but failed to make *any* additional findings of fact. *See N.M.*, 290 N.C. App. 482, 892 S.E.2d 643. Thus, *N.M.* would properly fall within the first category of cases. Since the trial court made no additional findings to address the factors, but only incorporated additional documents, the trial court did not demonstrate it had exercised independent reasoning upon the case. *See*, *e.g.*, *J.J., Jr.*, 216 N.C. App. at 376, 717 S.E.2d at 66; *V.M.*, 211 N.C. App. at 392, 712 S.E.2d at 215.

But this case falls into the third category of cases. *See D.E.P.*, 251 N.C. App. at 759, 796 S.E.2d at 514; *G.C.*, 230 N.C. App. at 521, 750 S.E.2d at 555. Here, the trial court not only incorporated other documents by reference but also made at least seven additional findings of fact, as quoted in the majority opinion. While the findings of fact could be worded more artfully, and they are in paragraph form rather than a neatly delineated list tracking the subsections of Section 7B-2501(c), the trial court did make additional findings addressing the factors.

In my references to past cases I have noted the trial court's use of "incorporation by reference" of other documents into the order because I am concerned that the majority's interpretation of the trial court's order elevates form over substance. The majority states, "As in *In re N.M.*, incorporating the reports by reference is insufficient to meet the statutory requirements set forth in Section 7B-2501(c)." *N.M.* stands for the proposition that incorporation of additional documents by reference, *alone*, is insufficient, but in this case, the trial court made additional findings. *See generally N.M.*, 290 N.C. App. 482, 892 S.E.2d 643. In

addition, although the majority noted the trial court's additional findings of fact, the majority failed to address the incorporated documents *at all*; the opinion reads as if *only* the additional findings may be considered.

According to Black's Law Dictionary, "incorporation by reference" is "[a] method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one." Black's Law Dictionary 916 (11th ed. 2019). In other words, because the trial court did not merely *refer* to "the predisposition report, risk assessment, and needs assessment" but explicitly "incorporat[ed them] by reference" those documents "should be treated as if [they] were contained with the primary one" along with the seven additional findings of fact. *N.M.*, 290 N.C. App. 482, 484-85, 892 S.E.2d 643, 645.

A clear example of review of an order with documents incorporated by reference is *In re J.A.D.*, wherein this Court stated, "The record on appeal includes [the juvenile's] predisposition report, risks assessment, and needs assessment that were incorporated by reference into the trial court's written disposition order, but these documents also do not sufficiently address each of the N.C. Gen. Stat. § 7B-2501(c) factors." *In re J.A.D.*, 283 N.C. App. 8, 24, 872 S.E.2d 374, 387 (2022) (citation omitted). In other words, the incorporated documents in *J.A.D.* case did not satisfy the factors in North Carolina General Statute Section 7B-2501(c), but the incorporated documents were considered as part of the primary document in determining whether the factors were addressed. *See id.*

Last, while again I conclude *N.M.* does not control this case because here the trial court made additional findings of fact, while the order in *N.M.* had no additional findings, *see generally N.M.*, 290 N.C. App. 482, 892 S.E.2d 643. I also disagree with the majority's analysis regarding application of precedent. Even if we assume there have been inconsistencies in this Court's interpretations of North Carolina General Statute Section 7B-2501(c), *see I.W.P.*, 259 N.C. App. at 261-62, 815 S.E.2d at 703, "we are bound to follow the 'earliest relevant opinion' to resolve the conflict[:]"

> 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. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. The dilemma of *In Re Civil Penalty* arises when panels of this Court have decided the same issue two different ways, since we are theoretically bound by two opposing precedents or lines of precedent.

> And the Court may have a double dilemma where a prior panel of this Court has addressed not only the underlying issue but also the effect of *In Re Civil Penalty* on the same issue in different ways. *See Routten*, ___N.C. App. at ___, 822 S.E.2d at 449 (Berger, J., concurring) ("*As the case before us here demonstrates, this Court can be trapped in a chaotic loop as different panels disagree, not only on the interpretation of the law, but also on what law appropriately controls the issue.*"). We have that double dilemma here, since this Court addressed the same issue *and* application of *In re Civil Penalty* in *Respess*, *see Respess v. Respess*, 232 N.C. App. 611, 754 S.E.2d 691 (2014), coming to one conclusion in 2014, and in *Routten*, coming to the opposite conclusion, in 2018. *See Routten*, ___ N.C. App. ___, 822 S.E.2d 436.
>
> Yet we must resolve this double dilemma, and we conclude *Respess* is the precedent which must be followed. Where there is a conflict in cases issued by this Court addressing an issue, ***we are bound to follow the 'earliest relevant opinion' to resolve the conflict***:
>
>> 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. Further, our Supreme Court has clarified that, ***where there is a conflicting line of cases, a panel of this Court should follow the older of those two lines***. With that in mind, we find *Skipper* and *Vaughn* are irreconcilable on this point of law and, as such, constitute a conflicting line of cases. Because *Vaughn* is the older of those two cases, we employ its reasoning here.
>
> *State v. Gardner*, 225 N.C. App. 161, 169, 736 S.E.2d 826, 832 (2013) (citations and quotation marks omitted). Thus, we turn to *Respess*. *See Respess*, 232 N.C. App. 611, 754 S.E.2d 691.

Huml v. Huml, 264 N.C. App. 376, 394–95, 826 S.E.2d 532, 545 (2019) (formatting altered). I rely on "the older" case of *J.A.D.* instead of the more recent case of *In re N.M. Huml*, 264 N.C. App. at 394-95, 826 S.E.2d at 545; *see also N.M.*, 290 N.C. App. 482, 892 S.E.2d 643 (noting filing in 2023); 283 N.C. App. 8, 24, 872 S.E.2d 374 (noting filing in 2022).

As the dissenting judge, I will not attempt to reconcile years of arguably inconsistent case law and remain "trapped in a chaotic loop as different panels disagree[.]" *Huml*, 264 N.C. App. at. 395, 826 S.E.2d at 545 (citation omitted). I simply note that here, by *incorporating* the pertinent documents into its order *along with* its additional findings of fact, the trial court satisfied North Carolina General Statute Section 7B-2501(c) as these documents and the trial court's findings address:

(1) The seriousness of the offense;
(2) The need to hold the juvenile accountable;
(3) The importance of protecting the public safety;
(4) The degree of culpability indicated by the circumstances of the particular case; and
(5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2021). I would affirm the trial court's order.

Accordingly, I dissent.

IN RE A.N.R.

No. COA23-479

Filed 21 November 2023

Termination of Parental Rights—grounds for termination—failure to make reasonable progress—findings of fact—evidentiary support

The termination of a mother's parental rights in her daughter was affirmed where clear, cogent, and convincing evidence supported the trial court's findings of fact (including all except one of the findings that were challenged on appeal), which supported a conclusion that the mother willfully left the child in placement outside of the home for more than twelve months without making reasonable progress in correcting the conditions that led to the child's removal. Specifically, the evidence showed that the mother failed to: consistently visit her child, follow the department of social services' (DSS) recommendations for addressing her substance abuse problems, complete parenting classes, maintain stable and appropriate housing, and provide verification of income demonstrating

her ability to care for the child. Although the mother was repeatedly incarcerated throughout the relevant twelve-month period, she did spend at least five months out of jail during which she could have taken steps to address the issues that led to the child's placement with DSS, but did not.

Appeal by Respondent from order entered 7 February 2023 by Judge Sarah N. Lanier in Randolph County District Court. Heard in the Court of Appeals 1 November 2023.

Chrystal Kay for Petitioner-Appellee Randolph County Department of Social Services.

Stephen M. Schoeberle for Appellee Guardian ad Litem.

Mercedes O. Chut for Respondent-Appellant Mother.

COLLINS, Judge.

Respondent-Mother ("Mother") appeals from an order terminating her parental rights to her daughter, Amy.[1] Mother argues that the trial court erred by concluding that she (1) neglected Amy and (2) willfully left Amy in placement outside of the home for more than 12 months and failed to show that reasonable progress had been made in correcting the conditions which led to Amy's removal. Because the trial court's findings are supported by the record evidence, and those findings support the trial court's conclusion that Mother willfully left Amy in placement outside of the home for more than 12 months without making reasonable progress, we affirm.

I. Background

Amy was born in July 2008. In March 2011, Mother and Amy's biological father[2] entered a voluntary "Custody Consent Order," granting temporary custody of Amy to Amy's maternal grandfather, Jeff, and maternal step-grandmother, Connie.[3] The custody order gave Mother and Amy's biological father "liberal visitation as the parties can agree."

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

2. Amy's biological father is not a party to this appeal.

3. We use pseudonyms for Amy's maternal grandfather and maternal step-grandmother to protect Amy's identity.

Jeff and Connie retained custody of Amy for more than 10 years, during which time Mother visited Amy sporadically. On 3 September 2021, Randolph County Department of Social Services ("DSS") filed a petition alleging that Amy was a dependent juvenile because: Jeff was unable to care for Amy; Connie was "unable to care for" Amy or "have [Amy] in her home" because of Connie's substance abuse issues; and Amy's mental health problems were not being successfully managed. The petition further alleged that Mother was incarcerated for possession of methamphetamine and drug paraphernalia as of the time of the filing and that Mother had inappropriate contact with Amy. The trial court placed Amy in the nonsecure custody of DSS that same day. Sometime after that 3 September hearing, Mother was released from incarceration and attended a hearing in September 2021 to address visitation with Amy; the trial court awarded Mother DSS-supervised visits with Amy for one hour, every other week.

The matter came on for hearing on 18 November 2021, and Mother, Jeff, and Connie stipulated to the trial court that: Jeff and Connie were no longer willing to be Amy's caregivers; "Mother was incarcerated and did not have safe and stable housing or income sufficient to support [Amy]"; and Mother "has a history of substance abuse issues[.]" The trial court adjudicated Amy dependent because her "parents, custodians, and caretaker are unable to provide for her placement and care and lack an appropriate, alternative childcare arrangement[.]" The trial court then moved to the dispositional phase of the hearing, concluding that Amy should remain in the secure custody of DSS and ordering Mother to complete a series of services and activities in order to reunify with Amy. The trial court ordered Mother to: (1) complete a substance abuse assessment and follow any and all recommendations from DSS; (2) complete random drug screens at the request of DSS, on the day and time requested by DSS; (3) complete parenting classes and demonstrate skills learned; (4) obtain and maintain stable and appropriate housing; (5) obtain and maintain legal, verifiable income sufficient to meet Amy's needs; (6) participate in Amy's therapy if or when deemed appropriate by Amy's therapist; (7) sign release forms; and (8) contact DSS within two days of any change to Mother's phone number, mailing address, or place where Mother stayed. The trial court maintained Mother's DSS-supervised visitations with Amy. Mother was incarcerated on 28 December 2021 and remained in jail through March 2022.

From April 2022 through 27 September 2022, during which time Mother was not incarcerated, Mother had approximately eight in-person visits with Amy that were not supervised by DSS. Mother failed to appear for any in-person visits supervised by DSS and located at the

agency. Instead, Mother would meet Amy and Amy's foster mother at a shopping center or at a restaurant. During this same time period, Mother also failed to: obtain a substance abuse assessment and engage in substance abuse treatment; obtain and maintain stable housing; and obtain and maintain legal, verifiable income. Mother was incarcerated again on 28 September 2022 and remained in jail until 8 January 2023.

DSS filed a motion to terminate Mother's parental rights on 17 October 2022. The matter came on for hearing on 4 January 2023 and, by order entered 7 February 2023, the trial court terminated Mother's parental rights to Amy under N.C. Gen. Stat. § 7B-1111(a)(1), neglect, and N.C. Gen. Stat. § 7B-1111(a)(2), willfully leaving the juvenile in placement outside of the home for more than 12 months and failing to show that reasonable progress had been made in correcting the conditions which led to removal of the juvenile.

The trial court found and concluded that it was in Amy's best interests to terminate Mother's parental rights. Mother gave timely notice of appeal on 6 March 2023.

II. Discussion

Mother argues that the trial court erred in terminating her parental rights under N.C. Gen. Stat. § 7B-1111(a)(1), neglect, and N.C. Gen. Stat. § 7B-1111(a)(2), willfully leaving the juvenile in placement outside of the home for more than 12 months and failing to show that reasonable progress had been made in correcting the conditions which led to removal of the juvenile, because certain findings of fact are unsupported by clear, cogent, and convincing evidence.

A. Standard of Review

A termination-of-parental-rights proceeding is a two-step process. *In re D.A.H.-C.*, 227 N.C. App. 489, 493, 742 S.E.2d 836, 839 (2013). "At the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5-6, 832 S.E.2d 698, 700 (2019) (quotation marks and citation omitted). If the petitioner meets its evidentiary burden with respect to a statutory ground and the trial court concludes that the parent's rights may be terminated, then the matter proceeds to the disposition phase, at which the trial court determines whether termination is in the best interests of the child. *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736-37 (2004). If, in its discretion, the trial court determines that it is in the child's best interests, the trial court may then terminate

the parent's rights. *In re Howell*, 161 N.C. App. 650, 656, 589 S.E.2d 157, 161 (2003).

Pursuant to N.C. Gen. Stat. § 7B-1111(a), a trial court may terminate parental rights upon a finding of one of eleven enumerated grounds. When reviewing the trial court's adjudication of grounds for termination, we examine whether the trial court's findings of fact "are supported by clear, cogent and convincing evidence and [whether] the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quotation marks and citations omitted). Any unchallenged findings are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citations omitted). The trial court's conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

B. Adjudication

1. N.C. Gen. Stat. § 7B-1111(a)(2) – Lack of Progress

When a trial court terminates parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), the trial court must determine that, as of the time of the hearing, the juvenile has been willfully left in placement outside of the home for more than 12 months and that the parent has not made "reasonable progress under the circumstances to correct the conditions which led to removal of the child." *In re O.C.*, 171 N.C. App. 457, 465, 615 S.E.2d 391, 396 (2005). The trial court may consider evidence of reasonable progress made by a parent "until the date of the termination hearing." *In re J.G.B.*, 177 N.C. App. 375, 385, 628 S.E.2d 450, 457 (2006) (citation omitted). A parent's "prolonged inability to improve [their] situation, despite some efforts in that direction, will support a finding of willfulness regardless of [their] good intentions[.]" *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93 (2004) (quotation marks and citation omitted). Our Courts consider the circumstance of a parent's incarceration in determining whether a parent has made reasonable progress and have made it clear that "incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights" proceeding. *In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017) (brackets and citations omitted).

Here, the trial court's unchallenged findings of fact show that Amy was placed into DSS custody on 3 September 2021 and DSS filed a motion to terminate Mother's parental rights on 17 October 2022. This satisfies the first prong of N.C. Gen. Stat. § 7B-1111(a)(2), that Amy was willfully left in a placement outside of the home for more than 12 months before DSS filed its motion to terminate Mother's parental rights.

Relevant to the second prong of N.C. Gen. Stat. § 7B-1111(a)(2), Mother challenges the following findings as being unsupported by clear, cogent, and convincing evidence:

a. Finding 23

Finding 23 states, "Since the minor child has not been in the Mother's custody, the Mother has not consistently visited the minor child." The record evidence shows that Mother "has had sporadic contact as far as visitation" with Amy; that Mother did not appear for any DSS-supervised visits with Amy at the agency; and that Mother attended, at most, eight unsupervised visits with Amy for the entire time that Amy was in DSS custody. This clear, cogent, and convincing record evidence supports Finding 23.

b. Finding 24

Finding 24 states, "The Mother has a history of substance abuse issues that has prevented her from being able to provide proper care to the minor child." Here, Mother stipulated at the adjudication hearing that she "has a history of substance abuse issue[s]" and "at the filing of the petition she was incarcerated for pending charges of possession of methamphetamines and possession of drug paraphernalia." Mother further stipulated that Amy needed placement or assistance because Mother was "unable to provide for [Amy's] placement and care and lack[ed] an appropriate, alternative arrangement[.]" Moreover, the record contains a certified criminal record for Mother, showing that Mother has had multiple convictions for possession of drugs and drug paraphernalia from 2016 through 2021. The record further shows that Mother had sporadic contact with Amy for the 10-year period from 2011 until the filing of the petition in September 2021. Finding 24 is supported by clear, cogent, and convincing record evidence.

c. Finding 25

Finding 25 states, "At the time of the filing of the petition by [DSS] the Mother did not have safe and stable housing." Mother admits that she was in jail at the time of the filing of the petition and concedes that jail is not suitable, appropriate housing for a child. The clear, cogent, and convincing record evidence shows that Mother was incarcerated on the date that DSS filed its petition and supports Finding 25. Mother argues that "[t]his finding is misleading" because "the record contains no evidence of [Mother's] housing prior to that incarceration." We disagree that the finding is misleading and instead understand the finding as clearly stating Mother's housing situation "[a]t the time of the filing of the petition"

when she was incarcerated. Furthermore, unchallenged Finding 39 states in relevant part, "When the Mother was not incarcerated, she never provided verification through a lease and allowing [DSS] to assess[] her home to verify that she has safe and stable housing." Finding 25 is supported by clear, cogent, and convincing record evidence.

d. Finding 30

Finding 30 states, "The Mother was incarcerated from December 28, 2021 through March 2022 and again from October 10, 2022 through January 8, 2023." Mother argues that the evidence does not support that she was incarcerated "through March 2022" and "from October 10, 2022." Mother testified that she was released from jail in April 2022, which supports that Mother was incarcerated "through March 2022." Mother also testified that she was in jail on 10 October 2022 and visited with a DSS social worker while incarcerated on that date; this testimony supports that Mother was incarcerated from at least 10 October 2022. There is clear, cogent, and convincing record evidence to support Finding 30.

e. Finding 31

Finding 31 states, "The Mother's certified criminal records indicates [sic] her current charges are Possession of Schedule I Controlled Substance, Possession with Intent to Distribute Schedule I, and Possession of Schedule II Controlled Substance." Mother argues, and we agree, that her certified criminal record shows that Mother's only pending charges at the time of the hearing were for driving while license revoked, not impaired; expired registration; and "expired/no inspection." While Mother's criminal record shows past convictions for other drug-related offenses, there is no evidence to support the pending charges listed in Finding 31. We strike and omit Finding 31 from consideration.

f. Findings 33, 34, 35

Finding 33 states, "[DSS] requested a drug screen from the Mother on June 9, 2021; she failed to show." Finding 34 states, "[DSS] requested a drug screen from the Mother on October 21, 2021; she failed to show." Mother admits that DSS requested drug screens on those dates and that Mother "did not take them." Mother does not argue on appeal that this finding is unsupported by record evidence, but instead sets forth an explanation for her failure to show for the drug screens. However, the clear, cogent, and convincing record evidence shows that DSS requested, and Mother failed to show for, two drug screens. Finding 35 states, "The Mother has not demonstrated she can be a sober caregiver." This finding is supported by record evidence that shows that DSS requested two drug

screens and Mother failed to take either drug screen, which could have demonstrated her commitment to sobriety. Finding 35 is also supported by record evidence showing that Mother failed to obtain a substance abuse assessment or engage in approved substance abuse treatment, which further could have demonstrated her commitment to sobriety.

g. Finding 36

Finding 36 states, "The Mother was ordered to complete parenting classes. The Mother participated in parenting modules offered while incarcerated, but the Mother never participated in a [DSS] approved parenting class to demonstrate her parenting skills." Two social workers with DSS testified that Mother completed parenting classes on a tablet while she was incarcerated and that Mother presented to DSS a transcript showing her completion of the parenting classes. However, Mother also testified and admitted on cross-examination that she had other people complete some of the parenting classes on her tablet.

Mother testified that there were four people in her cell, they did "some of the courses," and all of the course credits were listed under her name despite others taking the classes. One of the DSS social workers testified that Mother never disclosed that other people had completed the parenting classes under Mother's name and that Mother did not mention this when she presented the transcript to DSS for credit. As it is the responsibility of the trial court to weigh testimony, pass upon the credibility of witnesses, and draw reasonable inferences from the evidence, *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167-68 (2016), we determine that clear, cogent, and convincing evidence supports the finding that Mother "never participated in a [DSS] approved parenting class to demonstrate her parenting skills."

Aside from Finding 31, clear, cogent, and convincing evidence supports the challenged findings of fact. In addition to the challenged findings, the trial court also made the following unchallenged, and thus binding, findings of fact:

> 32. The Mother indicated she completed substance abuse classes while incarcerated but there were no means to have her progress monitored. The Mother failed to complete a substance abuse assessment.
>
> . . . .
>
> 37. The Mother reported she was living at Holder Inman Road, Randleman, North Carolina. A home visit was scheduled on June 20, 2022. The Mother contacted [DSS]

> that morning stating she was running a fever and she was going to the emergency room. The Mother stated she would reach out to [DSS] to reschedule a home visit.
>
> 38. On July 25, 2022, [DSS] contacted the Mother to get an update. The Mother failed to provide a time for a home visit.
>
> 39. Throughout the time the minor child has been in [DSS] custody the Mother has been in and out of incarceration. The Mother is currently incarcerated. When the Mother was not incarcerated she never provided verification through a lease and allowing [DSS] to assess[] her home to verify that she has safe and stable housing.
>
> 40. The Mother reported she would begin working for Hendrix Batting April 28, 2022, but she failed to provide proof of income.
>
> 41. The Mother reported she began working at Everhart Enterprises in August 2022, but the Mother failed to notify or provide proof of income to [DSS].
>
> 42. The Mother is currently incarcerated and does not have a source of income.
>
> 43. Since the minor child has come into [DSS] custody, the Mother has failed to provide any proof of income.
>
> 44. The Mother failed to provide verification of income demonstrating her ability to support the minor child.

The supported findings of fact show that Mother: failed to obtain a substance abuse assessment or any treatment; failed to show for at least two required drug screens ordered by DSS; failed to complete parenting classes and demonstrate skills learned; failed to obtain and maintain stable and appropriate housing; and failed to obtain and maintain legal, verifiable income.

While Mother could not do some of these things while incarcerated, Mother was not incarcerated for the entirety of this matter. Mother was out of jail for a period of at least five months, spanning April 2022 through September 2022; during that time, Mother was going back and forth between two residences in Randolph County. At the time of the termination hearing in January 2023, Mother testified that she planned to move in with her employer, which would have been her third residence in a span of less than nine months. This evidence further supports that

Mother failed to obtain and maintain stable and appropriate housing, even when she was not incarcerated. The record evidence shows that Mother failed to correct the conditions which led to Amy's placement in custody with DSS.

The trial court thus properly found that Amy was willfully left in placement outside of the home for more than 12 months and concluded that grounds existed to terminate Mother's rights under N.C. Gen. Stat. § 7B-1111(a)(2). "Because a finding of only one ground is necessary to support a termination of parental rights," we need not address Mother's remaining argument regarding the remaining ground of neglect. *In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019) (citation omitted).

III. Conclusion

Clear, cogent, and convincing evidence supports the relevant challenged findings of fact except for Finding 31, and the findings of fact support the trial court's conclusion of law to terminate Mother's parental rights to Amy. Mother willfully leaving Amy in placement outside of the home for more than 12 months without showing that reasonable progress had been made in correcting the conditions which led to the removal of the juvenile supports this conclusion of law. Accordingly, the trial court's order terminating Mother's parental rights is affirmed.

AFFIRMED.

Judges TYSON and MURPHY concur.

LAURA LEIGH LINKER, Plaintiff
v.
TIMOTHY LYON LINKER, Defendant
v.
NANCY LYON BOLING, Intervenor

No. COA23-328

Filed 21 November 2023

1. Appeal and Error—interlocutory order—custody action—motion to intervene allowed—substantial right

In a child custody matter, the trial court's interlocutory order allowing a grandparent's motion to intervene affected the natural parents' constitutional right to the care, custody, and control of their child and was therefore immediately appealable as affecting a substantial right.

2. Child Custody and Support—standing—grandparent—motion to intervene—filed prior to death of party—ongoing case

In a child custody matter between the child's parents, where the child's paternal grandmother filed a motion to intervene after the father filed a motion to modify custody and before the father died, the trial court properly concluded that the grandmother had standing to seek visitation because, although the court did not grant the motion to intervene until after the father's death, the underlying custody action was ongoing at the time the motion was filed. Therefore, the trial court properly denied the mother's motion to dismiss pursuant to Civil Procedure Rule 12(b)(1) (lack of subject matter jurisdiction).

Appeal by plaintiff from an order entered on 3 November 2022 by Judge Tabatha P. Holliday in Guilford County District Court. Heard in the Court of Appeals 18 October 2023.

Scott Law Group, PLLC, by Harvey W. Barbee, Jr., for plaintiff-appellant.

Law Offices of Lee M. Cecil, by Lee M. Cecil, for intervenor-appellee.

FLOOD, Judge.

Laura Linker ("Plaintiff") appeals from the trial court's order allowing Nancy Boling ("Intervenor") to intervene in the underlying custody action. For the reasons discussed below, we affirm.

I. Facts and Procedural Background

On 23 January 2009, a child (the "minor child") was born to Plaintiff and Timothy Linker ("Defendant"). The family unit lived together for five years until Plaintiff and Defendant separated on 6 February 2014. On 10 March 2014, Plaintiff filed the first of what would be numerous complaints and motions in the underlying action, seeking sole custody of the minor child. On 6 June 2014, Plaintiff and Defendant entered into a temporary consent order which granted Plaintiff primary physical custody and Defendant secondary custody. This temporary consent order stipulated that Defendant's overnight visits with the minor child would be supervised by paternal grandmother, Intervenor. On 19 August 2014, the 6 June temporary order was formalized, mirroring the terms of the temporary order with Plaintiff having primary custody and Defendant having secondary custody.

At some point following entry of the 19 August Order, a report was made to Guilford County Department of Social Services ("DSS") that Defendant had struck the minor child during a supervised visit. DSS investigated the allegation and found no credible evidence to support Defendant's alleged abuse of the minor child but *did* find Plaintiff had "severely emotionally abused" the minor child. Due to the "degree of alienation caused by" Plaintiff, "the parties agreed to a safety plan whereby the minor child was placed with [Intervenor]." Per the safety plan, Plaintiff and Defendant were given supervised visits with the minor child at a therapist's office.

On 7 January 2015, Defendant filed a motion for emergency custody, which included an affidavit from social worker Rosa Holland in which Ms. Holland stated it was DSS's opinion that Plaintiff "presents an immediate and serious threat to the safety of [the minor child] as evidenced by her continued emotional abuse[.]" The trial court entered an order for emergency custody granting sole physical and legal custody to Defendant, "contingent on him agreeing to and following the DSS safety plan[.]" A return hearing was set for 16 January 2015.

Following the return hearing, the trial court entered a permanent custody order (the "April Order"), which made the following findings of fact:

> 3. From December 18, 2014 until February 23, 2015 (the day on which this [c]ourt orally made this Order), the minor

child lived primarily with his paternal grandmother [Intervenor], and had visitation with both parents, more fully described below.

. . . .

48. The parties agreed that the minor child would reside primarily with [Intervenor], and that the minor child would have supervised joint therapeutic visits with each parent at Lisa Partin's office. The parties signed a safety assessment implementing that plan.

49. Following the December 18, 2014 meeting, the minor child began residing with the paternal grandmother, [Intervenor].

. . . .

58. The [Intervenor] has taken good care of the minor child.

Ultimately, the trial court granted Defendant sole legal custody and primary physical custody of the minor child, with Plaintiff being allowed two supervised, one-hour visits per week. After a few years, Plaintiff filed a motion to modify, and ultimately, the trial court increased Plaintiff's visitation pursuant to a permanent custody order entered on 1 August 2019 (the "August Order").

At some point between August 2019 and March 2022, Defendant was diagnosed with colon cancer. Given the circumstances, Plaintiff and Defendant orally agreed they would begin a "week on, week off" custody arrangement because it would be beneficial for the minor child. On 25 August 2022, Defendant filed a motion to modify the August Order. On 29 August 2022, Intervenor filed a motion to intervene in the pending custody action between Plaintiff and Defendant for the purpose of seeking visitation with the minor child. On 30 August 2022, Defendant died.

On 3 November 2022, Intervenor's motion to intervene was heard before the trial court, during which the court granted Intervenor's motion and found the following as fact:

4. On August 25, 2022, prior to his death, Defendant filed a Motion for Attorney's Fee and Motion to Modify Custody. These Motions . . . remained pending at the time of Defendant's death on August 30, 2022.

5. On August 29, 2022, also prior to the death of Defendant, Proposed Intervenor filed a Motion to Intervene, seeking

> visitation with [the minor child] based on N.C. Gen. Stat. §§ 50-13.2(b1) and 50-13.2(a).
>
> . . . .
>
> 7. Proposed Intervenor's Motion alleges that she has standing to seek visitation, in that she has a close bond with the minor child, which is in nature of a parent-child relationship, and that she exercised primary care of the minor child, with consent of the parties, [DSS], and the [c]ourt for several months as reflected by [c]ourt orders and DSS Safety Plans in this case.

The trial court concluded that there were "unresolved issues regarding child custody" pending at the time of Defendant's death, and Intervenor had standing as a "*de facto* party due to her prior involvement with the minor child as reflected by prior orders" of the trial court. Plaintiff appealed.

II. Jurisdiction

[1] The trial court's 3 November order is not a final judgment; accordingly, we note this appeal is interlocutory. Plaintiff requests this Court review the trial court's order allowing Intervenor to intervene on the basis that such a grant affects Plaintiff's substantial right pursuant to N.C. Gen. Stat. § 7A-27(b)(3)(a) (2021). In the alternative, Plaintiff petitions this Court for writ of certiorari in the event we determine she has not met her burden for immediate review of her interlocutory appeal. For the reasons discussed below, we allow Plaintiff's interlocutory appeal, dismiss Plaintiff's petition for writ of certiorari as moot, and deny Defendant's motion to dismiss.

"[W]hen an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (2005) (citation omitted).

> Admittedly, the "substantial right" test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Waters v. Qualified Pers., Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

This Court tends to view matters involving third party custody claims against natural parents as affecting the natural parents' substantial rights. *See In re Adoption of Shuler*, 162 N.C. App. 328, 330, 590 S.E.2d 458, 460 (2004) (allowing an interlocutory appeal on the basis that the trial court's order denying father's motion to dismiss a petition for adoption effectively eliminated his constitutional rights). Further, a natural parent's rights to the care, custody, and control of their children are among the oldest recognized fundamental rights and are protected by the Due Process Clause of the Fourteenth Amendment. *See Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49, 57 (2000).

Here, Plaintiff appeals from the trial court's grant of Intervenor's petition to intervene, a ruling that is not a final judgment but does allow for Intervenor to make a claim for third party custody or visitation with the minor child. Such a ruling would directly impact Plaintiff's substantial rights in the care, custody, and control of her minor child. *See Troxel*, 530 U.S. at 66, 120 S. Ct. at 2060, 147 L. Ed. 2d at 57. For that reason, we elect to review Plaintiff's interlocutory appeal on the merits.

III. Analysis

[2] Plaintiff makes two arguments on appeal. Plaintiff argues the trial court erred when it (A) denied her motion to dismiss and (B) concluded as a matter of law that Intervenor had previously been made a *de facto* party to the underlying custody action.

A. Motion to Dismiss

1. Standard of Review

This Court reviews a motion to dismiss for lack of standing *de novo*, viewing "the allegations as true and the supporting record in the light most favorable to the non-moving party." *Breedlove v. Warren*, 249 N.C. App. 472, 475, 790 S.E.2d 893, 895 (2016) (quoting *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008)). The trial court's conclusions of law are reviewed *de novo* on appeal. *In re Clark*, 76 N.C. App. 83, 86, 332 S.E.2d 196, 199 (1985); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.").

2. Analysis

Plaintiff begins by contending the trial court erred when it denied her motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina

Rules of Civil Procedure. Plaintiff's motion to dismiss asserts the trial court lacked subject matter jurisdiction over the action because the underlying custody action abated upon the death of Defendant, leaving Intervenor with no action in which to intervene.

This Court has long held that actions between parents involving custody claims abate upon the death of one of the parties. *See*, *e.g.*, *McDuffie v. Mitchell*, 155 N.C. App. 587, 590, 573 S.E.2d 606, 608 (2002) ("Upon the death of the mother in the instant case, the ongoing case between the mother and father ended."). Typically, only the parents of a minor child may initiate actions for custody; however, a trial court may, in its discretion, grant visitation to a third party where it would promote the "interest and welfare" of the child, or to a grandparent with whom the minor child has a "substantial relationship." N.C. Gen. Stat. §§ 50-13.2(a), (b1) (2021).

Following the seminal case *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995), a case in which the North Carolina Supreme Court considered whether grandparents had standing to sue for visitation with their grandchildren, "our Court has repeatedly held that grandparents only have statutory standing to sue for visitation . . . when the custody of a child [is] 'in issue' or 'being litigated' by the parents." *Alexander v. Alexander*, 276 N.C. App. 148, 151, 856 S.E.2d 136, 139 (2021) (quoting *Adams v. Langdon*, 264 N.C. App. 251, 257, 826 S.E.2d 236, 240 (2019)).

This Court considered facts similar to the case currently before us in *Alexander v. Alexander*, a case in which the mother of a minor child argued the trial court had no statutory authority to award the child's paternal grandparents visitation rights after the death of the minor child's father. *Alexander*, 276 N.C. App. at 149, 856 S.E.2d at 138. In *Alexander*, the father, upon learning of his cancer diagnosis, moved in with his parents, meaning the minor child lived with both the father and paternal grandparents during the father's custodial periods. Eventually, the father made a motion to modify the existing custody order. *Id.* at 149, 856 S.E.2d at 138. Shortly thereafter, the paternal grandparents motioned to intervene, which the trial court granted. *Id.*, 856 S.E.2d at 138. After the death of the father, the trial court dismissed his motion to modify due to mootness. *Id.*, 856 S.E.2d at 138. Subsequently, the trial court awarded the mother physical and sole legal custody of the minor child but granted the paternal grandparents "permanent, extensive visitation rights." *Id.*, 856 S.E.2d at 138.

Upon review, this Court concluded the "[g]randparents had statutory standing to seek permanent visitation rights, notwithstanding that

[the] [f]ather had died, as they had been allowed to intervene during a time when custody between Father and Mother was in dispute." *Id.* at 152, 856 S.E.2d at 140.

Conversely, this Court in *McDuffie v. Mitchell*, 155 N.C. App. 587, 573 S.E.2d 606 (2002), considered a maternal grandmother's motion to intervene in an underlying custody action that was filed *subsequent* to the death of the minor children's natural mother. This Court reasoned that a "[g]randparents' right to visitation is dependent on there [] being an ongoing case where custody is an issue between the parents" and therefore "[u]pon the death of the mother in this instant case, the ongoing case between the mother and father ended." *McDuffie*, 155 N.C. App. at 590, 573 S.E.2d at 608.

While this Court's analysis in both *Alexander* and *McDuffie* provide valuable insight into a grandparent's right to seek custody and visitation under our statutes, neither provide an answer to the question that is paramount to our current case. In the case before us, we must determine what becomes of a motion to intervene that was timely filed prior to the death of a party, if at the time of the party's death, a trial court had yet to rule on the motion. Here, unlike the maternal grandmother's circumstances in *McDuffie*, Intervenor's motion to intervene was filed *prior* to Defendant's death. Additionally, unlike the paternal grandparents' circumstances in *Alexander*, Intervenor's motion was not granted until *after* the death of Defendant. It is this precise legal limbo we seek to clarify.

To answer this question, we consider the binding precedent set forth in *McIntyre*, 341 N.C. at 635, 461 S.E.2d at 750 (grandparents have standing to initiate suit only when custody is being litigated); *McDuffie*, 155 N.C. App. at 590, 573 S.E.2d at 608 (ongoing custody disputes abate upon the death of a parent); and *Alexander*, 276 N.C. App. at 152, 856 S.E.2d at 140 (grandparent standing as an intervenor continues past the death of a parent if the trial court's grant of the motion for intervention was made prior to the death).

On 25 August 2022, Defendant filed a motion to modify custody, which effectively re-opened the case; four days later, Intervenor filed a motion to intervene in the on-going case. The following day, on 30 August 2022, Defendant died. While the timeline may appear "dubious," as Plaintiff contends, Intervenor's motion falls within the scope of acceptable timing per our statutes and case law. *See* N.C. Gen. Stat. § 50-13.2(b1); *see also McDuffie*, 155 N.C. App. at 590, 573 S.E.2d at 608. Because Intervenor's motion was filed prior to Defendant's death and

while the underlying action was ongoing, we hold the trial court's determination that Intervenor had standing was proper; accordingly, so too was the trial court's dismissal of Plaintiff's 12(b)(1) motion.

B. De Facto Party

Next, Plaintiff argues the trial court erred in finding and concluding as a matter of law that Intervenor had previously been made a *de facto* party to the underlying custody action.

Due to the interlocutory nature of Plaintiff's appeal, and because we have concluded that Intervenor has standing under both our statutes and case law, we need not reach the issue of whether the trial court improperly determined that Intervenor was a *de facto* party to the underlying case. *See Alexander*, 276 N.C. App. at 151, 856 S.E.2d at 140 ("[W]here grandparents *have intervened* or at least have been made de facto parties while the parents are disputing custody of a child, a resolution or abatement of the parents' custody dispute does not cut off the grandparents' statutory right to have their claim for visitation rights heard." (emphasis added)).

IV. Conclusion

Because custody of the minor child was being litigated at the time of Intervenor's motion to intervene, the trial court correctly denied Plaintiff's motion to dismiss for lack of standing.

AFFIRMED.

Judges COLLINS and GORE concur.

MECKLENBURG ROOFING, INC., Plaintiff
v.
JEREMY ANTALL & JOHNSON'S ROOFING SERVICE, INC., Defendants

No. COA23-255

Filed 21 November 2023

Appeal and Error—interlocutory order—substantial right test—more than mere assertion required

In an action to enforce a non-compete clause filed by a roofing contractor (plaintiff) against a former employee, the appellate court lacked jurisdiction to review the trial court's interlocutory order denying plaintiff's motion for a preliminary injunction where plaintiff failed to include in its statement of the grounds for appellate review any factual support—particular to this case—for its conclusory assertions that the order affected a substantial right, or a specific explanation of how the order would work injury absent appellate review.

Appeal by plaintiff from order entered 17 November 2022 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 August 2023.

Safran Law Offices, by Brian J. Schoolman, and Hendrick, Phillips, Salzman & Siegel, P.C., by Philip J. Siegel, for plaintiff-appellant.

Smith, Currie & Hancock LLP, by Matthew E. Cox, for defendants-appellees.

ZACHARY, Judge.

Plaintiff Mecklenburg Roofing, Inc., ("MRI") appeals from the trial court's order denying its motion for a preliminary injunction. After careful review, we dismiss the interlocutory appeal for lack of jurisdiction.

I. Background

In May 2019, MRI hired Defendant Jeremy Antall. MRI is a roofing contractor, and Mr. Antall first worked in the MRI service department as a superintendent and then was promoted to project manager. Mr. Antall described his responsibilities as "ensur[ing] that job materials were delivered to job sites, that safety was being adhered to, and that the job was completed per the plans and specifications."

In July 2021, MRI promoted Mr. Antall to the position of estimator. According to Alexander Ray, MRI's Vice President, Mr. Antall "estimated over $64,000,000 worth of roofing projects for MRI across most of the states" that MRI served. Mr. Ray averred that "Mr. Antall worked closely with MRI's customers and potential customers" and "was given increased access to MRI's confidential information and trade secrets, and estimated projects with the benefit of MRI's pricing strategies, gross profit percentage targets, man-hour targets, overhead allocation targets, and net profit percentage targets."

As part of this promotion, Mr. Antall and MRI entered into an "Employment Covenants Agreement" ("the Agreement"), which included the following non-compete clause:

> [F]or so long as [Mr. Antall] is employed by [MRI] and for a period of two (2) years thereafter, [Mr. Antall] will not, individually or on behalf of any person, firm, partnership, association, business organization, corporation or other entity engaged in the "Business" (as defined above), engage or participate in the actual Estimating or Selling of commercial roofing services, including but not limited to roof removal, roof retrofit, roof replacement, and roof maintenance and repair, the retrofit, renovation or repair of the exterior building envelope and waterproofing including above and below grade, of commercial or public buildings and other operations incidental to the roofing and construction services described herein and provided by [MRI]; provided that the restrictions set forth in this section shall only apply within the one hundred (100) mile radius from [MRI]'s office . . . .

In August 2022, Mr. Antall terminated his employment with MRI and accepted a position as an estimator with Defendant Johnson's Roofing Service, Inc. ("JRS") in Fort Mill, South Carolina, located within ten miles of MRI's office.

On 5 October 2022, MRI filed a verified complaint against Defendants alleging claims for misappropriation of trade secrets, tortious interference with contract, and tortious interference with existing and prospective relations. MRI also sought injunctive relief to enforce the non-compete clause and other provisions of the Agreement, and moved for the issuance of a preliminary injunction. Along with its complaint, MRI filed an affidavit from Mr. Ray. Before filing their responsive pleadings, on 10 November 2022, Defendants submitted affidavits from Mr.

Antall and Drew Brashear, the owner of JRS. The parties also submitted memoranda of law opposing MRI's motion for a preliminary injunction.

On 15 November 2022, MRI's motion for a preliminary injunction came on for hearing in Mecklenburg County Superior Court. After hearing the arguments of counsel and reviewing the pleadings, affidavits, and memoranda submitted, the trial court denied MRI's motion by order entered on 17 November 2022. MRI timely filed notice of appeal from the trial court's order denying its motion for a preliminary injunction.

II. Appellate Jurisdiction

MRI acknowledges the interlocutory nature of the order from which it appeals, but asserts that this Court may properly exercise jurisdiction because the trial court's order affects a substantial right of MRI. We disagree.

Ordinarily, this Court only hears appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(2) (2021). "A preliminary injunction is interlocutory in nature." *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990). "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." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (citation omitted). "An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to [the] appellant if not corrected before appeal from final judgment." *Id.* (cleaned up); *see* N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a).

Our Supreme Court has consistently defined a "substantial right" as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which one is entitled to have preserved and protected by law: a material right." *Hanesbrands*, 369 N.C. at 219, 794 S.E.2d at 499–500 (cleaned up). Granted, this nebulous test is admittedly "more easily stated than applied"; thus, "it is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Id.* at 219, 794 S.E.2d at 500 (cleaned up); *see also Radiator Specialty Co. v. Arrowood Indem. Co.*, 253 N.C. App. 508, 520, 800 S.E.2d 452, 460 (2017) ("Generally, each interlocutory order must be analyzed to determine whether a substantial right is jeopardized by delaying the appeal." (cleaned up)).

"To confer appellate jurisdiction based on a substantial right, the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Doe v. City of Charlotte*, 273 N.C. App. 10, 21, 848 S.E.2d 1, 9 (2020) (cleaned up); N.C. R. App. P. 28(b)(4) ("When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right."). "[I]f the appellant's opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of appellate jurisdiction." *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019).

> Although this rule seems straightforward in the abstract, it is complicated by different rules concerning *how* a litigant must show that a substantial right is affected. Some rulings by the trial court affect a substantial right essentially as a matter of law. Sovereign immunity is an example. A litigant appealing the denial of a sovereign immunity defense need only show that they raised the issue below and the trial court rejected it—there is no need to explain why, on the facts of that particular case, the ruling affects a substantial right.
>
> By contrast, most interlocutory issues require more than a categorical assertion that the issue is immediately appealable. In these (more common) situations, the appellant must explain, in the statement of the grounds for appellate review, why the facts of that particular case demonstrate that the challenged order affects a substantial right.

Id. at 17–18, 824 S.E.2d at 438 (citation omitted).

Here, in its statement of the grounds for appellate review, MRI fails to offer the requisite explanation. Instead of explaining why the facts of this case demonstrate that the trial court's order affects a substantial right, MRI simply parrots the oft-repeated proposition that "[i]n cases involving an alleged breach of a non-competition agreement and an agreement prohibiting disclosure of confidential information, North Carolina appellate courts have routinely reviewed interlocutory court orders both granting and denying preliminary injunctions, holding that substantial rights have been affected." *Kennedy v. Kennedy*, 160 N.C. App. 1, 5–6, 584 S.E.2d 328, 331 (citation omitted), *appeal dismissed*, 357 N.C. 658, 590 S.E.2d 267 (2003). However, MRI's simple reliance on such bare statements of law—absent a clear and articulable

demonstration of the factual basis underlying MRI's asserted substantial right—is insufficient.

Our appellate courts have consistently reiterated that mere citation to precedent is generally insufficient to invoke this Court's interlocutory jurisdiction. Indeed, a "fixation on . . . published case[s] that [the appellant] believe[s] to be controlling" is "a mistake our Court has warned against for years." *Doe*, 273 N.C. App. at 22, 848 S.E.2d at 10. Rather, "[w]hether a particular ruling affects a substantial right must be determined on a case-by-case basis." *Id.* (cleaned up). "Consequently, . . . the appellant cannot rely on citation to precedent to show that an order affects a substantial right. Instead, the appellant must explain, in the statement of the grounds for appellate review, why the facts of that particular case demonstrate that the challenged order affects a substantial right." *Id.* (cleaned up).

And as explained below, here, MRI's misguided fixation on existing caselaw—at the expense of any context that might aid in our consideration of its interlocutory appeal—is compounded by another fatal shortcoming: MRI's failure to demonstrate that the order "will work injury to [MRI] if not corrected before appeal from final judgment." *Hanesbrands*, 369 N.C. at 218, 794 S.E.2d at 499 (citation omitted). "The appellant[ ] must present more than a bare assertion that the order affects a substantial right; [the appellant] must demonstrate *why* the order affects a substantial right." *Id.* at 219, 794 S.E.2d at 499 (citation omitted).

In its statement of the grounds for appellate review, MRI asserts that "interlocutory review is appropriate because MRI will lose the benefit of the noncompetition covenant in the absence of prompt review." MRI baldly asserts—without any supporting argument—that it "has a valid employment agreement structured to be no broader than necessary to protect its legitimate business interests" and that the trial court's denial of its motion for a preliminary injunction "permits [Mr.] Antall to violate the [A]greement while working for a competitor within the narrow geographic limits proscribed in the [A]greement."

Relying solely on these unsupported, conclusory assertions and scattered citation to a few, select opinions—ascribing great weight to an unpublished decision of this Court[1]—MRI maintains that "because the

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1. Although not determinative of our central analysis and ultimate disposition, we nevertheless caution that the case upon which MRI most relies in this section of its brief is an unpublished decision of this Court, which lacks precedential value. *See generally Pinehurst Surgical Clinic, P.A. v. Dimichele-Manes*, 227 N.C. App. 225, 741 S.E.2d 927, 2013 WL 1901710 (2013) (unpublished). *Cf. Doe*, 273 N.C. App. at 22, 848 S.E.2d at 10

covenants have only a two-year period, the relief sought by MRI could be mooted if Mr. Antall is permitted to continue competing with MRI." Consequently, according to MRI, our "failure to hear [its] appeal would involve a substantial right that may be lost before trial on the merits." *Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 92 N.C. App. 21, 24, 373 S.E.2d 449, 451 (1988), *aff'd*, 324 N.C. 327, 377 S.E.2d 750 (1989).

MRI's statement of the grounds for appellate review is wholly insufficient. Like so many of its predecessors on appeal, MRI improperly and disproportionately relies upon vague, conclusory statements and prior cases to demonstrate that the challenged order affects a substantial right. Such assertions are ineffective to invoke our appellate jurisdiction, absent the requisite factual or evidentiary support. "In effect, [MRI] ask[s] this Court to comb through the record to understand the facts, research the elements of [preliminary injunctions and non-compete clauses], and then come up with a legal theory" to support its claim of a substantial right. *Doe*, 273 N.C. App. at 21–22, 848 S.E.2d at 10. "That is not our role; we cannot construct arguments for or find support for [the] appellant's right to appeal from an interlocutory order. The burden is on the appellant to do so, and [MRI] d[oes] not carry that burden here." *Id.* at 22, 848 S.E.2d at 10 (cleaned up).

Again, "outside of a few exceptions such as sovereign immunity, [an] appellant cannot rely on citation to precedent to show that an order affects a substantial right." *Id.* If there is any reasonable inference to draw from the oft-repeated proposition (upon which MRI relies) that "North Carolina appellate courts have routinely reviewed interlocutory court orders both granting and denying preliminary injunctions," *Kennedy*, 160 N.C. App. at 5, 584 S.E.2d at 331, it is *not* that appellants seeking interlocutory review of any such order may safely assume our jurisdiction.

Rather, ever cognizant of the general rules governing interlocutory appeals, the cautious reader will infer from so generalized a proposition *only* that the appellants in those "routine" cases appropriately invoked our interlocutory jurisdiction pursuant to the substantial-right test of appealability—i.e., that the appellants sufficiently demonstrated, based on the unique facts and procedural context presented, that the challenged orders affected substantial rights and would work injury to the appellants absent immediate review. *See Hanesbrands*, 369 N.C. at 219,

(admonishing the plaintiff-appellants for "fixati[ng] on a *published* case that they believed to be controlling . . . . a mistake our Court has warned against for years" (emphasis added)).

794 S.E.2d at 500; *Doe*, 273 N.C. App. at 21–22, 848 S.E.2d at 10. We reiterate: the *appellant* bears the burden in *every* case to "include in the statement of the grounds for appellate review an explanation of how the challenged order would . . . affect a substantial right *based on the particular facts of that case*." *Denney*, 264 N.C. App. at 19, 824 S.E.2d at 439 (emphasis added).

To be sure, MRI makes arguments in its appellate brief concerning the merits of its underlying claims and the reasonableness of the Agreement, particularly the non-compete clause. However, in its statement of the grounds for appellate review, MRI neglects to make the argument that it will prevail on the merits, or to show that it will suffer irreparable injury. Indeed, the facts belie this contention.

For example, although MRI relies in its merits argument on *Precision Walls, Inc. v. Servie*, MRI makes only general and hypothetical allegations as to the sort of trade secrets and information that Mr. Antall *might* disclose to JRS, and has made none as definite as the allegation in *Precision Walls* that "one of [the] plaintiff's subcontractors had been contacted by [the] defendant on . . . [the] defendant's first day working for [his new employer], about performing subcontract work for" his new employer. 152 N.C. App. 630, 638, 568 S.E.2d 267, 273 (2002). In fact, rather than confirming that his "position with [his new employer] was almost identical to his job with [the] plaintiff[,]" *id.*, Mr. Antall here averred that "[t]he things that [he is] doing at JRS are not the same as what [he] did at MRI, or for the same clientele." Further, Defendants' counsel argued to the trial court that Mr. Antall "doesn't have any trade secrets. He uses mathematics, which is, to my knowledge, not a trade secret." MRI makes no specific showing to the contrary in its statement of the grounds for appellate review.

Additionally, MRI asserts in its appellate brief that "MRI and JRS bid against each other constantly, aggressively, and are direct competitors in the same market." Yet Mr. Antall stated in his affidavit that he was "unaware of any jobs that [he] bid for MRI that JRS was also bidding at the same time." Although MRI provided a "non-exhaustive list of examples" of the two companies bidding against each other, Mr. Brashear explained in his affidavit that JRS only bid on one of the listed projects, and that Mr. Antall did not work on that bid. Mr. Brashear even provided documentation showing that MRI did not bid on that particular project. Ultimately, MRI has made many accusations about Defendants' conduct, both before the trial court and this Court on appeal, but has not supported those accusations with evidence other than the assertions made

in its verified complaint and by Mr. Ray in his affidavit, all of which are contradicted by Defendants.

Regardless, this Court lacks jurisdiction to review MRI's arguments when its statement of the grounds for appellate review is insufficient to invoke our interlocutory jurisdiction to reach those arguments. *See Hanesbrands*, 369 N.C. at 219–20, 794 S.E.2d at 500 (dismissing the interlocutory appeal where the appellant "appear[ed] to suggest that she may suffer some unspecified prejudice from th[e] case being tried in Business Court," but did "not explain[ ] how she would be prejudiced" or "identif[y] a specific material right that she would lose if the order [were] not reviewed before final judgment nor [did she] explain[ ] how the order in question would work injury to her if not immediately reviewed" (cleaned up)); *Doe*, 273 N.C. App. at 21, 848 S.E.2d at 10 (deeming insufficient a statement of the grounds for appellate review in an appeal claiming a substantial right based on the risk of inconsistent verdicts, where the appellants "asserted, categorically and in a single sentence, that all the claims in this case involve the 'same facts and legal questions' concerning probable cause, without explaining how or why a jury's consideration of those facts in the various state and federal claims in this case could lead to irreconcilable results"); *Denney*, 264 N.C. App. at 19, 824 S.E.2d at 439 (dismissing for lack of jurisdiction where the crux of the appellant's arguments—that a res-judicata defense *always* creates a risk of inconsistent verdicts, obviating the need for case-by-case applications of the substantial-right test—was, "in effect, simply an assertion that [the appellant] should not be forced to endure the burden of a trial when [it] ha[s] asserted a defense on which [it] believe[s] [it] will prevail on appeal").

In essence, MRI asks us to assume—for the sake of our jurisdiction, no less—that the barebones assertions in its statement of the grounds for appellate review are self-evident and supported by the record; and yet, MRI only begins to expound upon those assertions in the merits section of its brief. This approach improperly assumes that the appellant's burden is met, and instead, places the burden upon this Court to divine the basis for the exercise of our interlocutory jurisdiction. But it is not the duty of an appellate court "to construct arguments for or find support for [an] appellant's right to appeal. Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed." *Hanesbrands*, 369 N.C. at 218, 794 S.E.2d at 499 (cleaned up). Accordingly, MRI's appeal is properly dismissed.

III. Conclusion

For the foregoing reasons, we dismiss the interlocutory appeal for lack of jurisdiction.

DISMISSED.

Judges DILLON and WOOD concur.

STATE OF NORTH CAROLINA
v.
CORY WYATT BOWMAN, Defendant

No. COA23-384

Filed 21 November 2023

1. Probation and Parole—probation revocation—notice—allegations of behavior—sufficiency

The trial court had jurisdiction to revoke defendant's probation where the allegations in the probation violation report provided sufficient notice of the probation hearing and its purpose. Although the report did not explicitly allege that defendant had committed a criminal offense, the report's description of defendant's behavior—that defendant admitted to downloading and viewing child pornography even though he was subject to a condition of probation that he not possess pornography—put defendant on notice of possible revocation.

2. Probation and Parole—probation revocation—new criminal offense—sufficiency of evidence—admission to viewing pornography

The trial court did not abuse its discretion by revoking defendant's probation where the State's evidence that defendant had admitted to downloading and viewing child pornography was sufficient to reasonably satisfy the court that defendant had violated a condition of his probation by committing a new offense. Although the court did not specify which new crime defendant had committed, defendant's actions fulfilled the elements of third-degree exploitation of a minor, which was also the underlying crime for which defendant had been placed on probation.

Judge COLLINS concurring in result only.

Appeal by defendant from an order entered by Judge Cynthia K. Sturges on 27 September 2022, in Forsyth County Superior Court, revoking his criminal probation and activating his suspended sentence. Heard in the Court of Appeals 18 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Reginaldo E. Williams, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for defendant-appellant.

FLOOD, Judge.

Cory Wyatt Bowman ("Defendant") appeals from the trial court's revocation of his criminal probation for third-degree exploitation of a minor. Defendant argues the trial court erred in revoking his probation status, as (A) Defendant did not have notice that his probation would face revocation, and (B) the State failed to prove he committed a new criminal offense. As explained in further detail below, we find the trial court did not err.

I. Factual and Procedural Background

On 21 June 2021, Defendant was charged with fifteen counts of third-degree exploitation of a minor. On 26 October 2021, Defendant pled guilty as charged, and on the same day, the trial court consolidated the convictions into three judgments. The trial court sentenced Defendant to three consecutive terms of five to fifteen months' imprisonment, which was suspended for sixty months' supervised probation. Included as conditions for Defendant's probation were, *inter alia*, that Defendant commit no criminal offense in any jurisdiction; participate in sex offender treatment; submit to warrantless searches for adult and child pornography; and a special condition under N.C. Gen. Stat. § 15A-1343(b2) (2021), that Defendant not "have any pornography adult or child."

In March 2022, Defendant began participating in group therapy pursuant to his court-mandated sex offender treatment. On 20 April 2022, during a group therapy meeting, Defendant admitted to "looking at child abusive material" and therefore was deemed non-compliant with the therapy. A counselor from Counseling and Support Associates reported Defendant's admission to his probation officer.

Two days later, on 22 April 2022, Defendant's probation officer ("Officer Wallace") and another police officer visited Defendant's home and made contact with him and his girlfriend. The officers asked

Defendant if he knew why they were there, and he replied "[p]robably for porn." The officers asked Defendant about his cell phone, and he indicated that his phone was damaged and that he had instead been using his girlfriend's phone. The officers asked Defendant if he had "looked at any child pornography," and he admitted to "looking at it" on his girlfriend's phone, and also admitted that he had factory reset his girlfriend's phone.

Defendant's girlfriend permitted the officers to look at her phone. Upon investigation of Defendant's girlfriend's phone, the officers observed Google search results for "little girls in bikini videos; little girl model videos; little girl videos; little girl web cams; . . . and live sex cam." Officer Wallace then contacted the Forsyth County Sheriff's Office, and a police deputy and investigator were sent to Defendant's residence. The investigator searched Defendant's girlfriend's phone, confiscated the phone, and determined "they could not pull anything off the phone that would lead to a new charge."

Soon after, Defendant went to a meeting with Officer Wallace, admitted again to viewing child pornography, and was arrested for the violation of being non-compliant in a group therapy class.

On 29 April 2022, Officer Wallace filed a violation report (the "Report"), alleging Defendant willfully violated probation. The Report reads, in relevant part:

> 1. Sex Offender Special Condition Number
>
>   Per [D]efendant's judgment, he is "not to have any pornography adult or child." On [20 April 2022] [D]efendant admitted to his counselor with C.A.S.A. that he had downloaded child abuse material to his telephone. During a home contact on [22 April 2022], the offender admitted to this officer that he had viewed child pornography on his girlfriend's cellphone (estimated time frame was a month prior). This officer contacted the Forsyth County Sherriff's office about it. [D]efendant's girlfriend's cellphone was seized by Investigator Tufft due to [D]efendant's admitting to viewing child pornography on it.
>
> 2. Condition of Probation
>
>   "Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court" in that Defendant was enrolled

> in sex offender treatment with counseling and support associates (C.A.S.A.) on [15 March 2022]. On [25 April 2022] [D]efendant was non-complied from group for the following: on [20 April 2022] he admitted to the counselor that he had downloaded (to his telephone) and watched child abuse material within the past week prior to admission. This violates the group rules [D]efendant signed on [7 March 2022]. On [22 April 2022] [D]efendant admitted to this officer that he had viewed child pornography (estimated time frame was a month prior).

(cleaned up).

This matter came on for hearing on 27 September 2022. The State argued that Defendant's admission of downloading and watching child pornography constituted a new criminal offense. The trial court asked Officer Wallace whether he had viewed any images on Defendant's girlfriend's phone, and Officer Wallace said he had not. Following this inquiry, Officer Wallace testified as to the Google search results he observed on Defendant's girlfriend's phone. Defendant's attorney contended that the search terms did not indicate illegality in the material viewed by Defendant, but the trial court noted that "whether or not what he did was illegal versus whether or not he violated probation, which he was not allowed to do, those are two different [questions]." The State then requested the trial court revoke Defendant's probation.

The trial court found Defendant violated probation, and that "the evidence does reasonably satisfy [the trial court] in [its] discretion that [Defendant] has violated conditions upon which his sentence was suspended," and ordered "that his probation is revoked and the suspended sentence is now active." In its written order, the trial court made the same findings, checked the box indicating that Defendant's probation was revoked for willful violation of the condition that he not commit any criminal offense, and indicated that each violation was, in and of itself, a sufficient basis upon which the court could revoke probation and activate Defendant's sentence. Defendant orally appealed from the trial court's order.

II. Jurisdiction

Pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure, this Court has jurisdiction over Defendant's appeal as to his argument concerning the State's alleged failure to prove he committed any new criminal offense. *See* N.C. R. App. P. 4(a)(1). As to Defendant's

argument regarding notice, under Rule 10: "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. At trial, the following exchange occurred between the court and Defendant's counsel:

> THE COURT: To satisfy due process in a probation revocation hearing, probationer is entitled to written notice of the claimed violations.
>
> We have that. You said you have notice.
>
> MS. MARTIN: Yes, Your Honor.

Defendant's counsel admitted that Defendant had notice, and Defendant did not bring at trial a request, objection, or motion regarding notice. Proper notice is required for a trial court to have subject matter jurisdiction, however, and "the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal[.]" *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008) (citation omitted); *see State v. Kelso*, 187 N.C. App. 718, 723, 654 S.E.2d 28, 32 (2007). Accordingly, we address Defendant's notice argument.

III. Standard of Review

Defendant asserts this Court reviews his appeal *de novo*. Defendant's assertion is erroneous as, "[w]hen reviewing the decision of a trial court to revoke probation, we review for abuse of discretion." *State v. Pettiford*, 282 N.C. App. 202, 206, 869 S.E.2d 772, 776 (2022) (citation omitted). A trial court abuses its discretion when its "ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 206, 869 S.E.2d at 776 (citation and internal quotation marks omitted). "Nonetheless, when a trial court's determination relies on statutory interpretation, our review is *de novo* because those matters of statutory interpretation necessarily present questions of law." *State v. Johnson*, 246 N.C. App. 132, 134, 782 S.E.2d 549, 551–52 (2016) (citation and internal quotation marks omitted). Here, the trial court's conclusions of law in its written order did not concern statutory interpretation, and our review is therefore for abuse of discretion. *See id.* at 132, 782 S.E.2d at 551–52; *see also Pettiford*, 282 N.C. App. at 206, 869 S.E.2d at 776.

IV. Analysis

Defendant contends on appeal: (A) the trial court erred in revoking Defendant's probation as he did not receive effective notice that he

would face probation revocation, and (B) the trial court erred by revoking Defendant's probation because the State failed to prove he committed any new criminal offense.

A. Notice

[1] Defendant contends he was not given notice of the hearing and its purpose, as the State alleged in the Report that he had violated a sex offender special probation condition, which is not a revocable violation. We disagree.

Under statute, "[t]he State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged." N.C. Gen. Stat. § 15A-1345(e) (2021). "Just as with the notice provided by criminal indictments . . . the purpose of notice mandated by N.C. [Gen. Stat.] § 15A-1345(e) is to allow the defendant to prepare a defense[.]" *State v. Moore*, 370 N.C. 338, 342, 807 S.E.2d 550, 553 (2017) (cleaned up) (citations and internal quotation marks omitted). Our Supreme Court has provided:

> A statement of a defendant's alleged actions that constitute the alleged violation will give that defendant the chance to prepare a defense because he will know what he is accused of doing. He will also be able to determine the *possible effects* on his probation that those allegations could have, and he will be able to gather any evidence available to rebut the allegations.

Id. at 342, 807 S.E.2d at 553 (emphasis added). One possible effect a defendant's actions may have on his probation, if said actions constituted a crime or absconding, is the revocation of said probation. *See* N.C. Gen. Stat. §§ 15A-1343(b)(1), -1344(a).

Here, Defendant was convicted for fifteen counts of third-degree exploitation of a minor, a crime that "prohibits the mere possession of child pornography." *State v. Fletcher*, 370 N.C. 313, 320, 807 S.E.2d 528, 534 (2017). Defendant was then placed on probation with the condition that he "not have any pornography adult or child." *See* N.C. Gen. Stat. § 14-190.17A(a) (2021) ("A person commits the offense of third[-]degree sexual exploitation of a minor if, knowing the character or content of the material, he possess material that contains a visual representation of a minor engaging in sexual activity."). In the Report, after noting that Defendant's probation is subject to the condition he "not have pornography adult or child[,]" Officer Wallace described Defendant's alleged actions of downloading to his phone and viewing "child abusive material," and viewing child pornography on his girlfriend's phone.

The Report's description of Defendant's alleged behavior was sufficient to give Defendant notice of possible probation revocation. While the Report does not explicitly allege that Defendant violated his probation by committing a criminal offense, its allegation of Defendant downloading and viewing child pornography gave Defendant the chance to prepare a defense against the accusation of him possessing child pornography—conduct that may be criminal as third-degree exploitation of a minor, which is the very offense for which Defendant was convicted. *See Moore*, 370 N.C. at 342, 807 S.E.2d at 553; *see Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534. We conclude that, from the Report, Defendant was able to determine the "possible effects" his alleged actions may have on probation, *i.e.*, revocation, and therefore hold the trial court did not err. *See Moore*, 370 N.C. at 342, 807 S.E.2d at 553.

B. New Criminal Offense

[2] Defendant argues that, even if the State gave him effective notice that his probation could be revoked for committing a new criminal offense, the State failed to meet its burden to show that a crime was committed. We disagree.

This Court has provided:

> A proceeding to revoke probation is often regarded as informal or summary, and the court is not bound by strict rules of evidence. An alleged violation by a defendant of a condition upon which his sentence is suspended need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended.

Johnson, 246 N.C. App. at 134, 782 S.E.2d at 551; *see also State v. Monroe*, 83 N.C. App. 143, 145–46, 349 S.E.2d 315, 317 (1986). As articulated above, a condition upon which probation may be revoked is the commission of a new crime, and one commits the crime of third-degree exploitation of a minor when, "knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity." N.C. Gen. Stat. § 14-190.17A(a); *see* N.C. Gen. Stat. §§ 15A-1343(b)(1), -1344(a). A person possesses child pornography when he is "aware of its presence and has himself or together with others both the power and intent to control the disposition of the material." *State v. Dexter*, 186 N.C. App. 587, 595, 651 S.E.2d 900, 906 (2007); *see State v. Riffe*, 191 N.C. App. 86, 92, 661 S.E.2d 899, 904 (2008).

In *Monroe*, this Court heard a defendant's appeal of the lower tribunal's decision to revoke his probation, and the defendant argued, "the trial court erred in revoking his probation because the trial court's findings of fact in the revocation order do not support the conclusion of law that [the] defendant breached a condition of probation by committing a criminal offense." 83 N.C. App. at 144, 349 S.E.2d at 316. We disagreed with the defendant's contention and provided that, although the trial court did not specifically state whether the criminal offense was in violation of one of the two statutory crimes listed in the defendant's violation report, "the evidence presented amply support[ed] a finding that [the] defendant violated" one of the statutory crimes. *Id.* at 144, 349 S.E.2d at 316. As such, the trial court's revocation of the defendant's probation was proper. *Id.* at 145–46, 349 S.E.2d at 317.

Here, the State presented evidence that Defendant admitted twice to downloading and viewing child pornography and "child abusive material[,]" that Defendant had factory reset his girlfriend's phone at some point after viewing the material on her phone, and that Defendant had made several suggestive Google searches on his girlfriend's phone. Defendant's admissions certainly support a finding that he possessed child pornography as, by downloading and viewing the material on his and his girlfriend's phones, he was necessarily aware of the pornography's presence and had the power and intent to control the material's disposition. *See Dexter*, 186 N.C. App. at 595, 651 S.E.2d at 906. This evidence, together with the remaining evidence presented by the State, was therefore sufficient to reasonably satisfy the trial court, in its sound discretion, that Defendant knowingly possessed material containing a visual representation of a minor engaging in sexual activity and committed third-degree exploitation of a minor. *See Johnson*, 246 N.C. App. at 134, 782 S.E.2d at 551; *see* N.C. Gen. Stat. § 14-190.17A(a).

In its written order, the trial court concluded, *inter alia*:

> 4. A [c]ourt may find a probationer has committed a new criminal offense regardless of the State's decision to drop the new criminal charge or to not bring a charge at all. . . .
>
> 5. The evidence before the [c]ourt was such as to reasonably satisfy the [c]ourt, in its discretion, that Defendant has willfully violated a condition of his probation.

(cleaned up). From the trial court's Conclusion of Law 4—that a court "may find a probationer has committed a new criminal offense regardless of the State's decision to . . . not bring a charge at all"—we conclude that the court found, in Conclusion of Law 5, Defendant willfully

violated the probation condition of not having child pornography by committing a new criminal offense.

Although the trial court did not specify in its order the new crime Defendant had committed, third-degree exploitation of a minor was the underlying crime for which Defendant was placed on probation with the condition that he not have child pornography. The State presented evidence which "amply support[ed] a finding" that Defendant committed third-degree exploitation of a minor, and the evidence was such that the trial court was reasonably satisfied Defendant violated a term of his condition. *See Monroe*, 83 N.C. App. at 145–46, 349 S.E.2d at 317. As such, the trial court did not abuse its discretion in revoking Defendant's probation.

V. Conclusion

Defendant has failed to demonstrate he did not receive notice that he would face probation revocation, and the trial court was reasonably satisfied Defendant violated a term of his condition such that revocation was proper. Accordingly, the trial court did not err in revoking Defendant's probation.

NO ERROR.

Judge GORE concurs.

Judge COLLINS concurs in result only.

STATE v. HAMILTON

[291 N.C. App. 368 (2023)]

STATE OF NORTH CAROLINA
v.
KAJUAN DYSHAWN HAMILTON, Defendant

No. COA22-847

Filed 21 November 2023

1. Criminal Law—motion for new counsel—insufficient basis —blindness

In a prosecution for two counts of robbery with a dangerous weapon, the trial court did not abuse its discretion in denying defendant's motion for new counsel, where the sole basis for defendant's motion was that his counsel was blind. Defendant did not offer a valid reason explaining why his counsel was not "reasonably competent" to present his case, nor did defendant assert that a conflict existed between them that would have rendered his appointed counsel "incompetent or ineffective."

2. Criminal Law—cross-examination of defendant—irrelevant and improper impeachment—plain error analysis

In a prosecution for two counts of robbery with a dangerous weapon, the trial court did not commit plain error when it failed to intervene ex mero motu during the State's cross-examination of defendant. The State's questions regarding defendant's use of curse words in his interactions with the court were irrelevant to the case and constituted improper impeachment. However, the court's failure to intervene did not rise to the level of plain error where there was ample evidence that defendant committed the robberies he was charged with, and therefore it was unlikely that the court's error impacted the jury's finding that defendant was guilty.

3. Robbery—with a dangerous weapon—jury instruction—lesser included offense—common law robbery

After defendant and his accomplice robbed a gaming business together, the trial court in defendant's criminal prosecution committed plain error by failing to instruct the jury on the lesser included offense of common law robbery with respect to one of defendant's two counts of robbery with a dangerous weapon, which was based on defendant acting in concert with his accomplice to rob one of the business patrons. Although defendant did demand money from the business manager by pointing a firearm at the manager, which supported a conviction on the first count of robbery with a dangerous weapon, nothing in the record suggested that defendant or

his accomplice approached the business patron with a weapon. Therefore, a rational jury could have found defendant guilty of common law robbery on the second count.

Appeal by Defendant from judgment entered 4 May 2022 by Judge Joseph N. Crosswhite in Davidson County Superior Court. Heard in the Court of Appeals 23 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Wyatt Early Harris Wheeler LLP, by Stanley F. Hammer, for Defendant-Appellant.

CARPENTER, Judge.

Kajuan Dyshawn Hamilton ("Defendant") appeals from judgment after a jury convicted him of two counts of robbery with a dangerous weapon. On appeal, Defendant argues the trial court erred by: (1) denying Defendant's motion for new counsel; (2) failing to intervene *ex mero motu* during Defendant's cross-examination; and (3) failing to instruct the jury on the lesser included offense of common-law robbery. After careful review, we conclude the trial court plainly erred by failing to instruct the jury on the lesser included offense. Accordingly, we vacate the trial court's judgment as to the second count of robbery with a dangerous weapon, and we remand for a new trial concerning that count.

I. Factual & Procedural Background

On 5 March 2018, a Davidson County grand jury indicted Defendant on two counts of robbery with a dangerous weapon. The State tried the case during the 3 May 2022 Criminal Session of Davidson County Superior Court before the Honorable Joseph Crosswhite. At the beginning of trial, Defendant orally moved for new appointed counsel. Defendant requested new counsel because his appointed counsel was blind. This was Defendant's third appointed counsel: his first withdrew, and his second discovered a conflict of interest. The trial court inquired into Defendant's position and heard from both Defendant's counsel and the State. The State asked the trial court to proceed with Defendant's counsel, and Defendant's counsel was willing to proceed. The trial court denied Defendant's motion for new counsel.

At trial, evidence tended to show the following. On 13 December 2016, Defendant and Willie Thomasson entered a gaming business

(the "Business") in Davidson County. Todd Bauguess was managing the Business at the time Defendant and Thomasson entered. Upon entering the Business, Defendant drew his firearm and pointed it at Bauguess. Defendant then demanded money from Bauguess, while Thomasson approached Business patrons, including Larry McClendon, and demanded money from them. Before leaving, Defendant and Thomasson took money from Bauguess, the Business, and McClendon, as well as Bauguess' gun and driver's license. Police arrived approximately ten minutes after Defendant and Thomasson left the Business.

After the robbery, police obtained images from the Business' surveillance videos and issued a press release asking for help identifying the suspects. Based on the surveillance images, a corrections officer identified Defendant as one of the suspected robbers. On this information, police asked Bauguess if he would review a lineup of potential suspects. Bauguess agreed, and he identified Defendant from the lineup as one of the robbers. In addition to the trial testimony, the jury viewed the Business' surveillance video from 3 December 2016.

Defendant failed to request an instruction on the lesser included offense of common-law robbery, and the jury found Defendant guilty of two counts of robbery with a dangerous weapon: one direct count regarding Bauguess and one count for acting in concert with Thomasson regarding McClendon. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

This Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

The issues on appeal are whether the trial court erred by: (1) denying Defendant's motion for new counsel; (2) failing to intervene *ex mero motu* during Defendant's cross-examination; and (3) failing to instruct the jury on the lesser included offense of common-law robbery.

IV. Analysis

A. Motion for New Counsel

[1] In his first argument, Defendant asserts the trial court erred by failing to grant his motion for new counsel. We disagree.

Whether a trial court erred in denying a defendant's motion for new appointed counsel is reviewed for abuse of discretion. *State v. Hutchins*, 303 N.C. 321, 336, 279 S.E.2d 788, 798 (1981) ("[T]he decision

of whether appointed counsel shall be replaced is a matter committed to the sound discretion of the trial court."). "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. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

An indigent defendant does not have the right to choose his appointed counsel. *State v. McNeil*, 263 N.C. 260, 270, 139 S.E.2d 667, 674 (1965). When an indigent defendant requests new appointed counsel, however, "the obligation of the court [is] to inquire into defendant's reasons for wanting to discharge his attorneys and to determine whether those reasons were legally sufficient to require the discharge of counsel." *Hutchins*, 303 N.C. at 335, 279 S.E.2d at 797. There is a legally sufficient reason for new appointed counsel "whenever representation by counsel originally appointed would amount to denial of defendant's right to effective assistance of counsel, that is, when the initial appointment has not afforded defendant his constitutional right to counsel." *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980). Concerning the "constitutional right to counsel," the *Thacker* Court said:

> when it appears to the trial court that the original counsel is reasonably competent to present defendant's case and the nature of the conflict between defendant and counsel is not such as would render counsel incompetent or ineffective to represent that defendant, denial of defendant's request to appoint substitute counsel is entirely proper.

Id. at 352, 271 S.E.2d at 255. In other words, *Thacker* presents a two-part test for determining whether to grant a motion for new appointed counsel. *See id.* at 352, 271 S.E.2d at 255. To receive new appointed counsel, the defendant must either show: (1) his current counsel is not "reasonably competent" to present the defendant's case; or (2) there is a conflict between the defendant and his appointed counsel that renders counsel "incompetent or ineffective." *See id.* at 352, 271 S.E.2d at 255.

In *State v. Jones*, however, our Supreme Court took a different route to review a request for new counsel. 357 N.C. 409, 413, 584 S.E.2d 751, 754 (2003). Because *Jones* potentially clouds our standard of review in these cases, we will illustrate the Court's reasoning and reconcile it with the established standard. *See Hutchins*, 303 N.C. at 336, 279 S.E.2d at 798; *Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. In *Jones*, the Court initially acknowledged the abuse-of-discretion standard. *Jones*, 357 N.C. at 413, 584 S.E.2d at 754. But directly after announcing the abuse-of-discretion standard, the Court stated that " 'a defendant must show that

he received ineffective assistance of counsel.' " *Id.* at 413, 584 S.E.2d at 754 (quoting *State v. Thomas*, 350 N.C. 315, 328–29, 514 S.E.2d 486, 495 (1999). From there, the Court discussed our Sixth Amendment standard for ineffective assistance of counsel. *See id.* at 413, 584 S.E.2d at 754.

The Sixth Amendment standard for ineffective assistance of counsel, however, is reviewed de novo. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). So, the *Jones* Court discerned whether there was an abuse of discretion by analyzing, de novo, whether there was prejudice via ineffective assistance of counsel. *See Jones*, 357 N.C. at 413, 584 S.E.2d at 754. In other words, if the *Jones* Court retrospectively found the appointed counsel effective, the trial court clearly did not err by denying the motion for new counsel because the counsel was indeed effective. *See id.* at 413, 584 S.E.2d at 754. Said another way: No prejudice, no abuse of discretion. *See id.* at 413, 584 S.E.2d at 754.

After its Sixth Amendment analysis, the *Jones* Court stated that the "hearing judges did not abuse their discretion in denying defendant's motions to dismiss [the appointed] counsel. Since defendant did not meet the two-pronged *Strickland* test, *it follows that the denials of defendant's motions were not 'manifestly unsupported by reason.'* " *Id.* at 416–17, 584 S.E.2d at 756 (quoting *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (emphasis added). The *Strickland* test is, of course, used to determine whether a defendant's Sixth Amendment right to effective assistance of counsel was violated. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

Put differently, the *Jones* Court backed into its abuse-of-discretion analysis by discerning whether the defendant was prejudiced. *See Jones*, 357 N.C. at 416–17, 584 S.E.2d at 756. The *Jones* Court seemingly used this logic: (1) a Sixth Amendment ineffective-assistance-of-counsel violation turns on whether a defendant received effective assistance of counsel; (2) an erroneous denial of a motion for new counsel turns on whether a defendant *could have* received effective assistance of counsel; (3) an alleged Sixth Amendment violation is reviewed de novo; (4) a denial of a motion for new appointed counsel is reviewed for abuse of discretion; (5) de novo review is more exacting than abuse-of-discretion review; therefore, (6) if there is no Sixth Amendment violation under a de novo review, it follows that a trial court did not abuse its discretion by denying a defendant's motion for new appointed counsel. *See id.* at 416–17, 584 S.E.2d at 756. Although it reached the right destination, the *Jones* Court skipped the straightforward abuse-of-discretion review described in *Thacker* for the meandering, and avoidable, Sixth Amendment review.

We, however, will purely review the trial court's denial of Defendant's motion for new counsel for abuse of discretion. *See Hutchins*, 303 N.C. at 336, 279 S.E.2d at 798; *Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. On a motion for new appointed counsel, a trial judge must decide—in the moment—whether appointed counsel *can* provide effective assistance of counsel. *See Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. A trial judge does not have the benefit of hindsight: When a defendant makes a motion for new counsel, the trial judge must decide whether (1) a defendant's current counsel is "reasonably competent" to present the case; or (2) there is a conflict between the defendant and his appointed counsel that renders counsel "incompetent or ineffective." *Id.* at 352, 271 S.E.2d at 255. This is a forward-looking decision, made in the moment. Such a decision is in the sound discretion of the trial judge, and it is reviewed for abuse of discretion. *See Hutchins*, 303 N.C. at 336, 279 S.E.2d at 798. If a defendant wants a retroactive, de novo review of whether he received effective assistance of counsel, he must make a Sixth Amendment argument. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. Defendant made no such argument.

Here, Defendant asserts the trial court erred by denying his motion for new appointed counsel. Defendant asserts the trial court abused its discretion because his appointed counsel was blind. The parties do not dispute that Defendant's counsel was blind. We cannot conclude, however, that the trial court abused its discretion by allowing Defendant's counsel to proceed in this case.

We turn to the two-part *Thacker* test. First, Defendant does not allege a conflict between him and his counsel. Therefore, no conflict could have "render[ed] counsel incompetent or ineffective to represent" Defendant. *See Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. Second, Defendant's only complaint about his appointed counsel was his counsel's blindness. As Defendant's only complaint was about his counsel's blindness, if we hold that the trial court abused its discretion, we hold that it is impossible for a blind lawyer, as such, to have been "reasonably competent" to present Defendant's case. *See id.* at 352, 271 S.E.2d at 255. In other words, if we hold the trial court abused its discretion merely because Defendant's counsel was blind, we necessarily hold that it is "manifestly unsupported by reason" to allow blind lawyers to practice criminal law. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. That, however, is a question for the State Bar, not this Court. *See* N.C. Gen. Stat. §§ 84-15 to -38 (2021) (granting the State Bar authority to manage admission to practice law in North Carolina). Defendant's counsel is licensed to practice law in this state, and we cannot say the trial court abused its

discretion by failing to replace him because of an immutable physical condition—a physical condition that is not limited to this case.

Thus, the trial court's "denial of [D]efendant's request to appoint substitute counsel [was] entirely proper" because Defendant did not offer a valid reason why his counsel was not reasonably competent to present his case, nor did Defendant assert a conflict with his counsel. *See Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. The trial court satisfied its obligation by "inquir[ing] into [D]efendant's reasons for wanting to discharge his attorney[] and . . . determin[ing] whether those reasons were legally sufficient to require the discharge of counsel." *See Hutchins*, 303 N.C. at 335, 279 S.E.2d at 797. The trial court's determination aligned with our State Bar, finding Defendant's counsel competent to practice law, and we think the trial court's decision was reasonable. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Accordingly, the trial court did not abuse its discretion by allowing Defendant's appointed counsel to proceed in this case. *See id.* at 285, 372 S.E.2d at 527.

B. Cross-Examination of Defendant

[2] In his second argument, Defendant asserts the trial court erred by failing to intervene *ex mero motu* during the State's cross-examination of Defendant. Although we agree with Defendant to the extent he argues the State's cross-examination of him was inappropriate, we conclude the trial court did not plainly err.

This Court reviews "unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). To find plain error, first, this Court must determine that an error occurred at trial. *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Second, the defendant must demonstrate the error was "fundamental," which means the error "had a probable impact on the jury's finding that the defendant was guilty" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 320–21 (2015) (internal quotations and citations omitted). Notably, the "plain error rule . . . is always to be applied cautiously and only in the exceptional case . . . ." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983) (citing *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

North Carolina "adheres to the 'wide-open' rule of cross-examination . . . ." *State v. Penley*, 277 N.C. 704, 708, 178 S.E.2d 490, 492 (1971). Thus, "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2021). A matter is relevant if it has any tendency to make a consequential

fact more or less probable. *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000). Credibility is relevant and may be cross-examined through questions about specific instances of a witness's conduct, but only insofar as the questions examine the witness's character for truthfulness or untruthfulness. N.C. Gen. Stat. § 8C-1, Rule 608(b) (2021); *State v. Morgan*, 315 N.C. 626, 633–34, 340 S.E.2d 84, 89 (1986).

Here, Defendant asserts the trial court erred by failing to intervene *ex mero motu* during the State's cross-examination of him. Defendant argues the State's cross-examination was irrelevant and an improper form of impeachment. The challenged exchange, in which the State questioned Defendant about his interactions with the court before his trial began, is as follows:

> **Q**. And what words did you use towards the people in this courtroom whenever you were angry about that?
>
> **A**. It's beyond that. We all know what was said. I know what was said. The jury wasn't there when it was said, so it's beyond that.
>
> **Q**. If you would answer the question.
>
> **A**. I did answer it, ma'am.
>
> **Q**. What words did you use whenever you were angry?
>
> **A**. Any words that a man or a person would use when they're angry.
>
> **Q**. Mr. Hamilton, if you would please answer the question.
>
> **A**. I did answer it for you, ma'am.
>
> **Q**. What words did you use?
>
> **A**. Words that would be used when a person's angry.
>
> **Q**. And what words were those?
>
> **A**. I'm not going to speak on them. And thank you. I'll continue on answering your questions. Thank you.
>
> **Q**. Mr. Hamilton, what words did you use?
>
> **A**. Words that anybody would use when they're angry.
>
> **Q**. What words did you use whenever you were angry in the courtroom?
>
> **A**. The same words that you would use when you're angry.
>
> **Q**. Mr. Hamilton, I'm asking you what words you used.
>
> **A**. I don't recall the words that I used.
>
> **Q**. Did you say that—did you use the word "mother fucker"?
>
> **A**. I don't know. Did I?

Q. Did you say that you were "getting fucked"?

A. To my knowledge and how I feel, yes, I do feel like that.

Q. Did you say that you were "getting raped"?

A. What's happening? I'm being took from my family.

Q. Is that a yes?

A. I didn't deny it.

Q. Did you say that I was a racist?

A. You act like it.

Q. Is that a yes?

A. No. Because you didn't hear that come out of my mouth and say you racist. I said Davidson County, period.

Q. You don't remember pointing at me and screaming that I was a racist from Jump Street?

A. Well, if I did, I did. I don't recall.

Defendant's counsel did not object to this portion of the cross-examination.

First, Defendant's exchange with the court, over five years after the crimes in question, has no tendency to make a consequential fact concerning those crimes more or less probable. *See Griffin*, 136 N.C. App. at 550, 525 S.E.2d at 806. Second, although Defendant's cross-examined conduct may have been probative concerning his general character, his examined conduct was irrelevant to his character for truthfulness. Therefore, the State's inquiry into these actions was an inappropriate form of impeachment. *See Morgan*, 315 N.C. at 633–34, 340 S.E.2d at 89; N.C. Gen. Stat. § 8C-1, Rule 608(b).

The trial court's failure to intervene, however, does not rise to "plain error." There was ample evidence of Defendant's guilt in this case, including video footage and eyewitness testimony. Through video footage, the jury could see for itself whether Defendant committed the charged crimes: The State's inappropriate cross-examination had no bearing on the jury's ability to consider the video evidence. Considering the evidence in the record, we cannot say the trial court's failure to intervene impacted "the jury's finding that the defendant was guilty" or "seriously affect[ed] the fairness" of the trial. *See Grice*, 367 N.C. at 764, 767 S.E.2d at 320–21. Accordingly, the trial court did not plainly err. *See Odom*, 307 N.C. at 661, 300 S.E.2d at 378.

C. Lesser Included Offense

[3] In his third argument, Defendant asserts the trial court erred by failing to instruct the jury on the lesser included offense of common-law

robbery as to Defendant's second count of robbery with a dangerous weapon. We agree with Defendant: The trial court plainly erred.

Again, this Court reviews unpreserved objections to jury instructions for plain error. *Gregory*, 342 N.C. at 584, 467 S.E.2d at 31. And to show plain error, Defendant must demonstrate the error was "fundamental," which means the error "had a probable impact on the jury's finding that the defendant was guilty" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Grice*, 367 N.C. at 764, 767 S.E.2d at 320–21. Failing to properly instruct a jury on a lesser included offense is a fundamental error: It "constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense." *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000).

"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). "The test is whether there 'is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.' " *Id.* at 562, 572 S.E.2d at 772 (quoting *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)).

A defendant commits robbery with a dangerous weapon when he: (1) unlawfully takes another's property; (2) by using a dangerous weapon; (3) that threatens another person's life. *State v. Bellamy*, 159 N.C. App. 143, 147, 582 S.E.2d 663, 667 (2003). The difference between robbery with a dangerous weapon and common-law robbery is that "the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened." *State v. Peacock*, 313 N.C. 554, 562, 330 S.E.2d 190, 195 (1985).

Concerning his second count, Defendant claims he was entitled to a jury instruction on common-law robbery. Here, Defendant was convicted of the second count of robbery with a dangerous weapon because he acted in concert with Thomasson. Bauguess testified that Defendant pointed a gun at him and ordered him to get the money from behind the counter. At the same time, Thomasson approached McClendon and took his money, while McClendon pleaded: "Man, I've got kids." Thomasson, however, did not have a firearm when he approached McClendon; Thomasson did not have a firearm at any time during the robbery. McClendon's mention of his children is evidence McClendon feared for his life. But Thomasson's lack of a firearm is evidence that a dangerous

weapon was not used to take McClendon's money, and Thomasson's lack of a firearm is also evidence that McClendon did not fear for his life.

The record shows Defendant indeed used a firearm to threaten Bauguess, but as neither Defendant nor Thomasson approached McClendon with a firearm, a rational jury could have reasonably inferred that neither Defendant nor Thomasson used a dangerous weapon to threaten McClendon. *See Bellamy*, 159 N.C. App. at 147, 582 S.E.2d at 667. Therefore, concerning Defendant's second count, a rational jury could have convicted Defendant of common-law robbery, rather than robbery with a dangerous weapon, because the difference between the crimes is the use of a dangerous weapon to threaten a life. *See Peacock*, 313 N.C. at 562, 330 S.E.2d at 195; *Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771.

Accordingly, because a rational jury could have viewed the evidence to support common-law robbery and not robbery with a dangerous weapon, the trial court erred by not instructing the jury on common-law robbery concerning Defendant's second count. *See Bellamy*, 159 N.C. App. at 147, 582 S.E.2d at 667; *Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771; *Peacock*, 313 N.C. at 562, 330 S.E.2d at 195. Therefore, the trial court plainly erred in failing to instruct the jury on the lesser included offense. *See Lawrence*, 352 N.C. at 19, 530 S.E.2d at 819. Thus, we vacate and remand the trial court's judgment concerning Defendant's second count of robbery with a dangerous weapon.

V. Conclusion

In sum, the trial court did not abuse its discretion by failing to grant Defendant's motion for new counsel, and the trial court did not plainly err by failing to intervene *ex mero motu* during the State's cross-examination of Defendant. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527; *Odom*, 307 N.C. at 661, 300 S.E.2d at 378. The trial court did, however, plainly err in failing to instruct the jury on the lesser included offense concerning Defendant's second count of robbery with a dangerous weapon. Failing to instruct the jury on the lesser included charge is a plain, reversible error; therefore, we must vacate and remand the trial court's judgment concerning the second count of robbery with a dangerous weapon. *See Lawrence*, 352 N.C. at 19, 530 S.E.2d at 819; *Bellamy*, 159 N.C. App. at 147, 582 S.E.2d at 667; *Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771.

NO PREJUDICIAL ERROR in part; VACATED and REMANDED in part.

Chief Judge STROUD and Judge DILLON concur.

STATE OF NORTH CAROLINA
v.
DOMINIQUE BUCK TUCKER

No. COA22-865

Filed 21 November 2023

1. Bail and Pretrial Release—kidnapping—connected to domestic violence—no pretrial release hearing—no flagrant constitutional violation—no prejudice shown

After defendant was incarcerated for multiple charges arising from a domestic violence incident, the trial court did not err in denying defendant's motion to dismiss a kidnapping charge even though the State had failed to hold a pretrial release hearing relating to that charge as required under N.C.G.S. § 15A-534.1 (requiring pretrial release hearings for domestic violence crimes). The State's violation of defendant's constitutional rights was not a flagrant violation, since the record suggested that the State's mistake was inadvertent rather than intentional where the State did hold pretrial release hearings for all of defendant's other charges and quickly arranged for a hearing for defendant's kidnapping charge after defendant filed his motion to dismiss. Moreover, defendant failed to show irreparable prejudice to the preparation of his case, where defendant did not post bond for any of his other charges and, therefore, would have remained incarcerated even if the State had complied with the statutory mandate in section 15A-534.1.

2. Appeal and Error—preservation of issues—double jeopardy—multiple assault convictions—separate and distinct offenses

In an appeal from various charges arising from a domestic violence incident, the Court of Appeals declined to invoke Appellate Rule 2 to address defendant's unpreserved argument that his multiple assault convictions were based on one continuous assault and therefore violated the constitutional prohibition against double jeopardy. The evidence showed that, throughout the time that defendant attacked his romantic partner in their shared home, there were "interruptions in the momentum" of the attack—where he would pause to do something else, including hitting the victim's mother or momentarily changing location—such that the record supported a finding of several, separate assaults. Thus, defendant failed to show the requisite manifest injustice or merit to justify applying Rule 2 to his appeal.

3. Assault—inflicting serious bodily injury—by strangulation—distinct interruption between two assaults—separate convictions upheld

In an appeal from multiple convictions arising from a domestic violence incident, during which defendant attacked his romantic partner in the home that she shared with him and with her mother, defendant's separate convictions for assault inflicting serious bodily injury and assault by strangulation were upheld where the record showed a distinct interruption in the momentum of the attack, which supported a finding of two separate assaults of the victim rather than one continuous assault. Specifically, defendant inflicted serious bodily injury on the victim by head-butting, punching, and then kicking her in the bedroom; then, he left the bedroom to hit the victim's mother, busting her lip, before returning to the bedroom to choke the victim to the point of blackout.

4. Kidnapping—first-degree—distinct from underlying felony—sufficiency of evidence—double jeopardy—domestic violence incident

In a prosecution for multiple convictions arising from a domestic violence incident, during which defendant attacked his romantic partner in the home that she shared with him and with her mother, the trial court did not violate the constitutional prohibition against double jeopardy by convicting defendant of both kidnapping and of the underlying assault. The evidence showed that defendant dragged the victim by the hair into the bedroom, ripping her hair out, and then choked her; because the act of dragging her into the bedroom was separate from the act of choking her, and because this and other acts of confining the victim to the bedroom were not necessary to defendant's assault of the victim (he could have assaulted her anywhere in the home), there was sufficient evidence to support separate convictions for kidnapping and assault.

Appeal by Defendant from judgments entered 16 November 2021 by Judge David T. Lambeth, Jr., in Durham County Superior Court. Heard in the Court of Appeals 6 September 2023.

Attorney General Joshua H. Stein, by Assistant General Counsel South A. Moore and Solicitor General Fellow James W. Whalen, for the State.

Kimberly P. Hoppin, for defendant.

WOOD, Judge.

Dominique Tucker ("Defendant") appeals the trial court's entry of four consecutive terms of imprisonment for a total of 185-253 months for first-degree kidnapping, three counts of assault, and interfering with emergency communications. After careful review of the record and applicable law, we determine Defendant's preparation of his case was not irreparably prejudiced by his pretrial detention and Defendant received a fair trial, free from prejudicial error.

I. Factual and Procedural History

Enomwoyi Moser ("Enomwoyi") lived in her mother Cynthia Moser's ("Cynthia") apartment in Durham with Cynthia and her grandson, K.P. Enomwoyi met Dominique Tucker ("Defendant') at church. Enomwoyi knew Defendant was married, and initially they were just friends. Eventually their relationship became more serious, and they began a physical relationship. Defendant came to live with Enomwoyi and Cynthia at their apartment because he needed an address change. Enomwoyi told Defendant that they needed to start to do "what's right" and stop "sleeping with each other under" the same roof. Refraining from having sex became an issue in their relationship.

Their relationship began to disintegrate in January 2020. Enomwoyi discovered Defendant had been handling her gun, and she did not approve because she knew he was a felon. Enomwoyi also discovered she had trichomoniasis, a sexually transmitted disease, and was very angry. She confronted Defendant about it, but he told her he "didn't catch anything[.]" Their relationship continued to deteriorate.

During the last week of January, Enomwoyi saw Defendant put a gun into his coat pocket after checking to make sure the magazine was in the gun. She told him he needed to get the gun out of Cynthia's apartment. Defendant denied having a gun. After this incident, the couple had "no good days."

On 29 January 2020, Enomwoyi returned home from work after 8:30 p.m. K.P. was asleep in Enomwoyi's bedroom, and Defendant and Cynthia were watching television in Cynthia's room. As Enomwoyi feared would happen, she and Defendant started arguing. When Enomwoyi started to collect a blanket and pillow for Defendant to sleep in the living room, "chaos" erupted as Defendant began bringing up all the arguments they had been having.

While the couple were in the living room, Defendant head butted Enomwoyi by hitting his forehead to her forehead. Enomwoyi told

Defendant if he put his hands on her again, she would call the police. The strike was very painful and left her dizzy and confused.

Enomwoyi then walked into the bedroom where K.P. was sleeping to make sure he was still asleep. Defendant followed behind her, "ranting and raging." After Enomwoyi again threatened to call the police, Defendant told her he would give her a reason to call the police. As Defendant "was standing behind [Enomwoyi] in [her] room by the door," he head butted her again, and she "went down." While Enomwoyi was down on the ground, Defendant kept punching her and started kicking her. During this beating, Enomwoyi shouted for Cynthia to call the police.

Cynthia heard Enomwoyi calling for her to call the police. Cynthia entered the room, telling Defendant, "don't hit her no more, don't put your hands on her." Defendant turned around and hit Cynthia, busting her lip.

Defendant then "went [back] into the bedroom" and resumed beating Enomwoyi. Enomwoyi again called out for Cynthia to call the police, but Defendant took Cynthia's phone away and threw it. Cynthia retrieved her phone and called the police. She then went outside to try to get help.

Enomwoyi tried escaping the attack by crawling out of the room, but Defendant continued kicking her until he had kicked her back into the room. Enomwoyi wanted to get out of the apartment out of concern for K.P. and Cynthia, because she did not know if he might turn his attention to them, but Defendant blocked the door in front of her.

At some point, Enomwoyi was able to get up, but Defendant, who was behind her, snatched her back into the room by her hair. Enomwoyi had a hair weave in, and Defendant snatched it all off making her feel like she "was being skinned." He slung her by her ponytail back into the room, and she fell over the bed.

Defendant then began choking Enomwoyi, causing her not to be able to breathe. Defendant had a chokehold around Enomwoyi's neck, and she pleaded for her life. Enomwoyi seemingly blacked out at that point because she could not see or hear anything. When Enomwoyi regained consciousness, she noticed for the first time that K.P. had awakened and was watching what was happening. She did not know how long K.P. had been awake or watching. Enomwoyi grabbed K.P. and cradled him.

Defendant returned to the room and began punching Enomwoyi once again while she cradled K.P. Finally, Defendant left the room. When Enomwoyi saw he had left, she jumped up, closed the door, and locked it.

Defendant once more returned and started kicking the door. Enomwoyi hid K.P. in the closet to protect him, and felt she had to remove herself from the situation.

While Defendant continued kicking the door, Enomwoyi jumped out of the third floor bedroom window, landing on the ground on her right side back and hip. She believed she could not have escaped the room any other way that would not have caused her death. Enomwoyi then saw Defendant looking out of a window and was afraid of being attacked again. She managed to get up and hide. She then heard Defendant start his car and heard what she believed were two gunshots before seeing Defendant pull out of the parking lot and leave.

Enomwoyi suffered a range of injuries from Defendant's attack. She complained of "severe hip pain and pain all over her face" to an EMS responder. Her face was very swollen, and an eye was swollen shut. There was blood all over her face and a significant laceration under an eye. Enomwoyi was transported to the hospital in an ambulance. Enomwoyi suffered a fractured eye socket fracture and also suffered vision issues, such as a spray of light in her peripheral vision. Pressure in her eye socket prevented her from wearing her contacts. At the time of trial, Enomwoyi continued to experience stabbing pains in her eye with varying degrees of severity, memory loss, headaches, migraines, fatigue, weakness, and struggling to think and focus. She continues to have difficulty eating because of a throat injury due to the choking. As a result of jumping out the window, Enomwoyi has hip issues and will need a hip replacement.

Defendant was arrested the same night of the assault. An officer attempted to stop Defendant for speeding and driving with a missing headlight; however, Defendant did not pull over but instead sped away. After a high-speed pursuit involving multiple officers, Defendant pulled into a driveway, and the officers conducted a "high-risk" apprehension. The arresting officers were unaware that a "bolo" (be on the lookout) bulletin had been issued for Defendant for his assaults upon Enomwoyi and Cynthia.

On 30 January 2020, Defendant was arrested on the charges stemming from the assaults, and the magistrate set his bond at $200,000.00. Defendant did not post bond, remaining in custody. On 16 March 2020, a grand jury indicted him on the charges of possession of a firearm by a felon, first-degree kidnapping of Enomwoyi, assault by pointing a gun, assault by strangulation, assault inflicting serious bodily injury, assault in the presence of a minor, assault on a female, and interference with

emergency communication. On 17 March 2020, Defendant was served the indictments while in custody. A bond of $50,000.00 was set for the additional charge of possession of a firearm by a felon. Because the magistrate determined the kidnapping charge involved an act of domestic violence, the magistrate did not set bond on the kidnapping charge and held the matter over for a judge to set the conditions of pretrial release pursuant to N.C. Gen. Stat. § 15A-534.1. Specifically, the magistrate ordered the State to produce Defendant before the next session of court held in Durham County or, if no session were held in the next forty-eight hours, to produce him before a magistrate in forty-eight hours to determine the conditions of pretrial release. The State failed to comply with this order, and Defendant was not afforded the required pretrial detention hearing on the kidnapping charge. Defendant did not post bond on any of the charges and remained in custody.

On 14 September 2020, Defendant filed a motion to dismiss the kidnapping charge, arguing his "arrest" and detention since 17 March 2020 without a pretrial release hearing for the kidnapping charge violated N.C. Gen. Stat. § 15A-534.1 and required its dismissal. The following day, the trial court consolidated Defendant's charges into one set of pretrial release conditions, setting a combined bond of $250,000.00. Defendant did not post bond and remained in custody. On 12 October 2020, the trial court denied Defendant's motion to dismiss for failure to meet the requirements of N.C. Gen. Stat. § 15A-954(a)(4) (2022).

Defendant waived his right to a jury trial and a bench trial was held 8-16 November 2021. Defendant renewed his motion to dismiss the kidnapping charge at the start of the trial. The trial court denied the motion prior to the start of trial. The trial judge found Defendant not guilty of possession of a firearm by a felon, and guilty of first-degree kidnapping, assault by strangulation, assault inflicting serious bodily injury, assault on a female, and interfering with emergency communications. At the close of the State's evidence, at the close of all the evidence, and after the verdict, Defendant made motions to dismiss all the charges. The trial court denied each motion.

Following the verdict, the trial court imposed a total of three sentences to run consecutively. The trial court consolidated the charges of first-degree kidnapping and interference with emergency communication and sentenced Defendant to 130-168 months imprisonment. The trial court consolidated the charges of assault inflicting serious bodily injury, assault in the presence of a minor, and assault on a female and sentenced Defendant to a consecutive term of imprisonment of 36-53 months. The trial court sentenced Defendant to a third consecutive term

of imprisonment of 19-32 months for the assault by strangulation charge. Defendant received credit for time served prior to trial.

Defendant gave oral notice of appeal in open court.

II. Analysis

Defendant raises four arguments on appeal: (1) his kidnapping charge should be dismissed because the State failed to hold a pretrial release hearing related to that charge in violation of N.C. Gen. Stat. § 15A-534.1; (2) the trial court improperly convicted him of multiple counts of assault in violation of the prohibition against double jeopardy; (3) N.C. Gen. Stat. § 14-32.4 permits his conviction of assault inflicting serious bodily injury but not conviction of assault by strangulation; and (4) Defendant's conviction for kidnapping was not based on sufficient evidence. We address each argument in turn.

A. Motion to Dismiss the Kidnapping Charge

[1] A criminal defendant's motion to dismiss is reviewed *de novo*. *State v. Golder*, 374 N.C. 238, 249-50, 839 S.E.2d 782, 790 (2020). Similarly, whether a "defendant has met the statutory requirements of N.C. Gen. Stat. § 15A-954(a)(4) and is entitled to a dismissal of the charge against him is a conclusion of law" reviewed *de novo*. *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008).

N.C. Gen. Stat. § 15A-954(a)(4) requires the trial court to dismiss a charge against a defendant if the trial court determines a "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." A defendant may demonstrate prejudice by showing he would have been released earlier had he received a pretrial hearing. *See State v. Thompson*, 349 N.C. 483, 501, 508 S.E.2d 277, 288 (1998).

For domestic violence crimes, including felonies perpetrated upon a person with whom the defendant lived, N.C. Gen. Stat. § 15A-534.1 (2022) requires a judge to hold a pretrial release hearing for the defendant within the first forty-eight hours from the time of arrest, and if a judge does not do so, then a magistrate must do so at the end of the forty-eight hour period.

To determine whether a defendant's pretrial detention violates N.C. Gen. Stat. § 15A-534.1, "it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the

interim decision may have been mistaken." *Thompson*, 349 N.C. at 499, 508 S.E.2d at 286–87.

Here, Defendant had been detained since 17 March 2020 on the kidnapping charge without receiving a pretrial release hearing for this charge. Defendant did not file his motion to dismiss the charge until 14 September 2020, almost six months later. It was not until after Defendant filed his motion that he received a pretrial release hearing related to the kidnapping charge.

Defendant has a private interest in liberty, which is a fundamental right. *Id.* at 499, 508 S.E.2d at 287. However, the State's failure to hold a pretrial release hearing related to the kidnapping charge did not flagrantly violate that right due to the inadvertence of the State's mistake as well as the absence of prejudice, as explained below. N.C. Gen. Stat. § 15A-954(a)(4).

The State admits it failed to hold a pretrial release hearing related to the kidnapping charge; however, it tries to explain the failure as an inadvertent mishap due to the significant disruption to our Judicial Branch at the onset of Covid-19. Indeed, Covid-19 significantly disrupted the operations of the Judicial Branch at the onset of the pandemic; nevertheless, the failure to conduct a pretrial release hearing could be a violation of Defendant's statutory and constitutional rights. Assuming it is a violation here, we next examine whether the failure to provide a pretrial hearing was intentional and thus a flagrant violation of Defendant's constitutional rights. Here, the State complied with the statutory mandate for all of Defendant's other charges and immediately arranged for a pretrial hearing after being made aware of the need for one upon the filing of Defendant's motion. Thus, there is merit to the State's contention it unintentionally withheld a timely pretrial release hearing regarding one of Defendant's charges. The inadvertence does not excuse the State; rather, it is relevant to show the absence of a flagrant constitutional violation.

Most compellingly, Defendant cannot show irreparable prejudice to the preparation of his case such that the trial court would have been required to dismiss the kidnapping charge. On 17 March 2020, Defendant had not posted the $200,000.00 bond following his 30 January 2020 arrest, so he was still incarcerated when he was arrested pursuant to the indictments of felon in possession of a firearm and kidnapping. After he was served these indictments, bond was set at $50,000.00 for the felon in possession of a firearm charge, and Defendant never posted that bond either. Therefore, even if the State had held a timely pretrial release hearing on the kidnapping charge, Defendant would not

have been released. Even after the trial court consolidated Defendant's charges into a combined bond of $250,000.00 on 15 September 2020, Defendant did not post bond and remained in custody.

Defendant argues his preparation for his case was irreparably prejudiced due to the State's failure to comply with N.C. Gen. Stat. § 15A-534.1. Specifically, Defendant argues it is reasonable to infer the trial court would have found a mitigating factor that Defendant had a support system in the community, but it did not because of Defendant's confinement due to his detainment for the kidnapping charge. However, as noted, Defendant would have remained confined had the State complied with the statute because he never posted bond for any of his criminal charges. Accordingly, Defendant cannot demonstrate irreparable prejudice to the preparation for his case. N.C. Gen. Stat. § 15A-954(a)(4).

Finally, we consider the "likelihood that the interim decision may have been mistaken." *Thompson*, 349 N.C. at 499, 508 S.E.2d at 287. We conclude the likelihood of mistakenly detaining Defendant was low because he already was in custody for other charges arising out of his assault of Enomwoyi. The indictments on the felon in possession of a firearm and kidnapping also arose out of the assault on Enomwoyi and were obtained and served while he was incarcerated on the other charges. Defendant was ultimately tried, convicted, and sentenced to 185-253 months in prison, and the trial court gave him credit for the time he spent in custody before trial. Thus, the record demonstrates Defendant was not mistakenly detained.

B. Multiple Assault Convictions

[2] Defendant next argues there was insufficient evidence to convict him for multiple counts of assault because his actions constituted one continuous assault. Defendant further argues, "in addition or in the alternative," his multiple assault convictions are not supported by the evidence insofar as the prohibition against double jeopardy prevents multiple convictions for the same offense. *See State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003). Indeed, Defendant grounds his insufficiency of the evidence argument primarily on his double jeopardy argument. However, "constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (brackets omitted). Therefore, Defendant requests this Court to exercise its discretion under N.C. R. App. P. 2 to suspend the rules and reach the merits of this argument. A defendant must demonstrate manifest injustice as well as merit for this Court to exercise its discretion as Defendant requests. *State v. Ricks*, 378 N.C. 737, 738, 862 S.E.2d 835, 837 (2021). For the following

reasons, we conclude Defendant fails to demonstrate manifest injustice and merit, and therefore, we decline to apply N.C. R. App. P. 2 to address Defendant's double jeopardy argument.

"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. "Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion." *Id.* at 249, 839 S.E.2d at 790. (Brackets and ellipsis omitted). We consider 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." *Id.* at 250, 839 S.E.2d at 790.

"In order for a defendant to be charged with multiple counts of assault, there must be multiple assaults." *State v. Maddox*, 159 N.C. App. 127, 132, 583 S.E.2d 601, 604 (2003). "[T]o find [a] defendant guilty of two separate assaults . . . a distinct interruption" must have occurred between the assaults. *State v. Brooks*, 138 N.C. App. 185, 189, 530 S.E.2d 849, 852 (2000). For example, there must be "an intervening event, a lapse of time in which a reasonable person may calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another." *State v. Robinson*, 381 N.C. 207, 218, 872 S.E.2d 28, 36 (2022). Contrarily, "the fact that a victim has multiple, distinct injuries alone is not sufficient evidence of a distinct interruption such that a defendant can be charged with multiple counts of assault." *Id.* at 218, 872 S.E.2d at 36.

Here, Defendant's second head butting of Enomwoyi followed by his punching and kicking her constitutes substantial evidence to support the conviction for assault causing serious bodily injury. This occurred in the bedroom. Second, Defendant's hitting Cynthia in the face, leaving her with a busted lip, constitutes substantial evidence to support the conviction for assault on a female. Third, Defendant "went into the bedroom" once more to beat Enomwoyi again. Therefore, there was both an interruption in the momentum of Defendant's attack on Enomwoyi when he paused to hit Cynthia and a change in location when Defendant returned to the bedroom to beat Enomwoyi again. Enomwoyi managed to get up to try to escape, and Defendant flung her to the bed and strangled her. Accordingly, substantial evidence supports Defendant's conviction for assault by strangulation. Fourth, Enomwoyi blacked out, woke up, and noticed K.P. had woken up. Defendant "came back" into the bedroom and punched Enomwoyi more, which K.P. witnessed. Therefore,

there was both an interruption in the momentum of Defendant's attack during the time Enomwoyi was blacked out and a change of location when Defendant returned to the bedroom to punch her. Accordingly, these facts constitute substantial evidence for Defendant's conviction of assault in the presence of a minor.

Because sufficient evidence supported each of Defendant's convictions for assault, we hold each offense was separate and distinct, and therefore, the trial court did not err in convicting Defendant of each charge of assault.

We further hold Defendant has failed to show merit in his argument that he did not commit multiple assaults upon Enomwoyi. Therefore, we decline to apply N.C. R. App. P. 2 to address Defendant's argument based on double jeopardy and hold the trial court did not err in convicting Defendant of numerous assaults because sufficient evidence supported the multiple convictions.

C. Assault by Strangulation and Assault Inflicting Serious Bodily Injury

[3] Defendant argues under N.C. Gen. Stat. § 14-32.4 (2022), only his conviction for assault inflicting serious bodily injury may stand, while his conviction for assault by strangulation must be vacated. This Court has held that whether a defendant's convictions violate N.C. Gen. Stat. § 14-32.4 is an issue "of statutory construction" reviewed *de novo*. *State v. McPhaul*, 256 N.C. App. 303, 317, 808 S.E.2d 294, 305 (2017). The State contends this argument was not preserved for appellate review; however, when the "trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *Id.* at 317, 808 S.E.2d at 305. Thus, we consider Defendant's argument.

N.C. Gen. Stat. § 14-32.4 provides that a trial court may convict a defendant for assault inflicting serious bodily injury "[u]nless the conduct is covered under some other provision of law providing greater punishment[.]" N.C. Gen. Stat. § 14-32.4(a). Two convictions are error if they are based on the same conduct. *State v. Prince*, 271 N.C. App. 321, 323, 843 S.E.2d 700, 702 (2020). Therefore, our analysis in the section above provides the answer here. If "[t]he record does not reveal that there was a 'distinct interruption' between two assaults," only one of the convictions may stand. *Id.* at 324, 843 S.E.2d at 703 (quoting *Brooks*, 138 N.C. App. at 189, 530 S.E.2d at 852).

Here, the initial head butting followed by punching and kicking Enomwoyi constitute evidence supporting Defendant's conviction

for assault inflicting serious bodily injury. Before Defendant choked Enomwoyi, he had left the room, even if momentarily, to hit Cynthia, busting her lip, then returned to the bedroom to beat Enomwoyi more, pulled her back into the room by her hair, flinging her to her bed as she attempted to escape, and then choked her to the point of blackout. The evidence demonstrates an interruption in the momentum of the attack when Defendant paused to hit Cynthia, as well as a change in the locations of his assaults upon Enomwoyi when he left the bedroom to do so and then returned to beating and then choking Enomwoyi. Accordingly, we conclude there was a distinct interruption in the assault, and both of Defendant's convictions must stand. *Prince*, 271 N.C. App. at 323, 843 S.E.2d at 702; *Robinson*, 381 N.C. at 218, 872 S.E.2d at 36.

D. Sufficiency of the Evidence for Kidnapping

[4] Finally, Defendant argues the evidence was insufficient for the trial judge to convict him of first-degree kidnapping because the act was not independent of the underlying assault. "Kidnapping is a specific intent crime, and therefore the State must prove that defendant unlawfully confined, restrained, or removed the victim for one of the specified purposes outlined in the statute." *State v. Rodriguez*, 192 N.C. App. 178, 187, 664 S.E.2d 654, 660 (2008). "[T]he act of kidnapping must be distinct from such a felony if the perpetrator is to be convicted of both kidnapping and the underlying felony." *State v. Cole*, 199 N.C. App. 151, 157, 681 S.E.2d 423, 428 (2009). N.C. Gen. Stat. § 14-39 "was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). Notwithstanding, "it is well-established that two or more criminal offenses may arise from the same course of action." *State v. Muhammad*, 146 N.C. App. 292, 295, 552 S.E.2d 236, 237 (2001). Therefore, "a conviction for kidnapping does not violate the constitutional prohibition against double jeopardy where the restraint is used to facilitate the commission of another felony, provided the restraint is a separate, complete act, independent of and apart from the other felony." *Id.* at 295, 552 S.E.2d at 237.

For example, in *State v. Romero*, during the course of an altercation that occurred inside a home, the victim "fled from inside the home," the defendant caught up with her and grabbed her, and "dragged her back inside by her hair." 164 N.C. App. 169, 174, 595 S.E.2d 208, 212 (2004). After dragging the victim back inside, the defendant further assaulted her. *Id.* at 174–75, 595 S.E.2d 208, 212. The *Romero* court concluded: the "defendant chose to drag [the victim] back inside to prevent others

from witnessing him then beat [the victim] with his fists, gun, and belt. Therefore, . . . the restraint and removal of [the victim] was separate and apart from, and not an inherent incident of, the commission of the assault with a deadly weapon." *Id.* at 175, 595 S.E.2d at 212 (2004).

Similarly, in *State v. Gayton-Barbosa*, the defendant committed multiple assaults on the victim. He kept the victim from leaving her house by repeatedly striking her with a bat. After she escaped the house, he chased her, grabbed her, and then shot her. There, the Court found, "Detaining [the victim] in her home and then again outside was not necessary to effectuate the assaults charged. These acts were committed 'separate and apart' from that which is inherent in the commission of the other felony." 197 N.C. App. 129, 140, 676 S.E.2d 586, 593 (2009) (quoting *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351).

Here, as in *Romero*, Defendant chose to drag Enomwoyi back into the bedroom by her hair and then choked her. The act of pulling Enomwoyi back into the bedroom by her hair, ripping it out, was separate and apart from the act of choking her. Also, as in *Gayton-Barbosa*, Defendant's pulling Enomwoyi back in by her hair, thereby confining her to the bedroom, was not necessary to Defendant's assaults. Defendant could have assaulted or choked Enomwoyi anywhere in the apartment. Therefore, Defendant's confinement of Enomwoyi was separate and apart from his subsequent choking of her. Finally, when Enomwoyi woke up after passing out and locked the bedroom door, Defendant further confined her when he kicked at the bedroom door. Such was Enomwoyi's fear of Defendant that she felt there was no other way to escape, "[o]ther than dying," besides jumping out the window to leave the room. Therefore, Defendant's confinement of Enomwoyi by pulling her by the hair back into the bedroom, confining her in there by kicking at the locked door, and forcing her to escape by jumping from the third floor window, were separate, complete acts apart from Defendant's other assaults upon her. *Muhammad*, 146 N.C. App. at 295, 552 S.E.2d at 237. Accordingly, the trial court did not err by convicting Defendant of assault and first-degree kidnapping.

III. Conclusion

For the foregoing reasons, we hold Defendant's preparation of his case was not irreparably prejudiced by his pretrial detention. Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges GRIFFIN and STADING concur.

STATE OF NORTH CAROLINA
v.
JUDY WEBSTER

No. COA23-68

Filed 21 November 2023

Assault—with deadly weapon inflicting serious injury—knife as deadly weapon per se—manner of use

In defendant's trial for assault with a deadly weapon inflicting serious injury arising from an altercation over macaroni and cheese at a neighborhood cookout—during which the victim sustained numerous stab wounds to her head, face, chest, arm, and hand—the trial court did not err by instructing the jury that the knife used by defendant to attack the victim was a deadly weapon per se. Although the folding knife that was allegedly used in the attack was never found, the trial court's determination that it was a deadly weapon as a matter of law was supported by the circumstances and manner of defendant's use of the weapon, which caused the victim great bodily harm. Further, where the State presented evidence of each element of the offense and there was no conflicting evidence about any element, the trial court was not required to instruct the jury on any lesser-included offenses.

Appeal by defendant from judgment entered 12 July 2022 by Judge Nathaniel J. Poovey in Forsyth County Superior Court. Heard in the Court of Appeals 23 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Dorian Woolaston, for the State.

Phoebe W. Dee for defendant-appellant.

ZACHARY, Judge.

Defendant Judy Webster appeals from the judgment entered upon a jury's verdict finding her guilty of assault with a deadly weapon inflicting serious injury, in violation of N.C. Gen. Stat. § 14-32(b) (2021). After careful review, we conclude that Defendant received a fair trial, free from error.

I. Introduction

In the instant appeal, what began as a neighborly disagreement over macaroni and cheese quickly escalated into violence reminiscent of "th[e] movie Carrie" after one resident pulled a concealed knife from her walker and just started "swinging [and] cutting."

Beginning at approximately 7:30 p.m. on 20 June 2021, the residents of Crystal Towers apartments in Winston-Salem threw a cookout to celebrate Father's Day. As set forth herein, there is substantial disagreement about the underlying details that ultimately led to violence; however, it is undisputed that the evening in question included three distinct hostile interactions between Defendant and the victim, Ms. Charon Smith ("Ms. Smith"), which began with Ms. Smith's refusal to serve some macaroni and cheese to Defendant.

II. Background

On 25 October 2021, a Forsyth County grand jury returned an indictment charging Defendant with assault with a deadly weapon inflicting serious injury, pursuant to N.C. Gen. Stat. § 14-32(b). This matter came on for a jury trial on 11 July 2022 in Forsyth County Superior Court, the Honorable Nathaniel J. Poovey presiding. The evidence at trial tended to show the following:

The initial dispute occurred while Ms. Smith was serving macaroni and cheese to cookout attendees under the Crystal Towers gazebo. Defendant and another resident approached and requested some macaroni and cheese, but Defendant became "upset" when Ms. Smith explained that there was "not enough" left. According to Ms. Smith, she intended to ensure that both women "would have at least got a taste" of macaroni and cheese, despite the low rations. But upon Defendant's outburst, Ms. Smith folded up the pan of macaroni and cheese and threw it in the trash, further enraging Defendant. Defendant "started cussing" and name-calling and "talking about [Ms. Smith's] mama," among other insults.

Defendant, however, recalls this initial confrontation much differently. At trial, Defendant testified that on the evening in question, she was enjoying the Father's Day cookout with a few friends from Crystal Towers and celebrating a friend's birthday. Defendant and her friend decided to get some food; but when Defendant asked Ms. Smith for some of the macaroni and cheese that she was serving, Ms. Smith "just flipped out on [her]." Defendant contends that Ms. Smith responded, "This is my f*****' macaroni. I made this. I ain't got to give you s***."

Defendant claims that although she was confused and slightly bothered by Ms. Smith's reaction, she initially walked away and returned to her friends.

The second interaction occurred a few minutes after the women's initial argument, in the apartment's lobby, near the elevator. Ms. Smith testified that she was headed upstairs to change clothes and begin cleaning up after the cookout when she again crossed paths with Defendant, who was also waiting for the elevator. Ms. Smith testified that, upon seeing Ms. Smith, Defendant resumed her expletive-filled tirade and accused Ms. Smith of following her. Defendant then "pushed and shoved [Ms. Smith] off the elevator . . . but [Defendant] knocked over a drink or something, and [Defendant] slipped and fell." At that point, Ms. Smith alleges, "a young man" entered the lobby carrying "a cane [or] a walking stick"; Defendant promptly "snatched" the man's stick and "c[a]me at [Ms. Smith] again, swinging the stick." But Defendant did not "land any blows" during that incident, and Ms. Smith was able to back away toward the door, unscathed. Regarding the experience, however, Ms. Smith testified at trial that she "was standing there still, like, What in the world is wrong with you?"

As with the women's first altercation, at trial, Defendant presented a very different account of the elevator incident. According to Defendant, after entering the elevator, she turned around and "saw [Ms. Smith] coming[,]" so she attempted to exit. Although Defendant said, "Excuse me[,]" Ms. Smith would not allow Defendant to leave, but instead "kept pushing"; eventually, the women were "pulling and tugging with [Defendant's] walker." Then Ms. Smith "pulled [Defendant's] walker away from [her]," and Defendant "hit the ground[.]" Finding herself unable to get back up off the ground, Defendant "grabbed [a nearby man's] stick and . . . started swinging it."

The final altercation ensued outside of the apartment building. Approximately 10 to 15 minutes after the elevator incident, Ms. Smith was outside socializing with other residents when suddenly, Defendant "was coming at [her] swinging a blade." Initially, Ms. Smith, who was unarmed, did not realize that Defendant possessed a weapon, but she "went to swing back to start defending [her]self[.]" Ms. Smith quickly realized, however, that "every time [Defendant] swung, [Defendant] was cutting [her]." Upon that realization, Ms. Smith testified, she "hollered" and tried to extricate herself from the fight. Ms. Smith tried removing her shirt to escape Defendant's grip, to no avail. Ms. Smith testified that by that point, her hands had "stopped swinging[,]" a reaction she believed was likely due to "shock or something." Meanwhile, Defendant "just kept on swinging [and] cutting, kept on swinging [and] cutting."

But again, Defendant testified to a much different version of events. According to Defendant, after the elevator incident, she went upstairs to change her wet clothes. After returning outside, Defendant was telling a friend about how Ms. Smith "just beat [her] up on the elevator" when she suddenly experienced a sensation in her head that "felt like a man hit [her]." Defendant testified that "[t]hat's when [Ms. Smith] came up and busted [Defendant] in [her] head." In response, Defendant opened her walker and retrieved a "little pocket knife[.]" Defendant testified that she "was scared because the only place [Ms. Smith] kept hitting [her] was in [the] head"—a particular danger for Defendant, who has seizures. According to Defendant, at the time, she was unable to see straight, and she believed that she "was going to die"; therefore, "every time [Ms. Smith] hit [her], [Defendant] cut [Ms. Smith]."

Kathy Holland, another Crystal Towers resident, was present at the cookout and witnessed the final altercation between Ms. Smith and Defendant. Ms. Holland testified that just before the fight, she overheard Ms. Smith ask Defendant, "You really want to fight over this?", to which Defendant replied, "Yes." The next thing Ms. Holland witnessed was blood "spraying everywhere[.]"

Officer J.H. Prisk of the Winston-Salem Police Department testified that upon reviewing the security footage of the altercation, he observed Ms. Smith "back-pedaling in an attempt to create distance, but also striking out of self-defense."

Ms. Smith was transported to the hospital and treated for multiple injuries to her face, scalp, chest, arm, and right hand. Dr. Stacie Zelman, an emergency physician at Wake Forest Atrium Health, treated Ms. Smith and testified for the State at Defendant's trial. According to Dr. Zelman, Ms. Smith was classified as "a Level II trauma" patient—potentially a "very serious" or "critical" patient—a categorization she received, in large part, due to multiple stab wounds sustained to her face, head, and scalp. Ms. Smith also required six staples in order to stop "pretty significant bleeding" from "a deep laceration to her scalp[.]"

Although Ms. Smith would eventually undergo multiple corrective surgeries to her face and right hand, none of her injuries were life-threatening. However, Ms. Smith testified that as of trial, she still suffered lasting effects including memory loss, significant scarring, and nerve damage, among other complications.

In addition to her own trial testimony, Defendant also presented two witnesses who testified that Ms. Smith had a reputation as a bully and that she was the aggressor in the affray.

During the charge conference, defense counsel requested that the jury be instructed on lesser-included misdemeanor assault offenses, asserting, *inter alia*, that the knife did not constitute a deadly weapon as a matter of law. Noting that "[t]here's plenary evidence in this case that this knife was a deadly weapon," the trial court overruled Defendant's objection and declined her request for instructions on lesser-included offenses. The court, however, delivered Defendant's requested instructions on self-defense.

On 12 July 2022, the jury returned its verdict finding Defendant guilty of the charged offense, assault with a deadly weapon inflicting serious injury. The trial court sentenced Defendant, as a Prior Record Level III offender, to 26 to 44 months in the custody of the North Carolina Division of Adult Correction. Defendant entered oral notice of appeal in open court.

III. Analysis

On appeal, Defendant advances two related challenges to the jury instructions arising from the trial court's determination, over Defendant's objection, that the knife constituted a deadly weapon per se. Specifically, Defendant contends that because the knife was never located and there was little trial testimony regarding its nature and appearance, the issue of whether the knife constituted a "deadly weapon" in this case should have been a question of fact decided by the jury, not an issue of law preliminarily determined by the trial court. Therefore, Defendant argues, the trial court committed reversible error (1) by instructing the jury that the knife was a deadly weapon per se, and (2) by declining to instruct the jury on the lesser-included offense of misdemeanor assault inflicting serious injury. We disagree.

A. Standard of Review

"Where the defendant preserves h[er] challenge to jury instructions by objecting at trial, we review the trial court's decisions regarding jury instructions de novo." *State v. Hope*, 223 N.C. App. 468, 471, 737 S.E.2d 108, 111 (2012) (cleaned up), *disc. review denied*, 366 N.C. 438, 736 S.E.2d 493 (2013). "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) (cleaned up).

The trial court's jury charge must include instructions on a lesser-included offense where the evidence at trial "would permit a jury rationally to find [the] defendant guilty of the lesser offense and acquit h[er] of the greater." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767,

772 (2002) (cleaned up). However, no instruction on a lesser-included offense is required "when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime." *Id.* (cleaned up).

B. The trial court properly determined that the knife was likely to cause death or great bodily harm under the circumstances of this case—a question of law—and instructed the jury accordingly.

The offense of assault with a deadly weapon inflicting serious injury comprises the following essential elements: "(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990); *see also* N.C. Gen. Stat. § 14-32(b).

On appeal, Defendant only disputes the second element of the offense—specifically, whether the knife constituted a deadly weapon as a matter of law.[1] The outcome of the instant appeal turns upon whether the trial court properly instructed the jury that the knife that Defendant used to assault Ms. Smith constituted a deadly weapon per se under the circumstances of its use in this case.

As our caselaw makes abundantly clear, whether a particular instrument or article constitutes a "deadly weapon" for the purposes of our assault statutes generally depends upon its likelihood, under the circumstances and evidence presented, to cause death or great bodily harm. *See, e.g.*, *State v. Palmer*, 293 N.C. 633, 642, 239 S.E.2d 406, 412 (1977); *State v. McCoy*, 174 N.C. App. 105, 112, 620 S.E.2d 863, 869 (2005) ("A deadly weapon is not one that *must* kill, but rather one that is likely to cause death or great bodily harm." (emphasis added)), *disc. review denied*, ___ N.C. ___, 628 S.E.2d 8 (2006).

The rationale for requiring such case-by-case determinations is manifest: while certain items are inherently lethal, others become so solely based upon the circumstances of their use (or misuse). Indeed, it is well established in North Carolina that the "deadly character" of a particular "weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself." *Palmer*, 293 N.C. at 642–43, 239 S.E.2d

1. Defendant concedes that there was sufficient evidence from which the jury could have found that the knife constituted a deadly weapon. Consequently, the success of Defendant's appeal turns on whether we are persuaded that this issue should have been submitted to the jury as a question of fact, rather than decided by the trial court as a matter of law.

at 412–13 (citation omitted). Thus, "[w]here the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether . . . it is deadly within the foregoing definition is one of law, and the [trial c]ourt must take the responsibility of so declaring." *Id.* at 643, 239 S.E.2d at 413 (citation omitted). But in cases where the alleged deadly weapon "may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury." *Id.* (citation omitted).

Reviewing the issue through this lens, our appellate courts have upheld trial courts' determinations in numerous cases finding myriad implements—including a wide variety of knives—to be deadly weapons per se under the circumstances presented. *E.g.*, *State v. Hefner*, 199 N.C. 778, 779, 155 S.E. 879, 881 (1930) ("blackjack"); *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924) (baseball bat); *State v. Walker*, 204 N.C. App. 431, 443–46, 694 S.E.2d 484, 493–94 (2010) (approximately three-inch knife); *State v. Wiggins*, 78 N.C. App. 405, 407, 337 S.E.2d 198, 199 (1985) (box cutter); *State v. Roper*, 39 N.C. App. 256, 257, 249 S.E.2d 870, 871 (1978) ("keen bladed pocketknife").

In a similar vein, our appellate courts have also consistently held that where the evidence *properly supported* a determination by the trial court that the weapon was deadly per se—but the court nevertheless submitted the question to the jury, which found as a matter of fact that the weapon was deadly—there could be no error in the trial court's failure to instruct on lesser-included offenses that lack proof of a deadly weapon as an essential element. *E.g.*, *State v. McKinnon*, 54 N.C. App. 475, 478, 283 S.E.2d 555, 557 (1981) ("We conclude the trial court *should have* held that the pocketknife as used by [the] defendant was a deadly weapon as a matter of law. There was, therefore, no error in the court's failure to submit the lesser offense of misdemeanor assault." (emphasis added)).

In the instant case, the alleged weapon—a small folding knife, which Defendant describes as "a little pocket knife"—was not introduced into evidence at trial. Moreover, as Defendant thoroughly argues in her appellate brief, little direct testimony was offered at trial regarding the knife's character and appearance.[2] Defendant contends that it was, therefore, improper for the trial court to instruct the jury that the

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2. We note that this is likely due, in part, to the fact that the knife was already missing when Defendant was interviewed by law enforcement officers who responded to Crystal Towers on the night in question.

knife was a deadly weapon per se; instead, Defendant contends, whether the knife was a "deadly weapon" under the circumstances was properly an issue of fact for the jury's decision. And by erroneously removing this issue from the province of the jury, Defendant argues, the trial court necessarily further erred by denying her request for jury instructions on lesser-included offenses, including assault inflicting serious injury.

We disagree. Defendant's arguments belie a fundamental misunderstanding of both the State's evidentiary burden regarding this element and the trial court's ultimate responsibility in charging the jury.

First, although the State bears the burden of proving, *inter alia*, the *use* of a deadly weapon, the State is not required to *produce* the alleged weapon to obtain a conviction for an assault involving a deadly weapon. *See*, *e.g.*, N.C. Gen. Stat. § 14-32(b); *Walker*, 204 N.C. App. at 445, 694 S.E.2d at 494 ("[W]e know of no rule of law that requires the production of the alleged deadly weapon on the trial of a criminal prosecution for an assault with a deadly weapon; indeed this Court recognizes that the weapon may not be produced." (cleaned up)).

Furthermore, we disagree with Defendant's characterization of the strength and scope of the evidence presented as regards the knife itself. In addition to Defendant's trial testimony, the jury also viewed State's Exhibit 4, body-cam video footage of Defendant's interview with law enforcement officers at Crystal Towers recorded mere hours after the altercation. In the video, Defendant described the missing weapon as a "small knife," "like a pocketknife," with a "foldout" blade, which she typically stored in her walker. When asked to estimate the size of the knife, Defendant demonstrated by holding her index fingers a few inches apart, in accord with her description of a small, foldout blade.

Nor do we agree with Defendant that the trial court "misapplied" well-established law by "using the injuries sustained by Ms. Smith as [the court's] basis for determining the weapon's dangerousness" because "there was no serious bodily injury alleged or proven . . . and because the trial [court] seems to have considered facts not in evidence when he made his determination." To the contrary, "well-established principles of North Carolina law allow the extent to which a particular instrument is a deadly weapon to be inferred based on the effects resulting from the use made of that instrument." *Walker*, 204 N.C. App. at 446, 694 S.E.2d at 494.

Here, we hold, consistent with the trial court's conclusion, that the knife was a deadly weapon per se based upon the circumstances of its use. The evidence in this case amply supports the conclusion that Ms. Smith suffered great bodily harm as a result of Defendant's assault

upon her with the knife, even absent production of that knife at trial. Ms. Smith sustained multiple injuries to her face, head, chest, arm, and hand, including several that continued to cause her lingering issues as of the trial in this matter. Ms. Smith testified that she suffers ongoing damage to the tendons, nerves, and ligaments in her right hand, and that her "memory comes in and out sometimes because [she] was cut . . . in [her] temple[.]" Ms. Smith required surgeries to her face and right hand—her dominant hand—due to injuries sustained in the assault; however, as of trial, she continued to experience pain and ongoing nerve damage in her hand and had not yet regained its full use.

Moreover, Dr. Zelman testified that Ms. Smith was admitted to the hospital as "a Level II trauma" patient, which "could potentially be a very serious patient or critical patient[,]" due to "a deep laceration to her scalp and multiple other lacerations to her face and her hands." Ms. Smith ultimately required six staples to curtail the "pretty significant bleeding" caused by this wound. And Ms. Holland, another Crystal Towers resident who witnessed the assault, testified similarly regarding the amount of blood at the scene; she recalled seeing Ms. Smith "just standing there . . . blood just coming out," like something out of the horror movie, "Carrie."

Notwithstanding Defendant's arguments to the contrary, the circumstances and manner of Defendant's use of the knife in this case "are of such character as to admit of but one conclusion": the knife was a deadly weapon as a matter of law. *Palmer*, 293 N.C. at 643, 239 S.E.2d at 413 (citation omitted). We simply cannot agree with Defendant that the injuries described above—most notably, deep knife wounds to the scalp and temple, and blood loss so extensive as to invoke memories of a notoriously gory horror movie—"merely raise[ ] a factual issue about [the knife's] potential for producing death." *Walker*, 204 N.C. App. at 444, 694 S.E.2d at 493 (citation omitted).

Having concluded that the trial court properly instructed the jury that the knife constituted a deadly weapon per se under the circumstances of this case, we necessarily also hold that the trial court appropriately declined Defendant's request for jury instructions on lesser-included offenses.

As explained above, the trial court did not err by determining, as a matter of law, that the knife constituted a deadly weapon—an instrument that was "likely to produce death or great bodily harm, under the circumstances of its use[,]" *Palmer*, 293 N.C. at 642, 239 S.E.2d at 412 (citation omitted)—nor by instructing the jury accordingly. The State's evidence was "positive as to each and every element of the crime charged

and there [wa]s no conflicting evidence relating to any element of the charged crime." *Millsaps*, 356 N.C. at 562, 572 S.E.2d at 772 (cleaned up). Accordingly, the trial court was not required to instruct the jury on assault inflicting serious injury or any other lesser-included offenses.

IV. Conclusion

Upon the evidence presented, the trial court did not err by instructing the jury that the knife was a deadly weapon as a matter of law, nor by denying Defendant's request for instructions on any lesser-included offenses omitting that element.

We thus conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges DILLON and WOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 21 November 2023)

Case	County	Disposition
CATO CORP. v. ZURICH AM. INS. CO. No. 23-305	Mecklenburg (21CVS9525)	Affirmed
FOUST v. N.C. DEP'T OF ENV'T QUALITY No. 23-18	Caswell (22CVS116)	Dismissed
IN RE A.G.G. No. 22-949	Orange (21JA32)	Dismissed
IN RE A.K. No. 22-877	Johnston (18JA140) (18JA141) (18JA142)	Affirmed
IN RE C.C.K. No. 23-362	Davidson (20JT123)	Affirmed
IN RE C.H. No. 23-508	New Hanover (21JT40)	Affirmed.
IN RE C.L.K. No. 23-453	Randolph (20JT106) (20JT107)	Affirmed
IN RE G.M. No. 22-1011	Watauga (16JT32) (18JT69) (18JT70)	Reversed and Remanded
IN RE I.M.J. No. 23-33	Durham (21J155)	Affirmed
IN RE L.D.C. No. 23-524	Gaston (18JT173) (18JT174)	Vacated and Remanded
IN RE L.L. No. 22-1045	Onslow (20JA81)	Vacated and Remanded
IN RE S.D. No. 23-233	Wake (20JT123) (20JT124) (20JT125)	Affirmed
IN RE S.E.B. No. 23-490	Guilford (19JT85)	Affirmed

Case	County	Disposition
IN RE T.L.B. No. 23-565	Lincoln (23JB6)	Affirmed
IN RE T.P. No. 23-469	New Hanover (19JT182)	Affirmed
MILLER v. TOWN OF CHAPEL HILL No. 23-230	Johnston (21CVS2036)	Affirmed
RYAN v. RYAN No. 23-467	Guilford (14CVD10126)	Affirmed in Part, Vacated in Part, and Remanded
STATE v. ALVA No. 22-1062	Scotland (20CRS51716-20)	No Error
STATE v. JONES No. 23-254	Union (20CRS51964)	No Error
STATE v. KELLER No. 23-203	Davidson (19CRS53809-12)	No Error
STATE v. LAWRENCE No. 22-804	New Hanover (17CRS60189) (17CRS60191) (17CRS60193) (17CRS60195) (17CRS60290)	No error in part, Vacated in part, Remanded for resentencing
STATE v. MELTON No. 23-182	Madison (20CRS50060)	Other - No error; no prejudicial error
STATE v. NEILL No. 23-95	Henderson (12CRS657)	Vacated and Remanded
STATE v. PEACOCK No. 23-91	Henderson (20CRS700711)	Reversed
STATE v. SANDERS No. 23-55	Wilson (18CRS50149-50)	Vacated and Remanded
STATE v. WILKINS No. 23-243	Nash (21CRS51448) (21CRS801)	No Error
SULLIVAN v. KARLIN No. 22-1037	Iredell (22CVS858)	Reversed

SASHA ROSE ELLIOTT and JEREMY LEE OACHS, Plaintiffs
v.
DEPARTMENT OF TRANSPORTATION, Defendant

No. COA23-390

Filed 5 December 2023

Eminent Domain—inverse condemnation—access to main road from property—collapsed driveway

After the gravel driveway connecting plaintiffs' property to the main road collapsed due to a three-day continuous rain event, the trial court properly dismissed plaintiffs' complaint alleging that the Department of Transportation (DOT)—which had performed some work near plaintiffs' driveway after acquiring a right-of-way to convert the main road into a two-lane paved highway—had taken a compensable interest in plaintiffs' property through inverse condemnation. Plaintiffs failed to show that DOT's actions contributed to the driveway's collapse or otherwise denied plaintiffs of their physical and lawful access to the main road. Further, competent evidence supported the trial court's findings and conclusions about the credibility of the parties' respective witnesses, which could not be reweighed on appeal.

Appeal by plaintiffs from order entered 9 January 2022 by Judge Jacqueline D. Grant in Caldwell County Superior Court. Heard in the Court of Appeals 1 November 2023.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Andrew J. Howell, for the plaintiff-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew Baptiste Holloway, for the defendant-appellee.

TYSON, Judge.

Sasha Rose Elliott and Jeremy Lee Oachs (collectively "Plaintiffs") appeal from an order entered concluding: *inter alia*, (1) the Department of Transportation ("DOT") had not taken a compensable interest in Plaintiffs' property through inverse condemnation; (2) Plaintiffs were not entitled to any compensation from DOT; and (3) dismissing Plaintiffs' claims. We affirm.

I. Background

Plaintiffs acquired a parcel of real property located at 6149 Laytown Road in Lenoir in July 2018. The parcel measures approximately 38.96 acres and contains Plaintiffs' single-family dwelling. Plaintiffs have lived on the property with their children since acquiring the parcel. The parcel is accessed through a gravel driveway, which rises and runs up a slope with a stream running along the base of the slope.

DOT acquired a new right-of-way to convert Laytown Road from a dirt road into a two-lane paved highway. This right-of-way extends into and through where Plaintiffs' driveway connects to Laytown Road. DOT's agreement with Plaintiffs' predecessors-in-title released DOT from all claims of damages by reason of acquiring and improving said right-of-way.

Sometime before 2017, a prior landowner, without involvement or help from DOT, installed eight concrete blocks directly on top of a slope on the driveway. Each of these blocks weighed an average of 3,600 lbs. Between 2017 and 2018, at the request of a prior owner, DOT installed gabion baskets filled with earth or rocks to support the abutment between Laytown Road and the driveway. The baskets were not located on the slope that later failed.

Plaintiffs noticed cracking and an opening in the ground at the connection of the driveway with Laytown Road. DOT performed maintenance work on a culvert near the driveway and placed large stone riprap on the fill side of the embankment beside the driveway in March 2019.

A three-day continuous rain event ("rain event") caused the slope of the driveway to collapse in June 2019 and rendered Plaintiffs' driveway unusable. Several other slides occurred on Laytown Road during the rain event. A significant portion of Plaintiffs' driveway collapsed down the fill side of the embankment on 8 June 2019.

Plaintiffs filed a complaint demanding a jury trial and alleged inverse condemnation by DOT on 26 November 2019. DOT filed an answer, a motion to dismiss, and a motion for a hearing pursuant to N.C. Gen. Stat. § 136-108 (2021) to determine all issues other than damages.

Following hearings on 12 July 2022 and 30 September 2022 without a jury, the trial court entered an order concluding DOT had not taken a compensable interest in Plaintiffs' property and Plaintiffs were not entitled to any compensation. The court dismissed Plaintiffs' complaint. Plaintiffs appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

Plaintiffs argue the trial court erred by: (1) concluding Plaintiffs' expert testimony was not supported by sufficient facts or data; (2) giving weight to DOT's witnesses, who did not offer credible evidence; and (3) eliminating their access to Laytown Road. Plaintiffs do not assert or argue any error from the trial court conducting the hearings and making findings without submitting disputed facts and evidence to resolution by a jury.

IV. Standard of Review

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether . . . competent evidence support[s] the trial court's findings of fact and whether the conclusions of law were proper in light of such facts." *Anthony Marano Co. v. Jones*, 165 N.C. App. 266, 267-68, 598 S.E.2d 393, 395 (2004) (citation omitted). Unchallenged findings of fact are binding upon appeal. *Lab. Corp. of Am. Holdings v. Caccuro*, 212 N.C. App. 564, 567, 712 S.E.2d 696, 699 (2011). "The trial court's conclusions of law are reviewed *de novo*[.]" *Strikeleather Realty & Invs. Co. v. Broadway*, 241 N.C. App. 152, 160, 772 S.E.2d 107, 113 (2015) (citation and quotation marks omitted).

V. Inverse Condemnation

Inverse condemnation actions are governed by N.C. Gen. Stat. § 136-111. "Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the Department of Transportation and no complaint and declaration of taking has been filed by said Department of Transportation may . . . file a complaint in the superior court[.]" N.C. Gen. Stat. § 136-111 (2021).

A taking under the power of eminent domain may be defined generally as an "entering upon private property for more than a momentary period and, under the warrant . . . of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." *Ledford v. Highway Comm.*, 279 N.C. 188, 190–91, 181 S.E.2d 466, 468 (1971). North Carolina courts and precedents recognize "[d]amage to land which inevitably or necessarily flows from a public construction project results in an appropriation of

land for public use." *Robinson v. N.C. Dept. of Transportation*, 89 N.C. App. 572, 574, 366 S.E.2d 492, 493 (1988) (citing *City of Winston–Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E.2d 794 (1986)).

Our Supreme Court has held: "[p]arties to a condemnation proceeding must resolve all issues other than damages at a hearing pursuant to N.C.[Gen. Stat.] § 136-108." *Dep't of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999). N.C. Gen. Stat. § 136-108 provides:

> After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.

N.C. Gen. Stat. § 136-108 (2021). N.C. Gen. Stat. § 136-108 applies to both inverse and traditional condemnations. *DeHart v. N.C. Dep't of Transp.*, 195 N.C. App. 417, 419, 672 S.E.2d 721, 722 (2008) ("DOT then moved for a hearing pursuant to N.C. Gen. Stat. § 136-108 (2007) to determine 'whether the Plaintiffs have had any interest or area of their property taken by the Defendant and/or whether the Plaintiffs have an inverse condemnation claim against the Defendant.' ").

VI. Plaintiffs' Expert Testimony

Plaintiffs argue the trial court erred in finding their expert, Jeffrey Brown's, testimony was not credible. Plaintiffs seek for this Court to re-weigh the evidence presented before the trial court. "The trial court must determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980) (citations omitted). Competent evidence supports the trial court's unchallenged and binding findings and conclusions about credibility and weight accorded to the competing experts. Plaintiffs' argument is overruled.

VII. DOT Witnesses

Plaintiffs argue the trial court improperly credited DOT's witness testimony. As established above, the "trial court must determine what pertinent facts are actually established by the evidence before it," and it is not our role as an appellate court to reweigh the evidence. *Id.* at 712, 268 S.E.2d at 189.

It is the injured party's burden at trial to establish their injury was sustained by the action of the opposing party. *See Board of Education v. McMillan*, 250 N.C. 485, 489, 108 S.E.2d 895, 898 (1959) (holding that the injured party has the burden of the issue on damages and must convince the jury by a greater weight of evidence that he has been damaged.).

This burden applies to cases dealing with an overflow of water damaging a landowner's property. *Lea Co. v. N.C. Board of Transportation*, 308 N.C. 603, 614, 304 S.E.2d 164, 172 (1983) (holding that in order to recover for damages, the plaintiff had to show how the increased overflow of water was "such as was reasonably to have been anticipated by the State to be the direct result of the structures it built and maintained" (citation omitted)). Plaintiffs must show it was reasonably foreseeable for the State to anticipate the change in water movement at the time it undertook to erect a structure. *Id.* Plaintiffs' argument is overruled.

VIII. Plaintiffs Access to Laytown Road

Plaintiffs argue the trial court erred by denying their access to Laytown Road without just compensation. Our statutes and precedents have long established "[a]n owner of land abutting a highway or street has the right of direct access from his property to the traffic lanes of the highway." *Dept. of Transportation v. Harkey*, 308 N.C. 148, 151, 301 S.E.2d 64, 67 (1983); *see* N.C. Gen. Stat. § 136-89.53 (2021) ("When an existing street or highway shall be designated as and included within a controlled-access facility the owners of land abutting such existing street or highway shall be entitled to compensation for the taking of or injury to their easements of access."). The State may not diminish, deprive, or take away this right away without just compensation to the property owner. *Harkey*, 308 N.C. at 151, 301 S.E.2d at 67.

Governmental action eliminating all direct access to an abutting road is a taking and compensable as a matter of law. *Id.* at 158, 301 S.E.2d at 71. Even if the State's actions do not eliminate all direct access, a landowner may be entitled to compensation if his common law and statutory rights of access are substantially interfered with by the State. *Highway Comm. v. Yarborough*, 6 N.C. App. 294, 302, 170 S.E.2d 159, 165 (1969).

Competent evidence supports the trial court's findings and conclusion the collapse of Plaintiffs' slope and driveway was not caused by or a result of DOT actions. Plaintiffs' failed to show DOT's actions denied Plaintiffs of their physical and lawful access to Laytown Road. Plaintiffs' argument is overruled.

IX. Conclusion

Plaintiffs do not appeal nor argue the hearings were conducted and expert testimony and factual disputes on damages incurred were presented before the trial court without a jury as was demanded in their complaint. The evidence, taken as a whole, is competent to support the trial court's findings of fact that the DOT's experts' testimonies were more persuasive than Plaintiffs' expert witness. These findings support the trial court's conclusions of law. The order of the trial court is affirmed. *It is so ordered.*

AFFIRMED.

Judges MURPHY and COLLINS concur.

JENNIFER GROSECLOSE, Plaintiff/Mother
v.
ALAN GROSECLOSE, Defendant/Father

No. COA22-950

Filed 5 December 2023

1. Divorce—modification—child support—alimony—no change in circumstances—calculation of income—additional findings needed

A trial court's order denying defendant father's motion for modification of child support and alimony was affirmed in part where: the court properly determined that defendant's decrease in employment income was insufficient on its own to show a substantial change of circumstances warranting a modification of his support or alimony obligations; competent evidence supported the court's finding that certain "loans" the father received from friends and his girlfriend were actually gifts to be included in the calculation of his actual gross income; and the court did not err in declining to make detailed findings regarding the father's health. However, because the court did not enter sufficient findings explaining precisely how it calculated the father's actual gross income, the case was remanded for additional findings regarding that issue.

2. Contempt—civil—failure to pay alimony—ability to pay—purge conditions—additional findings needed

In an action between divorced parents, the trial court properly held defendant father in civil contempt for failure to pay alimony, a distributive award to plaintiff mother, and attorney fees, where competent evidence supported the court's conclusion that defendant had the ability to pay each of those court-ordered obligations. Notably, the evidence showed that, despite a pattern of fluctuating income, defendant had maintained a relatively high standard of living, often spending significant amounts of money on alcohol and shopping at high end grocery stores. However, because the court's civil contempt order lacked sufficient findings of fact establishing that defendant had the present ability to satisfy the purge conditions detailed in the order, the case was remanded for additional findings of fact addressing that issue.

3. Appeal and Error—abandonment of issues—Rule 28(b)(6)—no argument or legal authority—attorney fees in divorce action

In defendant father's appeal from an order denying his motion to modify his child support and alimony obligations, defendant challenged the trial court's award of attorney fees without citing any legal authority or making any substantive arguments, relying instead upon arguments he laid out in other parts of his appellate brief relating to other issues. Consequently, any argument he had regarding the attorney fees award was deemed abandoned pursuant to Appellate Rule 28(b)(6).

Appeal by defendant from order entered 16 December 2021 by Judge Tracy H. Hewett in Mecklenburg County District Court. Heard in the Court of Appeals 5 September 2023.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Haley E. White, and Kristin J. Rempe, for plaintiff-appellee.

Wofford Burt, PLLC, by J. Huntington Wofford and Rebecca B. Wofford, for defendant-appellant.

ZACHARY, Judge.

Defendant Alan Groseclose ("Father") appeals from the trial court's order denying his motion for modification of permanent child support and permanent alimony, and granting Plaintiff Jennifer Groseclose's ("Mother") motion for contempt. After careful review, we affirm in part and remand for additional findings of fact and conclusions of law.

I. Background

Mother and Father were married in 2000, separated in 2014, and divorced thereafter. One child was born of the marriage. On 3 December 2015, the trial court entered a temporary support order addressing post-separation support and child support (together, "temporary support"). The court ordered Father to pay:

> $726.37 per month in ongoing temporary child support; . . . $11,848.52 in child support arrears at the rate of $300.00 per month; . . . $400.00 per month in ongoing postseparation support; . . . $800.00 in postseparation support arrears at the rate of $100.00 per month; and . . . $7,444.50 in attorney's fees to [Mother]'s counsel at the rate of $200 per month.

Father filed his first motion to modify 20 days later, alleging that he suffered a substantial decrease in income and seeking a reduction in his temporary support obligations. Father was then late in paying his temporary support and attorney's fees for several months of 2016, and failed to make any payments in October, November, or December of that year. Mother filed her first motion for contempt. On 3 January 2017, the trial court entered a permanent support order, denying Father's motion to modify, granting Mother's motion for contempt, and ordering Father to pay

> $2,579 in temporary support arrears and $600 in attorney's fees obligations; . . . $803.61 per month in permanent child support; . . . $1,000 per month in alimony until December 30, 2020; and . . . $18,000 in attorney's fees at the rate of $225 per month until paid in full.

Father filed two more motions to modify his support obligations in 2017, while the parties' equitable distribution action reached its conclusion. On 19 September 2017, the trial court entered its equitable distribution order, awarding Mother "a distributive award of $158,141.00 [payable by Father] at a rate of $1,000 per month until paid in full in order to achieve an equal distribution of the marital estate." The trial court made a finding of fact that Father "had the ability to pay such a distributive award."

On 3 December 2018, Father filed his fourth motion to modify, again alleging a substantial decrease in his income and requesting that the trial court reduce his child support and alimony obligations. On 18 June 2020, Mother filed another motion for contempt, alleging that Father had failed to pay his child support, alimony, attorney's fees, and distributive award payments.

On 12 February and 3 March 2021, the parties' motions came on for hearing in Mecklenburg County District Court. On 16 December 2021, the trial court entered an order denying Father's motion to modify and granting Mother's motion for contempt. The trial court also ordered Father to pay Mother an additional sum in reimbursement for her attorney's fees. On 14 January 2022, Father timely filed notice of appeal.

II. Discussion

Father argues that the trial court erred by denying his motion to modify his child support and alimony obligations and by granting Mother's motion for contempt.

A. Modification of Child Support and Alimony

[1] Father first contends that the trial court abused its discretion by denying his motion for modification "where the findings of fact supported changed circumstances[,]" namely, "an involuntary decrease in [Father's] income" and Father's persistent health concerns. We do not find Father's arguments as to this issue to be persuasive. Father also argues that the trial court's "findings of fact lacked detail to support the finding" of his actual monthly income. On this issue, we agree and remand for additional findings of fact.

1. Standard of Review and Applicable Legal Principles

Generally, the amount of child support and alimony is "left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *Shirey v. Shirey*, 267 N.C. App. 554, 559, 833 S.E.2d 820, 824 (2019) (citation omitted), *disc. review denied*, 376 N.C. 675, 853 S.E.2d 159 (2021). "A trial court abuses its discretion when it renders a decision that is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 560, 833 S.E.2d at 825 (cleaned up).

"When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Id.* at 559–60, 833 S.E.2d at 824–25 (citation omitted). "When the trial judge is authorized to find the facts, [its] findings, if supported by competent evidence, will not be disturbed on appeal despite the existence of evidence which would sustain contrary findings." *Kelly v. Kelly*, 228 N.C. App. 600, 605, 747 S.E.2d 268, 275 (2013) (citation omitted). While "the trial court need not recite all of the evidentiary facts[,]" it still "must find those material and ultimate facts from

which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Id.* at 606–07, 747 S.E.2d at 276 (citation omitted). We review de novo the trial court's conclusions of law. *Shirey*, 267 N.C. App. at 560, 833 S.E.2d at 825.

An order for child support or alimony may be modified "upon motion in the cause and a showing of changed circumstances by either party[.]" N.C. Gen. Stat. §§ 50-13.7(a), -16.9(a) (2021). The movant bears the burden of showing a change of circumstances in order to modify either child support or alimony. *Thomas v. Thomas*, 134 N.C. App. 591, 592, 518 S.E.2d 513, 514 (1999) (child support); *Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E.2d 921, 926 (1980) (alimony).

In both contexts, the change of circumstances must be *substantial*. For example, for the purposes of modifying alimony, this Court has made clear that

> not *any* change of circumstances will be sufficient to order modification of an alimony award; rather, the phrase is used as a term of art to mean a *substantial* change in conditions, upon which the moving party bears the burden of proving that the present award is either inadequate or unduly burdensome.

Britt, 49 N.C. App. at 470, 271 S.E.2d at 926. Meanwhile, the "modification of a child support order involves a two-step process. The court must first determine a *substantial* change of circumstances has taken place; only then does it proceed to apply the [Child Support] Guidelines to calculate the applicable amount of support." *McGee v. McGee*, 118 N.C. App. 19, 26–27, 453 S.E.2d 531, 536 (emphasis added), *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995).

2. The Trial Court's Findings of Fact

In its order, the trial court made the following pertinent findings of fact regarding the lack of a substantial change of circumstances for the purposes of modifying child support and/or alimony:

> 23. The Court does **not** find that there has been a substantial change in circumstances such that permanent child support or alimony should be modified.
>
> 24. In the January 3, 2017 Permanent Support Order, the Court found as follows:

a. [Mother]'s income from her full-time job at Calvary Church is $2,594.73 gross per month and $1,974.45 net per month.

b. Two-thirds (2/3) of [Mother]'s shared family expenses should be attributed to [Mother]. Thus, [Mother]'s portion of the shared family expenses is $1,699.90 per month.

c. [Mother]'s monthly individual expenses are $1,493.83.

d. [Mother]'s total monthly needs and expenses are $3,193.73, plus her child support obligation of $305.89 pursuant to the North Carolina Child Support Guidelines.

e. [Mother] has a monthly shortfall in excess of $2,300.

f. [Father]'s testimony regarding his income was not credible.

g. [Father]'s income from employment is $6,067.90 gross per month.

h. [Father] received money from friends to help him pay his living expenses and attorney's fees in the average amount of $750 per month. [Father] testified that this monetary support from friends was a "loan" or series of "loans." However, [Father] failed to present any evidence to support his contention that the additional monetary support were loans.

i. [Father]'s portion of the shared family expenses is $1,740.95 per month. [Father]'s individual expenses are $583.00 per month. [Father]'s total monthly needs and expenses are $2,323.95, plus his child support obligation of $803.61.

j. After mandatory deductions listed on his paystub, [Father]'s total monthly net income is $6,273.26. After subtracting his total monthly needs and expenses and his child support obligation, [Father] has a monthly surplus of $3,145.70.

25. The Permanent Support Order awarded [Mother] monthly alimony of $1,000 per month for a period of five (5) years or sixty (60) months.

26. [Father]'s current Fourth Motion to Modify was filed on December 3, 2018 after he became unemployed due to his employer in Virginia Beach, Virginia changing management or otherwise reorganizing such that the "last in was the first out" and [Father] was the "last in." The Court does not find that [Father]'s income changed substantially at that time as he received unemployment benefits, severance pay, and his living expenses were paid by his sister. Additionally, [Father] began receiving financial assistance from his girlfriend . . . in 2018. The Court acknowledges and finds as fact that when [Father] was employed in Virginia Beach, he paid his court-ordered obligations.

27. In April 2019, [Father] moved in with [his girlfriend] and continued living a lifestyle with no substantial economic difference, except the majority of his income came from [his girlfriend] by way of her payment of his living expenses and alleged "loans," which this Court finds were actually regular, recurring gifts and not loans.

28. The Court does not find that either of the "loans" evidenced by promissory notes signed by [Father] and [his girlfriend] are truly loans for the following reasons:

    a. Though the terms call for payments to begin, no payments have ever been made, despite the fact that [Father] had voluntary deductions totaling $1,093.31 from his Lowe's pay which would have covered either or both of the "loan" payments cited in the promissory notes.

    b. [Father] has experience with the courts such that he knew that he would need to have evidence that money given to him is to be paid back (*i.e.*, a loan) and therefore, he attempted to create evidence of such.

    c. Despite his experience with the courts, [Father] never disclosed any other gifts paid on his behalf,

nor that he lived with [his girlfriend], and had access to her bank account via his own debit card attached to that account, despite being asked in discovery.

d. During his testimony, [Father] cited his advanced age (64 years old), his poor health (which he also cited 4 years ago at the equitable distribution trial), his inability to secure a better paying job, no savings, no property, no investments, and little credit available. Accordingly, the Court finds that [Father] and [his girlfriend] could not, in good faith, have signed the promissory notes setting forth 5 and 10 year terms for repayment and intended that [Father] would repay the loans according to the terms in the promissory notes.

e. The loans are unsecured with no penalty for non-payment or late payment.

f. The loan documents and promissory notes were prepared just prior to the deadline for the filing of Financial Affidavits, wherein the parties are required to disclose debts and provide documentation evidencing such debts.

g. *See Lowe v. Lowe*, 2005 N.C. App. LEXIS 1025 (2005), which provides that loans from close family members should be closely scrutinized for legitimacy and failure to make payments on loans for several years when funds are available to do so is evidence that the loans are illusory. The alleged "loans" from [Father's girlfriend] to [Father] do not pass such scrutiny and the evidence shows that the "loans" are illusory.

29. In addition to the purported "loans" from [Father's girlfriend] (which the Court finds were not loans at all, but were gifts which should be included in [Father]'s income) almost all of [Father]'s living expenses were either paid directly by [his girlfriend] or by the authorized use of her bank account and debit card.

. . . .

32. [Father] has a cavalier and entitled attitude toward money that became apparent though his testimony and actions, including, but not limited to:

    a. When questioned about his failure to pay support to [Mother], [Father] responded: "If I pay her, I can't pay something else."

    b. [Father]'s Financial Affidavit listed voluntary deductions from his paycheck totaling approximately $1,093.31 per month. [Father] listed a monthly garnishment of $568.90 on his Financial Affidavit, and he testified that the garnishment had been satisfied in January 2021, prior to the filing of his verified Financial Affidavit.

    c. [Father] spent significant amounts of money on alcohol and shopping at higher end grocery stores and gourmet shops.

    d. The last entry in [Father]'s job search log was May 6, 2019. [Father] has not continued to search for higher paying employment in line with his skills and abilities.

    e. [Father]'s Financial Affidavit states that his average monthly net income is $640.38 and his monthly needs and expenses are $1,921.31. [Father]'s statement that "no one can live on $640.38 per month" further demonstrates his attitude of entitlement to a certain lifestyle.

    f. [Father] took a 6 week leave of absence from his job at Lowe's because he "thought" he had COVID. Notably, this was right around the same time that [Father] received a tax refund.

    g. The Court previously found that [Father] incorporated and ran several coin businesses, and that fact has not changed. In fact, [Father]'s most recent well-paid employment was in the coin business.

    h. [Father] earned his real estate license, which is a difficult undertaking. This demonstrates to the Court that even if [Father] was unable to sell

houses and subsequently let his real estate license lapse, that he has the ability to earn more than he is earning at his current job.

i. The history of this case shows that [Father] did not make any support payments to [Mother] until he was court ordered to do so.

j. [Father] has filed multiple motions to modify support and there have been multiple motions for contempt filed against him. [Mother] has prevailed on her motions for contempt. [Father]'s motions to modify support have either been voluntarily dismissed by [Father] or denied by the Court.

k. Prior Court Orders have found as a fact that [Father] is not entirely credible.

l. [Father]'s actions show a pattern of fluctuating income but a consistent relatively high standard of living.

33. At present, the Court finds [Father]'s gross monthly income to be $6,526.18 per month. This is comprised of (a) $2,355.43 from Lowe's; (b) $2,758.75 from monetary "loans" from [his girlfriend], which the Court finds to be gift income; (c) $1,412 from additional regular, recurring gifts by way of [his girlfriend] paying [Father]'s living expenses, directly and through [Father]'s use of her bank account. After mandatory deductions set forth on [Father]'s paystub, [Father]'s net monthly income is $5,904.44. This income is [Father]'s actual income from all sources. The Court does not find bad faith such that it will impute income to [Father].

34. At present, the Court finds that [Father]'s shared monthly expenses are $500 per month that he pays to [his girlfriend]. [Father]'s individual expenses are $71.00 per month. Additionally, his court ordered obligations including a monthly child support obligation of $803.61, the Equitable Distributive award of $1,000 per month, and attorney's fees payment of $225.00 per month. [Father]'s monthly expenses total $2,599.61, leaving him a monthly surplus of $3,304.83. [Father]

therefore has the ability to pay $1,000 each month in alimony.

. . . .

37. [Mother] has a monthly shortfall of $1,027.52. Her current monthly shortfall is lower than what the Court found in the January 3, 2017 Permanent Support Order and approximately 2.8% more than the amount of alimony that was originally ordered in the Permanent Support Order.

38. The Court finds that [Mother] had no choice but to reduce her personal expenses in November 2018 when [Father] unilaterally began paying only $50 per month toward his alimony obligation, which is only 5% of the court-ordered amount. After [Father] reduced his support payments, [Mother] took on a temporary part-time job as a delivery driver for Uber Eats for a few months to help make ends meet. The Court does not consider [Mother]'s temporary income for these calculations.

. . . .

Alimony

41. This Court considered two possible calculations for alimony, neither of which the Court finds to be a substantial change in circumstances such that alimony should be modified.

42. For both calculations, the Court used [Father]'s income as set forth above.

    a. The first calculation is based on [Mother] receiving the entire distributive award payment of $1,000 per month from [Father]. [Mother]'s monthly income is $3,744.27 when she receives the entire $1,000 distributive award payment. [Mother]'s reasonable monthly expenses of $2,861.89, plus her monthly child support obligation of $442.60, equals $3,304.49. In this scenario, there is no shortfall, but only a slim $347 per month left over after her expenses. This Court finds that alimony of $1,000 per month would still

be awarded and appropriate. This Court is constrained from reconsidering dependency that was already established by the Permanent Support Order. *See Cunningham v. Cunningham*, 345 N.C. 430, 480 S.E.2d 403 (1997). The Court considers the following:

i. [Father]'s marital misconduct, *i.e.*, abandonment, under N.C.G.S. § 50-16.3A according to the Permanent Support Order, Finding of Fact No. 19, "[Father] moved to Hawaii without informing [Mother] or the minor child of his intentions or whereabouts," which left [Mother] without any financial support ([Father] did, however, leave her with debt) or even knowledge as to where [Father] was living;

ii. The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of the minor child; and

iii. That the standard of living during the marriage was significantly higher than the modest $2,861.89 cited in [Mother]'s Financial Affidavit, which is the result of [Mother] being forced to reduce her expenses from the standard of living she enjoyed during her marriage.

b. The second calculation is based on [Father] only paying a fraction of the distributive award payment. Since November 1, 2018, [Father] has only been paying $50 (or 5%) of the distributive award payment such that [Mother]'s income for alimony purposes would only be increased by $50 per month, which results in a shortfall of $997.52, which is approximately 3% less than what is currently ordered in the Permanent Support Order.

43. [Father] has failed to show a substantial change in circumstances such that his alimony obligation should be modified.

Child Support

44. The Court considered [Mother]'s income including the $1,000 per month alimony payment and the $1,000 distributive award payment (even though she has not been receiving the court-ordered amounts of those payments since November 2018) and determined that the calculation does not result in a 15% or more decrease to [Father]'s child support obligation.

    a. [Father]'s gross monthly income is $6,526.18. If the $1,000 monthly alimony payment is added to [Mother]'s gross income for child support purposes, the North Carolina Child Support Guidelines have her child support obligation at $442.60. [Father]'s child support obligation would be $771.44 which is approximately only 4.2% lower than the current ordered amount of $803.61.

    b. If the Court adds both the $1,000 monthly alimony payment and the $1,000 distributive award payment to [Mother]'s gross income, her child support obligation would be $552.30. [Father]'s child support obligation would be $759.74 which is approximately 5.8% lower than the current ordered amount of $803.81.

    c. If the Court considers what [Mother] has <u>actually</u> received since November 1, 2018 (*i.e.*, $50 in monthly alimony and $50 in monthly distributive award payments), her gross income would be $2,844.27, which results in a child support obligation of $453.38. [Father]'s child support obligation would be $818.22, which is approximately 2% higher than the court ordered amount of $803.81.

45. [Father] failed to present evidence of a substantial change in circumstances sufficient to justify a downward modification of his alimony obligation and permanent child support obligation and his Motion to Modify should be denied.

3. Substantial Change of Circumstances

Father first argues that the trial court erred by failing to find a substantial change of circumstances where he met his burden of showing such a

change "based on an involuntary decrease in his income." As Father notes, it is undisputed that he "lost his job in October 2018, and then remained unemployed until he found a new job paying significantly less than he earned prior to his unemployment." Father contends that he suffered "a decrease of more than 60% from his income from employment when the Support Order was entered. Such a decrease in income is clearly substantial and should have been sufficient for the trial court to find a substantial change in circumstances and to modify [his] support obligation."

However, this Court has repeatedly recognized that "[t]he fact that a husband's salary or income has been reduced substantially does not automatically entitle him to a reduction" of either child support or alimony. *Wolf v. Wolf*, 151 N.C. App. 523, 526, 566 S.E.2d 516, 518 (2002); *see also Britt*, 49 N.C. App. at 470, 271 S.E.2d at 926 ("[A] conclusion of law that there has been a substantial change of circumstances based only on income is inadequate and in error."). "There cannot be a conclusion of substantial change in circumstances based solely on change in income. The overall circumstances of the parties must be compared with those at the time of the award." *Patton v. Patton*, 88 N.C. App. 715, 719, 364 S.E.2d 700, 703 (1988) (citation omitted). In the instant case, the trial court made that comparison and determined that Father failed to show a substantial change of circumstances.

Father primarily contends that "[t]he trial court improperly made findings of fact under a capacity to earn analysis and then made an inconsistent ultimate finding of fact that [its] analysis was based on" his "actual income[.]" This assertion is misplaced.

"The trial court may refuse to modify support and/or alimony on the basis of an individual's earning capacity instead of his actual income when the evidence presented to the trial court shows that a husband has disregarded his marital and parental obligations . . . ." *Wolf*, 151 N.C. App. at 526, 566 S.E.2d at 518. "When the evidence shows that a party has acted in 'bad faith,' the trial court may refuse to modify the support awards. If a husband has acted in 'good faith' that resulted in the reduction of his income, application of the earnings capacity rule is improper." *Id.* at 527, 566 S.E.2d at 519 (citation omitted).

Father specifically highlights those portions of the trial court's finding of fact 32 that seem to address his "intent with regard to income and spending money" to argue that the trial court improperly conducted an earning-capacity analysis, despite its seemingly contradictory finding that Father had not acted in bad faith. "[H]owever, the trial court never reached the step of calculating [Father]'s child support [or alimony]

obligation, since the trial court found no change of circumstances warranting a modification of [his] current obligation. Therefore, [Father]'s discussion of the earning capacity rule is incorrect." *Armstrong v. Droessler*, 177 N.C. App. 673, 677–78, 630 S.E.2d 19, 22 (2006).

Rather than conducting an earning-capacity analysis, the trial court's extensive findings concerning Father's "cavalier and entitled attitude toward money" provide an illustrative context for the trial court's finding that Father "continued living a lifestyle with no substantial economic difference, except the majority of his income came from" his girlfriend. Indeed, the final two paragraphs of finding of fact 32, which Father does not specifically challenge in his appellate brief, state that Father "is not entirely credible" and that his "actions show a pattern of fluctuating income but a consistent relatively high standard of living."

We conclude that "[i]n the present case, the trial court did not impute income to [Father] as a result of voluntary unemployment or underemployment, but rather was merely attempting to determine what [Father] actually earned in [2021]. Consequently, the law of imputation is inapplicable." *Diehl v. Diehl*, 177 N.C. App. 642, 650, 630 S.E.2d 25, 30 (2006).

4. Calculation of Father's Income

Father next complains that the trial court "did not use [his] actual income as a basis for the calculation of his income." First, the North Carolina Child Support Guidelines explicitly state that a parent's income includes "gifts . . . or maintenance received from persons other than the parties to the instant action." N.C. Child Support Guidelines, at 3 (2019).

> When income is received on an irregular, non-recurring, or one-time basis, the court may average or prorate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.

Id. Additionally, this Court has observed that "[t]here appears to be no good reason to employ a different definition of income for the purposes of a child support award than for an alimony award." *Glass v. Glass*, 131 N.C. App. 784, 788, 509 S.E.2d 236, 239 (1998).

Mother submits in her brief on appeal that the facts of this case resemble those of *Onslow County v. Willingham*, in which the defendant-father testified that a female "friend" with whom he shared a joint bank account "contributed about $800.00 per month into the joint [bank] account and that she had been giving him this financial

assistance in the form of a loan for about three months." 199 N.C. App. 755, 687 S.E.2d 541, 2009 WL 2929305, at *5 (2009) (unpublished).[1] The trial court, however, did not find the defendant-father's "assertion that said deposits were loans to be credible[,]" and this Court recognized that the trial court "was not bound to accept [the defendant-father's] assertion that any of the recurring, financial assistance provided to him was in the form of loans." *Id.* Indeed, the defendant-father "did not produce any documentation or other evidence to show that these deposits were loans." *Id.*, at *6. Therefore, we concluded that "[i]n accordance with the Guidelines, these deposits could be classified as 'gifts' or 'maintenance received from persons other than the parties to the instant action.' " *Id.*

Although an unpublished decision of this Court, and therefore not binding authority, we find our previous decision in *Willingham* to be persuasive in guiding our analysis of the trial court's findings in the case at bar. As quoted above, the trial court found that the "alleged 'loans' . . . were actually regular, recurring gifts and not loans[,]" and made extensive findings of fact as to why it did "not find that either of the 'loans' evidenced by promissory notes signed by [Father] and [his girlfriend] [we]re truly loans." Just as in *Willingham*, the trial court's findings support its conclusion that these "alleged 'loans' " were properly classified as income to Father. Moreover, as in *Willingham*, the trial court here concluded that Father's testimony was not credible, a determination by which this Court is bound. *See Asare v. Asare*, 281 N.C. App. 217, 243, 869 S.E.2d 6, 25 (2022) ("The trial court is the sole judge of the credibility and weight of the evidence.").

5. Father's Health

Father also argues that "[t]he trial court failed to consider [his] health" in denying his motion to modify. Father cites this Court's opinion in *Kelly* in support of his contention that "[w]orsening health, although not automatically a changed circumstance, must be considered in a modification proceeding as it may affect the obligor's ability to earn income or be reason for a decline in income." However, as Father acknowledges, "the relevance of [the *Kelly*] defendant's medical condition was his claim that it was contributing to his reduction in income" and yet, in *Kelly*, "the trial court found that his income was not substantially reduced." 228 N.C. App. at 611, 747 S.E.2d at 278. The trial court

1. 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).

in this case similarly did not find that Father's income was substantially reduced, "and thus the trial court did not err in not making detailed findings as to [Father]'s health." *Id.*

In sum, the trial court did not err by determining that Father's decrease in income from employment alone was not sufficient to show a substantial change of circumstances; finding that Father's actual income included the gift income from his girlfriend; or declining to make detailed findings as to Father's health.

6. Sufficiency of the Findings of Fact

Nonetheless, while "the trial court need not recite all of the evidentiary facts[,]" it still "must find those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Id.* at 606–07, 747 S.E.2d at 276 (citation omitted).

"There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982) (citation omitted), *superseded in part on other grounds*, N.C. Gen. Stat. § 50-13.4(f)(9) (1983).

> [W]hile Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Id. at 452, 290 S.E.2d at 658. Our Supreme Court has explained that this requirement is not a formality, but rather is essential to the process of appellate review:

> The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the

> appellate courts to perform their proper function in the judicial system.

Id. (cleaned up).

Father contends that the trial court's "findings of fact lacked detail to support the finding" that Father's actual gross income was $6,526.18 per month. For example, Father argues that "the trial court did not make findings that would allow this [C]ourt to see how the trial [court] calculated the ultimate monthly amount of $1,412.00" in "regular, recurring gifts[.]" Although we have concluded that the trial court did not err in determining that Father's actual gross income included this gift income, and the record amply supports the trial court's determinations as to what to include or not to include in calculating Father's actual gross income, we agree with Father that the trial court's findings of fact leave us unable to determine precisely *how* it calculated Father's actual gross income.

"The findings of fact should address . . . how [the trial court] calculated [Father's actual] gross income based upon its consideration of the evidence presented." *Craven Cty. ex rel. Wooten v. Hageb*, 277 N.C. App. 586, 590, 861 S.E.2d 571, 574–75 (2021). Accordingly, because we cannot determine how the trial court used the evidence presented to calculate Father's actual gross income, we remand for additional findings of fact concerning this issue.

B. Contempt

[2] Father further argues that "[t]he trial court erred in holding [him] in contempt of court based on an ultimate conclusion that he has at all times had the ability to comply, but not making findings of fact supported by the evidence that he had the ability to comply during the specific time periods at issue."

The trial court found as fact that Father was in substantial compliance with his child support obligation, but that he "has willfully failed to pay his court ordered financial obligations as to alimony, equitable distribution distributive award, and attorney's fee award, and is therefore in civil contempt." The trial court also found that Father "has, at all times, been fully aware of the Permanent Support [and Equitable Distribution] Order[s], has had full knowledge and understanding of the requirements of the Order[s], and has had the ability to comply with the Order[s]." The court determined that Father's failure to comply with those orders "is willful, wanton, deliberate, without justification, and constitutes a civil contempt of Court[,]" and set the following purge conditions:

a. In addition to his ongoing obligations to pay prospective alimony, attorney's fee award payments, and distributive award payments, [Father] shall pay arrears to [Mother] as follows:

   i. $5,000 within thirty (30) days of the entry of this Order;

   ii. $5,000 within sixty (60) days of the entry of this Order;

   iii. $5,000 within ninety (90) days of the entry of this Order;

   iv. $5,000 within one hundred and twenty (120) days of the entry of this Order.

b. After payment of $20,000 as set forth above, [Father] will owe $43,184.50 in arrears as of September 30, 2021. Beginning on the first (1st) day of the first (1st) month after the last $5,000 payment is due as set forth above, [Father] shall continue paying $2,500 per month towards his arrears until paid in full.

c. [Father] shall pay to [Mother] the sum of $17,919.15 as attorney's fees. The Court will hold a hearing at a later date to determine a payment schedule for [Father]'s payment of attorney's fees once he has satisfied his arrearages as set forth above.

1. Standard of Review

Appellate review of "contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986). "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573, *appeal dismissed in part and disc. review denied in part*, 327 N.C. 482, 397 S.E.2d 218 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).

2. Ability to Pay

It is well established that "the trial court cannot hold a defendant in contempt unless the court first has sufficient evidence to support

a factual finding that the defendant had the ability to pay, in addition to all other required findings to support contempt." *Cty. of Durham ex rel. Wilson v. Burnette*, 262 N.C. App. 17, 22, 821 S.E.2d 840, 846 (2018) (citation omitted), *aff'd per curiam*, 372 N.C. 64, 824 S.E.2d 397 (2019). Father compares this case to *Burnette*, in which the defendant "presented substantial evidence regarding his medical condition, his minimal living expenses, and his lack of income[,]" but the plaintiff "presented no evidence other than the amount of arrears owed, including any evidence regarding [the] defendant's ability to work, income, potential income, or assets." *Id.* at 23, 821 S.E.2d at 846. Father asserts that he similarly "presented evidence of his inability to pay and it was not refuted by" Mother; according to Father, "[t]he trial court's finding are, in essence, that she did not believe what he was saying to be true, but this is insufficient."

Indeed, it is axiomatic that "the trial court is the sole judge of credibility and weight of the evidence[.]" *Id.* Nonetheless, "although the trial court could find [the] defendant's evidence not to be credible, this does not create evidence for [the] plaintiff. The absence of evidence is not evidence." *Id.* (emphasis omitted). Therefore, the *Burnette* Court concluded that "even if the trial court determined not one word of [the defendant's evidence] to be true, we are then left with no evidence from [the] plaintiff other than the amount owed." *Id.*

However, Father's reliance on *Burnette* is misplaced. Unlike the facts presented in *Burnette*, Father's own evidence in the case at bar evinces his ability to pay. Here, the trial court found as fact that Father's "Financial Affidavit listed voluntary deductions from his paycheck totaling approximately $1,093.31" and that despite a "pattern of fluctuating income" Father has maintained "a consistent relatively high standard of living." Further, the trial court noted that Father "spent significant amounts of money on alcohol and shopping at higher end grocery stores and gourmet shops," evidencing his "cavalier and entitled attitude toward money[.]" These findings are supported by competent evidence in the record, and in turn support the trial court's conclusion that Father had the ability to pay for the purposes of civil contempt. *Adkins*, 82 N.C. App. at 292, 346 S.E.2d at 222.

"Given the extensive evidence presented and findings made regarding [Father]'s income and expenses, we hold that the trial court's finding on present ability to pay is adequate." *Gordon v. Gordon*, 233 N.C. App. 477, 483, 757 S.E.2d 351, 355 (2014). Accordingly, the trial court's conclusion that Father is in contempt is affirmed.

3. Purge Conditions

Finally, Father argues that the trial court's "findings of fact are insufficient to warrant the purge conditions" because there was no showing that he had the present ability to satisfy the purge conditions. We agree, and remand for the trial court to consider this issue.

"To justify conditioning [a] defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that [the] defendant has the present ability to pay those arrearages." *Tigani v. Tigani*, 256 N.C. App. 154, 160, 805 S.E.2d 546, 551 (2017) (citation omitted); *see also Burnette*, 262 N.C. App. at 38–39, 821 S.E.2d at 856 (remanding for additional findings of fact and conclusions of law, including conclusion as to the defendant's "present ability to pay the full amount of any purge payments ordered"); *Bishop v. Bishop*, 90 N.C. App. 499, 502, 369 S.E.2d 106, 108 (1988) ("Since the instant order allows [the] defendant to purge his contempt by paying the entire $2,230 arrearage, the trial court would . . . be required to conclude [that the] defendant had the [present] ability . . . to pay the entire $2,230 arrearage in order to hold him in civil contempt.").

In the present case, although the trial court made sufficient findings of fact regarding Father's ability to pay his court-ordered support obligations, it failed to make a conclusion of law that he had the present ability to satisfy the purge conditions that it imposed. Accordingly, we must remand for the entry of a new order "including the required findings of fact . . . and conclusions of law for [Father's] present ability to pay the full amount of any purge payments ordered. The trial court may, in its discretion, receive evidence on remand." *Burnette*, 262 N.C. App. at 38–39, 821 S.E.2d at 856. "On remand, if the trial court holds [Father] in civil contempt, new evidence will be necessary to determine if [Father] has the *present* ability to pay any purge payments ordered." *Id.* at 39 n.11, 821 S.E.2d at 856 n.11.

C. Attorney's Fees

[3] Lastly, Father concludes his appellate brief with the following paragraph: "The trial court entered an award of attorney fees [sic] in its order. Her consideration of an award of such fees was based in significant part on her prior erroneous rulings as set forth herein. The attorney fees [sic] award should, therefore, be vacated." Father cites no authority nor makes any substantive argument other than summarily relying upon his previous arguments, already discussed in this opinion.

"Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App. P. 28(b)(6). "An appellant avoids abandonment when it complies with the rule's mandate that '[t]he body of the argument . . . shall contain citations of the authorities upon which the appellant relies.' " *K2HN Constr. NC, LLC v. Five D Contr'rs, Inc.*, 267 N.C. App. 207, 213, 832 S.E.2d 559, 564 (2019) (alterations in original) (quoting N.C. R. App. P. 28(b)(6)). "This Court has routinely held an argument to be abandoned where an appellant presents argument without such authority and in contravention of the rule." *Id.* Father cites no legal authority in his argument concerning the trial court's award of attorney's fees; accordingly, this issue is "taken as abandoned." N.C. R. App. P. 28(b)(6).

III. Conclusion

For the foregoing reasons, we affirm the trial court's order in part and remand for additional findings of fact and conclusions of law (1) detailing the court's calculation of Father's actual income, and (2) stating whether Father has the ability to satisfy the purge conditions. The court may hear additional evidence on either issue, in its discretion.

AFFIRMED IN PART; REMANDED.

Judges HAMPSON and FLOOD concur.

IN THE MATTER OF ENOC ALCANTARA

No. COA22-795

Filed 5 December 2023

Sexual Offenders—registration—older federal conviction—substantial similarity test—newer version of statute insufficient

The trial court's order requiring defendant to register as a sexual offender was vacated and the matter was remanded for a new hearing because the State failed to show that defendant's prior conviction in 2003 of a federal offense was substantially similar to a sexually violent offense under North Carolina law. Instead of presenting the trial court with the 2003 version of the federal statute, the State instead presented the 2021 version, and did not provide any evidence that the statute had remained unchanged from 2003 to 2021.

Appeal by Defendant from order entered 16 June 2022 by Judge Mark E. Klass in Guilford County Superior Court. Heard in the Court of Appeals 11 April 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Bryan G. Nichols, for the State.

Jason Christopher Yoder for defendant-appellant.

MURPHY, Judge.

To require a person to register for a federal conviction under N.C.G.S. §§ 14-208.6(4)(c) and 14-208.7, the State has the burden to prove by a preponderance of the evidence that a person's federal conviction is for an offense that, if committed in North Carolina, was substantially similar to a sexually violent offense. When the State only offers an out-of-date version of the statute to the trial court, the State does not meet this burden. Here, where the State presented the 2021 version of the statute for a 2003 federal conviction, we vacate the trial court's order requiring Defendant to register as a sex offender and remand for a new registration hearing.

BACKGROUND

On 22 April 2003, Defendant Enoc Alcantara pled guilty to violating 18 U.S.C. § 2252(a)(4)(a) in the United States District Court for the District of Puerto Rico. He received a 40-month active sentence followed by three years of supervised release. On 20 October 2021, the Guilford County Sheriff's Office notified Defendant of his requirement to register as a sex offender based on his federal conviction pursuant to N.C.G.S. § 14-208.7(a). On 3 November 2021, Defendant filed a petition in Guilford County Superior Court for Judicial Determination of Sex Offender Registration Requirement and was appointed counsel.

On 16 June 2022, the trial court held a hearing on the matter, and Mr. Floyd, Defendant's appointed counsel, requested to withdraw as counsel. The trial court denied Mr. Floyd's request and proceeded with the hearing. At the 16 June hearing, the State presented a copy of Defendant's 2003 federal conviction for sexual exploitation of a minor, a copy of the 2021 version of the charging federal statute, 18 U.S.C. § 2252(a)(4)(a), and a copy of N.C.G.S. § 14-190.17A. The State argued that the federal statute and the North Carolina statute are substantially similar and "almost identical in language," requesting that the trial court order Defendant to register as a sex offender in North Carolina.

After the State presented its evidence and arguments, defense counsel asked the trial court to be heard about his request to withdraw as Defendant's attorney. Defense counsel described the conflict between himself and Defendant, which was followed with a brief exchange between the two:

> [COUNSEL]: [Defendant] has given me a couple written motions which I've reviewed and have absolutely no merit in the law . . . It is my opinion that he should have to register as a sex offender.
>
> . . . .
>
> Then he went into wanting me to file other frivolous motions, which I will not do, on his behalf . . . [H]e asked me to withdraw which I'll gladly do . . . But I'm just telling the court . . . he's trying to avoid registering and delaying the court process which I will not do under any circumstance.
>
> . . . .
>
> If [Defendant] thinks he's such a copious student of the law, then, I'd ask the court to find that he forfeited his right to counsel and he can represent himself in this matter. And if he wants to address the court, he's more than welcome.
>
> . . . .
>
> [DEFENDANT]: I wish my attorney to give the court . . . the handwritten motions . . . that I gave him so that we can all be on the same page . . . I want everything transcribed and that the court will be able to see the precise language that I use to raise my points.
>
> . . . .
>
> [COUNSEL]: Judge, I'll be glad to let you review these frivolous motions he's prepared, but . . . it's not my obligation to adopt whatever he writes . . . if he wants to file them on his own behalf, that's fine, but I'm not going to do it.

After hearing from both Defendant and his counsel, the trial court did not acknowledge defense counsel's renewed request to withdraw. The trial court found the statutes, as submitted by the State, to be substantially similar and that Defendant's "conviction from Puerto Rico fits the requirements of registration . . .." Defendant asked the trial court

about raising a federal question on the matter, and defense counsel interjected, saying "[n]ot in state court." After the trial court denied Defendant's request, the following exchange took place:

> [DEFENDANT]: I want to appeal the court decision.
>
> [COURT]: I don't know – I don't even –
>
> [STATE]: Do a little research, Your honor?
>
> [COUNSEL:] I'm not giving notice of appeal. If . . . he wants to give notice of appeal he can do it on his own.
>
> [COURT]: I'll let him do that.
>
> [COUNSEL]: He can do it. I don't have to do it, Your Honor? Your Honor?
>
> [COURT]: No, you don't.
>
> [COUNSEL]: All right. I'm going to withdraw. You . . . want to file a notice of appeal, you can do that on your own behalf. Good luck. We're done.
>
> [DEFENDANT]: Thank you, sir.

The trial court acknowledged defense counsel's motion to withdraw, but only after rendering its order requiring Defendant to register as a sex offender. The trial court entered its order on 16 June 2022. Defendant timely filed a written notice of appeal on 13 July 2022.

ANALYSIS

On appeal, Defendant challenges the trial court's finding that N.C.G.S. § 14-190.17A(a) is substantially similar to the 2021 version of 18 U.S.C. § 2252(a)(4)(A). Specifically, Defendant argues that the trial court erred when it failed to compare the 2021 version of N.C.G.S. § 14-190.17A with the 2003 version of 18 U.S.C. § 2252(a)(4)(A)—the federal statute under which Defendant was initially convicted.

In the context of criminal sentencing, we have held that "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[,]" which we review *de novo*. *State v. Fortney*, 201 N.C. App. 662, 669 (2010). While it is not required "that the statutory wording [of a Federal Statute] precisely match, . . . the offense [must] be 'substantially similar' " to a statute of a particular felony in North Carolina. *State v. Graham*, 379 N.C. 75, 80 (2021) (citation and marks omitted).

However, as recognized by our Supreme Court, we have "consistently held that when evidence of the applicable law is not presented to the trial court, the party seeking a determination of substantial similarity has failed to meet its burden of establishing substantial similarity by a preponderance of the evidence." *State v. Sanders*, 367 N.C. 716, 718 (2014); *see* N.C.G.S. § 14-208.12B(c) (2022) ("At the hearing, the [State] has the burden to prove by a preponderance of the evidence, that the person's out-of-state or federal conviction is for an offense, which if committed in North Carolina, was substantially similar to a sexually violent offense[.]"). In *State v. Burgess*, we held that the State failed to present sufficient evidence of out-of-state convictions' similarity to North Carolina offenses when, *inter alia*, the State provided copies of the 2008 version of the applicable out-of-state statutes but did not present evidence that the statutes were unchanged from the 1993 and 1994 versions under which the defendant had been convicted. *State v. Burgess*, 216 N.C. App. 54, 57–58 (2011). In *State v. Morgan*, we held that the State failed to meet its burden of proving that the defendant's prior conviction was substantially similar to a North Carolina offense when it offered the 2002 version of the applicable New Jersey statute governing the defendant's 1987 New Jersey conviction, but failed to present any evidence that the statute was unchanged from 1987 to 2002. *State v. Morgan*, 164 N.C. App. 298, 309 (2004). As both the criminal statutes and this civil statute require the State to meet the same burden of proof related to the same type of evidence, we are bound by the reasoning in these opinions.

By failing to present the trial court with the 2003 version of 18 U.S.C. § 2252(a)(4)(A) or evidence that there had not been any changes in the intervening 18 years, the State failed to meet its burden to present sufficient evidence of the applicable statute. The State failed to provide to the trial court such evidence as to allow it to determine that 18 U.S.C. § 2252(a)(4)(A) remained unchanged from 2003 to 2021 and that the federal statute is substantially similar to the North Carolina statute. Accordingly, under *Burgess* and its progeny, we vacate the trial court's order and remand this issue for a new hearing. "The State and [D]efendant may offer additional evidence at the resentencing hearing." *Burgess*, 216 N.C. App. at 58.[1]

1. Since we vacate the trial court's order that Defendant register as a sex offender and remand this case for a new hearing, we need not address defendant's argument that his trial counsel's actions amounted to ineffective assistance of counsel. *See Burgess*, 216 N.C. App. at 58, n.4.

CONCLUSION

We vacate the trial court's order that Defendant be required to register as a sex offender pursuant to N.C.G.S. §§ 14-208.6(4)(c) and 14-208.7. Further, we remand for a new hearing because the State did not meet its burden of proof regarding substantial similarity between the prior federal conviction and the North Carolina statute.

VACATED AND REMANDED.

Judges ZACHARY and CARPENTER concur.

SHILPA SHAHEEN SINCLAIR, Plaintiff
v.
GREGORY SCOTT SINCLAIR, Defendant

No. COA22-390

Filed 5 December 2023

Child Custody and Support—subject matter jurisdiction—modification of out-of-state child support order—registration required

In an action to modify the child support provisions of a Virginia order (which contained both child custody and child support provisions), the trial court's order modifying the mother's child support obligation from $0.00 to $777.00 per month was vacated for lack of subject matter jurisdiction because, although the mother registered the Virginia order in North Carolina pursuant to N.C.G.S. § 50A-305 regarding the custody provisions, neither party registered the foreign order in this state pursuant to the Uniform Interstate Family Support Act (UIFSA) (Chapter 52C) for purposes of enforcement or modification of the Virginia Order's child support provisions.

Appeal by plaintiff-appellant from order entered 12 October 2021 by Judge Nathaniel M. Knust in District Court, Cabarrus County. Heard in the Court of Appeals 7 February 2023.

Arnold & Smith, PLLC, by Ashley A. Crowder, for plaintiff-appellant.

Gregory S. Sinclair, pro-se, defendant-appellee.

STROUD, Chief Judge.

Plaintiff-appellant appeals from the trial court's child support order modifying her child support obligation. Plaintiff-appellant's primary argument is the trial court erred in concluding a substantial change in circumstances had occurred. However, since the trial court did not have subject matter jurisdiction to modify a Virginia child support order, we vacate the child support modification order for lack of subject matter jurisdiction.

I. Background

Plaintiff-appellant ("Mother") and defendant-appellee ("Father") were married in 2006 in Virginia. The parties had two children, born in 2010 and 2012. On 25 August 2018, the parties began living separate and apart. In August of 2018, Mother was in Okinawa, Japan working for the United States military, and the children were living with Father in Fairfax, Virginia. On or about 22 October 2019, the parties entered into a Property Settlement Agreement ("2019 Agreement"), including terms for visitation, custody, and child support.

On or about 25 November 2019, a final order of divorce was entered in Fairfax County, Virginia ("Virginia Order"). The Virginia Order lists Mother's residential and work address as Okinawa, Japan and Father's residential address as Fairfax, Virginia. The 2019 Agreement was incorporated into the Virginia Order. Relevant terms from the 2019 Agreement incorporated into the Virginia Order include:

> 2. Incorporation of Property Settlement Agreement: The parties executed a Property Settlement Agreement (the "Agreement") on October 22, 2019 (attached hereto as Exhibit A) and the same hereby is affirmed, ratified, and incorporated, but not merged, into this Order as if the same were set forth herein verbatim, pursuant to Virginia Code § 20-109.1 (1950 as amended) and the parties are hereby ordered to comply with all provisions thereof.
>
> 3. Child Support: Pursuant to Paragraph 5 of the Agreement, the parties agree that no direct child support shall be paid by either one, as follows:
>
> > (a) The parties acknowledge their mutual duty to provide support and maintenance for the minor children but agree that there shall be $0.00 in monthly child support payable from one party to the other. Each

> party shall pay the living and activity expenses of the children when the children are in their care and custody without contribution from the other parent.

The parties also agreed to provisions regarding custody and visitation, Section 6, in the 2019 Agreement and the Virginia Order also incorporated these provisions, including the following:

> 6. CUSTODY AND VISITATION
>
> A. Custody: Father shall have sole physical and legal custody of the minor children with the children's primary residence being with Father.
>
> B. Visitation: [Mother] shall have visitation pursuant to the holiday and summer schedule below, as well as when the parties agree based on [Mother]'s travel schedule.

On 11 January 2021, Mother filed a notice of registration of foreign child custody order under North Carolina General Statute Section 50A-305, regarding child custody, in Cabarrus County, North Carolina. Father did not object to the registration, and on 31 March 2021, the order confirming registration of the foreign child custody order was entered. The parties did not raise any issue either before the trial court or on appeal regarding the fact that the order was not registered under North Carolina General Statute Chapter 52C, Uniform Interstate Family Support Act ("UIFSA"), for purposes of modification of child support.

Father filed a motion for modification of child support on 6 May 2021 in Cabarrus County, North Carolina, and served Mother at her mailing address in Japan. Father alleged that "[d]uring [Mother's] residency abroad, [he] and the minor children relocated from Fairfax County, Virginia to Cabarrus County, North Carolina." The motion also alleged Mother "returned to Fairfax, Virginia in July of 2020." Father testified he moved from Fairfax, Virginia to Harrisburg, North Carolina on 15 August 2020.

Father's motion for modification asserts there has been a substantial change in circumstances warranting modification of child support due to Mother's return from Japan and her subsequent acceptance of another position overseas. Father's evidence tended to show that in 2018 the parties did not anticipate that Mother's work in Japan would be a permanent condition and both parties expected Mother would return to the United States after completion of her contract. But Father contended that upon Mother's most recent acceptance of employment in Japan, her relocation had become permanent.

The trial court rendered its ruling at the close of the hearing, finding there was a substantial change in circumstances since "[Father] now provides full-time care for the minor children on a permanent basis" and "[Father] now incurs work related childcare expenses that he is solely responsible for." On 12 October 2021, the trial court entered a new child support order ("2021 Order") calculating child support based upon Worksheet A of the North Carolina Child Support Guidelines. The 2021 Order modified Mother's child support obligation from $0.00 per month, as set in the Virginia Order, to $777.00 per month. Mother appealed.

II. Jurisdiction

We must first address the issue of subject matter jurisdiction of the trial court to modify the Virginia Order. Although neither party has raised any question regarding subject matter jurisdiction, we raise this issue *sua sponte*. *See Rinna v. Steven B.*, 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009) ("As this Court recently emphasized, subject matter jurisdiction may not be waived, and this Court has not only the power, but the duty to address the trial court's subject matter jurisdiction on its own motion or *ex mero motu*." (citation omitted)). Further, the parties cannot create subject matter jurisdiction "by consent, waiver or estoppel, and therefore failure to object to the jurisdiction is immaterial." *Halterman v. Halterman*, 276 N.C. App. 66, 74, 855 S.E.2d 812, 817 (2021) (formatting altered) (quoting *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006)).

A. Jurisdictional Background

On 11 January 2021, Mother filed a Petition for Registration of Foreign Child Custody Order, (capitalization altered), under North Carolina General Statute Section 50A-305 in Cabarrus County, North Carolina. *See* N.C. Gen. Stat. § 50A-305 (2021). Father did not object to the registration, and on 31 March 2021, the District Court, Cabarrus County entered an Order Confirming Registration of Foreign Child Custody Order. (Capitalization altered.) But here, the issue is modification of a *child support* order, not child custody, and the Order Confirming Registration of Foreign Child Custody Order did not address child support. (Capitalization altered.)

B. Registration Requirements for Child Support Orders

The registration requirements for child custody orders and child support orders issued out-of-state are different. *Compare* N.C. Gen. Stat. § 50A-305 (2021) ("Registration of child-custody determination.") *with* N.C. Gen. Stat. § 52C-6-602 (2021) ("Procedure to register order for

enforcement.") *and* N.C. Gen. Stat. § 52C-6-609 ("Procedure to register child support order of another state for modification."). This Court has recognized the differences in registration and modification jurisdiction for out-of-state child support orders, as governed by UIFSA, and the registration and modification of child custody orders, as governed by the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). *See*, *e.g.*, *Halterman*, 276 N.C. App. at 76, 855 S.E.2d at 818. ("For purposes of child custody, the focus is on the residence of the children, and personal jurisdiction over a parent is not required. For purposes of child support modification and enforcement, the focus is on the residence of the obligor . . . ." (citations omitted)). For example, in *Halterman*, this Court ultimately determined the mother did not properly register an out-of-state child support order since the registration was "in substance and in form a petition to register a foreign custody order . . . not a petition to register" an out-of-state support order. *Id.* at 77-78, 855 S.E.2d at 819. Additionally, our Administrative Office of the Courts has a separate form for registering child support orders as opposed to child custody orders, reflecting the different statutory requirements for registration of each type of order. *See* Form AOC-CV-505, Rev. 5/16 ("Notice of Registration of Foreign Support Order(s)" (capitalization altered)).

Child support orders issued in another state are registered under North Carolina General Statute Section 52C-6-602, UIFSA. *See* N.C. Gen. Stat. § 52C-6-602 (2021).

> Under UIFSA, a child support order is first entered by the "issuing tribunal" in the "issuing state." N.C. Gen.Stat. § 52C–6–609 (2009) establishes that if an obligee wants to modify an order against an obligor who resides in a different state, the obligee must "register" the order in the state in which the obligor resides. *See* N.C. Gen.Stat. § 52C–6–609 cmt. ("A petitioner wishing to register a support order of another state for purposes of modification must . . . follow the procedure for registration set forth in [N.C. Gen. Stat. § 52C–6–602 (2009),]" which requires registration in "the tribunal for the county in which the obligor resides in this State[.]").

Crenshaw v. Williams, 211 N.C. App. 136, 140, 710 S.E.2d 227, 230 (2011) (citing to the 2009 version of Chapter 52C) (citations omitted). North Carolina General Statute Section 52C-6-609 addresses the registration of a child support order issued in another state. Section 52C-6-609 provides,

> A party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another state shall register that order in this State in the same manner provided in G.S. 52C-6-601 through G.S. 52C-6-608 if the order has not been registered.

N.C. Gen. Stat. § 52C-6-609. North Carolina General Statute Section 52C-6-602 sets out the requirements for registration of a child support order:

> (a) Except as otherwise provided in G.S. 52C-7-706, a support order or income-withholding order of another state or a foreign support order may be registered in this State by sending the following records to the appropriate tribunal in this State:
>
> (1) A letter of transmittal to the tribunal requesting registration and enforcement;
>
> (2) Two copies, including one certified copy, of the order to be registered, including any modification of the order;
>
> (3) A sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage;
>
> (4) The name of the obligor and, if known:
>
> a. The obligor's address and social security number;
>
> b. The name and address of the obligor's employer and any other source of income of the obligor; and
>
> c. A description and the location of property of the obligor in this State not exempt from execution; and
>
> (5) Except as otherwise provided in G.S. 52C-3-311, the name and address of the obligee and, if applicable, the person to whom support payments are to be remitted.

N.C. Gen. Stat. § 52C-6-602.

Here, neither party has registered the Virginia Order in North Carolina as an out-of-state child support order; Mother merely filed a "Petition for Registration of Foreign *Child Custody Order*[,]" (emphasis added) (capitalization altered), and the trial court entered an "Order Confirming Registration or Denying Confirmation or Registration of

Foreign *Child Custody Order*[.]" (Emphasis added.) (Capitalization altered.) Thus, the Virginia Order, as to child support, was not properly registered in North Carolina for enforcement or modification purposes.

C. Jurisdiction for Modification of Out-of-State Child Support Orders

Subject matter jurisdiction for modification of an out-of-state child support order may be established under either North Carolina General Statute Section 52C-6-611 or 52C-6-613. North Carolina does not have jurisdiction to modify the Virginia Order under North Carolina General Statute Section 52C-6-613 because, in part, this applies only if *both* parents reside in North Carolina; however, Mother resides in Japan. *See* N.C. Gen. Stat. § 52C-6-613 ("(a) If all of the parties who are individuals *reside in this State* . . . ." (emphasis added)).

North Carolina General Statute Section 52C-6-611 provides for jurisdiction to modify an out-of-state child support order if Section 52C-6-613 does not apply:

> (a) If G.S. 52C-6-613 does not apply, upon petition, a tribunal of this State may modify a child support order issued in another state which is registered in this State if, after notice and hearing, the tribunal finds that:
>
> (1) The following requirements are met:
>
> a. Neither the child, nor the obligee who is an individual, nor the obligor resides in the issuing state;
>
> b. A petitioner who is a nonresident of this State seeks modification; and
>
> c. The respondent is subject to the personal jurisdiction of the tribunal of this State; or
>
> (2) This State is the residence of the child, or a party who is an individual, is subject to the personal jurisdiction of the tribunal of this State and *all of the parties who are individuals have filed consents in a record in the issuing tribunal for a tribunal of this State to modify the support order and assume continuing, exclusive jurisdiction.*

N.C. Gen. Stat. § 52C-6-611 (2021) (emphasis added).

Here, the trial court's findings would not support subject matter jurisdiction to modify under North Carolina General Statute Section

52C-6-611(a) subsection (1) because the party seeking modification – Father – is a resident of North Carolina. In addition, the record does not reveal if the trial court could have jurisdiction under Section 52C-6-611(a)(2). While the trial court found that North Carolina is the residence of the children and Father, there is no indication that "all of the parties who are individuals" – Mother and Father – "have filed consents in a record in the issuing tribunal[,]" Virginia, "for a tribunal of this State to modify the support order and assume continuing, exclusive jurisdiction." *See* N.C. Gen. Stat. § 52C-6-611(a)(2). Therefore, even if the Virginia Order could be considered as registered in North Carolina, the trial court would still not have jurisdiction to modify the child support provisions under North Carolina General Statute Sections 52C-6-611 or 613.

As noted in *Crenshaw*,

> In the overwhelming majority of cases, the party seeking modification must seek that relief in a new forum, almost invariably the State of residence of the other party. This rule applies to either obligor or obligee, depending on which of those parties seeks to modify.
>
> This restriction attempts to achieve a rough justice between the parties in the majority of cases by preventing a litigant from choosing to seek modification in a local tribunal to the marked disadvantage of the other party. In short, the obligee is required to register the existing order and seek modification of that order in a State which has personal jurisdiction over the obligor other than the State of the obligee's residence. Most typically this will be the State of residence of the obligor.

N.C. Gen. Stat. § 52C-6-611 cmt (2009). As North Carolina is not the proper forum for modifying the Michigan support order, the trial court lacked the authority to modify that order. *See Lacarrubba v. Lacarrubba*, 202 N.C. App. 532, ___, 688 S.E.2d 769, 773 (2010) (concluding North Carolina court "lacked authority to modify New York child support order or reduce arrearages" where obligee, who resided in Florida, registered foreign order in North Carolina for enforcement only and obligee did not consent to personal jurisdiction in North Carolina).

Crenshaw, 211 N.C. App. at 140–41, 710 S.E.2d at 231 (ellipses omitted) (citation omitted); *see also Lacarrubba v. Lacarrubba*, 202 N.C. App. 532, 538, 688 S.E.2d 769, 773 (2010) (noting the strict compliance required by UIFSA, and though the order was registered here, it was for "enforcement only[;]" thus, modification was not allowed).

Accordingly, prior cases from this Court address the different requirements for registration and modification jurisdiction for child custody orders under the UCCJEA and child support orders under UIFSA. *See*, *e.g.*, *Halterman*, 276 N.C. App. at 76, 855 S.E.2d at 818. Because the Virginia Order was not registered under UIFSA, the trial court did not have subject matter jurisdiction to modify child support. *See Crenshaw*, 211 N.C. App. at 140, 710 S.E.2d at 230 ("*See* N.C. Gen. Stat. § 52C–6–609 cmt. ('A petitioner wishing to register a support order of another state for purposes of modification must . . . follow the procedure for registration set forth in [N.C. Gen. Stat. § 52C–6–602 (2009),]' which requires registration in 'the tribunal for the county in which the obligor resides in this State[.]' ") (alterations in original)).

III. Conclusion

Because the Virginia Order was not properly registered in North Carolina under UIFSA for purposes of modification of the child support obligation, the trial court did not have subject matter jurisdiction to modify the child support provisions of the Virginia Order.

VACATED.

Judges CARPENTER and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
NATHANIEL E. DIXON, DEFENDANT

No. COA21-471

Filed 5 December 2023

1. Jury—selection—Batson challenge—third step—clear error analysis

In a first-degree murder trial, the trial court did not clearly err by denying defendant's *Batson* challenge to the State's use of a peremptory strike against an African American potential juror—the only one of two in the jury pool to be peremptorily struck after others were excused for cause—where the trial court accepted the State's race-neutral reason that the potential juror had expressed reservations about the death penalty, and where there was no evidence of racially discriminatory intent.

2. Criminal Law—motion for mistrial—first-degree murder prosecution—juror knowledge of witness killed during trial—abuse of discretion analysis

In a first-degree murder trial, the trial court did not abuse its discretion by denying defendant's two motions for a mistrial concerning jurors who learned about the murder of one of the State's witnesses during trial. At the time of the hearing on the first motion, which led to one juror being excused for cause, there was no evidence that any other impaneled jurors knew of the witness's death. With regard to the second motion, which defendant filed after another juror belatedly disclosed—after the verdict was reached—that he had inadvertently learned about the death of the witness by seeing a headline on his cell phone, the trial court was in the best position to gauge the juror's truthfulness regarding the lack of impact the knowledge had on his ability to be fair and impartial.

3. Judges—motion to recuse—first-degree murder trial—hearing on motion for mistrial

In a first-degree murder trial, the trial judge did not err by refusing to recuse himself from hearing defendant's motion for mistrial concerning a juror who failed to report that he had learned about the murder of a State's witness during trial. Defendant failed to show that the trial judge was a witness for or against one of the parties in

the case and there was no indication that the judge exhibited such a bias or prejudice as to be unable to rule impartially.

Chief Judge STROUD and Judge ZACHARY concurring in the result only.

Appeal by Defendant from judgments entered 16 July 2019 by Judge R. Gregory Horne in Buncombe County Superior Court. Originally heard in the Court of Appeals 20 September 2022.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

MURPHY, Judge.

Where a Defendant cannot demonstrate at the third step of *Batson* that the State acted on a discriminatory purpose with respect to race and that the trial court clearly erred in its ruling, we will not overturn the denial of a *Batson* ruling on appeal. Here, taking into account the whole Record as it existed before the trial court at the time of Defendant's *Batson* objection, we are not persuaded that the State's peremptory strike of one of only two African American prospective jurors in the jury pool was motivated by discriminatory intent, even where the State made a greater effort to rehabilitate other jurors who expressed reservations about the death penalty, because we cannot be confident the trial court was mistaken in its conclusion that reservations about the death penalty still explained the exercise of the strike.

Furthermore, given the high degree of discretion with which a trial court is entrusted in ruling on a motion for mistrial, we cannot say the trial court abused that discretion in denying Defendant's. The trial court also permissibly ruled on all motions for mistrial, as the trial judge was not a witness in any associated hearing.

BACKGROUND

This case arises out of Defendant Nathaniel E. Dixon's appeal of his criminal convictions for first-degree murder, attempted first-degree murder, and malicious maiming on 26 June 2019, following a high-profile jury trial that lasted several weeks and garnered significant media attention.

During voir dire, the State struck an African American[1] potential juror, R.D.[2], who expressed reservations about the death penalty:

> [R.D.]: Personally I have reservations about the death penalty. Simply because [it's] disproportionate. Most people who know anything about the death penalty know[] that the statistics show that African American[s] receive it more than others. You know, this is weighed on me like quite a bit. Just back and forth. And . . . I wish I wasn't here, honestly. I wish the reason that I'm here never occurred. And . . . that's not a presumption of guilt or innocence for anyone. I just wish that what happened, that we know for sure never happened, so I was never in this courtroom. But what I . . . struggle with is, I'd rather my life not be interrupted. I'd rather be only thinking about what I have to do at work today and the plans that I have at the end of June. But then there's another side of me that understands [] something tragic really did happen. And if this is the course for justice to be served, a part of me just wants to see that happen.
>
> So the law is the law, and whatever is decided, I would hope that the punishment fits the crime. I would hope that the Defense would be confident in doing their job, that they can present their case to where they believe what they're doing is going to help their Defendant, and I would hope that the Prosecution is confident in that they can present their case, that justice would be served one way or another. And then whomever has to decide, decides the right thing. But it weighs heavily on me when just thinking that we might be part of this process. So the short answer is neither one of those penalties do I object to.
>
> [THE STATE]: Okay. Well, I guess are your -- I believe the terms you used [were] you have reservations about the death penalty. And would your feelings about that be

1. For consistency with the Record, we use the term "African American" in this opinion, though we use it interchangeably with the term "black" referenced in our caselaw. Furthermore, as this case involves an appeal from a *Batson* objection, we note that Defendant is African American.

2. To limit the use of juror and potential juror names and in consideration of concerns regarding juror safety raised during and after the trial, we use pseudonyms for the jurors and potential jurors in this case.

such – are your feelings such that you could not under any circumstance vote for a death sentence?

[R.D.]: Well, it's not that I couldn't. I hoped to never put myself in a position where I'm on the other side of one of those tables. But my point is, if that's what the law requires, then that's what the law requires.

[THE STATE]: I guess --

[R.D.]: My reservation is, I don't want to see anybody die. That's my reservation.

[THE STATE]: I understand. Well, basically the trial would be divided into two parts. The first part would be one determining guilt or innocence on the charge -- particularly on the charge of first degree murder. There are other charges the jury would also consider. But as far as the penalty goes, the only one that potentially would go to a second phase would be the charge of first degree murder. So the first stage in any of this would be the jury would have to consider that. And do your -- again, you have some clearly heart-felt personal feelings about the death penalty. And because of those, would those affect your -- or prevent you from making an impartial decision based on the evidence about the Defendant's guilt in the first part of the trial?

[R.D.]: No.

[THE STATE]: So you think you could sit through that part?

[R.D.]: Certainly.

[THE STATE]: Okay. And if the Defendant is guilty -- found guilty of first degree murder, we would then move into a second or a sentencing phase of the trial. And that phase as well as the first phase, the burden is on the State and that's always proof beyond a reasonable doubt. But in the second phase, the first part of that is the State would produce -- present evidence of what are called aggravating circumstances. And that would be things that would tend to suggest that the appropriate penalty is a death sentence.

[R.D.]: Sure.

[THE STATE]: And again, the jury would have to consider those and find them -- any one of them exists beyond a reasonable doubt. The second part of that, the Defense then would have the ability to present evidence of what are called mitigating circumstances. And again, that would be evidence that would tend to show that the appropriate sentence is one of life in prison. And there the burden is different on the Defense. It's not beyond a reasonable doubt. It's the lower burden of preponderance of the evidence. And in that -- also for the mitigating circumstances there doesn't have to be unanimity. Any juror who felt like -- particular mitigating circumstance applied, had been proven to themselves could consider that. Whether or not everyone else agreed on that. So the mitigating is more of an individual juror decision.

[R.D.]: Yes, sir.

[THE STATE]: And again, if aggravating circumstances have been found, the next step the jury would be asked to weigh those. And the standard there is -- and the question the jury would have to ask is, are the mitigating circumstances insufficient to outweigh the aggravating circumstances. Which is kind of a backwards question --

[R.D.]: I understand.

[THE STATE]: -- the way it's asked; but basically weighing. And again, that's beyond a reasonable doubt and mitigating insufficient to outweigh the aggravating. And if the jury finds that, then the final question is, are the aggravating circumstances when taken into account the mitigating, are they sufficiently substantial to call for the imposition of a death sentence. And again, that's a beyond a reasonable doubt question as well. And given that -- and that's the framework the jury would have to do that. And in your case -- and again, you're the only one -- and again, you've clearly given a lot of thought to this. There's no question. But if the Defendant was found guilty of first degree murder, would your feelings about the death penalty substantially impair your ability to vote at the sentencing hearing to impose a death sentence no matter what the evidence or aggravating circumstances that were proved?

[R.D.]: No.

[THE STATE]: So you think if the -- if you felt like it was appropriate, you would be able to vote for a death sentence?

[R.D.]: If that's what the law required, yes.

[THE STATE]: Again --

[R.D.]: I get it.

[THE STATE]: The laws requires --

[R.D.]: I understand nuances. I'm a [p]astor. I understand backwards questions, too. I use them all the time, but I understand what you're saying.

[THE STATE]: And again --

[R.D.]: I understand the framework.

[THE STATE]: The law requires you to consider --

[R.D.]: Yes.

[THE STATE]: The law doesn't require a vote one way or the other. That's a juror's decision about how to vote.

[R.D.]: I would not --

[THE STATE]: You would not --

[R.D.]: I would not have any reservations.

[THE STATE]: Okay. Likewise, if you felt like the evidence called for it, would you be able to vote for a sentence of life in prison?

[R.D.]: Certainly.

Defendant raised an objection to the State's peremptory strike of R.D. under *Batson v. Kentucky*, which the trial court overruled during the following exchange in open court:

[DEFENDANT]: [] [Y]our Honor, at the appropriate time, we do enter a *Batson* challenge as to Alternate Number One, [R.D.].

. . . .

Your Honor, in regards to [R.D.], and I tried to be very careful . . . to write down everything that he said. Certainly there was nothing indicated on his questionnaire . . . that

indicated that he could not follow the law, that he was not available, that he could not make the time. He certainly hadn't formed any opinions. He understood clearly the presumption of innocence and the reasonable doubt theories that we all deal with. And I was especially struck[ ] when he was asked questions about his views on the death penalty. . . . [O]ne of the reasons why we feel like the District Attorney's peremptory strike against him, that there are some racial undertones to it, because what he said was he didn't want to be here. He didn't want to be in this position. He would do it. And he made the statement that if anybody is familiar with personal statistics, they do show that there are more African Americans that receive the death penalty. But then he went on to say that it was weighing on him. He's a minister. He said he has struggled with his decisions in this. Prefers that his life not be interrupted, but then he said the law is the law and what is decided. The punishment[] fits the crime. And he was confident. . . . . He made that statement. And he also said if the State is confident and can convince him beyond a reasonable doubt, whoever has to decide will make the right decision. He made it very clear that he . . . wasn't predisposed to either penalty. That he could consider each one. That there wasn't either penalty that he objected to. He didn't want to see anyone die but that he could do it. He's, in our opinion, the perfect juror. Not only is he rational and intelligent and thoughtful in his answers[,] . . . [b]ut he is what we would call the perfect juror for a death-qualified jury, and that is somebody who has made it very clear that he can consider both sides[.] . . . [W]ith everybody else that they have accepted, we can find the only reason that they would want to kick [R.D.] off is because he is an African American man and because he did happen to make that statement which is a true statement. That the death penalty is more often than not applied to African Americans if you look to see who is on our death row.

. . . .

I think obvious to all of us as we have received the past three jury pools that these pools are woefully lacking in diversity. I counted in this particular pool that we got today . . . [and] we had a total of 89 people . . . in this pool. And five of them were African American and then two of

them were released for cause. In the other two pools, it has been similar to that, and that is . . . not a cross section of this community. I don't know why that is. . . . I haven't done statistical studies. I don't know why that is that our jury pools in Buncombe County are so obviously lacking in diversity.

But I think given that, the fact that we have had the opportunity to speak to one African American juror and that gentleman is on our jury now, we haven't had any opportunity to question any other African Americans until [R.D.] came in. And I think that is something to be considered as well. The fact that our client has[] . . a Sixth Amendment right to a fair trial. He has a right under . . . the Sixth and the Eighth Amendment and due process to be judged by . . . a cross section of the community. And although I think we . . . worked hard to do that, and we certainly have been able to obtain one African American juror who is appropriate for death-qualified jury, we have not had the opportunity to question anybody else until [R.D.]. And I think that also needs to be considered in whether or not the State should be allowed to strike what may well be the only other African American potential juror that we'll have a chance to talk to in this case. I don't . . . know that we have any more. I think we might have one somewhere. So we would ask that you take that into consideration as well.

THE COURT: Okay. Thank you. The issue for the Court to determine under *Batson* . . . is, first, whether or not the party making the *Batson* claim has made a sufficient showing that the other party exercised appropriate challenge on the basis of race or sex. I'm looking at *State v. Smith*, 351 [N.C.] 251 [2000]. The Court will take the following matters into consideration to determine whether or not the prima facie showing has been taken by the Defendant.

First, []my recollection is that . . . the State has exercised no peremptory challenges as to any previous African American juror. There was a previous African American juror that was excused by cause but that was with the consent of [] Defendant. . . . [T]he Court did not observe any racially motivated questions by the State. . . . [R.D.] did make the statement about the death penalty . . . [being]

disproportionately given to African Americans. . . . . So it is a low standard. Lower than a preponderance as shown by our evidence for the initial threshold showing.

Based upon that statement, the Court is going to find a prima facie showing and then turn to the State for any neutral justification. So . . . I'll recognize the State at this point.

[THE STATE]: Well, first of all, I would -- I think I would object to [the] finding of a prima facie case, your Honor. I don't think there has been a showing of that. I particularly think the part about the jury pool, given that Buncombe County is only six or seven percent African American, the numbers that they cited regarding the jury pool would not be particularly out of order given Buncombe County's overall population.

However, as far as a reason for the strike of [R.D.] is he did express reservations about the death penalty. He was very clear about that. He had thought about it and had reservations about it and its application. Just like the juror next to him, [M.K.]. She also expressed rather [] different reservations about the death penalty, but she expressed them as well. And that would be the State's reason for striking him are the reservations he expressed about the death penalty, your Honor.

. . . .

And . . . I don't think the reasoning behind is reservations, your Honor, is relevant. The fac[t] is he expressed reservations about the death penalty.

THE COURT: All right. Thank you. [Defendant]?

[DEFENDANT]: Well, your Honor, I . . . was very careful to write down what [R.D.] was saying, because what I recall happening is he made it very clear when he said the punishment should fit the crime. That . . . he wasn't predisposed to either sentence; and, in fact, I think what the record would show is that it was at that point that [the State] asked him the questions that you would normally ask of somebody that says, I don't think I can consider the death penalty. And, in fact, I think those questions were an attempt to lead [R.D.] to some different conclusion other

> than that which he had already given in a very sincere and genuine way, and that is that it would be very difficult for him. The law is the law. Whatever is decided, punishment fits the crime. He'd listen [to] what the Defendant presents. He[] . . . hopes that the State is confident in their case. And whomever has to decide it will make the right decision. Then he clearly said, neither penalty do I object to. I don't want to see anyone die he said. There's nothing about that that suggests that he had any reservations about the death penalty. If that's the reason that the State is giving.
>
> THE COURT: All right. Thank you. . . . [F]or purposes of the *Batson* hearing, the Court would find that . . . under the low threshold, the Court found a prima facie showing. [The] State has now provided the justification indicating that he expressed reservations about the death penalty. I wrote down, quote, I have reservations. It is correct[,] as [Defendant] indicated[,] that he did indicate that he could consider both punishments. [The] Court does consider, again, as I indicated earlier[,] that the State has exercised no peremptory challenges as to any previous African American juror. The one . . . African American juror that was called to the panel and excused was excused by cause and that was consented to by the Defense and that was a situation in which she was related to some of the parties involved. So that was not a peremptory challenge. That was a challenge for cause.
>
> Again, no racially-motivated questions were asked. [The] State has used at this point what would be . . . 16 previous peremptory challenges. . . . 15 of which . . . involved white jurors. And again, he did express reservations about the death penalty.
>
> The Court would find based upon the evidence presented that there has not been a sufficient showing that the juror's race was a significant or motivating factor in striking [R.D.]. And so the *Batson* challenge is respectfully denied.

No further *Batson* issues were raised during jury selection.

While trial was ongoing, one of the State's witnesses was killed, and the Buncombe County District Attorney issued a press release identifying the victim by her involvement in the case. The release stated, in

pertinent part, that the trial court had "issued appropriate orders to protect individuals who are involved with the trial to ensure proceedings may safely continue." One of the jurors learned of the press release and was excused for cause. Defendant moved for a mistrial, and the trial court denied the motion.

Two days after the jury reached its verdict, Defendant became aware that another juror had learned of the murder of the State's witness, and Defendant moved once again for a mistrial. The trial court conducted a hearing on the matter and ruled that, in light of the juror having communicated to the bailiff that learning of the news did not personally concern him, the juror's failure to report his having obtained the information to the court had "not resulted in substantial or irreparable prejudice to [Defendant's] case[.]" The trial court also denied this motion for mistrial.

ANALYSIS

On appeal, Defendant argues (A) the trial court erred in overruling his *Batson* challenge; (B) the trial court abused its discretion in not granting his motions for mistrial; and (C) the trial court erred in not recusing from Defendant's final motion for mistrial, allegedly because the resolution of the motion "hinged on [the trial judge's] own testimony."[3] For the reasons stated below, we hold the trial court did not err.

A. *Batson*

[1] First, Defendant argues the trial court erred in denying his *Batson* objection. Under *Batson v. Kentucky*,

> a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show . . . that the prosecutor has exercised peremptory challenges to remove [members] from the venire [on the basis of] race. Second, the

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3. Defendant has also sought an *in camera* review of the sealed personnel records of an officer testifying in the case. *See State v. Hardy*, 293 N.C. 105, 128 (1977) ("[I]f the [trial] judge, after the *in camera* examination [of allegedly exculpatory evidence], rules against [a] defendant on his motion, the judge should order the sealed statement placed in the record for appellate review."). However, we have reviewed the personnel records in question and have identified nothing that would be both material and favorable to Defendant. *See State v. Sheffield*, 282 N.C. App. 667, 684-85, *disc. rev. denied*, 382 N.C. 328 (2022) (separately analyzing materiality and favorability). The trial court, therefore, did not err in its *in camera* review of the sealed personnel records.

> defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.
>
> . . . .
>
> Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging [jurors of the excluded class].

Batson v. Kentucky, 476 U.S. 79, 96, 97 (1986) (marks and citations omitted). Thus, a *Batson* analysis consists of three steps: “First, the defendant must make a prima facie showing that the [S]tate exercised a race-based peremptory challenge.” *State v. Taylor*, 362 N.C. 514, 527 (2008). Second, “[i]f the defendant makes the requisite showing, the burden shifts to the [S]tate to offer a facially valid, race-neutral explanation for the peremptory challenge.” *Id.* “Finally, the trial court must decide whether the defendant has proved purposeful discrimination.” *Id.*

In *State v. Hobbs*, our Supreme Court clarified the procedural requirements applicable to a *Batson* analysis. It emphasized that, “when a defendant presents evidence raising an inference of discrimination, a trial court, and a reviewing appellate court, must consider that evidence in determining whether the defendant has proved purposeful discrimination in the State’s use of a peremptory challenge.” *State v. Hobbs*, 374 N.C. 345, 356 (2020). It then reiterated the U.S. Supreme Court’s holding that

> [a] criminal defendant may rely on a variety of evidence to support a claim that a prosecutor’s peremptory strikes were made on the basis of race. This evidence includes, but is not limited to:
>
> • statistical evidence about the prosecutor’s use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
>
> • evidence of a prosecutor’s disparate questioning and investigation of black and white prospective jurors in the case;

> • side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
>
> • a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
>
> • relevant history of the State's peremptory strikes in past cases; or
>
> • other relevant circumstances that bear upon the issue of racial discrimination.

Id. (marks and citation omitted) (citing *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019)).

Here, Defendant argues on appeal that the trial court erred in its *Batson* ruling because the State's reason for striking R.D.—reservations about the death penalty—was pretextual. In support of this argument, Defendant argues that two similarly situated white jurors gave similar answers to Defendant and were not stricken by the State; that the State, in addition to striking R.D., struck prospective jurors who expressed concerns relating to race; that the State's strike rate was suspect, especially in light of historic statistical trends in North Carolina strike rates by race in capital trials; and that the racial makeup of the jury pool rendered this case susceptible to racial discrimination.

As the trial court explicitly issued its ruling at the third step of *Batson*, we review its determination for clear error. *Foster v. Chatman*, 578 U.S. 488, 500 (2016) (marks omitted) ("*Batson*'s third step[] . . . turns on factual determinations, and, in the absence of exceptional circumstances, we defer to [trial] court factual findings unless we conclude that they are clearly erroneous."). However, before conducting our ultimate analysis, we must address two threshold issues.

1. Scope of Defendant's Argument on Appeal

First, several of Defendant's arguments on appeal were not actually before the trial court during the *Batson* hearing. The whole of Defendant's argument before the trial court, reproduced in relevant part above, concerned R.D.'s willingness to impose the death penalty if legally warranted, the fact that R.D.'s misgivings about the death penalty arose from his concerns about its racially disparate rate of application, the overall lack of diversity in Buncombe County's jury pools, the fact that R.D. was one of only two African American prospective jurors at the time the State struck him, and the State's inappropriately

having pursued a line of inquiry with R.D. that is typically pursued only with jurors who have expressed an inability to impose the death penalty. Beyond these arguments, the trial court also considered, on its own initiative, whether the State asked R.D. "racially motivated" questions. At no point during trial did Defendant raise arguments concerning any comparable answers by white jurors, nor did Defendant discuss the striking of jurors of other races who voiced concerns pertaining to race, as he does now on appeal.

Defendant and the State disagree as to the proper scope of appellate review, and sources conflict as to whether and to what extent a defendant may make additional *Batson* arguments on appeal. At face value, the traditional emphasis on the Defendant's burden at step three of *Batson* should operate to limit the scope of available arguments on appeal to what was actually argued at trial. *Batson*, 476 U.S. at 93 (marks omitted) ("[T]he burden is, of course, on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination."); *see also State v. Bennett*, 282 N.C. App. 585, 601 (citing N.C. R. App. P. 10(a)(1)) (remarking, with respect to a *Batson* argument, that "a defendant must (1) raise the issue below and (2) argue the same theory below."), *appeal dismissed*, *review denied*, 383 N.C. 694 (2022). Moreover, even in *State v. Hobbs*, which emphasized that "a trial court, and a reviewing appellate court, must consider [all of a defendant's] evidence in determining whether the defendant has proved purposeful discrimination[,]" the scope of the requirement was limited to instances "when a defendant presents evidence raising an inference of discrimination[.]" *Hobbs*, 374 N.C. at 356; *see also State v. Clegg*, 380 N.C. 127, 149-50 (describing step three of *Batson* as the trial court "weigh[ing] all of the reasoning from both sides").

Nonetheless, both our Supreme Court and the U.S. Supreme Court have cautioned that, " 'in reviewing a ruling claimed to be *Batson* error, *all* of the circumstances that bear upon the issue of racial animosity must be consulted.' " *State v. Waring*, 364 N.C. 443, 475 (2010) (emphasis added) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)), *cert. denied*, 565 U.S. 832 (2011); *see also Flowers*, 139 S. Ct. at 2243 (emphasis added) ("The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, *and* in light of the arguments of the parties."). Thus, while the holding in *Hobbs* creates an affirmative duty to weigh *at least* the evidence put forth by Defendant during the *Batson* hearing at trial, *see Hobbs*, 374 N.C. at 356, we understand the proper scope of our review on appeal to include all relevant information in the Record at the time, regardless of

whether Defendant's arguments at trial specifically invoked that information.[4] This approach comports with that used by the U.S. Supreme Court. *Miller-El v. Dretke*, 545 U.S. 231, 240-44 (2005) (conducting a comparative juror analysis on appeal not used before the trial court).

This analysis also mirrors the scope of review applied to clear error in our First Amendment jurisprudence. "In cases raising First Amendment issues[,] an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *State v. Taylor*, 379 N.C. 589, 608 (2021) (marks omitted) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)). This whole record review "does not empower an appellate court to ignore a trial court's factual determinations[,]" *id.*; rather, the underlying "credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the opportunity to observe the demeanor of the witnesses[.]" *Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 43 (2020) (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 689 (1989)). This whole record review does not necessarily require a detailed written exploration of all salient features of a record, only that such a review have actually occurred.[5] *E.g.*, *Mitchell v. Univ. of N.C. Bd. of Governors*, 288 N.C. App. 232, 242-43 (2023). Our *Batson* analysis, therefore, is not only consistent with the existing *Batson* caselaw, but also mirrored elsewhere in our State's constitutional clear error jurisprudence.

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4. This further highlights an emergent distinction in our caselaw between substantively correct *Batson* analyses—analyses that correctly answer whether the State purposefully discriminated based on race—and procedurally correct *Batson* analyses—analyses that adequately addresses a defendant's *Batson* arguments at step one and three. A *Batson* proceeding, even if substantively correct, may be procedurally deficient if either we or the trial court fail to adequately address a defendant's arguments. *Compare Hobbs*, 374 N.C. at 360 (reversing and remanding to the trial court at *Batson*'s third step, in part, for "failing to engage in a comparative juror analysis of the prospective juror's voir dire responses and failing to consider the historical evidence of discrimination that [the defendant] raised") *with State v. Hobbs*, 384 N.C. 144, 156-57 (2023) (holding, in the same case, that the trial court did not clearly err in its substantive *Batson* ruling). Thus, under *Hobbs*, a *Batson* ruling may be overturned on appeal on substantive grounds for any reason clear from the Record at the time of the ruling; however, *Batson* analyses are only *procedurally* deficient if they fail to respond to a defendant's arguments.

5. This scope of review also, we think, best suits both the practical and substantive needs of our justice system, balancing the paramount importance of ensuring that racial discrimination not occur in North Carolina's jury pools with the need to avoid the systemic inefficiency that would result from a written analysis spanning the entire Record in every case on appeal. *Batson v. Kentucky*, 476 U.S. at 99 (1986) ("[P]ublic respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.").

For these reasons, we base our analysis on a review of the whole record, engaging in a full, written analysis of all arguments raised by Defendant at trial, as required by *Hobbs*. *Hobbs*, 374 N.C. at 356. We also, for methodological clarity, address in writing most[6] arguments Defendant raises for the first time on appeal; those arguments, while not encompassed under the procedural command of *Hobbs*, still factor into our review of the whole record.

2. Race and Views About Race

Defendant has made two arguments pertaining to stricken jurors "who expressed concern about racial disparities"—one as to R.D. and another as to three white prospective jurors. Thus, as a second threshold issue, we devote this section of the opinion to clarifying whether and to what extent these arguments factor into our analysis.

Our Supreme Court has made clear that, at step three of *Batson*,

> "[t]he ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2244 (cleaned up). Thus, "[n]o matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race." *Hernandez* [*v. New York*, 500 U.S. 352, 375 (1991)] (O'Connor, J., concurring).

State v. Campbell, 384 N.C. 126, 135 (2023). In other words, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 134-35 (citing *Hernandez*, 500 U.S. at 360).

Race, for all the discussion devoted to it in the legal field and beyond, naturally generates a variety of viewpoints as to the nature and extent of its significance, as well as what norms and policies ought to be adopted surrounding it. *Cf. Mitchell*, 288 N.C. App. at 246 (Murphy, J., concurring in part and dissenting in part) (citing Kevin Laland, *Racism in academia, and why the 'little things' matter*, Nature (Aug. 25, 2020), https://www.nature.com/articles/d41586-020-02471-6; John McWhorter, *Words Have Lost Their Common Meaning*, The Atlantic (Mar. 31, 2021), https://www.theatlantic.com/ideas/archive/2021/03/nation-divided-language/618461/; Yuvraj Joshi, *Racial Transition*, 98 Wash. U. L. Rev. 1181,

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6. We do not include Defendant's evidence and arguments pertaining to death penalty statistics by race in North Carolina in our analysis because, as Defendant concedes, this evidence was not in the record before the trial court at the time of the *Batson* hearing.

1203-1208 (2021)) ("Copious amounts of ink have been spilled over what the significance of race in academia should be, what constitutes racism, and how to solve the myriad of problems it poses."). Just as naturally, we would not expect—nor is it in fact the case—that all members of a given racial group subscribe to the same views about race or that a particular view about race canonically expresses the interests of any given group. For this reason, a peremptory strike employed on the basis of a stricken juror's views about race, standing alone, will not itself establish a violation of *Batson*, "[n]o matter how closely tied . . . to race th[at] explanation for a peremptory strike may be," topically speaking. *Campbell*, 384 N.C. at 135 (citing *Hernandez*, 500 U.S. at 375).

Nonetheless, just as views about race are not identical with race, they are also not fully separable from an inquiry—taking "all of the circumstances that bear upon the issue of racial animosity" into account—as to whether a strike had been used with discriminatory intent. *Waring*, 364 N.C. at 475. After all, if the State were of a mind to strike a juror based on his or her race, the same discriminatory animus that motivated a strike based on race would also tend to motivate strikes of jurors espousing a special sympathy for that racial group, especially in a case where the race of the stricken juror and the race of the defendant align. Put differently, while it is not, in fact, the case that discrimination based on race and discrimination based on views about race are the same for *Batson* analysis purposes, the two would run closely enough together in the mind of the discriminator that a racial-views-based strike can operate as a "plus factor" with respect to an allegedly race-based strike.

Accordingly, to the extent Defendant alleges the strike of juror R.D. having been based on his views about race would amount to a strike based on race, we reject that argument. However, to the extent Defendant offers R.D.'s views about race and the views of the three stricken white jurors as context to support an allegation that the strike of R.D. was pretextual, we consider his argument for that limited purpose.

3. *Batson* Analysis

Turning to the merits, Defendant argues that the State's proffered race-neutral reasons for its strike—reservations about the death penalty—was pretextual for the following reasons: first, juror R.D. did not actually express an inability to impose the death penalty, yet he was asked questions similar to those asked of jurors who expressed an inability to do so; second, the State accepted similarly situated white jurors, J.C. and C.D., who also expressed reservations about the death penalty; third, the State used peremptory strikes on jurors X.I., D.F., and B.M., "who expressed race-based concerns"; and, finally, the jury

pool being almost entirely white rendered this case more susceptible to racial discrimination. Meanwhile, in addition to disputing Defendant's arguments, the State points us to the fact that both Defendant and the alleged victims were African American and directs our attention to another white juror it struck, M.K., who was allegedly similar to R.D.

The voir dire responses of J.C., which Defendant alleges demonstrated similar reservations about the death penalty to R.D., were as follows:

> [THE STATE]: As you're aware the one we're trying is charged with first degree murder, and the two possible penalties for first degree murder are life in prison or a death sentence. And with that in mind, do you have any moral, philosophical, or religious beliefs or opinions against the death penalty?
>
> [J.C.]: No, sir.
>
> [THE STATE]: So no particularly strong belief one way or the other?
>
> [J.C.]: No, sir.
>
> [THE STATE]: Okay. So if -- in light of that, under the evidence that was produced, if you thought that a death sentence was the appropriate punishment you would be able to vote for that?
>
> [J.C.]: Yes.
>
> [THE STATE]: And likewise, if you thought a sentence of life in prison was appropriate, you would be able to vote for that?
>
> [J.C.]: Yes, sir.
>
> . . . .
>
> [THE STATE:] [I]f the Defendant was found guilty of first degree murder, would your feelings about the death penalty substantially impair your ability at the sentencing hearing to impose a death sentence no matter what the evidence was?
>
> [J.C.]: Yes.
>
> [THE STATE]: So you think that your feelings about the death penalty might cause a problem?

> [J.C.]: Yes.
>
> [THE STATE]: All right. And what are those feelings you have about --
>
> [J.C.]: Just the way we was brought up as a family, you do not take a life.
>
> [THE STATE]: Okay. So the way you were brought up, do not take a life, think that would affect your ability to sit and consider whether or not to impose a death sentence?
>
> [J.C.]: It could.
>
> [THE STATE]: And are those feelings so strong that you don't think under any circumstance you could vote for a death sentence?
>
> [J.C.]: No, not that I can -- I don't think so. I'd have to know what the circumstances were.
>
> [THE STATE]: Okay. So then what you're telling me is there might be circumstances that you felt were sufficient to call for a death sentence but you would -- that wouldn't be your first inclination?
>
> [J.C.]: Right.
>
> [THE STATE]: And would you be able to keep an open and fair and impartial mind about those issues until you've heard all the evidence and Judge Horne has instructed you about the law?
>
> [J.C.]: I hope I could.
>
> [THE STATE]: I guess the bottomline question then is, and again, not sort of an academic one. In this it's a very direct question. If you thought the evidence called for it, could you walk in here and tell the Court that you voted for death?
>
> [J.C.]: Yes, sir.

The responses of C.D., which Defendant offers for the same purpose, were as follows:

> [THE STATE]: Do you have any moral or religious objections to or opinions against the death penalty?

[C.D.]: I don't really like the death penalty, but I would be willing to give my vote whether or not the evidence provided that the person was guilty or not.

. . . .

[THE STATE]: And is that belief that you have, that opinion that you don't like the death penalty, is that strong enough that it would keep you under any circumstances from voting for a sentence of death?

[C.D.]: No, it wouldn't impede my decision.

. . . .

[THE STATE]: So you -- despite not really, as you put it, not really liking the death penalty, you think under some circumstances at least you would be able to vote in favor of a sentence of death?

[C.D.]: If he was guilty, yes.

[THE STATE]: Well, if he's guilty, then you also realize that you would be obligated to weigh both the sentence of life in prison and the death sentence.

[C.D.]: Yes.

[THE STATE]: You could consider both?

[C.D.]: Yes.

[THE STATE]: And would you be able to go through that process of hearing about aggravating circumstances and mitigating circumstances and weigh those?

[C.D.]: Yes.

[THE STATE]: And if you felt like that the appropriate sentence was one of -- was a death sentence, would you be able to vote for that?

[C.D.]: Yes.

[THE STATE]: Would you be able to walk back into court and announce that that was your verdict?

[C.D.]: Yes.

> [THE STATE]: Similarly, if you felt like the appropriate sentence was one of life in prison, would you be able to vote that?
>
> [C.D.]: Yes.
>
> [THE STATE]: And would you be able to walk back here in court and announce that that was your verdict?
>
> [C.D.]: Yes.

When asked whether she could render a verdict free of racial bias, X.I. affirmatively brought up the scarcity of African Americans on the jury, and D.F. agreed:

> [X.I.:] I thought it was odd that so far it looked like all the people you had to choose from were Caucasians, so I thought that was odd.
>
> [D.F.]: I thought that, too.
>
> [X.I.]: I was concerned you wouldn't end up having any African Americans on your jury.
>
> [THE STATE]: Well, obviously, that is an issue in today's world.
>
> [X.I.]: You can only have what you call in, so I was concerned.
>
> [THE STATE]: And again, that's why it's important to get these issues out.

The State eventually exercised peremptory strikes against both D.F. and X.I., though D.F.'s strike occurred only after she reported that Defendant waved at her.

Later during voir dire, B.M., in response to a similar question about rendering a verdict free of racial bias, made the following remark:

> [B.M.:] I [] think it's going to be challenging because he's African American; and basically everybody in here except for those sitting out in the gallery are not; and so I can't presume to understand his background at all. And so yes -- so that adheres to it. I'm not one who has this color blind mind set. I fully am aware of my status and my privilege and who I am as far as my race.

The State exercised a peremptory strike against B.M.

Finally, the State argues another allegedly similar white prospective juror that it struck during voir dire, M.K., was similar to R.D.:

> [THE STATE:] [M.K.], do you have any moral, philosophical, religious beliefs or opinions against the death penalty?
>
> [M.K.]: I'm a homeschooling mother, and I raised my children -- we did Government. Don't ask me anything about it now. But I raised them to understand that our laws are placed here by God and that we honor them and also that everyone of you are in here appointed by God.
>
> [THE STATE]: I'm sorry, I didn't hear what you said.
>
> [M.K.]: That everybody in here is appointed in authority by God, and my children are to do the right thing, whatever it is. I don't -- I don't like -- I don't think about the death penalty. I just have to be honest. But I do read a lot in scripture and different things. I know how God set up things. I know he has grace and mercy. But I also know he has justice before he can even extend mercy. I can't say that I have a problem with the death penalty. We're all under a death penalty eventually anyway. But for me to play that part, I would have to know in my heart beyond a shadow of a doubt that that really is what the answer should be. I have to know from what you-all are saying that's something that should be put in place or not put in place. I can't make a decision. I'm not quite sure -- I don't have a problem -- I do have a problem. Like I can't imagine somebody not having a problem with it. But I just have to hear everything, you know.
>
> [THE STATE]: Okay. Well, obviously this is a very -- it's a very serious question, and I think no one would do any of this lightly.
>
> [M.K.]: Yeah. If I had to, I would. If I really, really felt strong, but I would have to really feel strong about it.
>
> [THE STATE]: Okay?
>
> [M.K.]: I can't -- I can't imagine.
>
> [THE STATE]: Okay.
>
> [M.K.]: Have to think about this issue.

[THE STATE]: So are your feelings -- let's see. Are your beliefs such that you think under some circumstances you could vote in favor of a death sentence?

[M.K.]: It would have to be a very extreme one.

[THE STATE]: Okay. But under a very extreme case, you think you would be able to -- your beliefs aren't so strong that under no circumstance then would you be able to vote in favor of a death sentence?

[M.K.]: No, my belief -- no.

[THE STATE]: You would under -- I believe as you put it, extreme circumstances, you would be able to vote for such a thing -- for a death sentence?

[M.K.]: Yeah, it would have to be proven extreme for me.

[THE STATE]: Okay. And do you think because of these strong personal feelings you have you would already be predisposed to vote for a sentence of life in prison?

[M.K.]: I have no -- no.

[THE STATE]: So you would come in -- again, be able to --

[M.K.]: I don't know what is going on with any of this stuff, and I have no agenda in my mind.

[THE STATE]: Okay. Would your attitude toward the death penalty prevent you from making an impartial decision based on the evidence about the Defendant's guilt in the first part of the trial?

[M.K.]: My attitude -- you know, I just really would be seeking the Lord the whole time. I mean I have to – I don't -- I don't think so.

[THE STATE]: Okay. So you think as far as that first part where it's not about the sentencing, it's just about whether the Defendant is guilty or innocent of first degree murder.

[M.K.]: Yeah, that's --

[THE STATE]: I mean that's still obviously a very serious decision.

[M.K.]: Yes, it is.

[THE STATE]: Do you think you would be able to -- as a juror be able to do that part, carry forward that part of your duties?

[M.K.]: I think I -- you know, if I can get out of this, I will. You know that. But I think I could make a decision.

[THE STATE]: Okay. When I was going through with [R.D.] the process then if the Defendant is found guilty of first degree murder, the process of the aggravating circumstances and the mitigating and the weighing. Were you able to listen to that?

[M.K.]: Yeah.

[THE STATE]: And again, I know this isn't stuff you normally sit around thinking about.

[M.K.]: No, I don't.

[THE STATE]: These are very difficult questions. And if the Defendant was found guilty of first degree murder, would your feelings about the death penalty substantially impair your ability to vote at the sentencing hearing to impose a death sentence no matter what the evidence or aggravating circumstances that were proved?

[M.K.]: Okay. Say that one more time, because it's heavy.

[THE STATE]: Yes. If the Defendant was found guilty of first degree murder, would your feelings about the death penalty substantially impair your ability to vote in the sentencing hearing to impose a death sentence no matter what the evidence or aggravating circumstances that were proved?

[M.K.]: I'm trying to understand the last part of what you're saying. I don't -- simply put --

[THE STATE]: Simply put, are your feelings about the death penalty so strong that they would impair your ability no matter what the State proved as far as -- what made this aggravating. No matter what we proved, would your feelings –

[M.K.]: About the death penalty?

[THE STATE]: About the death penalty --

[M.K.]: Override what --

[THE STATE]: Substantially impair your ability to vote for a death sentence no matter what the evidence was?

[M.K.]: I don't – you know what, I think I'm not your person, but I don't think -- I've never been in that position. I just don't think I'm your person. I don't believe that I would be impartial or partial. I just want to know the truth, if I'm responsible for something. I don't think about the death penalty like I don't think about life imprisonment. I don't think about that stuff. I will just -- when things are presented, that's when I'll look at it and decide what goes on in my -- you know, from what I'm seeing, from what you're proving. I don't know if that helps you or not, but I don't know all your legal jargon. But I don't think I would object be -- in my own words, I don't feel like I would be impartial. I just think I would do whatever I really felt was the right thing to do.

[THE STATE]: Okay. Well --

[M.K.]: But if you don't want me, that's okay.

[THE STATE]: I understand. Kind of strip it down as -- the question down as much as I can.

[M.K.]: Okay.

[THE STATE]: If you thought the evidence called for it --

[M.K.]: Yes.

[THE STATE]: -- could you walk in here and tell the Court that you had voted for death?

[M.K.]: If I thought the evidence called for death, would I say that? Is that what you're saying?

[THE STATE]: Could you vote for it --

[M.K.]: Yes.

[THE STATE]: -- and walk in and say you voted for it?

[M.K.]: Yes, if I felt that that called for that, yes.

[THE STATE]: Likewise, if you felt like the evidence called for a sentence of life in prison, could you –

[M.K.]: If I felt that, yes.

The State exercised a peremptory strike against M.K., doing so at the same time as it struck R.D.

On this Record, we cannot say the trial court clearly erred in denying Defendant's objection at the third step of *Batson*, though the case is close. *See Foster*, 578 U.S. at 500. At the outset, the percentage-based strike rate analysis proffered by Defendant is completely indeterminate, with only two African American jurors having remained in the jury pool after removals for cause; a fifty-percent strike rate means almost nothing when that fifty percent represents only a single person. Similarly, the relative scarcity of African Americans in the jury pool, while perhaps a problematic phenomenon for racial equity in the justice system in general, is the product of circumstances outside the State's control in its prosecutorial capacity. This factor therefore plays no role in our determination of whether Defendant has demonstrated "purposeful discrimination" on the part of the State. *Taylor*, 362 N.C. at 527.

As often happens in *Batson* inquiries, the more compelling evidence in this case is the relative treatment of prospective juror R.D. and white jurors who expressed reservations about the death penalty. *See Miller-El*, 545 U.S. at 241 ("More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve."). Comparing the responses of J.C., C.D., and M.K. to those of R.D., we note that R.D. shares the most relevant features with M.K. In expressing their respective initial thoughts about the death penalty, R.D. and M.K. both wavered in their feelings about its application, albeit under different rationales—R.D. was concerned primarily about racial disparities in application, while M.K. couched her thoughts in terms of religious introspection. R.D. and M.K. were also questioned sequentially, minimizing the likelihood that simple variables like the passage of time or differences in levels of fatigue on the part of the State affected the comparability of the outcomes. Finally, R.D. and M.K. both suffered some degree of miscommunication with the State during questioning that may have undermined the State's confidence in the juror's answers, with R.D. interrupting the State during its explanation of forthcoming procedures and M.K. indicating she did not understand what the State was saying.

Despite these similarities, there was more reason for the State to doubt M.K.'s ability to serve as a death-qualified juror than R.D. As stated above, though both jurors suffered a degree of miscommunication with the State, only M.K. suffered that miscommunication as a result of failure

to comprehend the State. R.D., by contrast, expressed a confidence and straightforwardness in his responses more comparable to J.C. and C.D.—whom the State did *not* strike—than M.K. Notwithstanding that difference in demeanor, the State took pains to attempt to rehabilitate M.K. that it did not with R.D., continuing to clarify and reframe its questions concerning her ability to serve on the jury even after she directly stated "I'm not your person[.]" And a similar interaction occurred with J.C., whom the State rehabilitated and accepted even after he expressed plainly that he could not vote for the death penalty. R.D. made no comparable remarks.

However, despite this possible contrast in the State's treatment of the venire members, we still cannot say that the trial court clearly erred in its determination that the State permissibly struck R.D. First, as stated previously, the sample size of African Americans in the jury pool was so small that it would have been impossible to extrapolate a meaningful pattern from the State's treatment of African American jurors as opposed to jurors of other races. R.D. was the only African American juror against whom the State exercised a peremptory strike, and the only other African American venireman questioned at the time of the *Batson* hearing was accepted without issue and subject to no irregular questioning patterns. Second, despite the potentially unfavorable treatment of R.D. by the State relative to other jurors who expressed reservations about the death penalty, the fact remains that the manner and reasoning with which R.D. expressed those reservations were unique, with no other allegedly similar juror expressing substantively comparable thoughts. On this Record, considering whether the State's explanation was pretextual, we are not "left with the definite and firm conviction that a mistake ha[d] been committed" by the trial court in overruling Defendant's objection. *Clegg*, 380 N.C. at 141.

Finally, applying the clearly erroneous standard, we are no less confident in this conclusion in light of the State's pattern of striking jurors who expressed concerns relating to race. If anything, without evidence of racially discriminatory intent elsewhere in the State's striking or questioning patterns, the consistency with which the State struck potential jurors who volunteered their views about issues of race—three out of four of whom were white—suggests that the State exercised a peremptory strike against R.D. because it was uniquely averse to the reason he gave for his reservations about the death penalty, not because R.D. is African American. We cannot be confident the trial court was mistaken in its conclusion that reservations about the death penalty explained the exercise of the State's strike of R.D., *see id.*, and we therefore hold the trial court did not err with respect to Defendant's *Batson* challenge.

B. Motions for Mistrial

[2] Defendant next argues the trial court abused its discretion by denying his motions for mistrial. "This Court reviews a trial court's denial of a motion for mistrial under an abuse of discretion standard." *State v. McDougald*, 2021-NCCOA-424, ¶ 7, 279 N.C. App. 25, 27 (2021). "The decision of the trial judge is entitled to great deference since he is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable." *State v. Williamson*, 333 N.C. 128, 138 (1992).

Here, the trial court did not abuse its discretion in denying Defendant's mistrial motions. The trial court found there was "not evidence before [it] at [that] time . . . that there [had] been and [was] substantial and irreparable prejudice to [Defendant's] case in that [there was] no evidence before [it] that the 12 jurors or the alternate ha[d] any knowledge at th[at] point." Moreover, the transcript demonstrates that, when the Buncombe County District Attorney's press release concerning the death of the State's witness was brought to the trial court's attention, "no impaneled juror indicated they had knowledge of [the] death"; that, "[a]t that point, the [R]ecord d[id] not indicate that any other jurors said they were aware of [the] death or had viewed any media reports related to it or this case"; that the juror who became aware of the press release "stated no other jurors had said anything to him about having any concerns about their safety or being afraid"; and that the trial court issued a curative instruction regarding the use of cell phones after another juror sent a text message to the clerk during trial about information he inadvertently learned.

Based on this Record, we cannot conclude that the trial court abused its discretion in denying these mistrial motions. Defendant has not offered any evidence or arguments that overcome the fact, as found by the trial court, that none of the impaneled jurors knew about the District Attorney's press release when the court considered Defendant's first mistrial motion. When the second mistrial motion was heard—occurring only after deliberations finished and the verdict was announced—the trial court was in the best position to gauge the veracity of the juror who used his cell phone and only inadvertently saw a headline, not the full details of an independent news broadcast, and unequivocally denied that the information regarding the death of the State's witness impaired his ability to be fair and impartial. These facts do not rise to the level of an abuse of discretion.

C. Recusal

[3] Finally, Defendant argues the trial court erred by conducting a hearing on his final motion for mistrial itself. N.C.G.S. § 15A-1223(e) provides that "[a] judge must disqualify himself from presiding over a criminal trial or proceeding if he is a witness for or against one of the parties in the case." N.C.G.S. § 15A-1223(e) (2021). A defendant must prove "objectively that grounds for disqualification actually exist" and "show substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially." *State v. Fie*, 320 N.C. 626, 627 (1987). "Our task on appeal is not to determine whether the trial court's decisions throughout the proceedings leading up to the [underlying motion] were appropriate, but whether, in light of [his] previous involvement with this case, 'the circumstances are such that a reasonable person would question whether the judge could rule impartially' . . . ." *In re: E.D.-A.*, __ N.C. App. __, __ (2023) (quoting *Harrington v. Wall*, 212 N.C. App. 25, 34 (2011)). We review a trial court's ruling on a judicial recusal motion de novo. *Dalenko v. Peden Gen. Contractors, Inc.*, 197 N.C. App. 115, 123 (2009), *disc. rev. denied*, 363 N.C. 854 (2010).

Here, despite his assertion that "the resolution of [the final motion for mistrial] hinged on [the trial judge's] own testimony[,]" Defendant has not shown that the trial judge was a witness for or against one of the parties in the case. Rather, the trial judge only became a witness as it relates to the recusal motion itself, which does not inherently constitute legal error. *See State v. Kennedy*, 110 N.C. App. 302, 306 (1993) ("[T]here was no error in the trial judge's failure to recuse himself. Having established that there were no facts presented to cause a reasonable person to doubt the trial judge's impartiality; there is also no error in the trial judge's failure to refer the motion to recuse to another judge."). Defendant's assertions that the trial judge acted as a "witness" obfuscate the fact that the substantive issue alleged with respect to Defendant's final motion for mistrial was the extrinsic factual knowledge of a juror, not the acts or omissions of the trial judge. And while the Record does reveal that a miscommunication between the bailiff and the trial judge may have occurred with respect to the underlying juror knowledge, we have no reason to believe "there exist[ed] such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially[,]" especially given the secondary importance of the miscommunication to the actual subject of the mistrial motion. *Fie*, 320 N.C. at 627. The trial court therefore did not err in denying Defendant's motion for recusal.

CONCLUSION

The trial court correctly overruled Defendant's *Batson* objection at step three, and it did not err in denying his motions for mistrial or failing to recuse.

NO ERROR.

Chief Judge STROUD and Judge ZACHARY concur in the result only.

STATE OF NORTH CAROLINA
v.
DELVIN HARVEY, DEFENDANT

No. COA23-542

Filed 5 December 2023

Jurisdiction—trial court—Rule 60(b) motion for relief—from lifetime satellite-based monitoring—appeal already perfected —exception to general rule

The trial court's order denying a criminal defendant's motion filed pursuant to Civil Procedure Rule 60(b)(6), which sought relief from the court's prior order imposing lifetime satellite-based monitoring (SBM) upon defendant, was reversed and the matter remanded because the court incorrectly concluded that it lacked jurisdiction over defendant's motion. As a general matter, a perfected appeal divests a trial court of jurisdiction over the matter appealed from, and defendant's pending appeal from the SBM order had already been perfected before the court heard defendant's Rule 60(b) motion. However, under an exception to the general rule, the court still had jurisdiction to consider the motion for the limited purpose of indicating how it would be inclined to rule on it were the appeal not pending. The court's exercise of jurisdiction would have been especially fitting considering defendant's novel contention that the General Assembly's revision of the SBM laws weeks after he was ordered to submit to lifetime SBM necessitated extraordinary relief.

Appeal by defendant from order entered on 3 November 2022 by Judge Robert C. Roupe in Columbus County Superior Court. Heard in the Court of Appeals 1 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya M. Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon Ben Mayes, for defendant-appellant.

FLOOD, Judge.

Delvin Harvey ("Defendant") appeals from the trial court's order denying his Rule 60(b) motion. For the reasons discussed below, we reverse and remand.

I. Facts and Procedural Background

On 17 November 2008, Defendant pled guilty to second-degree rape in Guilford County Superior Court and was sentenced to 93–121 months' imprisonment. Sometime in December 2020, Defendant was released after completing his sentence. On 15 June 2021, a hearing occurred on whether Defendant should be subject to satellite-based monitoring ("SBM"). On 10 August 2021, the trial court entered an order (the "SBM Order") compelling Defendant to submit to a lifetime of SBM. On 20 August 2021, Defendant appealed.

Two weeks later, on 2 September 2021, the North Carolina General Assembly changed the law related to when the imposition of a lifetime of SBM was appropriate. Under the revised statute, a trial court must find that a defendant needs the highest level of supervision before imposing any length of SBM. N.C. Gen. Stat. § 14-208.40A(c1) (2021). Further, the revised statute provides that "[a]n offender who was ordered prior to December 1, 2021, to enroll in [SBM] for a period longer than [ten] years may file a petition for termination or modification of the monitoring requirement[.]" N.C. Gen. Stat. § 14-208.46(a) (2021).

On 31 March 2022, Defendant filed a motion for relief from the trial court's SBM Order pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure, arguing the change to the SBM law mere weeks after he was ordered to submit to a lifetime of SBM constituted an extraordinary circumstance warranting relief. On 4 November 2022, Defendant's Rule 60(b)(6) motion was heard before the trial court. During the hearing, the following colloquy occurred between Defendant's counsel and the trial judge:

> THE COURT: First and foremost, I believe that pendency of an appeal in this case divests me of jurisdiction to rule on this motion at this time . . . . And I believe the case

> law clearly indicates that my reviewing the matter presently, while its on appeal to the Court of Appeals, divests – divests me of that jurisdiction.
>
> [DEFENSE COUNSEL]: Your Honor if I may?
>
> THE COURT: Go ahead.
>
> [DEFENSE COUNSEL]: I do have – I did bring with me notices of withdrawal of appeal. And now I – obviously, that can be risky, depending on, you know, where the [trial c]ourt might go. And if – if [Defendant] needs to find that before getting any indication as to where the [trial c]ourt is going to rule then, you know, I would probably not do that.
>
> However, with – with an indication of maybe how the [trial c]ourt was going to rule and then [Defendant] and I could sit down, explain it in more detail th[a]n I already have to him; sign the notice; and serve it and file it with the clerk. That should remove the impediment of jurisdiction.
>
> THE COURT: And I appreciate you making me aware that, []. Thank you, sir.
>
> At this point, I'm not going to accept a withdrawal of appeal in that I frankly believe the matter needs to be addressed by the appellate court to protect your client's interests.
>
> . . . .
>
> Having found that Rule 60(b) does not apply to this case, I believe that it would be improper for the [trial c]ourt to move further to do any sort of constitutional analysis of this case at this time, which is what I believe [Defendant] through counsel is asking me to do.

Following the hearing, the trial court entered an order (the "Rule 60 Order") denying Defendant's Rule 60(b)(6) motion for relief from the SBM Order. The Rule 60 Order included the following conclusions of law:

> 1. That the pendency of the appeal in this case divests the [trial c]ourt[']s ruling of this motion.
>
> . . . .
>
> 3. That [N.C. Gen Stat.] § 14-208.46 provides a method for [] Defendant to ask for relief based on the modification in law by the General Assembly.

> . . . .
>
> 5. That respectfully, Rule 60(b)(6) does not apply because extraordinary circumstances do not exist.
>
> . . . .
>
> 7. Justice does not require the [trial c]ourt to act in this case because [] Defendant has a statutory method of relief.

On 2 December 2022, Defendant timely filed a notice of appeal from the Rule 60 Order; prior to that, however, Defendant's initial appeal from the SBM Order was docketed at this Court on 10 November 2022. On 30 January 2023, Defendant formally withdrew his initial appeal from the SBM Order, while maintaining his appeal from the trial court's Rule 60 Order.

II. Jurisdiction

This Court has jurisdiction to review the final judgment of a superior court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Analysis

On appeal, Defendant argues (1) the trial court erred when it determined it did not have jurisdiction over the Rule 60(b)(6) motion; and (2) by denying Defendant's Rule 60(b)(6) motion, the trial court's application of N.C. Gen. Stat. § 14-208.46 denied Defendant equal protection of the law. After careful review, we determine the trial court erred in its conclusion that it lacked jurisdiction; accordingly, we reverse and remand the trial court's denial of Defendant's Rule 60(b)(6) motion and do not reach Defendant's equal protection argument.

A. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). " '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) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

On our *de novo* review of the matter before us, we broadly consider whether the trial court had jurisdiction to hear Defendant's Rule 60(b)(6) motion—either because Defendant's appeal from the SBM Order was not yet perfected, or through operation of Rule 60. Because the case before us presents the Court with an opportunity to apply our Rule 60

precedent to a novel request for extraordinary relief from a criminal SBM order, our analysis will review each rule in turn.

B. Perfection of Appeal

To begin, we first examine whether Defendant's appeal from the SBM Order was perfected, and if so, what effect that perfection had on the trial court's jurisdiction to enter the Rule 60 Order.

This Court recognizes "our long-standing general rule that an appeal removes a case from the jurisdiction of the trial court, and, pending the appeal, the trial court is functus officio." *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 635, 234 S.E.2d 748, 749 (1977). "An appeal is not 'perfected' until it is docketed in the appellate court, but when it is docketed, the perfection relates back to the time of notice of appeal[.]" *Ponder v. Ponder*, 247 N.C. App. 301, 305, 786 S.E.2d 44, 47 (2016) (citation omitted). Upon perfecting an appeal, therefore, any order rendered by "the trial court after the notice of appeal [is given,] [is] void for lack of jurisdiction." *Id.* at 305, 786 S.E.2d at 47 (citation omitted).

Here, the chronology of this case shows that Defendant's appeal from the SBM Order was not docketed until one week *after* the trial court entered its Rule 60 Order. Regardless, once Defendant's appeal from the SBM Order was docketed and thus perfected, that perfection related back to the date he originally filed his notice of appeal—20 August 2021. *See id.* at 305, 786 S.E.2d at 47. Therefore, Defendant's appeal was perfected as of 20 August 2021, and any orders entered after that date would be considered void for lack of jurisdiction. Our analysis does not end there, however, because in this case, the trial court had the authority to exercise jurisdiction pursuant to Rule 60 of the North Carolina Rules of Civil Procedure.

C. Rule 60 Exception

Defendant contends that, pursuant to *Sink v. Easter*, the trial court had jurisdiction to rule on the extraordinary relief sought in his Rule 60(b)(6) motion, despite Defendant's appeal from the SBM order being pending at the time his Rule 60(b)(6) motion was made. 288 N.C. 183, 217 S.E.2d 532 (1975). We agree.

As stated above, the general rule is that an appeal divests the trial court of jurisdiction over a case. *See Bowen*, 292 N.C. at 635, 234 S.E.2d at 749. There is, however, an exception made for consideration of Rule 60 motions. *See Sink*, 288 N.C. at 199, 217 S.E.2d at 542; *see also Bell v. Martin*, 43 N.C. App. 134, 142, 258 S.E.2d 403, 409 (1979), *rev'd on*

other grounds, 299 N.C. 715, 264 S.E.2d 101 (1980). This exception was specifically applied in this Court's 1979 opinion in *Bell*.

In *Bell*, this Court determined the best practice "is to allow the trial court to consider the Rule 60(b) motion filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending." 43 N.C. App. at 142, 258 S.E.2d at 409. At that point, should the trial court indicate it would be in favor of granting the motion, the appellant would "be in position to move the appellate court to remand to the trial court for judgment on the motion." *Id.* at 142, 258 S.E.2d at 409. If, on the other hand, the trial court indicated it would deny the motion, that indication "would be considered binding on that court and [the] appellant could then request appellate court review of the lower court's action." *Id.* at 142, 258 S.E.2d at 409. The *Bell* Court reasoned that this method was preferable because "initial consideration of Rule 60(b) motions at the appellate level does not provide the essential ingredient of trial court review[.]" *Id.* at 142, 258 S.E.2d at 409. "As is recognized in many cases, a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink*, 288 N.C. at 198, 217 S.E.2d at 541.

The principle that a trial court retains limited jurisdiction for the purposes of a Rule 60(b) motion has been most often applied in the context of cases arising from civil law. *See, e.g.*, *Talbert v. Mauney*, 80 N.C. App. 477, 478–79, 343 S.E.2d 5, 7 (1986) (applying Rule 60 in a case where the defendant was sued for slander and unfair and deceptive trade practices); *In re Baby Boy Scearce*, 81 N.C. App. 662, 345 S.E.2d 411 (1986) (applying the Rule 60 exception to a case in which the district court made an oversight in not assessing the costs of bringing the action in its order).

Here, we apply the procedure outlined in *Bell* while considering Defendant's novel contention that the change in our SBM laws one month after he was ordered to submit to a lifetime of SBM necessitates extraordinary relief under Rule 60(b)(6). Defendant's appeal was perfected on 20 August 2021, which would typically divest the trial court of jurisdiction; however, Defendant's Rule 60(b)(6) motion for extraordinary relief vested the trial court with the authority to indicate how it would rule if an appeal were not pending. *See Bell*, 43 N.C. App. at 142, 258 S.E.2d at 409; *see also Morgan v. Nash Cnty.*, 224 N.C. App. 60, 74–75, 735 S.E.2d 615, 625 (2012) (upholding an advisory opinion issued by the trial court during the pendency of an appeal).

Upon our *de novo* review, it appears that statements made in the transcript and conclusions made in the Rule 60 Order are at odds with each other. On the one hand, the transcript reveals the trial court stated: "I believe the case law clearly indicates that my reviewing the matter presently, while its [sic] on appeal to the Court of Appeals, [] divests me of [] jurisdiction." On the other hand, the trial court concludes in its Rule 60 Order that "Rule 60(b)(6) does not apply because extraordinary circumstances do not exist." The trial court's error in concluding it lacked jurisdiction to enter an order on the Rule 60(b)(6) motion would necessarily negate its secondary conclusion that "respectfully, Rule 60(b)(6) does not apply because extraordinary circumstances do not exist." In order to conclude that extraordinary circumstances did not exist, the trial court would first have to determine it had jurisdiction—which it had pursuant to our caselaw—yet did not recognize.

In this particular instance, where our review of statements made in the transcript and conclusions made in the Rule 60 Order do not align, we elect to allow the conclusions made in the Rule 60 Order to guide this Court's ultimate disposition. Because the trial court had jurisdiction to enter an order on Defendant's Rule 60(b)(6) motion, we reverse and remand for a new hearing consistent with this opinion. *See Bell*, 43 N.C. App. at 143, 142, 258 S.E.2d at 409 (reversing and remanding after concluding the trial court "should have considered appellant's Rule 60(b) motion for the limited purpose of indicating how it would have been inclined to rule on the motion and the trial court erred in dismissing the Rule 60(b) motion").

IV. Conclusion

The pendency of Defendant's appeal from the SBM Order did not divest the trial court of jurisdiction to enter an order on Defendant's Rule 60(b)(6) motion. Accordingly, we reverse and remand.

REVERSED AND REMANDED.

Judges ARROWOOD and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
ANDRE EUGENE LESTER

No. COA23-115

Filed 5 December 2023

Evidence—testimonial evidence—Confrontation Clause—hearsay—exceptions—phone records—statutory rape case

Defendant was entitled to a new trial on charges of statutory rape of a child and related sexual offenses arising from his interactions with a thirteen-year-old girl, where the trial court erroneously admitted into evidence defendant's cell phone records along with a derivative record showing communications between his phone and the girl's phone. The records' admission violated defendant's rights under the Confrontation Clause of the Sixth Amendment, since the records constituted direct testimonial evidence and defendant was not given any prior or in-court opportunity to confront the records' source or assertions. Although the court properly determined that the records were inadmissible under the business records exception to the hearsay rule—because the State failed to authenticate defendant's phone records, and the derivative record was expressly made for litigation purposes rather than in the regular course of the phone company's business—the court erred in admitting the records under the "catch-all" exception to the hearsay rule. Further, because the records were the only evidence that corroborated the girl's testimony at trial, the State failed to show that the court's error was harmless beyond a reasonable doubt.

Appeal by defendant from judgment entered 21 July 2022 by Judge Thomas H. Lock in Wake County Superior Court. Heard in the Court of Appeals 20 September 2023.

Attorney General Joshua H. Stein, by Deputy General Counsel Tiffany Y. Lucas, and General Counsel Fellow Zachary R. Kaplan, for the State.

Mark L. Hayes, for the defendant-appellant.

TYSON, Judge.

Andre Eugene Lester ("Defendant") appeals from judgments entered upon the jury's verdicts of guilty of statutory rape of a child, statutory sex offense with a child, and indecent liberties with a child. The State has failed to show the Constitutional confrontation error was harmless beyond a reasonable doubt. Defendant is entitled to a new trial.

I. Background

Thirteen-year-old Riley lived in an apartment in Cary with her father and her fifteen-year-old brother. (Pseudonym is used to protect the identity of minors. N.C. R. App. P. 42(b). Riley's father worked during the day and left his children at home alone after school. Riley's mental health diagnoses included major depressive disorder without psychosis, which had previously required "several inpatient psychiatric hospitalizations." Riley also exhibited signs of cutting herself.

Riley's father took her to a Duke Hospital Clinic ("Duke") in the summer of 2019. Riley privately met with Kristen Russell ('Russell"), a social worker. Russell inquired of Riley about her sexual health and experiences. Riley asserted she had previous sexual experiences with a man around thirty years old. Riley told Russell she did not believe this experience was wrong and did not want to tell an adult. Duke is a mandatory reporter of alleged sexual assaults and reported her allegations to Riley's father and to law enforcement officers. Riley was referred to and interviewed at the SAFEchild Advocacy Center.

Cary Police Corporal Armando Bake received Russell's report on 12 September 2019 at the Juvenile Crimes Unit. Corporal Bake spoke with Riley, her father, and her brother. Riley's brother identified the alleged perpetrator as "Ray-Ray," and he informed Corporal Bake "Ray-Ray" was currently in jail for an alleged robbery.

Riley told Corporal Bake that she and "Ray-Ray" had communicated *via* text messages and cellular phone calls. Riley also gave Corporal Bake her and "Ray-Ray's" cell phone numbers. Corporal Bake contacted Cary Police Detective Jim Young, who was investigating the alleged robbery. Detective Young identified "Ray-Ray" as Defendant and also confirmed his date of birth and his cell phone number.

Corporal Bake and Detective John Schneider obtained a court order requesting Defendant's cell phone records from Verizon from May 2019 until July 2019. The officers used PenLink, a computer program, to create a derivative record showing communications between Defendant's and Riley's cellular phones. PenLink derived "over 100 communications . . . between the two phones" within the May to July 2019 time period.

Riley testified she and her brother used their apartment as a "crack house," bringing people over for "drugs and sex," while their father was away working. Riley initially met then thirty-two-year-old Defendant at a hotel through her brother. Riley later encountered Defendant outside near the family's apartment, while she was walking her dog during the summer of 2019. After "small talk," Defendant told Riley that he was waiting to meet her brother. Riley "offered to let [Defendant] wait in the house because it was hot outside."

Riley and Defendant talked, which "led to [Riley] doing a tarot card reading" for Defendant. Riley displayed a tarot card, which "had a naked lady on it," and which steered the conversation towards the topic of sex. Riley produced and showed Defendant her "pleasure toys." Riley asked Defendant if he wanted to have sex. Defendant agreed, and the two went into Riley's brother's bedroom and allegedly engaged in multiple acts of fellatio and intercourse.

Riley allegedly told her brother what had occurred when he arrived home a short time later. Neither Riley nor her brother told their father or any other adult about the allegations until her visit at Duke, because she was "scared." Defendant received Riley's cell phone number from her brother and began to communicate with her.

Defendant was indicted for statutory rape of a person fifteen years or younger, statutory sexual offense with a child fifteen years or younger, and indecent liberties with a child.

During pre-trial proceedings on the day trial was scheduled to begin, Defendant's attorney stated: "Your honor, the defendant requests that I move to withdraw, so I move to withdraw." Defendant's attorney stated he had been representing Defendant for several years in multiple different cases. Defendant's attorney asserted this representation had begun cordially, but their relationship had become difficult after Defendant had "refused to talk to him." Defendant's attorney stated he had received all discovery materials and an offer of a plea agreement from the State, which he had forwarded to Defendant. Defendant's attorney stated he was familiar with the case and was fully prepared to try the case.

Defendant stated his counsel had not come to see him much and had "yelled" at him during a visit. Defendant disagreed with his counsel's trial strategy, specifically his counsel's refusal to challenge the indictment and to file a motion for discovery. Defendant acknowledged receipt of all materials provided by the State, including a plea offer and agreement.

The trial court denied Defendant's counsel's motion to withdraw, trial proceeded, and a jury convicted Defendant of all three charges. The trial court consolidated his convictions for statutory rape of a person fifteen years or younger and statutory sexual offense with a child fifteen years or younger and sentenced Defendant to an active sentence of 317 to 441 months imprisonment. Defendant was also sentenced to 21 to 35 months active imprisonment for the indecent liberties with a child conviction, the sentences to run consecutively. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

Defendant argues the trial court erred by: (1) admitting phone records, which were hearsay and violated his rights under the Confrontation Clause, (2) admitting hearsay evidence to link him to a phone number; (3) allowing an in-court identification based on an impermissibly suggestive pretrial procedure; (4) denying his motion to have his attorney withdraw as counsel; and, (5) denying his motion for a new attorney.

IV. Confrontation Clause

Defendant asserts the admission of State's Exhibit #2 of the Verizon records showing calls made to and from cell number (984)-328-XXXX from 1 May 2019 to 13 July 2019 and State's Exhibit #3 showing calls to Defendant's purported cell number ending in 1545 and (984)-328-XXXX were inadmissible hearsay and violated his Sixth Amendment right to confront and cross-examine witnesses and challenge the evidence admitted against him.

A. Standard of Review

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless [the State proves] . . . it was harmless beyond a reasonable doubt." *State v. Lewis*, 361 N.C. 541, 549, 648 S.E.2d 824, 830 (2007) (citing N.C. Gen. Stat. § 15A-1443(b) (2005)). Whether a defendant's right to confrontation has been violated is reviewed *de novo*. *State v. Jackson*, 216 N.C. App. 238, 241, 717 S.E.2d 35, 38 (2011) (citation omitted).

"When the State fails to prove the error was harmless beyond a reasonable doubt, 'the violation is deemed prejudicial[,] and a new trial is

required.' " *State v. Glenn*, 220 N.C. App. 23, 25, 725 S.E.2d 58, 61 (2012) (citation omitted).

B. Analysis

1. Sixth Amendment Confrontation Clause

Defendant argues he suffered Constitutional and prejudicial error when the trial court admitted the hearsay cellular phone data records as direct evidence without any prior or in-court opportunity for him to confront and cross-examine the source and assertions. U. S. Const. amend VI.

The Supreme Court of the United States held: "The Sixth Amendment's Confrontation Clause provides that, [i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. We have held that this bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford v. Washington*, 541 U.S. 36, 42, 158 L. Ed. 2d 177, 187 (2004) (citations and quotation marks omitted).

Justice Scalia cited a very early decision from the Court in North Carolina in support of the original meaning and understanding of the right of confrontation:

> Early state decisions shed light upon the original understanding of the common-law right. *State v. Webb*, 2 N.C. 103 (1794) (per curiam), decided a mere three years after the adoption of the Sixth Amendment, held that depositions could be read against an accused only if they were taken in his presence. Rejecting a broader reading of the English authorities, the court held: "[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Id.*, at 104.

Crawford, 541 U.S. at 49, 158 L. Ed. 2d at 191,

Justice Scalia also reasoned:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of reliability. . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee.

Id. at 42, 158 L. Ed. 2d at 187 (internal quotation marks omitted).

Our Supreme Court more recently held the Sixth Amendment Confrontation Clause within the Constitution of the United States, and applicable to the states, bars admission of direct testimonial evidence, "unless the declarant is unavailable to testify and the accused had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009).

Courts employ a three-step inquiry to determine whether a defendant's right to confront a witness has been violated: (1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and, (3) whether defendant had an opportunity to cross-examine the declarant. *See State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (2004); *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203.

The trial court made oral findings to support its ruling to admit State's Exhibit #2:

> The court does not find that it is admissible under the express terms of Rule 801 - - I'm sorry, 803(6). However, the court will accept the document under Rule 803(6) read in conjunction with Rule 803(24), the so-called catch-all exception to the hearsay rule under Rule 803, in that the document is not specifically covered by any of the foregoing exceptions under the rule, but does have equivalent circumstantial guarantees of trustworthiness, in that *the statement is offered as evidence of a material fact; it is more probative on the point for which it is offered than any other evidence which the proponent could procure through reasonable efforts;* and the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.
>
> The court, moreover, does find, and I believe there is no dispute as to this, that the proponent did give written notice stating its intention to offer this statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement. (emphasis supplied).

The trial court's findings answered the first and second factors and steps above in the affirmative and the third factor in the negative and these statements are testimonial. *Clark*, 165 N.C. App. at 283, 598 S.E.2d at 217; *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203.

These findings contravene *Crawford*'s admonition, "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of reliability. . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Crawford*, 541 U.S. at 42, 158 L. Ed. 2d at 187. *Crawford* forbids testimonial evidence not subject to confrontation, and the evidence should have been excluded. *Id.*

2. Rule of Evidence 803(6)

The trial court erroneously admitted this evidence under a combination of hearsay rules, "under Rule 803(6) read in conjunction with Rule 803(24)." Hearsay is a "statement *other than one made by the declarant while testifying at the trial* or hearing, offered in evidence *to prove the truth of the matter asserted*." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2021) (emphasis supplied).

The State initially attempted to admit State's Exhibits #2 and #3 solely as business records pursuant to Rule 803(6). No official or agent from Verizon appeared in court to authenticate them, and the cover letter purporting to authenticate the records were not sworn, under seal nor notarized, to qualify them as an affidavit, nor were any of these record subject to prior confrontation by Defendant. *Id.*

While Verizon's hearsay records, which are produced and kept in the ordinary course of business, may have been qualified a custodian and sought admission as non-testimonial ordinary course of business records, the State failed to authenticate them to justify admission under that specific exception. *Id.*; *State v. Smith*, 315 N.C. 76, 93, 337 S.E.2d 833, 844 (1985). The trial court correctly concluded, "[t]he court does not find that it is admissible under the express terms of Rule 801 - - I'm sorry, 803(6)." N.C. Gen. Stat. § 8C-1, Rule 803(6) (2021).

State's Exhibit # 3 was also inadmissible as a business record after Detective Schneider testified the document was expressly made for the purpose of litigation and not produced or retained in the regular course of Verizon's business. *Id.* The documents were compiled, derived, and presented for the upcoming litigation, and the Exhibits were not compiled nor maintained in the regular course of Verizon's business nor presented by a qualified custodian. N.C. Gen. Stat. § 8C-1, Rule 803(6).

No one was present at trial with knowledge or authority to validate or testify to and to be subject to cross-examination concerning their maintenance, retention, compilation, chain of custody, or authenticity. *Id.* The trial court, after objection, correctly denied their admission as

business records, given as the trial court properly found, "the statement is offered as evidence of a material fact." *Id.*

3. Rule of Evidence 803(24) Catch all

The trial court then erroneously admitted both the challenged documents and exhibits over objection "under rule 803(6) read in conjunction with Rule 803(24), the so-called catch-all exception." Rule 803(24) governs the admission of a hearsay statement, as a "catch all", which is not covered by another exception, but the evidence carries sufficient *indicia* of reliability. The residual or "catch all" exception to the rule against the admission of hearsay statements is codified by N.C. Gen. Stat. § 8C-1, Rule 803(24) (2021).

The residual hearsay exception allows the admission of:

> [a] *statement not specifically covered by any of the foregoing exceptions* but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. *However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.*

Id. (emphasis supplied).

In order for hearsay statements to be admissible under Rule 803(24), our Supreme Court, in a pre-*Crawford* opinion, held the trial court must also determine and conjunctively find:

> (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent

> can procure through reasonable efforts, *and* (6) whether the interests of justice will be best served by admission.

State v. Valentine, 357 N.C. 512, 518, 591 S.E.2d 846, 852 (2003) (citations omitted) (emphasis supplied). *See Crawford*, 541 U.S. at 42, 158 L. Ed. 2d at 187.

The trial court is also mandated to "make adequate findings of fact and conclusions of law sufficient to allow a reviewing court to determine whether the trial court [erred] in making its ruling." *State v. Sargeant*, 365 N.C. 58, 65, 707 S.E.2d 192, 196 (2011) (citation omitted). "If the trial court either fails to make findings or makes erroneous findings, we review the record in its entirety to determine whether that record supports the trial court's conclusion concerning the admissibility of a statement under a residual hearsay exception." *Id.* (citation omitted).

As noted, the trial court made findings purporting to support its ruling to admit State's Exhibit #2:

> The court does not find that it is admissible under the express terms of Rule 801 - - I'm sorry, 803(6). However, the court will accept the document under Rule 803(6) read in conjunction with Rule 803(24), the so-called catch-all exception to the hearsay rule under Rule 803, in that the document is not specifically covered by any of the foregoing exceptions under the rule, but does have equivalent circumstantial guarantees of trustworthiness, in that the statement is offered as evidence of a material fact; it is more probative on the point for which it is offered than any other evidence which the proponent could procure through reasonable efforts; and the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.
>
> The court, moreover, does find, and I believe there is no dispute as to this, that the proponent did give written notice stating its intention to offer this statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

When the State sought to introduce their Exhibit #3 at trial, Defendant renewed and objected on the same grounds as previously asserted, and the trial court again overruled Defendant's objection.

The primary purpose of the court-ordered production of and preparation of the data records retained and provided by Verizon was to prepare direct testimonial evidence for Defendant's trial. The trial court specifically found "the statement is offered as evidence of a material fact." Exhibits #2 and #3 were offered and admitted for consideration by the jury as substantive and testimonial evidence. Defendant was not given the prior opportunity or at trial to challenge or cross-examine officials from Verizon, who had purportedly accumulated this evidence, and their admission as such violated Defendant's rights under the Confrontation Clause. U. S. Const. amend VI. *Crawford*, 541 U.S. at 42, 158 L. Ed. 2d at 187; *State v. Webb*, 2 N.C. 103, 104 (1794) (per curiam) ("no man shall be prejudiced by evidence which he had not the liberty to cross-examine").

4. Harmless Error

The State recognizes the potential Confrontation error and argues their erroneous admission was "harmless beyond a reasonable doubt." *Lewis*, 361 N.C. at 549, 648 S.E.2d at 830 (citation omitted). The trial court found the phone records were direct evidence of the State's case and submitted them to the jury. Without these records, and in the absence of other physical or corroborative evidence, the State's case relies solely upon Riley's allegations and testimony. Without these records, the jury was left to adjudicate Defendant's guilt solely upon Riley's credibility.

The State has failed to carry its burden to prove the erroneous admission of the hearsay phone records in violation of the Confrontation Clause was "harmless beyond a reasonable doubt." *Id.* (citation omitted). The purported cellular phone contacts between Defendant and Riley after the alleged assaults gave corroboration and credibility to her testimony. No other physical or direct evidence was admitted to support the State's case.

The State cannot demonstrate, absent the cellular phone data hearsay or without other physical or direct evidence, the jury would have found Riley's allegations as credible to reach its verdicts to meet and carry its burdens to demonstrate the Constitutional error was "harmless beyond a reasonable doubt." *Id.*

V. Conclusion

This challenged evidence was testimonial, and the trial court correctly ruled they did not qualify to be admitted as business records. The State failed to carry its burden to demonstrate the error in the admission of the admittedly hearsay cell phone records in State's Exhibits #2 and #3 was "harmless beyond a reasonable doubt." *Id.*

We reverse the trial court's rulings on Defendant's motions, vacate the trial court's judgment entered on Defendant's convictions for statutory rape of a person fifteen years or younger, statutory sexual offense with a child fifteen years or younger, and indecent liberties with a child, and remand for a new trial.

In light of our disposition on these issues, we need not address Defendant's remaining arguments. *It is so ordered.*

NEW TRIAL.

Judges COLLINS and WOOD concur.

STATE OF NORTH CAROLINA
v.
JORDAN NATHANIEL MITCHELL

No. COA23-270

Filed 5 December 2023

1. Criminal Law—defenses—voluntary intoxication—jury instructions—sufficiency of evidence

In a prosecution for charges arising from a pharmacy break-in, the trial court did not err by denying defendant's request for a jury instruction on voluntary intoxication. According to the evidence, defendant and an accomplice successfully broke into the pharmacy by prying open and sliding under a roll-up door leading to the stock room, after which they stole items from the pharmacy, ran out the front door through a parking lot into a field across the street, and then attempted to climb over a fence. Although some evidence indicated that defendant was very sleepy during police interviews, had a hard time standing up, and had consumed cocaine over the previous few days, defendant failed to show that he was so intoxicated on the day of the break-in that he could not form the specific intent to commit the charged offenses.

2. Firearms and Other Weapons—possession of a firearm by a felon—jury instructions—type of firearm not specified—plain error analysis

In a prosecution for charges arising from a pharmacy break-in, where law enforcement saw defendant drop what looked like a gun while fleeing the scene through the pharmacy parking lot, the

trial court did not commit plain error when it instructed the jury on the charge of possession of a firearm by a felon without identifying the specific firearm listed in defendant's indictment: a revolver found in the parking lot. The court properly instructed the jury on the requirement that defendant have actual possession of a firearm in order to be convicted of the crime. Although law enforcement found two other guns (in addition to the revolver) inside a vehicle that was parked outside the pharmacy during the break-in, defendant was never seen near that vehicle; therefore, because defendant could not have had actual possession of the other two guns, the court did not plainly err in failing to single out the revolver in its jury instructions.

Judge MURPHY concurring in the result only as to Part II-A.

Appeal by Defendant from judgments entered 9 August 2022 by Judge Patrick Thomas Nadolski in Guilford County Superior Court. Heard in the Court of Appeals 1 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin, for the State-Appellee.

Mary McCullers Reece for Defendant-Appellant.

COLLINS, Judge.

Defendant, Jordan Nathaniel Mitchell, appeals from judgments entered upon guilty verdicts of breaking and entering, two counts of larceny after breaking and entering, possession of a firearm by a felon, and resisting a public officer. Defendant argues that the trial court erred by denying his request for a jury instruction on voluntary intoxication, and that the trial court plainly erred by not identifying the specific firearm in its jury instructions for possession of a firearm by a felon. We find no error or plain error.

I. Background

The evidence at trial tended to show the following: Greensboro Police Officer Taylor Brame received a call around 5:00 a.m. on 10 May 2021, reporting two males wearing black hoodies and blue jeans had broken into a Walgreens pharmacy through a roll-up door behind the pharmacy. When Brame arrived on the scene, she observed a white Jeep Cherokee parked near the roll-up door behind the pharmacy. The

vehicle was unlocked, and the keys were in the ignition. Brame removed the keys from the ignition and "proceeded to do a perimeter around the store [and] check for broken windows, while [she] waited for additional units to respond."

Two males, later identified as Defendant and Lloyd Harper, briefly stepped out of the rear door on the right side of the pharmacy. Brame "barely could give commands [before] they shut the door again[.]" Defendant and Harper then exited the pharmacy through the front door and ran through the parking lot. While Defendant and Harper were running through the parking lot, Defendant dropped what "looked to be a gun[.]" Defendant and Harper crossed through the bushes at the front of the parking lot and ran into a field across the street. Defendant was apprehended, while trying to climb over a fence, and Harper was later apprehended after climbing over the fence and running into the woods.

Upon searching the parking lot, officers discovered "a .22 Ruger caliber [revolver] in a holster . . . along with a tire iron that [Defendant and Harper had] discarded." The "revolver was damaged, so th[e] barrel fell out of that." Two bottles of Oxybutynin, a prescription bladder medication, were found in the field where Defendant was apprehended. The shelves inside the pharmacy "[l]ooked like stuff had been knocked over. . . . [either] purposely knocked over or knocked over as [Defendant and Harper] came out[.]" Three boxes of Newport cigarettes, two boxes of compression socks, and another bottle of prescription medication were found on the floor near the pharmacy exit.

Officers searched the Jeep that was parked behind the pharmacy and discovered the following: two HP laptop computers, an HP PC charger, a Samsung TV, Razer headphones, an HP all-in-one printer, and a Byrna PepperBall pistol. These items, along with the Ruger .22 caliber revolver, had been stolen earlier that night from Wilson & Lysiak, an architectural business approximately a half-mile away from the Walgreens. Officers also discovered a nine-millimeter Beretta on the passenger side dashboard.

Defendant was indicted for two counts of breaking and entering, breaking and entering a pharmacy, two counts of larceny after breaking and entering, possession of a firearm by a felon, and resisting a public officer. Defendant filed a notice of defense, asserting that "[D]efendant was so intoxicated that he was unable to form the requisite specific intent" for the charged offenses.

The matter came on for trial on 11 July 2022. Defendant moved to dismiss at the close of the State's evidence, and the trial court denied the

motion.[1] The trial court denied Defendant's request for a jury instruction on voluntary intoxication during the jury charge conference. The jury returned guilty verdicts of breaking and entering, breaking and entering with intent to commit larceny, two counts of larceny after breaking and entering, possession of a firearm by a felon, and resisting a public officer.

The trial court sentenced Defendant to 19 to 32 months of imprisonment for possession of a firearm by a felon. Furthermore, the trial court sentenced Defendant to three consecutive terms of 11 to 23 months of imprisonment for breaking and entering, two counts of larceny after breaking and entering, and resisting a public officer. Finally, the trial court arrested judgment on Defendant's conviction for breaking and entering with intent to commit larceny. Defendant appealed.

II. Discussion

A. Voluntary Intoxication

[1] Defendant first argues that the trial court erred by denying his request for a jury instruction on voluntary intoxication.

"To determine whether a defendant is entitled to a requested instruction on voluntary intoxication, this Court reviews de novo whether each element of the defense is supported by substantial evidence when taken in the light most favorable to the defendant." *State v. Meader*, 377 N.C. 157, 162, 856 S.E.2d 533, 537 (2021) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quotation marks and citation omitted).

"The doctrine of voluntary intoxication should be applied with great caution." *Id.* (quotation marks, brackets, and citation omitted). "A defendant is not entitled to an instruction on voluntary intoxication in every case in which a defendant consumes intoxicating beverages or controlled substances." *Id.* (quotation marks, brackets, ellipses, and citation omitted). To obtain a voluntary intoxication instruction, a defendant "must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form" the specific intent to commit the underlying offenses. *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988). "Evidence of mere intoxication, however, is not enough to meet defendant's burden of production." *Id.* "There must be some evidence tending to show that the defendant's

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1. Defendant was also indicted for breaking and entering a private residence. The indictment does not appear in the record before us; however, it appears from the record and transcripts that the trial court dismissed this charge at the close of the State's evidence and denied the motion to dismiss with respect to the relevant charges.

mental processes were so overcome by the excessive use of liquor or other intoxicants that he had temporarily, at least, lost the capacity to think and plan." *Meader*, 377 N.C. at 162, 856 S.E.2d at 537 (quotation marks, brackets, and citation omitted).

Here, surveillance footage from the Walgreens showed that Defendant and Harper "pried [the exterior roll-up door] up enough to where they . . . were actually able to slide under the door and into the stock room." Defendant and Harper "went upstairs to see what was in the upstairs stock room" and then came back downstairs, "jimmied the door, [and] got into the pharmacy." When Brame arrived at the Walgreens, she observed the white Jeep parked near the roll-up door behind the pharmacy. At that time, Defendant and Lloyd Harper briefly stepped out of the rear door on the right side of the pharmacy, and Brame "barely could give commands [before] they shut the door again[.]" Defendant and Harper then exited the pharmacy through the front door, ran through the parking lot into a field across the street, and attempted to climb over a fence. Brame testified that Defendant was "very sweaty" and "breathing heavily," and that "we all were, as you could hear in the [bodycam footage]."

Greensboro Police Detective Martin attempted to interview Defendant after he was apprehended and observed that Defendant "was pretty sleepy . . . [and] hadn't slept in a couple days." Defendant "would talk to himself, kind of not complete any thoughts or sentences. He had a hard time standing up, which I think would relate to him being sleepy at that time, and he said that he was tired."

Defendant testified that he had used "probably like 3.5 grams" of cocaine over the span of two or three days and that he "kind of lost control of [him]self at the time somewhat." He recalled meeting up with Harper, driving around in the white Jeep, and going to the Walgreens because he was "probably [looking for] money[.]"

Defendant felt "[p]anicked" as he was leaving the Walgreens and running through the parking lot, and remembered "[t]he road, a fence, and being tackled[.]" Defendant recalled being interviewed at the police station, and that he "didn't really have much to say." Defendant further testified, "I was nodding off. I was really tired, and they was just dragging me through the processing. I just wanted to go to sleep, talk about it - wake up later. Didn't really – but they drug me through that process. I was really exhausted."

When viewed in the light most favorable to Defendant, he has failed to produce substantial evidence which would support a conclusion by

the judge that he was so intoxicated that he could not form the specific intent to commit the underlying offenses. *See Mash*, 323 N.C. at 346, 372 S.E.2d at 536.

Accordingly, the trial court did not err by denying Defendant's request for a jury instruction on voluntary intoxication.

B. Possession of a Firearm by a Felon

[2] Defendant next argues that the trial court plainly erred by not identifying the specific firearm listed in the indictment in its jury instructions for possession of a firearm by a felon.

"If at trial, a defendant fails to object to a jury instruction, that instruction is reviewable on a plain error standard on appeal." *State v. Raynor*, 128 N.C. App. 244, 247, 495 S.E.2d 176, 178 (1998) (citation omitted). "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) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (quotation marks and citation omitted). "Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]" *Id.* (quotation marks, brackets, and citations omitted).

Here, the indictment alleged that Defendant "unlawfully, willfully and feloniously did possess a Ruger 22 caliber revolver, which is a firearm." The trial court gave the following jury instruction for possession of a firearm by a felon:

> The defendant has been charged with possession -- possessing a firearm after having been convicted of a felony. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:
>
> First, that on March 31st, 2010, in Moore County Superior Court, the defendant pled guilty to or was found guilty of a felony that was committed in violation of the laws of the State of North Carolina.
>
> And second, that after March 31st, 2010, the defendant possessed a firearm. A person has actual possession of a firearm -- strike that . A person has actual possession of an article if the person has it on the person, is aware

> of its presence, and either alone or together with others has both the power and intent to control its disposition or use.
>
> If you find from the evidence beyond a reasonable doubt that on March 31st, 2010, in Moore County Superior Court, the defendant pled guilty to or was found guilty of a felony that was committed in violation of the laws of the State of North Carolina and that the defendant, after March 31st, 2010, possessed a firearm, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Aside from briefly stepping out of the rear door on the right side of the pharmacy, Defendant was not near the Jeep where the Byrna PepperBall pistol and nine-millimeter Beretta were later found. Rather, Defendant exited the pharmacy through the front door and dropped what "looked to be a gun" while running through the parking lot. After Defendant was apprehended, "a .22 Ruger caliber [revolver] in a holster" was found in the parking lot. The trial court instructed the jury that "[a] person has actual possession of an article if the person has it on the person, is aware of its presence, and either alone or together with others has both the power and intent to control its disposition or use." Because Defendant was not near the Jeep where the Byrna PepperBall pistol and nine-millimeter Beretta were found and thus could not have had actual possession of either weapon, the trial court did not plainly err by not specifically identifying the .22 Ruger caliber revolver in its jury instructions for possession of a firearm by a felon.

III. Conclusion

The trial court did not err by denying Defendant's request for a jury instruction on voluntary intoxication. Furthermore, the trial court did not plainly err by not identifying the specific firearm in its jury instructions for possession of a firearm by a felon.

NO ERROR; NO PLAIN ERROR.

Judge TYSON concurs.

Judge MURPHY concurs in the result only as to Part II-A and concurs in Part II-B.

STATE OF NORTH CAROLINA
v.
JOHNNY LEE WILLIAMS, Defendant

No. COA22-914

Filed 5 December 2023

Search and Seizure—motion to suppress—erroneous finding and conclusion—plain error analysis—no constitutional violation

In a drug prosecution, there was no plain error in the trial court's denial of defendant's motion to suppress evidence found during a traffic stop where, although the trial court's order contained a factual error (regarding the contents of an anonymous tip about possible drug activity) and an erroneous conclusion of law (that Fourth Amendment scrutiny was not triggered during the stop even though an officer assisted defendant out of the vehicle, at which point no reasonable person would have felt free to leave), those errors did not amount to fundamental error seriously affecting the fairness of the proceedings. Defendant's constitutional rights were not violated during the stop because officers' initial interactions with the vehicle's occupants were consensual, and the occupants were not seized until after officers had reasonable suspicion that illegal drug activity was taking place based on smelling an odor of marijuana coming from the car, seeing marijuana crumbs in plain view, and soliciting an explanation from one of the occupants that he possessed no marijuana but that he "was just making a blunt."

Chief Judge STROUD concurring in result only.

Appeal by Defendant from order entered 17 August 2022 by Judge Vince Rozier, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 23 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Phillip T. Reynolds, for the State.

Dysart Willis, by Andrew Nelson, for Defendant-Appellant.

CARPENTER, Judge.

Johnny Lee Williams ("Defendant") appeals from judgment entered after a jury found him guilty of one count of possessing methamphetamine, one count of possessing drug paraphernalia, one count of resisting a public officer, and one count of carrying a concealed weapon. On appeal, Defendant argues the trial court plainly erred in denying his motion to suppress because the suppression order contains erroneous findings of fact and conclusions of law. After careful review, we disagree with Defendant and find no plain error.

I. Factual & Procedural Background

This case began with a traffic stop initiated by two Johnston County Sheriff's deputies on 3 August 2018 in a mobile-home park. On 4 September 2018, a Johnston County grand jury returned true bills of indictment against Defendant, charging him with one count each of the following: trafficking in methamphetamine by possession; trafficking in methamphetamine by transportation; possession of drug paraphernalia; possessing up to one-half ounce of marijuana; resisting a public officer; carrying a concealed weapon; and attaining the status of habitual felon. On 21 January 2020, a Johnston County grand jury returned a superseding true bill of indictment, indicting Defendant of one count of possession with intent to sell or deliver methamphetamine. On 22 March 2019, Defendant filed a pretrial motion to suppress the evidence collected by the deputies on 3 August 2018. On 17 February 2020, the Honorable Vince Rozier, Jr. conducted a pretrial hearing concerning Defendant's motion to suppress.

The evidence presented at the pretrial suppression hearing tended to show the following: On 3 August 2018, the Johnston County Sheriff's Department dispatched two deputies, Deputy Andrew McCoy and Deputy Jonathan Lee, in response to a service call concerning drug activity. Deputy McCoy testified that an anonymous caller stated "the meth man is on the way over [to the mobile-home park]," and that "a deal is about to happen." A follow-up call came in stating, "it's either lot 10 or 11 [of the mobile-home park] and should have a silver Saturn in the yard."

When Deputy McCoy arrived at the scene, he saw one silver car and one black car, both parked near a mobile home. Deputy McCoy parked behind the mobile home; he did not block either vehicle or use emergency signaling. There were four individuals in the silver car, and one individual in the black car. Deputy McCoy stood between the two vehicles and began speaking with the driver of the black car.

While Deputy McCoy was speaking with the driver of the black car, a passenger in the back seat of the silver car rolled down his window and

spoke to Deputy McCoy. Deputy McCoy then "began to smell the odor of marijuana coming from the car." He also saw "marijuana crumbs," in plain view, on the rear passenger's lap and clothing. When questioned by Deputy McCoy as to how much marijuana he had in the car, the passenger responded, "none, I was just making a blunt." At that time, another back-seat passenger exited the silver vehicle and walked to the front of the vehicle.

Deputy Lee then arrived at the scene and parked directly behind Deputy McCoy. He "noticed the vehicle that had been described by the call notes" and walked up between the cars, where Deputy McCoy stood. Deputy McCoy approached the front passenger window of the silver car, where Defendant was seated. According to Deputy McCoy, Defendant's "hand was completely under his buttocks," and he "appeared to be stuffing something under his person and in his seat." After multiple requests, Defendant refused to show his hands or get out of the car. Deputy McCoy ultimately assisted Defendant out of the vehicle. Before Deputy McCoy could pat down Defendant, another passenger started to run from the silver car, and Deputy McCoy chased him on foot.

Deputy Lee stayed with the vehicles and "tr[ied] to keep [the subjects, who had all exited from the vehicles,] centralized in one area" while also keeping an eye on Deputy McCoy's pursuit. Deputy Lee witnessed Defendant approach the driver's side of the black vehicle. Deputy Lee ordered Defendant to stay where he was.

Shortly thereafter, Deputy Lee observed Defendant "bend over in the front end of the vehicle in the grill area" and make "a swinging motion [with] his arm." Deputy Lee asked Defendant to stop moving. Defendant did not respond to Deputy Lee. Instead, Defendant moved to the opposite side of the vehicle and ran from the scene. Deputy Lee caught Defendant and patted him down, but Deputy Lee did not find any weapons or contraband on Defendant. After securing Defendant in a patrol car, the officers searched the area, including under and inside the vehicles. In the silver car, the officers found digital scales, a glass smoking pipe, a plastic bag containing what the officers believed was methamphetamine, a plastic bag containing what the officers believed was marijuana, and other drug paraphernalia.

On 17 February 2020, the trial court issued a written order denying Defendant's motion to suppress. On 8 March 2021, a jury trial began before the Honorable Thomas H. Locke, and the State introduced evidence collected from the scene without objection. The jury returned unanimous verdicts finding Defendant guilty of one count of possession

of methamphetamine, one count of possession of drug paraphernalia, one count of resisting a public officer, and one count of carrying a concealed weapon. Defendant admitted to attaining the status of habitual felon. The trial court sentenced Defendant to a minimum term of thirty-six months and a maximum term of fifty-six months in prison. Defendant filed deficient[1] written notice of appeal on 19 March 2021.

On 3 May 2022, after granting Defendant's first petition for writ of certiorari, this Court concluded the trial court's order denying Defendant's pretrial motion to suppress lacked sufficient conclusions of law. We remanded so the trial court could make the required conclusions. The trial court executed an amended order denying Defendant's motion to suppress on 17 August 2022. Defendant filed timely written notice of appeal on 25 August 2022.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issue

The issue on appeal is whether the trial court plainly erred in denying Defendant's motion to suppress.

IV. Analysis

On appeal, Defendant argues that the trial court erred in denying his motion to suppress because the suppression order contains erroneous findings of fact and conclusions of law. Defendant argues Deputies McCoy and Lee violated his Fourth Amendment rights. After careful review, we disagree.

A. Standard of Review

Normally, "[t]he 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) (citing *State v. Brooks*, 337 N.C. 132, 140–41, 446 S.E.2d 579, 585 (1994)). And we review the trial court's conclusions of law de novo. *State v. Leach*, 166 N.C. App. 711, 715, 603 S.E.2d 831, 834 (2004).

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1. Defendant's notice of appeal inaccurately described the criminal counts included in the judgment issued by the trial court.

But our standard of review changes when a motion-to-suppress issue is not preserved. *See State v. Burwell*, 256 N.C. App. 722, 729, 808 S.E.2d 583, 590 (2017). This is because we review certain unpreserved issues for plain error: "(1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). The second plain-error category "includes the denial of a pre-trial motion to suppress when a defendant fails to object to the admission of evidence that was the subject of his pre-trial motion to suppress." *Burwell*, 256 N.C. App. at 729, 808 S.E.2d at 590; *see also State v. Waring*, 364 N.C. 443, 468, 701 S.E.2d 615, 631–32 (2010) ("[T]o the extent defendant failed to preserve issues relating to the motion to suppress, we review for plain error.").[2]

"To preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence. A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. His objection must be renewed at trial." *State v. Golphin*, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) (citation omitted); *see State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (holding that "a trial court's evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue . . . for appeal unless a defendant renews the objection during trial").

Here, Defendant filed a motion to suppress the challenged evidence, but at trial, Defendant failed to object to the admission of the evidence. Thus, Defendant failed to preserve any issues concerning his motion to suppress. *See Golphin*, 352 N.C. at 463, 533 S.E.2d at 232. Defendant appealed, and in February 2022, we remanded the matter to allow the trial court to make adequate conclusions of law. Our remand, however, did not negate the fact that Defendant failed to preserve the issues raised in his motion to suppress at trial. Thus, we review the trial court's denial of Defendant's motion to suppress for plain error. *See Burwell*, 256 N.C. App. at 729, 808 S.E.2d at 590; *Waring*, 364 N.C. at 468, 701 S.E.2d at 632.

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2. In *Waring*, the Court declared the plain-error standard of review, yet it used the approach designated for preserved motion-to-suppress issues. *See Waring*, 364 N.C. at 468–74, 701 S.E.2d at 631–35. This, however, was not a rejection of the plain-error standard; it was an application of the first plain-error step. The first step of the plain-error review is to determine if the trial court erred. *See State v. Lawrence*, 365 N.C. 512, 519, 723 S.E.2d 330, 335 (2012). In other words, if the trial court did not err, the trial court could not have *plainly* erred, so the analysis is complete. *See id.* at 519, 723 S.E.2d at 335. The *Waring* Court found no errors in the challenged motion to suppress, so there was no need to proceed to the second step of the plain-error review. *See Waring*, 364 N.C. at 468–74, 701 S.E.2d at 631–35; *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335 (stating that the second step of the plain-error review is to discern whether an error was "fundamental").

To find plain error, this Court must first determine that an error occurred at trial. *See State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Second, the defendant must demonstrate the error was "fundamental," which means the error probably caused a guilty verdict and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 320–21 (2015) (quoting *State v. Lawrence*, 365 N.C. 512, 519, 723 S.E.2d 330, 335 (2012)). Notably, the "plain error rule . . . is always to be applied cautiously and only in the exceptional case . . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

B. The Fourth Amendment and Applicable Rules

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment protects citizens from unreasonable searches or seizures within their homes, *State v. Borders*, 236 N.C. App. 149, 163, 762 S.E.2d 490, 502 (2014), and within their vehicles, *State v. Mackey*, 209 N.C. App. 116, 124, 708 S.E.2d 719, 724 (2011).

Under the Fourth Amendment, "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980). Freedom of movement is restrained by a show of authority " 'if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *State v. Isenhour*, 194 N.C. App. 539, 543, 670 S.E.2d 264, 267 (2008) (quoting *Mendenhall*, 446 U.S. at 553, 100 S. Ct. at 1877, 64 L. Ed. 2d at 509). Whether a reasonable person would feel "free to leave" a police encounter is determined by analyzing the totality of circumstances. *Id.* at 543, 670 S.E.2d at 267–68; *State v. Icard*, 363 N.C. 303, 309, 677 S.E.2d 822, 827 (2009).

Circumstances that shape whether a reasonable person would feel free to leave a police encounter include, but are not limited to: (1) whether blue lights were illuminated; (2) whether police sirens were engaged; (3) whether weapons were displayed; (4) whether there was physical touching; (5) an officer's language and tone; and (6) the location of an officer's patrol car. *See Isenhour*, 194 N.C. App. at 543, 670 S.E.2d at 267–68; *Icard*, 363 N.C. at 309–10, 677 S.E.2d at 827–28. Notably, "[p]olice are free to approach and question individuals in public places when circumstances indicate that citizens may need help or mischief might be afoot." *Icard*, 363 N.C. at 311, 677 S.E.2d at 828.

Generally, seizures conducted without a warrant are "*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, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576, 585 (1967) (footnote omitted). One such exception is when there is probable cause that an automobile contains contraband, such as a controlled substance. *State v. Degraphenreed*, 261 N.C. App. 235, 241, 820 S.E.2d 331, 336 (2018).

Probable cause is generally defined as "a reasonable ground" to suspect criminal activity. *State v. Yates*, 162 N.C. App. 118, 122, 589 S.E.2d 902, 904 (2004); *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 800, 157 L. Ed. 2d 769, 775 (2003) (" '[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt . . . .' ") (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, 93 L. Ed. 1879, 1890 (1949)). Under the North Carolina Controlled Substances Act, it is unlawful for anyone in North Carolina to possess a controlled substance, and marijuana is a controlled substance. *See* N.C. Gen. Stat. §§ 90-94(b)(1), -95(a)(3) (2021).

C. The Suppression Order

Here, Defendant was neither a resident nor had any possessory interest in the mobile home; thus, his reasonable expectation of privacy is limited to the vehicle in which he was a passenger. *See Borders*, 236 N.C. App. at 163, 762 S.E.2d at 502; *Mackey*, 209 N.C. App. at 124, 708 S.E.2d at 724.

1. Challenged Finding of Fact

First, Defendant challenges a portion of finding of fact 7, that "[a] black car was referenced in the anonymous call." The State concedes error, and we agree: The trial court's reference to an anonymous tip concerning a black car constitutes error, as the testimony only referenced a tip concerning a silver car.

But as we detail below, the trial court's error concerning finding of fact 7 was not plain error because admitting the challenged evidence did not violate Defendant's Fourth Amendment rights. In other words, the trial court's seventh finding of fact was not a plain error because it did not "seriously affect the fairness, integrity, or public reputation" of the trial, as the evidence found in the silver vehicle was appropriately admitted. *See Grice*, 367 N.C. at 764, 767 S.E.2d at 320–21.

2. Challenged Conclusions of Law

Next, Defendant challenges conclusions of law 10 and 11. Conclusion of law 10 states:

> As in *Florida v. Bostick*. . . , a seizure did not occur here simply because of the approach of law enforcement and the asking of a few questions. The individuals who were approached had the right . . . "to disregard the police and go about [their] business". . . . Their failure to do so and the voluntary statements made resulted in the encounter being consensual and no reasonable suspicion was required.

Conclusion of law 11 states: "The encounter with the Defendant did not trigger Fourth Amendment scrutiny." Defendant argues these conclusions are incorrect, and the deputies violated his Fourth Amendment rights. Although the suppression order lacked clear constitutional analysis, we disagree with Defendant.

Here, when Deputy McCoy arrived at the scene, he saw one silver car and one black car, both parked near a mobile home. Prior to arrival, Deputy McCoy received an anonymous tip that an occupant of a silver car was about to engage in a drug deal. On arrival, Deputy McCoy parked behind the mobile home; he did not block the vehicles or use any emergency signaling. There were four individuals, including Defendant, in the silver car, and one individual in the black car. Deputy McCoy stood between the two vehicles and began speaking with the driver of the black car. While Deputy McCoy spoke with the driver of the black car, an occupant in the back seat of the silver car rolled down his window and spoke to Deputy McCoy.

At this point, the encounter between Deputy McCoy and the occupants of the vehicles, including Defendant, was consensual. *See Isenhour*, 194 N.C. App. at 543, 670 S.E.2d at 267–68; *Icard*, 363 N.C. at 309, 677 S.E.2d at 827. We analyze this encounter against the backdrop presumption that "[p]olice are free to approach and question individuals in public places when circumstances indicate that . . . mischief might be afoot." *See Icard*, 363 N.C. at 311, 677 S.E.2d at 828. Here, Deputy McCoy received a tip that the occupant of a silver car in the trailer park was about to engage in a drug deal, reasonably leading Deputy McCoy to believe that "mischief might be afoot." *See id.* at 311, 677 S.E.2d at 828.

Further, Deputy McCoy did not block the vehicles in; he did not engage his blue lights or sirens; he did not draw his weapon; and he did not touch any of the occupants. Also, the conversations between Deputy McCoy and the vehicle occupants were not coerced; one of the occupants of the silver car rolled down his window to talk with Deputy McCoy—without Deputy McCoy asking the occupant to do so. Under the totality of circumstances, a reasonable person would have felt free

to leave the encounter; thus, Defendant and the other vehicle occupants were not seized at this point. *See Isenhour*, 194 N.C. App. at 543, 670 S.E.2d at 267–68. Therefore, the trial court did not err in its tenth conclusion of law because the encounter was initially consensual. *See id.* at 543, 670 S.E.2d at 267–68.

After the back-seat occupant of the silver car rolled down his window to speak, Deputy McCoy "began to smell the odor of marijuana coming from the car." He also saw "marijuana crumbs," in plain view, on one occupant's lap and clothing. When questioned by Deputy McCoy as to how much marijuana he had in the car, the occupant responded, "none, I was just making a blunt."

As mentioned, marijuana is illegal in North Carolina. *See* N.C. Gen. Stat. §§ 90-94(b)(1), -95(a)(3). And the smell and sight of marijuana, coupled with an occupant's statement that he "was just making a blunt," are enough to establish "a reasonable ground" to suspect illegal drug possession. *See Yates*, 162 N.C. App. at 122, 589 S.E.2d at 904. Therefore, at this point in the interaction, the deputies had the requisite probable cause to seize the occupants of the vehicles, including Defendant. *See Degraphenreed*, 261 N.C. App. at 241, 820 S.E.2d at 336.

Further, and more specific to Defendant, Deputy McCoy then approached the front passenger window of the silver car, where Defendant was seated. Defendant's "hand was completely under his buttocks," and he "appeared to be stuffing something under his person and in his seat." After multiple requests, Defendant refused to show his hands or get out of the car. Deputy McCoy ultimately assisted Defendant out of the vehicle. These facts are specific to Defendant, and coupled with the facts above, are enough to establish "a reasonable ground" for suspicion of illegal drug possession. *See Yates*, 162 N.C. App. at 122, 589 S.E.2d at 904. Therefore, these facts bolstered the deputies' authority to seize Defendant. *See Degraphenreed*, 261 N.C. App. at 241, 820 S.E.2d at 336.

Nonetheless, the trial court's eleventh conclusion of law was erroneous: Contrary to the trial court's conclusion, "Fourth Amendment scrutiny" was "triggered" when Deputy McCoy assisted Defendant out of the vehicle because no reasonable person would have felt free to leave at that point. *See Isenhour*, 194 N.C. App. at 543, 670 S.E.2d at 267–68. But even so, the deputies had the requisite probable cause to seize Defendant, as a reasonable person would view Defendant's actions as "a reasonable ground" to suspect illegal drug possession. *See Yates*, 162 N.C. App. at 122, 589 S.E.2d at 904; *Degraphenreed*, 261 N.C. App. at 241, 820 S.E.2d at 336.

Although the trial court's eleventh conclusion of law was an error, it was not plain error because the deputies did not violate Defendant's Fourth Amendment rights. *See Yates*, 162 N.C. App. at 122, 589 S.E.2d at 904. In other words, the trial court's eleventh conclusion of law was not a plain error because it did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings," as the evidence was appropriately admitted. *See Grice*, 367 N.C. at 764, 767 S.E.2d at 320–21. Accordingly, this is not "the exceptional case" that clears the plain-error threshold. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

V. Conclusion

We conclude that the trial court did not plainly err in denying Defendant's pretrial motion to suppress. Even though the suppression order contains an erroneous finding of fact and conclusion of law, the trial court appropriately denied Defendant's motion to suppress because the deputies did not violate Defendant's Fourth Amendment rights.

NO PREJUDICIAL ERROR.

Judge DILLON concurs.

Chief Judge STROUD concurs in result only.

UNIVERSAL LIFE INSURANCE COMPANY, Plaintiff
v.
GREG E. LINDBERG, Defendant

No. COA23-274

Filed 5 December 2023

1. Appeal and Error—interlocutory orders—having effect of determining the action—enforcement of federal money judgment

In a case concerning a state court's enforcement of a federal court judgment requiring an individual (defendant) to pay an insurance company (plaintiff) hundreds of millions of dollars, defendant had a right to immediately appeal two orders entered by the state court: one enjoining defendant from encumbering or withdrawing from any entity he owned or controlled without prior authorization, and another requiring defendant to send plaintiff any distributions he was to receive from several LLCs he had an interest in. Although

both orders were interlocutory, their purpose was to enforce the underlying federal judgment, which was a final judgment in the case. Furthermore, both interlocutory orders had the effect of determining the action given that, absent immediate appeal, defendant would have to either comply with the potentially invalid orders or be held in contempt for noncompliance in order to appeal.

2. Enforcement of Judgments—state court enforcement—federal money judgment—jurisdiction to issue injunction—unsatisfied writ of execution required

In a case concerning a state court's enforcement of a federal court judgment requiring an individual (defendant) to pay an insurance company (plaintiff) hundreds of millions of dollars, the state court lacked jurisdiction to enter an order enjoining defendant from encumbering or withdrawing from any entity he owned or controlled without prior authorization. Although Chapter 1, Article 31 of the General Statutes allows a court to forbid transfers or other dispositions of a judgment debtor's property (under section 1-358) and permits a court to order that a judgment debtor's non-exempt property be applied toward the judgment (under section 1-362), both sections 1-358 and 1-362 required plaintiff to return an unsatisfied writ of execution in order for the court to have had jurisdiction; here, plaintiff returned an unsatisfied writ, but the record showed that plaintiff never attempted to execute it.

3. Enforcement of Judgments—state court action—enforcement of federal money judgment—charging order—Limited Liability Company Act—interest owner—exclusive remedy provision

In a case concerning a state court's enforcement of a federal court judgment requiring an individual (defendant) to pay an insurance company (plaintiff) hundreds of millions of dollars, where the state court entered a charging order requiring defendant to send plaintiff any distributions he was entitled to receive from several LLCs, the court erred by including a significant number of LLCs in the charging order of which defendant was neither a member nor an assignee of an economic interest. Further, the charging order violated the North Carolina Limited Liability Company Act by requiring defendant to produce all governing company documents and compelling the LLCs to freeze distributions to defendant, which went beyond the "exclusive remedy" established under the Act (providing that entry of a charging order is the "exclusive remedy" by which a judgment creditor of an interest owner may satisfy the judgment).

Appeal by Defendant from orders entered 27 October 2022 and 16 November 2022 by Judge Michael O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 4 October 2023.

Fox Rothschild LLP, by Matthew Nis Leerberg & Elizabeth Sims Hedrick, for Defendant-Appellant.

Troutman Pepper Hamilton Sanders, LLP, by Christopher G. Browning, Jr., for Plaintiff-Appellee.

Williams Mullen, by Wes J. Camden, for Appellee-Southland National Insurance Company, et al.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Daniel S. Johnson & M. Denise Stanford, for Intervenor-Appellee North Carolina Commissioner of Insurance Mike Causey.

CARPENTER, Judge.

Greg E. Lindberg ("Defendant") appeals from the trial court's orders issuing an injunction (the "Injunction") and issuing a charging order (the "Charging Order"). After careful review, we vacate the Injunction, and we reverse the Charging Order in part and affirm the Charging Order in part.

I. Factual & Procedural Background

This case concerns state-court enforcement of a federal-court judgment. On 3 May 2022, the United States District Court for the Middle District of North Carolina entered a money judgment requiring Defendant to pay Plaintiff $524,009,051.26, plus interest (the "MDNC Judgment").[1] On 12 July 2022, Plaintiff registered the MDNC Judgment with the Durham County Clerk of Court and moved to enforce the judgment under the Uniform Enforcement of Foreign Judgments Act. On 19 August 2022, the Durham County Superior Court granted Plaintiff's motion to enforce the MDNC Judgment. On 19 September 2022, Defendant appealed the enforcement order.

1. On 26 September 2023, Plaintiff filed a motion requesting this Court to take judicial notice of two Middle District orders; neither order is in the record, but both relate to the MDNC Judgment. We grant Plaintiff's motion. *See State v. Watson*, 258 N.C. App. 347, 352, 812 S.E.2d 392, 395 (2018) ("North Carolina law clearly contemplates that our courts, both trial and appellate, may take judicial notice of documents filed in federal courts.").

On 1 August 2022, Plaintiff filed a motion for the entry of a charging order concerning all limited liability companies ("LLCs") in which Defendant has an interest. On 7 September 2022, Plaintiff filed a motion to compel Defendant to turn over stock to the local sheriff and to enjoin Defendant from interfering, pledging, encumbering, assigning, or otherwise disposing of his ownership interest in any businesses.

On 13 September 2022, the trial court allowed Southland National Insurance Company, Bankers Life Insurance Company, Colorado Bankers Life Insurance Company, and Southland National Reinsurance Corporation to intervene. On 13 October 2022, the trial court also allowed Mike Causey, in his official capacity as Commissioner of Insurance on behalf of the North Carolina Insurance Companies (the "NCIC"), to intervene.

On 27 October 2022, the trial court issued the Injunction, granting Plaintiff's 7 September motion, in part, by enjoining Defendant from withdrawing or encumbering more than $5,000 from any entity owned or controlled by Defendant without Plaintiff's and the NCIC's consent or by court order. The Injunction also scheduled a November 2022 status conference "to hear pending motions" and stated Plaintiff could use "any judicial process permitted by law to pursue execution on its judgment against [Defendant]" in the meantime. Defendant appealed from the Injunction on 31 October 2022.

On 16 November 2022, the trial court issued the Charging Order, which affected 626 different LLCs. In order to satisfy the MDNC Judgment, the Charging Order required all LLC distributions intended for Defendant be sent to Plaintiff, instead. The Charging Order also compelled Defendant to produce all governing documents and verified accountings concerning the 626 LLCs. Further, the Charging Order required Defendant to update the governing documents and accountings every sixty days. Finally, the Charging Order compelled the 626 LLCs to "freeze" all payments, other than wages, to Defendant. The requirements of the Charging Order were all "pending further orders of [the trial court]." Defendant appealed the Charging Order on 9 December 2022.

On 22 December 2022, the trial court amended the Injunction "to expressly permit the payment of reasonable business expenses of ordinary course operations." On 30 December 2022, this Court consolidated Defendant's appeals. On 10 August 2023, Defendant filed a petition for writ of certiorari. On 15 September 2023, Plaintiff filed a motion to dismiss this appeal. On appeal, Defendant argues the trial court erred in issuing both the Injunction and the Charging Order.

II. Jurisdiction

[1] The initial issue is whether this Court has jurisdiction over this appeal. We must first discern whether this case is interlocutory because "[g]enerally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An order is interlocutory if it does not determine the entire controversy between all of the parties." *Abe v. Westview Cap., L.C.*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998).

In the Injunction, the trial court enjoined Defendant from withdrawing more than $5,000 from any entity owned or controlled by Defendant. Additionally, the trial court set a future status conference "to hear pending motions." And the Charging Order required Defendant to update and deliver accountings of the 626 LLCs to Plaintiff every sixty days, "pending further orders of [the trial court]."

Although the underlying MDNC Judgment is a final judgment, both the Charging Order and the Injunction fail to "determine the entire controversy between all of the parties" because both are subject to change, pending further proceedings by the trial court. *See id.* at 334, 502 S.E.2d at 881. Thus, though not typical, this appeal is interlocutory. *See id.* at 334, 502 S.E.2d at 881.

There are, however, exceptions to the general rule prohibiting appeals of interlocutory orders. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). One such exception applies to an interlocutory order that "[i]n effect determines the action and prevents a judgment from which an appeal might be taken." N.C. Gen. Stat. § 7A-27(b)(3)(b) (2021).

The challenged orders effectively determine this action. First, although this case is interlocutory, the MDNC Judgement is a valid, enforceable judgement. So, paradoxically, this case is "determined" in that respect. *See id.* Second, if there is no right of immediate appeal here, Defendant has two options: Either Defendant can appeal after adhering to the orders and satisfying the MDNC Judgment, or Defendant can appeal from a judgment adjudicating him in contempt of the orders.

In other words, unless we conclude the challenged orders effectively determine this case, Defendant must either comply with potentially invalid orders in order to appeal or be held in contempt in order to appeal. If these orders do not "in effect determine the action," no order will. *See id.* Therefore, this Court has jurisdiction over this appeal under subsection 7A-27(b)(3)(b). *See id.* We accordingly deny Plaintiff's

motion to dismiss this appeal, and we dismiss Defendant's petition for writ of certiorari as moot.

III. Issues

The issues on appeal are whether the trial court erred in issuing: (1) the Injunction; and (2) the Charging Order.

IV. Analysis

A. The Injunction

1. Standard of Review

Our caselaw lacks definitive authority concerning our standard of review. In *84 Lumber Co. v. Habitech Enterprises*, an unpublished case, this Court interpreted multiple supplemental-proceeding statutes and stated that the statutes were "discretionary in nature, and therefore, we will not disturb them absent an abuse of discretion." 2007 N.C. App. LEXIS 2425 at * 4 (Dec. 4, 2007) (citing *State ex rel. Long v. Interstate Cas. Ins. Co.*, 120 N.C. App. 743, 750, 464 S.E.2d 73, 77 (1995)). On the other hand, we review a trial court's grant of a preliminary injunction "essentially" de novo. *QSP, Inc. v. Hair*, 152 N.C. App. 174, 176, 566 S.E.2d 851, 852 (2002). Similarly, we review questions of statutory interpretation de novo. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

Here, we must interpret supplemental-proceeding statutes. If published, we would be bound by *84 Lumber*, but it remains only persuasive authority. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989); *Erie Ins. Exch. v. Miller*, 160 N.C. App. 217, 222, 584 S.E.2d 857, 860 (2003) ("Unpublished decisions are not . . . controlling authority."); *84 Lumber*, 2007 N.C. App. LEXIS 2425 (unpublished).

We review preliminary injunctions and statutory interpretations de novo, and this case involves an injunction based upon statutory authority. *See Hair*, 152 N.C. App. at 176, 566 S.E.2d at 852; *McKoy*, 202 N.C. App. at 511, 689 S.E.2d at 592. Therefore, we review supplemental-proceeding injunctions, like the challenged injunction here, de novo.

" '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) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

2. Authority to Issue the Injunction

[2] First, Defendant argues the trial court lacked authority to issue the Injunction because Rule 65 of the North Carolina Rules of Civil Procedure does not apply to post-judgment proceedings. We disagree.

We agree that Rule 65 concerns temporary restraining orders and preliminary injunctions—neither of which occur post-judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 65(a)–(b) (2021). But within Chapter 1 of our General Statutes lies Article 31, labeled "Supplemental Proceedings." Article 31 statutes facilitate the satisfaction of judgments. *See* N.C. Gen. Stat. §§ 1-352 to -368 (2021). More specifically, section 1-358 states: "The court or judge may, by order, forbid a transfer or other disposition of, or any interference with, the property of the judgment debtor not exempt from execution." *Id.* § 1-358.

Here, the trial court issued the Injunction under "Rule 65 of the North Carolina Rules of Civil Procedure *and the equitable powers of this Court to issue the injunctive equitable relief*." Regardless of the applicability of Rule 65, the "equitable powers" of the trial court include section 1-358, which allows a court to "forbid a transfer or other disposition of . . . the property of the judgment debtor." *See id.*

The MDNC Judgment is no longer disputed, and it renders Defendant a judgment debtor. Therefore, the trial court had the authority to issue the Injunction under "the equitable powers" detailed in Article 31, regardless of its mention of Rule 65. *See id.*

3. Jurisdiction to Issue the Injunction

Defendant also argues the trial court lacked jurisdiction to issue the Injunction because a writ of execution was never issued and returned unsatisfied. Specifically, Defendant asserts that sections 1-358 and 1-362 of Article 31 require a returned, unsatisfied writ of execution. We agree.

i. Section 1-358

We have held that Article 31 statutes require the return of an unsatisfied writ of execution. *See Milone & Macbroom, Inc. v. Corkum*, 279 N.C. App. 576, 582, 865 S.E.2d 763, 767–68 (2021). In *Milone*, the plaintiff did not return an unsatisfied writ of execution, and accordingly, we said the "supplemental proceedings under Article 31 of Chapter 1 of the General Statutes were not available to Plaintiff." *Id.* at 582, 865 S.E.2d at 768.

In *Radiance Capital Receivables Twenty One, LLC v. Lancsek*, however, this Court distinguished *Milone* and held that section 1-358

does not require a returned, unsatisfied writ. 286 N.C. App. 674, 677, 881 S.E.2d 883, 887 (2022) ("Section 1-358 . . . [does] not require a return of the execution unsatisfied prior to any supplemental proceeding."). This Court in *Radiance* reasoned that the sections analyzed in *Milone* were "directed at the judgment debtor to discover his property." *Id.* at 678, 881 S.E.2d at 887. According to the analysis in *Radiance*, however, the order before it "was entered to prevent transfer of defendant's property and/or funds by a Dare County financial institution, a third party with access to the property." *Id.* at 678–79, 881 S.E.2d at 887.

In other words, according to *Radiance*, section 1-358 does not require the return of an unsatisfied writ when the section is applied to enforce third-party action. *See id.* at 678–79, 881 S.E.2d at 887–88 ("Since the [order] was issued pursuant to Sections 1-358 and 1-360 to prevent third parties from disposing of property, the [order] differed from the supplemental proceeding in *Milone & MacBroom, Inc.*, in which the trial court lacked subject matter jurisdiction.").

Either the *Radiance* Court astutely distinguished *Milone*, or the *Radiance* Court improperly held to the contrary of *Milone*. If the latter, we are bound by *Milone*. *See State v. Gardner*, 225 N.C. App. 161, 169, 736 S.E.2d 826, 832 (2013) ("[W]here there is a conflicting line of cases, a panel of this Court should follow the older of those two lines.") (citing *In re R.T.W.*, 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (2005)). If the former, the writ requirement hinges on the identity of the compelled party. *See Radiance*, 286 N.C. App. at 678–79, 881 S.E.2d at 887–88. If the compelled party is a party to the suit, a returned writ is required; if the compelled party is a third party, a returned writ is not required. *See id.* at 678–79, 881 S.E.2d at 887–88.

Here, each enjoining conclusion of law within the Injunction begins with, "Defendant is hereby enjoined." The Injunction compels Defendant's actions, not third-party actions. So regardless of whether the distinction in *Radiance* is valid, the trial court needed a returned, unsatisfied writ of execution to have jurisdiction under section 1-358. *See Milone*, 279 N.C. App. at 582, 865 S.E.2d at 767–68 (requiring a returned writ for Article 31 statutes); *Radiance*, 286 N.C. App. at 678–79, 881 S.E.2d at 887–88 (creating an exception for when third parties are compelled); *Gardner*, 225 N.C. App. at 169, 736 S.E.2d at 832 (binding us by *Milone* if *Radiance* conflicts with *Milone*).

ii. Section 1-362

Section 1-362 states:

> The court or judge may order any property, whether subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within 60 days next preceding the order, cannot be so applied when it appears, by the debtor's affidavit or otherwise, that these earnings are necessary for the use of a family supported wholly or partly by his labor.

N.C. Gen. Stat. § 1-362.

Stated differently, the trial court may order a judgment debtor's non-exempt property be applied towards the judgment. *See id.* But without an exception, section 1-362, like the other Article 31 statutes, requires the return of an unsatisfied writ of execution. *See Milone*, 279 N.C. App. at 582, 865 S.E.2d at 767–68.

As detailed above, the Injunction prevents Defendant's actions, not third-party actions. Therefore, section 1-362 also requires a returned, unsatisfied writ of execution, regardless of whether the *Radiance* distinction is valid. *See Milone*, 279 N.C. App. at 582, 865 S.E.2d at 767–68 (requiring a returned writ for Article 31 statutes); *Radiance*, 286 N.C. App. at 678–79, 881 S.E.2d at 887–88 (creating an exception for when third parties are compelled); *Gardner*, 225 N.C. App. at 169, 736 S.E.2d at 832 (binding us by *Milone* if *Radiance* conflicts with *Milone*).

Thus, under both sections 1-358 and 1-362, the trial court's jurisdiction hinged on whether Plaintiff returned an unsatisfied writ of execution, so we must determine whether Plaintiff did so.

iii. Whether Plaintiff Returned an Unsatisfied Writ of Execution

In *Massey v. Cates*, the plaintiff sought relief through section 1-363. 2 N.C. App. 162, 164, 162 S.E.2d 589, 591 (1968). This Court in *Massey* acknowledged the requirement of a returned, unsatisfied writ. *See id.* at 164, 162 S.E.2d at 591. The Court also stated that "[Article 31] proceedings are available only after execution is attempted." *Id.* at 164, 162 S.E.2d at 591.

Here, Plaintiff returned an unsatisfied writ. Defendant, however, asserts that no officer ever attempted to execute on the MDNC Judgment. Plaintiff does not dispute this assertion. Rather, in a footnote, Plaintiff merely argues that a returned writ of execution is valid "regardless of whether the Sheriff was unable to find assets, the Sheriff could not track down the judgment debtor's assets within the 90-day statutory period, or the judgment creditor requested the Sheriff to return the execution as quickly as possible."

We disagree. The officer who signed the writ checked a box stating, "I did not serve this Writ of Execution," and he made a separate handwritten notation: "Per plaintiff's attorney, writ requested to be served unsatisfied." Further, the writ shows the date of receipt and date of return are the same: 21 September 2022. In other words, Plaintiff merely asked the deputy to check a box and return the writ—a far cry from the required attempted execution. *See id.* at 164, 162 S.E.2d at 591.

Because Plaintiff did not attempt to execute the writ, the trial court lacked jurisdiction to enter the Injunction. *See id.* at 164, 162 S.E.2d at 591. Accordingly, we vacate the Injunction. *See Milone*, 279 N.C. App. at 582, 865 S.E.2d at 767–68.

B. The Charging Order

1. Standard of Review

Whether a charging order complies with the North Carolina Limited Liability Company Act (the "NC LLC Act") is a question of statutory interpretation, which we review de novo. *See First Bank v. S&R Grandview, L.L.C.*, 232 N.C. App. 544, 546, 755 S.E.2d 393, 394 (2014). Again, " '[u]nder a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Williams*, 362 N.C. at 632–33, 669 S.E.2d at 294 (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. at 647, 576 S.E.2d at 319).

2. Relief Granted by the NC LLC Act

[3] The NC LLC Act is located in Chapter 57D of the North Carolina General Statutes. *See* N.C. Gen. Stat. § 57D-1-01 (2021). Section 57D-5-03, titled "Rights of judgment creditor," states:

> On application to a court of competent jurisdiction by any judgment creditor of an interest owner, the court may charge the economic interest of an interest owner with the payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor

> has only the right to receive the distributions that otherwise would be paid to the interest owner with respect to the economic interest.

Id. § 57D-5-03(a).

In other words, to facilitate the satisfaction of judgments, trial courts can enter charging orders compelling the redirection of distributions from LLCs in which a judgment debtor is an interest owner. *See id.* Further, "[t]he entry of a charging order is the exclusive remedy by which a judgment creditor of an interest owner may satisfy the judgment from or with the judgment debtor's ownership interest." *Id.* § 57D-5-03(d).

An "interest owner" is a "member or an economic interest owner." *Id.* § 57D-1-03(15). An "economic interest owner" is a "person who owns an economic interest but is not a member." *Id.* § 57D-1-03(11). And an "economic interest" is the "proprietary interest of an interest owner in the capital, income, losses, credits, and other economic rights and interests of a limited liability company, including the right of the owner of the interest to receive distributions from the limited liability company." *Id.* § 57D-1-03(10).

i. Entities in Which Defendant has an Economic Interest

First, Defendant argues the Charging Order is erroneous because it includes LLCs in which Defendant has no "economic interest." We agree.

There are discrepancies in the record concerning the number of LLCs in which Defendant has an economic interest. Defendant does not challenge the validity of the Charging Order concerning 73 LLCs, as Defendant admits to being a member of those companies. Plaintiff, on the other hand, says Defendant is a member or manager of 190 LLCs, and has an economic interest in the remainder. An affidavit filed with the United States District Court for the Middle District of North Carolina, by a third-party licensed attorney, lists 329 LLCs of which Defendant is a member or manager. Yet the Charging Order says Defendant has an "economic interest" in 626 LLCs. Concerning these 626 LLCs, Plaintiff asserts that Defendant has at least an indirect economic interest in hundreds of them through a complex web of holding companies.

The definition of "economic interest" is wide. *See id.* § 57D-1-03(10) (including "proprietary interest of an interest owner in the capital, income, losses, credits, and other economic rights"). The NC LLC Act, however, does not define "proprietary interests." And when examining statutes, words undefined by the General Assembly "must be given their

common and ordinary meaning." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202–03 (1974). Absent precedent, we look to dictionaries to discern a word's common meaning. *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016).

Merriam-Webster's defines "proprietary," in adjective form, as "used, made, or marketed by one having the exclusive legal right." *Proprietary*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003). Black's defines "proprietary interest" as "a property right." *Proprietary Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019). So, a "proprietary interest of an interest owner" is a non-member's exclusive legal entitlement to the member's property rights—namely, the member's economic rights. *See* N.C. Gen. Stat. § 57D-1-03(10), *Proprietary*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra*; *Proprietary Interest*, BLACK'S LAW DICTIONARY, *supra*.

An assignment is a legal transfer of property rights. *See Hinshaw v. Wright*, 105 N.C. App. 158, 164, 412 S.E.2d 138, 143 (1992). LLC members may assign their economic interests in the LLC. *See Haynes v. B & B Realty Grp., LLC*, 179 N.C. App. 104, 111, 633 S.E.2d 691, 695–96 (2006); N.C. Gen. Stat. § 57D-5-02 (2021) ("An economic interest is transferable in whole or in part."). But absent an assignment, non-members of LLCs are not entitled to any "capital, income, losses, credits, [or] . . . distributions" from an LLC. *See* N.C. Gen. Stat. § 57D-1-03(10).

There is conflicting evidence in the record concerning how many LLCs Defendant is a member of, but all evidence suggests it is fewer than 626. And there is nothing in the record detailing how many "economic interests" have been legally assigned to Defendant. Because charging orders only apply to interest owners, *see id.* § 57D-5-03(a); because interest owners are only LLC members and non-member economic-interest holders, *see id.* § 57D-1-03(15); and because Defendant can only become a non-member economic-interest holder by assignment, *see id.* § 57D-5-02; the Charging Order is erroneous insofar as it includes LLCs of which Defendant is not a member or an assignee of an economic interest.

Therefore, the trial court erred by including 626 LLCs in the Charging Order. The record indicates Defendant was an interest owner in far fewer. On remand, the trial court must reduce the number of LLCs in the Charging Order to the number of LLCs of which Defendant is a member or an assignee of an economic interest. *See id.* § 57D-5-03(a).

ii. Obligations Beyond the "Exclusive Remedy"

Next, Defendant argues that the Charging Order imposes obligations that go beyond the "exclusive remedy" established in the NC LLC Act.

He asserts the Charging Order: (1) requires him to provide operating agreements and accountings concerning the 626 LLCs; and (2) requires the 626 LLCs to "freeze all membership interests, economic interests, or payment of any sums to [Defendant] (other than wages) pending further order of this Court." Again, we agree with Defendant.

Subsection 57D-5-03(d) states "[t]he entry of a charging order is the *exclusive* remedy by which a judgment creditor of an interest owner may satisfy the judgment from or with the judgment debtor's ownership interest." *Id.* § 57D-5-03(d) (emphasis added). And subsection 57D-5-03(a) states that "the judgment creditor has *only* the right to receive the distributions that otherwise would be paid to the interest owner with respect to the economic interest." *Id.* § 57D-5-03(a) (emphasis added).

The plain text of Chapter 57D only gives Plaintiff the right to receive distributions. *See id.* The text says nothing about producing documents or freezing distributions. *See id.* Thus, the trial court violated the NC LLC Act when it compelled the production of documents and the freezing of distributions through the Charging Order. *See id.* § 57D-5-03(d).

Compelling the production of documents and the "freezing" of distributions may be possible under Article 31, however. *See* N.C. Gen. Stat. §§ 1-352 to -368. But as already discussed, the trial court lacked jurisdiction to operate under Article 31. *See Milone*, 279 N.C. App. at 582, 865 S.E.2d at 767–68. Therefore, even if the trial court purported to act under Article 31 when it issued the Charging Order, it lacked jurisdiction to compel the production of documents and to freeze distributions.

V. Conclusion

The trial court lacked jurisdiction to enter the Injunction; therefore, we vacate the Injunction. Concerning the Charging Order, the trial court erred by including any LLCs of which Defendant was not a member or an assignee of an economic interest, and the trial court erred by compelling the production of documents and the freezing of distributions. Therefore, we reverse those portions of the Charging Order and remand this case to the trial court to continue proceedings in accordance with this opinion.

AFFIRMED in part, VACATED in part, REVERSED in part, and REMANDED.

Judges TYSON and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 5 December 2023)

Case	County	Disposition
ABRANTES v. ABRANTES No. 23-333	Onslow (22CVD600605)	Vacated
ALEXANDER v. BURKEY No. 23-179	Mecklenburg (20CVS2194)	Reversed and Remanded
CHAGARIS v. VANDERGRIFT No. 23-164	Iredell (20CVS2472)	Affirmed
DAVIS v. LAW No. 22-1053	Wake (14CVD15242)	Affirmed
DAVIS v. LAW No. 22-1054	Wake (14CVD15242)	Affirmed
DETROI v. SABER HEALTHCARE HOLDINGS, LLC No. 23-465	Mecklenburg (22CVS8794)	Affirmed
EASTWOOD CONSTR. PARTNERS, LLC v. WAXHAW DEVS., LLC No. 23-180	Mecklenburg (21CVS876)	Affirmed
ENV'T JUST. CMTY. ACTION NETWORK v. N.C. DEP'T OF ENV'T QUALITY No. 22-1047	New Hanover (22CVS443)	Affirmed
GARRITY v. GODBEY No. 22-471	Wake (21CVS7789)	Affirmed
HERMOSA v. SPELLANE No. 23-373	Guilford (18CVD8698)	Affirmed
IN RE A.J.G. No. 23-704	Carteret (21JB43)	Vacated and Remanded
IN RE G.E. No. 22-1056	Mecklenburg (20JA330)	Affirmed
IN RE J.R. No. 23-554	Durham (19J186) (19J187)	VACATED IN PART AND REMANDED.
IN RE L.M. No. 23-19	Cumberland (20JA287)	Dismissed

Case	County	Disposition
IN RE N.I.R.W. No. 23-389	Lenoir (22JT33)	Affirmed
STATE v. DAVIS No. 23-551	Forsyth (20CRS986-87)	No error in part; remanded for correction of clerical error in part.
STATE v. ELLERBE No. 23-60	Richmond (21CRS50262-63)	Dismissed.
STATE v. GALES No. 23-689	Mecklenburg (20CRS213051-52) (21CRS12027)	No Error
STATE v. HOFFMAN No. 23-76	Richmond (19CRS50890-92)	No Error
STATE v. MACON No. 23-357	Randolph (20CRS52132-43)	No Error
STATE v. MINOR No. 22-845	Franklin (18CRS50124)	Affirmed.
STATE v. OGLESBY No. 23-783	Beaufort (22CRS50700) (22CRS50702)	Affirmed in part; vacated and remanded in part
STATE v. SHINE No. 23-106	Buncombe (21CRS80768-77)	No Error
STATE v. SINGLETARY No. 23-175	Columbus (20CRS50984)	No Error
STATE v. SPANN No. 22-1004	Caldwell (07CRS3906-08)	Dismissed
STATE v. SPRUILL No. 23-248	Martin (20CRS50284) (20CRS50294)	No Error
STATE v. STEVENS No. 22-1057	Lincoln (20CRS50881)	Affirmed
STATE v. STOKES No. 22-921	Wayne (20CRS54440) (21CRS484)	No Error
STATE v. SWINDELL No. 23-217	Craven (18CRS53598)	No Error

STATE v. TERRY No. 23-378	Orange (20CRS52102)	Affirmed in Part, Remanded for Correction of Judgment
STATE v. WADE No. 23-492	Caswell (16CRS50435-36)	No Error
STATE v. ZAPATA No. 23-63	Pender (20CRS51264) (20CRS51408)	No Error in Part, Dismissed in Part.

CARCANO v. JBSS, LLC

[291 N.C. App. 522 (2023)]

JAMES R. CARCANO AND CARCANO REALTY GROUP, LLC, PLAINTIFFS
v.
JBSS, LLC, AND DAVID BROWDER, LUCY BROWDER,
AND JASON BROWDER, DEFENDANTS

No. COA23-685

Filed 19 December 2023

1. Statutes of Limitation and Repose—action for renewal of judgment—judgment amended—no jurisdiction to amend—limitations period running as of initial judgment

In an action seeking to renew a money judgment, where plaintiffs filed their complaint for renewal over ten years after the judgment was entered but less than ten years after the trial court amended the judgment (to correct the name of a party), the trial court properly granted summary judgment to defendants on the ground that plaintiffs did not file their complaint within the applicable ten-year statute of limitations. The limitations period could not have begun on the date that the amended judgment was entered because the trial court lacked jurisdiction to amend the judgment: (1) under Civil Procedure Rule 59(e), since there was no evidence that plaintiffs filed a motion to amend the initial judgment within the requisite ten-day period; (2) under Civil Procedure Rule 60(b)(1), since there was no evidence that plaintiffs moved to amend the judgment under this rule, and even if they had, a Rule 60(b) amendment would not have affected the finality of the initial judgment; or (3) as a *nunc pro tunc* judgment, where the amended judgment did not include language designating it as *nunc pro tunc* and where the record did not suggest that the initial judgment was never entered to begin with.

2. Statutes of Limitation and Repose—summary judgment granted—individual defendant—did not raise affirmative defense—corporate defendant—appearing pro se and without agent

In an action seeking to renew a money judgment, an order granting summary judgment to defendants—on the ground that plaintiffs failed to file their complaint within the applicable ten-year statute of limitations—was affirmed in part and reversed in part. Although one of the individual defendants did not join in the other defendants' pro se answer to plaintiffs' complaint, in which defendants asserted their statute of limitations argument as an affirmative defense,

plaintiffs conceded to having executed a release of their claim of judgment against that individual defendant. Because there was no existing claim against the individual defendant that the court could have renewed, plaintiffs failed to present a genuine issue of material fact as to that defendant, and therefore it did not matter that the defendant had failed to personally raise an affirmative defense to plaintiffs' complaint. Conversely, the court did err in granting summary judgment as to a corporate defendant, since corporations cannot appear pro se and this particular defendant was not represented by an agent in the action.

Appeal by plaintiffs from order entered 20 December 2022 by Judge J. Thomas Davis in Rutherford County Superior Court. Heard in the Court of Appeals 28 November 2023.

King Law Offices, PLLC, by Alexander M. Sherret, for plaintiffs-appellants.

David Browder and Lucy Browder, pro se for defendants-appellees.

FLOOD, Judge.

James R. Carcano and Carcano Realty Group (collectively, "Plaintiffs") appeal from the trial court's order granting summary judgment in favor of JBSS, LLC ("JBSS"), David Browder, Lucy Browder, and Jason Browder (collectively, "Defendants"). Plaintiffs argue the trial court erred in denying Plaintiffs' motion for summary judgment and granting summary judgment in favor of Defendants because, (A) Plaintiffs sufficiently pled and filed their complaint within the statute of limitations, and (B) Defendants JBSS and Jason Browder did not raise the affirmative defense of statute of limitations. As explained in further detail below, we affirm in part, reverse in part, and remand.

I. Facts and Procedural Background

On 12 October 2010, based on a prior civil action, the trial court entered a judgment (the "Initial Judgment") against Defendants, ordering that Defendants were jointly and severally liable to Plaintiffs in the amount of $95,000.00 for breach of contract. The Initial Judgment, however, included an erroneous caption that indicated the parties to whom the judgment was being awarded were "James R. Carcano and the Carcano Family Trust, LLC." On 23 May 2012, the trial court amended the Initial Judgment (the "Amended Judgment"), such that Plaintiffs

were properly listed as "James R. Carcano and Carcano Realty Group LLC." The monetary judgment listed in the Amended Judgment was the same as in the Initial Judgment—$95,000.00.

On 29 July 2017, Plaintiffs received a check from Defendant Jason Browder in the amount of $7,000.00 towards the Amended Judgment, and the current Record on appeal contains no evidence of other payments from any Defendant. On 7 April 2022, Plaintiffs filed a complaint (the "Complaint") to "obtain a new Judgment, renewing the [p]rior Judgment for an additional term of ten [] years." In the Complaint, Plaintiffs requested they recover judgment against Defendants for the remaining balance of the monetary judgment as of 1 April 2022. On 12 May 2022, Defendants JBSS, David Browder, and Lucy Browder filed *pro se* an Answer to the Complaint where they asserted, *inter alia*, Plaintiffs' claim is barred by the ten-year statute of limitations under N.C. Gen. Stat. § 1-47(1) (2021). Defendant Jason Browder was not included in this Answer to the Complaint.

On 2 December 2022, Plaintiffs filed a Motion for Summary Judgment (the "Motion"). This matter came on before the trial court, and on 20 December 2022, the trial court entered an order denying the Motion. In its order, the trial court found, *inter alia*:

> 3. The current action was filed on [7 April 2022], ten years after the [Initial J]udgment, but prior to the [A]mended [J]udgment.
>
> 4. There is nothing in [the Amended Judgment] to indicate that any motion was filed to amend the [Initial J]udgment, nor anything to indicate that [D]efendants were given notice or an opportunity to be heard about the amendment.
>
> . . . .
>
> 6. [P]laintiffs have not set out the legal basis upon which the amendment to the judgment was made, nor cited any authority of the [c]ourt to make such an amendment nineteen months after the [Initial J]udgment. Rule 59(e) of the Rules of Civil Procedure provides that a motion to amend a judgment must be made within [ten] days after the entry of the judgment, which was not done. Rule 60(b)(1) may give authority to amend a judgment to correct the party, however, this provision is limited to one year after the judgment was entered. [P]laintiff[s] do[] not assert the correction was clerical in nature in that [P]laintiff[s]

> contend[] the statute of limitations should begin after the amended judgment, and the changing of the name of the party in a case, to which is entitled to judgment, would be substantive. Rule 60, however, provides: "A motion under this section does not affect the finality of a judgment or suspend its operation."
>
> 7. While it does not appear the case here, even if [P]laintiff[s] contend[] the correction is merely clerical and corrected under Rule 60(a), the amendment again would not affect the finality of the [Initial J]udgment or suspend its operation.
>
> 8. The Judge lacked any jurisdiction or authority to enter the amended judgment, [D]efendants were not given notice of its amendment nor the request to have it amended, the amendment was not timely, and the amendment had no affect [sic] on the finality of the original judgment nor suspend its operation.

Plaintiffs timely appealed.

II. Jurisdiction

As the trial court's granting of summary judgment for Defendants constitutes a final judgment, Plaintiffs' appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)a. (2021).

III. Standard of Review

"This Court reviews decisions arising from trial court orders granting or denying motions for summary judgment using a de novo standard of review." *Cummings v. Carroll*, 379 N.C. 347, 358, 866 S.E.2d 675, 684 (2021) (citation omitted). "Summary judgment is appropriate when '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.'" *Dallaire v. Bank of America, N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021)).

IV. Analysis

Plaintiffs argue on appeal they: (A) are entitled to summary judgment against Defendants because Plaintiffs sufficiently pled and filed their Complaint within the statute of limitations; and, (B) are entitled to summary judgment against Defendants JBSS and Jason Browder

because these Defendants did not properly raise the affirmative defense of the statute of limitations. We address each argument in turn.

A. Statute of Limitations

[1] In their first issue on appeal, Plaintiffs argue that 23 May 2012—the date the Amended Judgment was entered—is the date of entry for the purposes of the ten-year statute of limitations, and their 7 April 2022 filing of the Complaint was therefore timely. *See* N.C. Gen. Stat. § 1-47(1) (2021); *see Unifund CCR Partners v. Young*, 282 N.C. App. 381, 386, 871 S.E.2d 347, 351 (2022) (providing that under N.C. Gen. Stat. § 1-47(1), "[a]n independent action seeking to renew a judgment must be brought within ten years of entry of the original judgment, and such renewal action can be brought only once"). In support of this contention, Plaintiffs present three sub-arguments: (1) Plaintiffs sufficiently pled their action to renew the judgment entered against Defendants; (2) 23 May 2012[1] is the date of entry for the purpose of the statute, and the statute of limitations window therefore did not run until 23 May 2022; and, (3) the trial court had authority and jurisdiction to enter the Amended Judgment *nunc pro tunc*. As Plaintiffs' third sub-argument is determinative of our statute of limitations analysis, we address this issue.

In arguing the trial court had authority and jurisdiction to enter the Amended Judgment, Plaintiffs specifically contend that the trial court had the power to enter the Amended Judgment *nunc pro tunc* "to ensure the proper order of the court was reflected." Plaintiffs further contend the Initial Judgment did not reflect the order of the trial court because it did not name the proper Plaintiffs, and Plaintiffs therefore could not enforce or collect a judgment to which they were not parties. Plaintiffs' contentions are without merit.

Under the North Carolina Rules of Civil Procedure, a party's motion to alter or amend a judgment "shall be served not later than [ten] days after the entry of the judgment." N.C. R. Civ. P. 59(e). Under Rule 60(b)(1) of the North Carolina Rules of Civil Procedure, a trial court may correct a party's name that was erroneously designated in the court's judgment or order, but this corrective action may be taken only upon a party's motion, to be brought "not more than one year after the judgment, order, or proceeding was entered or taken." N.C. R. Civ. P. 60(b). A motion made under Rule 60(b), however, "does not affect the finality of a judgment or suspend its operation." N.C. R. Civ. P. 60(b).

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1. In their Brief, Plaintiffs list 12 May 2012 as the date the trial court entered the Amended Judgment. This is in error as, per the Record, the Amended Judgment was entered on 23 May 2012.

Absent a proper motion under the Rules of Civil Procedure, a trial court may issue *nunc pro tunc* a corrective judgment or order. Regarding *nunc pro tunc* orders or judgments, this Court has provided:

> A nunc pro tunc order is a correcting order. The function of an entry of nunc pro tunc is to correct the record to reflect a prior ruling made in fact but defectively recorded. A nunc pro tunc order merely recites court actions previously taken, but not properly or adequately recorded. A court may rightfully exercise its power merely to amend or correct the record of the judgment, so as to make the court's record speak the truth or to show that which actually occurred, under circumstances which would not at all justify it in exercising its power to vacate the judgment. However, a nunc pro tunc entry *may not be used to accomplish something which ought to have been done but was not done.*

K&S Res., LLC v. Gilmore, 284 N.C. App. 78, 83, 875 S.E.2d 538, 542 (2022) (emphasis added) (cleaned up) (citation omitted); *see Whitworth v. Whitworth*, 222 N.C. App. 771, 778–79, 731 S.E.2d 707, 713 (2012) (holding an amended order was not *nunc pro tunc* where it "essentially created an order with findings of fact and conclusions of law that had not previously existed"); s*ee also Dabbondanza v. Hansley*, 249 N.C. App. 18, 22, 791 S.E.2d 116, 120 (2016) ("[O]rders may be entered *nunc pro tunc* in the same manner as judgments." (cleaned up) (citation omitted)). Further,

> before a court order or judgment may be ordered *nunc pro tunc* to *take effect on a certain prior date*, there must first be an order or judgment actually decreed or signed on that prior date. If such decreed or signed order or judgment is then not entered due to accident, mistake, or neglect of the clerk, and provided that no prejudice has arisen, the order or judgment may be appropriately entered at a later date *nunc pro tunc to the date when it was decreed or signed.*

Whitworth, 222 N.C. App. at 778–79, 731 S.E.2d at 713 (emphasis added).

Regardless of the means by which a trial court enters an amended judgment, however,

> [o]n the question of the effect of clerical errors in the names and designation of parties, our case law is clear. Names are to designate persons, and where the identity

> is certain a variance in the name is immaterial. Errors or defects in the pleadings or proceedings not affecting substantial rights are to be disregarded *at every stage of the action.*

Bank of Hampton Rds. v. Wilkins, 266 N.C. App. 404, 408, 831 S.E.2d 635, 639–40 (2019) (citation and internal quotation marks omitted); *see also Gordon v. Pintsch Gas Co.*, 178 N.C. 435, 100 S.E.2d 878, 880 (1919) (holding the defendant did not suffer any prejudice by reason of a misnomer in the trial court's judgment, as "a misnomer does not vitiate [a judgment], provided the identity of the *corporation* or person . . . intended by the parties is apparent, whether it is in a deed, *or in a judgment*, or in a criminal proceeding" (emphasis added) (citations omitted)).

Here, the Initial Judgment was entered on 12 October 2010 and the Amended Judgment on 23 May 2012. There is no Record evidence Plaintiffs filed a motion to amend the Initial Judgment within ten days after its entry, and as such the trial court did not have jurisdiction to enter its Amended Judgment under Rule 59(e). *See* N.C. R. Civ. P. 59(e). As to Rule 60(b)(1), there is nothing in the Record to suggest Plaintiffs moved to amend the Initial Judgment under this Rule, and even if they did, the function of Rule 60(b) is such that amended judgments do not affect the finality of the prior judgment. *See* N.C. R. Civ. P. 60(b).

As the trial court had no jurisdiction under the North Carolina Rules of Civil Procedure to enter the Amended Judgment, the only means by which the court may have had jurisdiction or authority to enter the Amended Judgment was by entering it *nunc pro tunc*, "to correct the record to reflect a prior ruling made in fact but defectively recorded." *K&S Res., LLC*, 284 N.C. App. at 83, 875 S.E.2d at 542. In review of the Record, however, nowhere in the Amended Judgment did the trial court include language indicating it was *nunc pro tunc*. Additionally, for an amended judgment to be *nunc pro tunc*, the prior judgment must *not have been entered* "due to accident, mistake, or neglect of the clerk," and there is nothing in the Record here that indicates the Initial Judgment was not, in fact, entered. *See Whitworth*, 222 N.C. App. at 778–79, 731 S.E.2d at 713.

Even if the trial court did enter the Amended Judgment *nunc pro tunc*, however, this would actually be to the detriment of Plaintiffs' ultimate argument regarding the statute of limitations. "The function of an entry of nunc pro tunc is to correct the record to reflect a prior ruling made in fact but defectively recorded" and "to make the court's record speak the truth or to show that which actually occurred[.]" *See K&S*

Res., *LLC*, 284 N.C. App. at 83, 875 S.E.2d at 542 (cleaned up). This function is reflected in this Court's articulation of what is required in a *nunc pro tunc* judgment—when appropriately entered, a *nunc pro tunc* judgment is entered "*to the date when it was decreed or signed*." *Whitworth*, 222 N.C. App. at 778–79, 731 S.E.2d at 713 (emphasis added). It is therefore evident Plaintiffs misapprehend the function of a *nunc pro tunc* judgment; if the Amended Judgment here had been entered *nunc pro tunc*, it would have been dated to 12 October 2010, *the date of the Initial Judgment*. Although Plaintiffs' argument is that, by filing the Complaint on 7 April 2022, they conformed to the ten-year statute of limitations, their contention concerning *nunc pro tunc* defeats their argument in its effect. In fact, to have complied with the statute of limitations, Plaintiffs had to file the Complaint by 11 October 2020, and they failed to do so. *See* N.C. Gen. Stat. § 1-47(1).

Finally, presuming by some procedural mechanism the trial court had jurisdiction to enter the Amended Judgment, we are unpersuaded by Plaintiffs' argument the Initial Judgment did not reflect the order of the court because it did not properly name Plaintiffs. As articulated above, in a judgment, where the identity of a party is clear—be it a person or corporation—a non-consequential variance in the party's name is immaterial. *See Bank of Hampton Rds.*, 266 N.C. App. at 408, 831 S.E.2d at 639–40; *see Gordon*, 178 N.C. at 435, 100 S.E.2d at 880. Here, in the Initial Judgment, Plaintiff, Carcano Realty Group, was erroneously listed as "Carcano Family Trust, LLC," and the Amended Judgment served only to correct this name. Nothing in the Record indicates, at any point in the proceedings, any uncertainty as to Plaintiff Carcano Realty Group's identity. As such, this error in the Initial Judgment is disregarded. *See Bank of Hampton Rds.*, 266 N.C. App. at 408, 831 S.E.2d at 639–40.

As the trial court did not have jurisdiction to enter the Amended Judgment, and the Initial Judgment did not prejudice Plaintiffs' ability to enforce or collect the monetary judgment, the ten-year statute of limitations ran from the date of entry of the final, Initial Judgment—12 October 2010. *See* N.C. Gen. Stat. § 1-47(1). Plaintiffs filed the Complaint on 7 April 2022, which was more than ten years following the entry of the Initial Judgment and therefore, after the running of the statute of limitations.

Accordingly, Plaintiffs failed to meet their burden of proving the Complaint was timely filed, the trial court was presented with no issues of material fact, and its order of summary judgment in favor of Defendants was proper. *See K&S Res.*, *LLC*, 284 N.C. App. at 81, 875 S.E.2d at 541 ("The question whether a cause of action is barred by

the statute of limitations is a mixed question of law and fact. When a defendant asserts the statute of limitations as an affirmative defense, the burden rests on the plaintiff to prove that his claims were timely filed." (citation and internal quotation marks omitted)); *see also Dallaire*, 367 N.C. at 367, 760 S.E.2d at 266. The trial court did not err.

B. Affirmative Defense

[2] Plaintiffs argue the trial court erred in denying the Motion and granting summary judgment in favor of Defendants Jason Browder and JBSS, as Jason Browder did not file an answer and raise the affirmative defense of statute of limitations, and JBSS is a corporation and may not proceed *pro se*. After careful review, we disagree with Plaintiffs' contentions as to Defendant Jason Browder, and agree as to Defendant JBSS.

1. Jason Browder

Under North Carolina law, "[t]he bar of the statute of limitations is an affirmative defense and cannot be availed of by a party who fails, in due time and proper form, to invoke its protection." *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assoc., P.C.*, 180 N.C. App. 257, 262, 636 S.E.2d 835, 839 (2006) (quoting *Overton v. Overton*, 259 N.C. 31, 36, 129 S.E.2d 593, 597 (1963)). Here, the Record shows that Jason Browder did not join Defendants JBSS, David Browder, and Lucy Browder in filing their *pro se* Answer to the Complaint, where they asserted the Complaint was barred by the ten-year statute of limitations.

In our *de novo* review of the Record, however, we find Plaintiffs conceded in the Complaint that they have executed a "release of their claim of judgment against only [] Defendant Jason Browder." As such, in moving for summary judgment to renew their prior claim of judgment against Jason Browder, Plaintiffs presented to the trial court no genuine issue of material fact, as Plaintiffs had against Jason Browder no claim of judgment that the trial court may have renewed for an additional term of ten years. *See Dallaire*, 367 N.C. at 367, 760 S.E.2d at 266; *see* N.C. Gen. Stat. § 1-47(1). We therefore hold the trial court did not err in granting summary judgment in favor of Jason Browder and dismissing with prejudice Plaintiffs' claim against him, and affirm the trial court's order as to Jason Browder.

2. Defendant JBSS

As a general rule,

> while an individual may appear *pro se* before [a] court, a corporation is not an individual under North Carolina

> law, and must be represented by an agent. Further, a corporation cannot appear *pro se*; it must be represented by an attorney licensed to practice law in North Carolina, pursuant to certain limited exceptions. These exceptions include the drafting by non-lawyer officers of some legal documents, and appearances in small claims courts and administrative proceedings.

HSBC Bank, USA, Nat'l Ass'n v. PRMC, Inc., 249 N.C. App. 255, 259, 790 S.E.2d 583, 586 (2016) (citations omitted); *see also Shen Yu Ke v. Heng-Qian Zhou*, 256 N.C. App. 485, 490, 808 S.E.2d 458, 462 (2017) (holding that an entry of default against the defendant corporation was proper where "the answer was not a valid response for [the defendant] corporation because [the corporation's agent] was not a licensed attorney").

Here, in the answer signed and filed by Defendants JBSS, David Browder, and Lucy Browder, David Browder was denoted as representing JBSS in his capacity as manager. As a corporation cannot appear *pro se*, and filing an answer does not fall under the limited exceptions where a corporation need not be represented by an attorney licensed to practice law in North Carolina, JBSS's defense of the statute of limitations was not proper because David Browder is not a licensed attorney. *See HSBC Bank, USA, Nat'l Ass'n*, 249 N.C. App. at 259, 790 S.E.2d at 586; *see also Shen Yu Ke*, 256 N.C. App. at 490, 808 S.E.2d at 462. Accordingly, as it concerns JBSS, it was error for the trial court to enter summary judgment against Plaintiffs and to deny Plaintiffs' claims with prejudice. We therefore reverse the trial court's order as to JBSS.

V. Conclusion

For the reasons aforesaid, we affirm in part the trial court's order, affirm the the order as it concerns Defendant Jason Browder, reverse the order as it concerns Defendant JBSS, and remand to the trial court for further proceedings.

AFFIRMED in part, REVERSED in part, and REMANDED.

Judges TYSON and ZACHARY concur.

CRANES CREEK, LLC, Plaintiff
v.
NEAL SMITH ENGINEERING, INC., Defendant

No. COA23-472

Filed 19 December 2023

Negligence—professional negligence—engineering—summary judgment—standard of care—expert testimony

In a professional negligence action filed against an engineering business (defendant) that performed civil engineering services on land that a corporation (plaintiff) was in the process of purchasing, where plaintiff discovered that the water flow on the property did not meet the minimum requirements for fire suppression despite defendant's statements to the contrary, the trial court did not err in granting defendant's motion for summary judgment and dismissing plaintiff's claims for negligence and negligent misrepresentation. Plaintiff failed to meet its burden of establishing the standard of care applicable to engineers, since none of plaintiff's expert witnesses were able to testify as to what that standard was and whether defendant breached it. Consequently, plaintiff failed to show that a genuine issue of material fact existed at the summary judgment phase.

Appeal by Plaintiff from order entered 22 November 2022 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 18 October 2023.

Van Camp, Meacham & Newman, PLLC, by Thomas M. Van Camp and Michael J. Newman, for Plaintiff-Appellant.

Ragsdale Liggett PLLC, by Melissa Dewey Brumback, Amie C. Sivon, and Michael Hutcherson, for Defendant-Appellee.

GRIFFIN, Judge.

Plaintiff, Cranes Creek, LLC, appeals from the trial court's order granting Defendant, Neal Smith Engineering, Inc.'s, motion for summary judgment. Plaintiff argues the trial court erred in granting Defendant's motion for summary judgment asserting genuine issues of material fact exist concerning Plaintiff's claims for negligence and

negligent misrepresentation. We hold the trial court did not err in granting Defendant's motion for summary judgment and affirm.

I. Factual and Procedural Background

In November 2015, Mid-State Development, LLC, purchased several acres located in Southern Pines. Mid-State intended to subdivide and develop the land into a residential subdivision ("Shaw Landing"). The Town of Aberdeen annexed the proposed subdivision from Southern Pines. On 12 November 2015, Mid-State entered into a contract with Defendant to provide civil engineering site services.

On 8 June 2019, Plaintiff signed an offer to purchase Shaw Landing from Mid-State. During the due diligence period, Plaintiff reached out to C. Webster, Defendant's member-manager, to ask if waterflow tests had been conducted. Plaintiff asked Webster to send the results and confirm whether flow was sufficient for fire suppression. B. Welborn, an employee of Defendant, responded to Plaintiff's email on 2 July 2019 stating, in relevant part: "We will need to model the proposed water mains for the NCDEQ-DWR permit, but the fire flow at the dead-end hydrant meets the minimum fire flow requirements at 20 psi."

On 2 October 2019, Plaintiff completed the purchase of Shaw Landing. Sometime later, Plaintiff discovered additional water supply and pipes would have to be installed and run to the subdivision to meet the minimum flow requirements for fire suppression.

On 20 July 2021, Plaintiff filed a complaint against Defendant asserting claims for negligent misrepresentation, negligence, breach of contract, and breach of implied warranties. On 29 September 2021, Defendant filed an answer and counterclaims. On 25 October 2021, Plaintiff filed an answer to Defendant's counterclaims. On 11 October 2022, Defendant filed a motion for summary judgment. On 25 October 2022, Plaintiff filed a motion to amend their complaint and an amended complaint asserting claims for negligent misrepresentation and negligence.

On 10 November 2022, Defendant's motion for summary judgment came on for hearing in Moore County Superior Court. On 22 November 2022, the trial court entered an order granting Defendant's motion for summary judgment and dismissing Plaintiff's complaint and amended complaint. Plaintiff timely filed notice of appeal on 19 December 2022.

II. Analysis

Plaintiff contends the trial court erred in granting Defendant's motion for summary judgment as there were genuine issues of material

fact concerning Plaintiff's claims for negligence and negligent misrepresentation. We disagree.

Summary judgment is appropriate 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." N.C. R. Civ. P. 56(c) (2023). In a summary judgment proceeding, the movant "bears the burden of establishing the lack of any triable issue." *Schmidt v. Breeden*, 134 N.C. App. 248, 251, 517 S.E.2d 171, 174 (1999). We review the trial court's allowance of a motion for summary judgment de novo, considering the evidence in the light most favorable to the non-moving party. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

Plaintiff's claims for negligence and negligent misrepresentation are both claims of professional negligence, as Plaintiff alleges Defendant was negligent in its professional capacity as an engineer. *See Frankenmuth Ins. v. City of Hickory*, 235 N.C. App. 31, 34, 760 S.E.2d 98, 101 (2014) (citation omitted) (stating a claim for "negligence" is actually a claim for "professional negligence" where the plaintiff alleges negligent performance by the defendant in its professional capacity). "In a professional negligence action, the plaintiff bears the burden of showing: '(1) the nature of the defendant's profession; (2) the defendant's duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs.' " *Id.* at 35, 760 S.E.2d at 101 (quoting *Michael v. Huffman Oil Co.*, 190 N.C. App. 256, 271, 661 S.E.2d 1, 11 (2008)).

Further, the plaintiff must establish the standard of conduct or care through expert testimony. *Id.* Through this requirement, the expert is able to "assist the jury in discerning whether [the] defendant's professional performance or conduct did not conform [with the standard of care], and thus was in breach of that duty and the proximate cause of [the] plaintiff's injury." *Handex of the Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 11, 607 S.E.2d 25, 31 (2005).

Expert testimony is not required to establish the standard of care where "the common knowledge and experience of the jury is sufficient to evaluate [the defendant's] compliance with [the] standard[.]" *Id.* (internal marks and citation omitted). This exception "is implicated where the conduct is gross, or of such a nature that the common knowledge of lay persons is sufficient to find the standard of care required, a departure therefrom, or proximate causation." *Id.* (internal marks and

citations omitted). Where the common knowledge exception does not apply and the plaintiff fails to establish the professional standard of care through expert testimony, "summary judgement for the defendant is proper." *Frankenmuth*, 235 N.C. App. at 35, 760 S.E.2d at 101 (citation omitted); *see also Huffman Oil Co.*, 190 N.C. App. at 271, 661 S.E.2d at 11 (holding the plaintiffs failed to establish a prima facie showing of professional negligence where expert testimony regarding the standard of care was lacking).

Thus, this Court will affirm the trial court's grant of summary judgment where the plaintiff's expert testimony "does not show, as is required to sustain the claim [for professional negligence], what an engineer practicing under the relevant standard of care actually does, nor any specific instances of breach of that relevant standard." *Handex*, 168 N.C. App. at 12, 607 S.E.2d at 32 (emphasis omitted).

Here, Plaintiff made professional negligence claims against Defendant for negligent misrepresentation and negligence. Specifically, as to its negligent misrepresentation claim, Plaintiff asserted:

> Plaintiff justifiably relied, to his detriment, on information prepared and conveyed by Defendant without reasonable care, and Defendant owed to Plaintiff a duty of care to make a full and fair disclosure of all relevant facts concerning the sufficiency of waterflow for fire suppression for the project.

Moreover, in its negligence claim, Plaintiff claimed:

> [Defendant] owed a duty to Plaintiff to exercise the ability, skill and care ordinarily used by engineers on similar projects.
>
> [Defendant] did not perform its duties as owed to Plaintiff. [Defendant] failed to exercise the ability, skill and care customarily used by engineers on similar projects. [Defendant] thereby breached its duties to Plaintiff. In doing so, [Defendant] was negligent.
>
> Specifically, [Defendant's] negligence includes but is not limited to, failing to know that the SW Broad Street Hydrant Flow at 20 psi did not meet the applicable Fire Code standards for the project, or negligently misreading the Hydrant Flow Test Report as somehow providing sufficient flow for fire suppression purposes for the project.

Each of these claims required Plaintiff to establish, through expert witness testimony, Defendant's professional standard of care as an engineer. *See Frankenmuth*, 235 N.C. App. at 34, 760 S.E.2d at 101. Plaintiff offered deposition testimony from several experts, M. Zaccardo, T. Cross, and R. Briggs. None of these experts was able to testify as to whether Defendant had breached the standard of care as was required to support Plaintiff's claims. In his deposition, Zaccardo's stated:

> Q: Did they ask you if you thought [Defendant] violated the standard of care for engineers?
>
> A: In a sense, I think they asked me that question.
>
> Q: And what was your answer?
>
> A: My answer was I couldn't really say, because the plans weren't approved.
>
> Q: And that's true sitting here today, as well, right?
>
> A: Yes.
>
> Q: So because the plans were not approved, you can't say that [Defendant] violated the standard of care?
>
> A: Because they weren't complete. Yes.

Cross testified similarly stating:

> Q: Do you have an opinion that [Defendant] violated the standard of care in any capacity?
>
> A: Based on information provided to me, I do not.

Moreover, Briggs, when asked if Defendant violated the professional standard of care for engineers noted:

> A: [ ] [Defendant] conducted the fire flow test totally correctly. Some of the wording with respect to the dead-end hydrant you could take issue with, but that is really minor in this case. [Defendant] also correctly identified the fire flow at the dead-end hydrant of five hundred gallons per minute does meet the minimum fire flow requirement at twenty psi. The issue with this is does the five hundred gallons per minute satisfy the proposed development requirement with the municipality of Aberdeen. Everything that I have reviewed indicates that it did not.

Further, Briggs stated, in his opinion, Defendant should have communicated more clearly "some of the quirks" on the project. Nonetheless, Briggs was never able to definitively testify to the standard or whether Defendant breached the standard, only that he would have included more information in the email.

Because none of Plaintiff's experts were able to testify to the professional standard of care for engineers, Plaintiff failed to present a genuine issue of material fact in support of its professional negligence claims against Defendant. Thus, the trial court did not err in granting Defendant's motion for summary judgment.

III. Conclusion

For the aforementioned reasons, we hold the trial court did not err in granting Defendant's motion for summary judgment.

AFFIRMED.

Judges DILLON and TYSON concur.

ELITE HOME HEALTH CARE, INC., and
ELITE TOO HOME HEALTH CARE, INC., Petitioners
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, DIVISION OF HEALTH BENEFITS, Respondents

No. COA23-122

Filed 19 December 2023

Administrative Law—Medicaid reimbursements—prepayment review—definition of "clean claim"—federal regulation controls

The decision of the Department of Health and Human Services terminating petitioners' continued participation in North Carolina's Medicaid program was properly upheld by the administrative law judge (ALJ) and, subsequently, the superior court, based on the ALJ's findings and conclusion that petitioners failed to achieve a minimum level of accuracy when submitting "clean claims" during prepayment review. The agency properly applied the definition of "clean claim" (which is undefined in the governing statute) used in the Code of Federal Regulations pertaining to prepayment claims review; there was no merit to petitioners' contention that the agency should have applied the definition that appears in the North

Carolina Administrative Code in a section that is solely applicable to local management entities (LMEs) or to services payable from funds administered by an LME, since petitioners are not LMEs and had never submitted claims to or through an LME.

Appeal by petitioners from order entered 12 September 2022 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 October 2023.

Ralph Bryant Law Firm, by Ralph T. Bryant, Jr., for petitioners-appellants.

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

ZACHARY, Judge.

This appeal concerns the definition of a "clean claim" for the purposes of prepayment claims review of Medicaid providers in North Carolina, pursuant to N.C. Gen. Stat. § 108C-7 (2021). After conducting prepayment claims review, Respondent North Carolina Department of Health and Human Services ("DHHS") terminated Petitioners Elite Home Health Care, Inc., and Elite Too Home Health Care, Inc., (collectively, "Elite")[1] from participation in North Carolina's Medicaid program, due to Elite's "failure to successfully meet the accuracy requirements of prepayment review pursuant to [N.C. Gen. Stat.] § 108C-7." Elite appeals from the superior court's order affirming the final decision of the administrative law judge, which upheld the termination. After careful review, we affirm.

I. Background

The dispositive issue in this appeal is the definition of a "clean claim" as used in N.C. Gen. Stat. § 108C-7. The relevant legal and procedural facts are undisputed.

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1. We use "Elite" as a collective term, consistent with the record on appeal and the proceedings below. As the superior court explained: "Petitioners Elite Home Health Care, Inc.[,] and Elite Too Home Health Care, Inc[.,] are two separate entities. [However,] Tara Ellerbe is the CEO and sole shareholder of each. Each was enrolled as a [Medicaid] provider . . . . Each was subject to the same prepayment review at issue in this case and both were referred to in the hearing as if a single entity."

Similarly, we use "DHHS" as a collective term to include Respondents Division of Medical Assistance and Division of Health Benefits, both of which are divisions within the Department of Health and Human Services.

A. Medicaid and Prepayment Claims Review

"The Medicaid program was established by Congress in 1965 to provide federal assistance to states which chose to pay for some of the medical costs for the needy." *Correll v. Division of Soc. Servs.*, 332 N.C. 141, 143, 418 S.E.2d 232, 234 (1992). "Whether a state participates in the program is entirely optional. However, once an election is made to participate, the state must comply with the requirements of federal law." *Id.* (cleaned up). In essence, "Medicaid offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 323, 191 L. Ed. 2d 471, 476 (2015).

Among the conditions imposed by Congress for a State's receipt of Medicaid funds is the requirement that "[a] State plan for medical assistance must . . . provide for procedures of prepayment and postpayment claims review[.]" 42 U.S.C. § 1396a(a)(37). Accordingly, N.C. Gen. Stat. § 108C-7 authorizes DHHS to conduct prepayment claims review "to ensure that claims presented by a provider for payment by [DHHS] meet the requirements of federal and State laws and regulations and medical necessity criteria[.]" N.C. Gen. Stat. § 108C-7(a).

Medicaid claims are generally paid upon receipt, and providers are subject to periodic audits thereafter. *See Charlotte-Mecklenburg Hosp. Auth. v. N.C. Dep't of Health & Hum. Servs.*, 201 N.C. App. 70, 74, 685 S.E.2d 562, 566 (2009), *disc. review denied*, 363 N.C. 854, 694 S.E.2d 201 (2010). Under certain circumstances, however, a Medicaid provider may receive notice that it has been placed on prepayment claims review. N.C. Gen. Stat. § 108C-7(b). The "[g]rounds for being placed on prepayment claims review" include:

> [R]eceipt by [DHHS] of credible allegations of fraud, identification of aberrant billing practices as a result of investigations, data analysis performed by [DHHS], the failure of the provider to timely respond to a request for documentation made by [DHHS] or one of its authorized representatives, or other grounds as defined by [DHHS] in rule.

Id. § 108C-7(a).

Before placing a provider on prepayment claims review, DHHS must "notify the provider in writing of the decision and the process for submitting claims for prepayment claims review." *Id.* § 108C-7(b). Such notice must contain:

> (1) An explanation of [DHHS]'s decision to place the provider on prepayment claims review.
>
> (2) A description of the review process and claims processing times.
>
> (3) A description of the claims subject to prepayment claims review.
>
> (4) A specific list of all supporting documentation that the provider will need to submit to the prepayment review vendor for all claims that are subject to the prepayment claims review.
>
> (5) The process for submitting claims and supporting documentation.
>
> (6) The standard of evaluation used by [DHHS] to determine when a provider's claims will no longer be subject to prepayment claims review.

Id.

Once a provider is placed on prepayment claims review, that provider must achieve an acceptable level of "clean claims submitted" to be released from review or else risk sanction, which potentially includes termination from the Medicaid program:

> (d) [DHHS] shall process all clean claims submitted for prepayment review within 20 calendar days of receipt of the supporting documentation for each claim by the prepayment review vendor. To be considered by [DHHS], the documentation submitted must be complete, legible, and clearly identify the provider to which the documentation applies. If the provider failed to provide any of the specifically requested supporting documentation necessary to process a claim pursuant to this section, [DHHS] shall send to the provider written notification of the lacking or deficient documentation within 15 calendar days of the due date of requested supporting documentation. [DHHS] shall have an additional 20 days to process a claim upon receipt of the documentation.
>
> (e) The provider shall remain subject to the prepayment claims review process until the provider achieves three consecutive months with a minimum seventy percent

> (70%) clean claims rate, provided that the number of claims submitted per month is no less than fifty percent (50%) of the provider's average monthly submission of Medicaid claims for the three-month period prior to the provider's placement on prepayment review. If a provider does not submit any claims following placement on prepayment review in any given month, then the claims accuracy rating shall be zero percent (0%) for each month in which no claims were submitted. If the provider does not meet the seventy percent (70%) clean claims rate minimum requirement for three consecutive months within six months of being placed on prepayment claims review, [DHHS] may implement sanctions, including termination of the applicable Medicaid Administrative Participation Agreement, or continuation of prepayment review. [DHHS] shall give adequate advance notice of any modification, suspension, or termination of the Medicaid Administrative Participation Agreement.

Id. § 108C-7(d)–(e).

B. Procedural History

Elite was party to a Medicaid Participation Agreement, pursuant to which it was required to abide by the policies developed by DHHS in Elite's provision of services. The Carolina Centers for Medical Excellence ("CCME") is a private corporation with which DHHS contracted to conduct prepayment claims reviews of particular Medicaid providers in North Carolina.

On 3 July 2019, at the direction of DHHS, CCME issued initial notices of prepayment claims review to Elite via certified mail. After a failed delivery attempt and after receiving no response to the notices left for Elite, CCME sent the notices to Elite by secured email on 22 July 2019. Between July 2019 and May 2020, CCME and Elite "made or attempted contact 263 times to discuss the prepayment review process, including, but not limited to, documentation requests, claims submissions, submission timelines, and denials." Elite submitted "roughly 60,000" claims while on prepayment claims review.

On 6 March 2020, DHHS sent to Elite, via certified mail, tentative notices of its decision to terminate Elite from participation in the North Carolina Medicaid program. The tentative notices stated that the decision was "a result of [Elite] not meeting minimum

accuracy rate requirements of prepayment review[.]" On 20 April 2020, Elite filed a petition for a contested case hearing with the Office of Administrative Hearings.

The matter came on for hearing before the administrative law judge on 26 and 27 April 2021. On 3 November 2021, the administrative law judge entered a final decision upholding DHHS's decision.

In his final decision, the administrative law judge made the following pertinent findings of fact:

> 12. The Notices informed [Elite] that CCME would conduct prepayment review of claims submitted by [Elite]. The Notices described the prepayment review process and specifically explained that the provider must attain a claims submission accuracy rate of at least 70% for three consecutive calendar months. Further, the Notices informed [Elite] that if this rate was not achieved within six months of being placed on prepayment review, . . . [DHHS] could implement sanctions, including termination of the provider from providing services.
>
> 13. The Notices specifically stated: "However, the prepayment review contractor will review the documentation for services billed, including prior authorized services, to determine if the documentation is compliant with policy. An example is obtaining staff credentials to verify that a service has been rendered by an appropriately credentialed person, as required by Medicaid policy."
>
> 14. The Notices from CCME also set out a list of documents CCME would need to review and included a sample Audit Tool. An Audit Tool lists what documentation the reviewer needs to review for each claim.
>
> . . . .
>
> 16. A claim submitted for a given date of service must be completely compliant with Clinical Coverage Policy as of that date of service.
>
> 17. This methodology has been approved by [DHHS] and is applied by CCME for all [personal care services] providers in the NC Medicaid Program that are on prepayment review.

18. CCME is in nearly daily contact with providers who are subject to prepayment review and have questions about the process, about records requests, about specific denials, and other issues and concerns about the prepayment review process.

19. The number of claims submitted while [Elite was] on prepayment review was roughly 60,000.

20. Between July 2019 and May 2020, [Elite] and CCME made or attempted contact 263 times to discuss the prepayment review process, including, but not limited to, documentation requests, claims submissions, submission timelines, and denials.

21. [Elite was] fully informed and aware of the requirements for accuracy.

22. In calculating the monthly accuracy report, CCME reviews each claim detail line item.

23. Petitioner Elite Home Health Care, Inc. failed to send all required documentation 78 [percent] of the time while on prepayment review. Petitioner Elite Too Home Health Care, Inc. failed to send all required documentation 74 [percent] of the time while on prepayment review.

24. [Elite] failed to meet the minimum accuracy requirements.

25. [Elite] ha[s] not proven that all required documentation was provided at the time claims were submitted and was available for review by the prepayment review vendor, nor that claims should not have been denied at the time of the vendor's initial review.

26. The term "clean claim" is not defined in [N.C. Gen. Stat. §] 108C.

27. The term "clean claim" is defined in 42 C.F.R. § 447.45 as "one that can be processed without obtaining additional information from the provider of the service or from a third party."

28. The term "clean claim" is not defined by the North Carolina Administrative Code as it relates to Medicaid claims.

On 2 December 2021, Elite filed a petition for judicial review in the Mecklenburg County Superior Court. In its petition, Elite specifically challenged the administrative law judge's findings of fact 16, 21, 23–25, and 28. Elite also challenged the conclusions of law in which the administrative law judge applied the federal definition of "clean claim" from 42 C.F.R. § 447.45 rather than the definition of "clean claim" from 10A N.C. Admin. Code 27A.0302 (2022), which Elite argued applied instead.

On 23 August 2022, the matter came on for hearing in Mecklenburg County Superior Court. By order entered on 12 September 2022, the superior court affirmed the final decision of the administrative law judge. Elite timely filed notice of appeal.

II. Discussion

On appeal, Elite argues that the superior court erred by affirming the final decision of the administrative law judge, and makes the same argument that it made below: that "DHHS was not authorized by statute to terminate [Elite's] participation in the Medicaid program" because it "failed to apply the correct definition of clean claim to determine the provider prepayment review accuracy rate[.]" We disagree.

A. Standard of Review

N.C. Gen. Stat. § 150B-51 sets forth the standard of review of decisions of an administrative agency, such as DHHS, and "governs both trial and appellate court review of administrative agency decisions." *Williford v. N.C. Dep't of Health & Hum. Servs.*, 250 N.C. App. 491, 493, 792 S.E.2d 843, 846 (2016) (citation omitted). Section 150B-51 provides, in pertinent part, that:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;

> (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b)–(c).

Thus, pursuant to § 150B-51(b)–(c), our standard of review depends upon the error asserted by the petitioner. *Id.* When the petitioner's appeal raises an issue of law, such as the scope of the agency's statutory authority, "this Court considers the matter anew and freely substitutes its own judgment for the agency's." *Christian v. Dep't of Health & Hum. Servs.*, 258 N.C. App. 581, 584, 813 S.E.2d 470, 472 (cleaned up), *appeal dismissed*, 371 N.C. 451, 817 S.E.2d 575 (2018). However, when the petitioner's appeal raises arguments pursuant to § 150B-51(b)(5)–(6), we review using the whole record test. "Using the whole record standard of review, we examine the entire record to determine whether the agency decision was based on substantial evidence such that a reasonable mind may reach the same decision." *Id.* at 584–85, 813 S.E.2d at 472.

In the present case, Elite acknowledges that the dispositive facts are undisputed and "the definition of a clean claim is determinative in this matter." In that this issue presents a pure question of law, we apply a de novo standard of review to the legal issue raised in this appeal.

B. Analysis

The question presented is the definition of the term "clean claim," which is not defined in the text of N.C. Gen. Stat. § 108C-7. However, the Centers for Medicare & Medicaid Services ("CMS") promulgated a federal regulation defining the term "clean claim" for the purposes of

prepayment claims review pursuant to 42 U.S.C. § 1396a(a)(37). CMS defines a "clean claim" in the Code of Federal Regulations as "one that can be processed without obtaining additional information from the provider of the service or from a third party." 42 C.F.R. § 447.45(b) (2022). DHHS asserts that the definition in this federal regulation controls in this case.

On the other hand, Elite contends that a "clean claim" is "an electronic invoice for payment that contains all of the information that is required to be completed on that invoice." Elite derives this definition from the North Carolina Administrative Code, one section of which ("the Rule") defines a "clean claim" as "an itemized statement with standardized elements, completed in its entirety in a format as set forth in Rule .0303 of this Section." 10A N.C. Admin. Code 27A.0302(b).

Elite correctly notes that the Rule is "the only DHHS[-]promulgated rule in the administrative code" that defines the term "clean claim." Nonetheless, the Rule is plainly inapplicable to the case before us. The Rule is found in a section of the Administrative Code that is solely "applicable to local management entities (LMEs) and public and private providers who seek to provide services that are payable from funds administered by an LME." 10A N.C. Admin. Code 27A.0301. LMEs are "area mental health, developmental disabilities, and substance abuse authorit[ies]" that operate under the Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985. N.C. Gen. Stat. § 122C-3(1), (20b).

Elite is not an LME, nor has it ever contended that it "provide[s] services that are payable from funds administered by an LME." 10A N.C. Admin. Code 27A.0301. As Robyn Winters—a contract supervisor with CCME, the independent contractor that processes documents submitted for prepayment claims review—testified before the administrative law judge: "None of the claims that were submitted by Elite were submitted to or through any of the [LMEs] in North Carolina." Elite does not contest this fact. Rather than arguing that this case involves claims that fall within the scope of the Rule, Elite instead argues that the Rule reaches beyond its text to encompass "all agencies that [DHHS] allows to administer Medicaid funds." This argument is meritless, and disregards the plain text limiting the scope of the Rule, which simply does not apply in the context presented in the case at bar.

It is evident that the CMS definition controls: for the purposes of prepayment claims review, a clean claim is "one that can be processed without obtaining additional information from the provider of the service or from a third party." 42 C.F.R. § 447.45(b).

Significantly, Elite candidly admits in its reply brief that, in the event that we reject its definitional argument and agree with DHHS that the definition promulgated by CMS in 42 C.F.R. § 447.45 applies, "DHHS would have made a showing of less than perfect compliance in over 70% of the claims submitted." Consequently, there are no contested issues of fact to resolve; our answer to this determinative question of law controls. Elite's argument is overruled.

III. Conclusion

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

AFFIRMED.

Chief Judge STROUD and Judge MURPHY concur.

IN THE MATTER OF Estate of RICKY W. SEAMON, Deceased

No. COA23-497

Filed 19 December 2023

Attorney Fees—petition for attorney fees—attorney representing administrator of estate—contemporaneously working for decedent's wife—improper alignment of interests

The trial court properly affirmed the clerk of court's order denying a lawyer's petition for attorney fees in an estate action, in which the decedent's cousin had hired the lawyer to represent her in her capacity as administrator of the decedent's estate. At the same time that the lawyer was representing the decedent's cousin, he also filed an application for a year's allowance on behalf of decedent's wife, even though he was aware of a prenuptial agreement barring the wife from receiving any part of the estate. Therefore, although the clerk of court had discretionary authority (under N.C.G.S. § 28A-23-3(d)(1)) to allow an award of attorney fees as a "necessary charge" incurred in the management of the estate, the legal services that the lawyer provided here did not constitute "necessary charges" because he labored under a conflict of interest that improperly aligned the interests of the personal representative of the estate with those of a competing claimant.

Appeal by Petitioner from order entered 19 April 2022 by Judge Susan E. Bray in Davie County Superior Court. Heard in the Court of Appeals 1 November 2023.

James A. Davis, Pro se, Petitioner-Appellant.

Robinson & Lawing, LLP, by Christopher M. Watford, for Respondent-Appellee.

COLLINS, Judge.

Petitioner, James Davis, appeals from the superior court's order affirming a prior order entered by the clerk of court that denied his petition for attorney's fees in the underlying estate proceeding. Petitioner argues that the clerk's finding that Petitioner "rendered legal services to Cynthia Cuthrell in her capacity as Administrator of the Estate of Ricky Seamon" was sufficient by itself to justify an award of attorney's fees to be paid by the estate. We disagree, and we affirm the superior court's order.

I. Background

Prior to their marriage, Ricky Seamon ("Decedent") and Tatyana Seamon ("Seamon") entered into a prenuptial agreement in April 2001 that barred Seamon from receiving any portion of Decedent's estate and from serving as personal representative of Decedent's estate. Seamon contacted Petitioner on 4 August 2015, expressing concern that when Decedent died, "she would get nothing as stipulated in the [prenuptial agreement] and she would be homeless." Petitioner emailed Seamon on 6 August 2015 and "reassure[d] [her] that he will be able to assist her in the matter[.]"

Decedent died intestate on 9 August 2015. Seamon emailed Petitioner on 10 August 2015 and asked him "to assist her in taking care of" Decedent's estate and informed him that Decedent's attorneys "will be against her defending [Decedent's] prenuptial aggreement (sic)."

Cynthia Cuthrell, Decedent's cousin, contacted Petitioner on or about 30 August 2015 to inquire about Petitioner representing her in her role as Administrator of Decedent's estate. Petitioner assisted Cuthrell in applying for letters of administration, and letters of administration were issued by the Clerk of Superior Court of Davie County ("Clerk") on 6 November 2015.

Despite the prenuptial agreement barring Seamon from receiving any portion of Decedent's estate, Petitioner filed an application for a year's allowance on behalf of Seamon on 27 April 2016. The Clerk

contacted Petitioner shortly thereafter and "made him aware that [she] would not sign the years allowance for Tatyana Seamon due to the language in the prenuptial agreement[.]"

Several weeks later, Petitioner told Seamon that he could no longer represent her due to a conflict of interest. On 3 June 2016, an attorney hired by Seamon sent Petitioner a letter stating that he believed it was a conflict of interest for Petitioner to continue representing Cuthrell in her capacity as Administrator of Decedent's estate and requesting that Petitioner withdraw as Cuthrell's counsel. Petitioner filed a motion to withdraw on 5 July 2016, and the Clerk allowed the motion by written order entered 22 July 2016.

Decedent's intestate heirs filed a motion for revocation of the letters of administration issued to Cuthrell, alleging that "[t]he estate involves special proceeding[s] and the potential for an attack by a surviving spouse who is disinherited due to a pre-nuptial" and that "[t]his litigation will provide potential conflicts with the existing administrator and be complex." The Clerk entered an order on 30 August 2016 removing Cuthrell as Administrator and appointing Bryan Thompson as Public Administrator of Decedent's estate.

More than three years later, on 20 December 2019, Petitioner filed a petition for payment of attorney's fees in the estate proceeding, alleging that he "assisted the Administrator in the administration of the Estate of [Decedent] and has performed valuable legal services" totaling $14,793.64, and that his fees are "fair and reasonable in every respect and should be paid from the funds on hand in the Estate."

After a hearing on 15 November 2021, the Clerk entered an order on 3 January 2022 denying Petitioner's petition for attorney's fees. Petitioner appealed to the superior court. After a hearing, the superior court entered an order on 19 April 2022 affirming the Clerk's order.[1] Petitioner appealed to this Court.

II. Discussion

Petitioner argues that the superior court erred by affirming the Clerk's order denying his petition for attorney's fees.

N.C. Gen. Stat. § 1-301.3 governs "matters arising in the administration of trusts and of estates of decedents[.]" N.C. Gen. Stat. § 1-301.3(a) (2021). "In matters covered by this section, the clerk shall determine

1. Both the Clerk's order and the superior court's order incorrectly indicate that the petition for attorney's fees was filed on 20 December 2018 instead of 20 December 2019.

all issues of fact and law . . . [and] shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment." *Id.* § 1-301.3(b). A party aggrieved by the clerk's order or judgment may appeal to the superior court. *Id.* § 1-301.3(c).

On appeal, the superior court "shall review the order or judgment of the clerk for the purpose of determining only the following:"

> (1) Whether the findings of fact are supported by the evidence.
>
> (2) Whether the conclusions of law are supported by the findings of facts.
>
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

Id. § 1-301.3(d). To determine whether the findings of fact are supported by the evidence, the superior court reviews the whole record. *In re Estate of Pate*, 119 N.C. App. 400, 402-03, 459 S.E.2d 1, 2 (1995). Conclusions of law are reviewed de novo. *In re Estate of Mullins*, 182 N.C. App. 667, 671, 643 S.E.2d 599, 602 (2007). "The standard of review in this Court is the same as that in the [s]uperior [c]ourt." *In re Estate of Monk*, 146 N.C. App. 695, 697, 554 S.E.2d 370, 371 (2001) (citation omitted).

N.C. Gen. Stat. § 28A-13-3(a)(19) authorizes a personal representative to "employ persons, including attorneys, . . . to advise or assist the personal representative in the performance of the personal representative's administrative duties." N.C. Gen. Stat. § 28A-13-3(a)(19) (2021). No direct statutory provision governs the payment of attorney's fees from an estate to an attorney representing the personal representative of the estate; the personal representative is generally personally liable for such fees. *See Kelly v. Odum*, 139 N.C. 278, 282, 51 S.E. 953, 954 (1905) ("An executor is always personally liable to his counsel for his fee or compensation; but it is in no sense a debt of the estate. He is liable in such case in his individual, and not in his official, capacity."). However, under N.C. Gen. Stat. § 28A-23-3(d)(1), the clerk of court possesses the authority to allow "reasonable sums for necessary charges and disbursements incurred in the management of the estate." N.C. Gen. Stat. § 28A-23-3(d)(1) (2021).

"The Supreme Court has expressly recognized that attorneys' fees incurred in the administration of an estate fall within this statutory provision." *In re Taylor*, 242 N.C. App. 30, 40, 774 S.E.2d 863, 870 (2015) (citing *Phillips v. Phillips*, 296 N.C. 590, 602, 252 S.E.2d 761, 769 (1979)).

Nonetheless, the clerk may deny the payment of attorney's fees from an estate to an attorney representing the personal representative of an estate where the attorney improperly aligns the personal representative's interests with those of a competing claimant. *See McMichael v. Proctor*, 243 N.C. 479, 485, 91 S.E.2d 231, 235-36 (1956).

Here, the Clerk made the following relevant findings of fact:

> 5. James A. Davis (Attorney Davis) is an attorney licensed to practice law in the State of North Carolina [and] rendered legal services to Cynthia Cuthrell in her capacity as Administrator of the Estate of Ricky Seamon and rendered legal services to Tatyana Seamon.
>
> 6. Attorney Davis received contact from Tatyana Seamon on August 4, 2015 at a time when the deceased had fallen ill, and Tatyana Seamon was concerned that she would be barred from receiving anything from her husband's estate because of the terms of a prenuptial agreement executed by the deceased and Tatyana in 2001.
>
> 7. Subsequent to this interaction, Tatyana Seamon, contacted Attorney Davis on August 10, 2015 in which she informed Attorney Davis that she wished to challenge the validity of the prenuptial agreement.
>
> 8. Attorney Davis entered into a formal agreement for representation with Tatyana Seamon [o]n August 11, 2015. Later tha[t] same month, Tatyana Seamon sought out Attorney Davis to ask how to address certain questions in challenging the validity of the prenuptial agreement.
>
> . . . .
>
> 11. On April 27, 2016 Attorney Davis submitted an "Application and Assignment of Years Allowance" or a Spouse's Yearly Allowance (SYA) on behalf of Tatyana Seamon.
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> . . . .
>
> 19. The exact duration of Attorney Davis' representation of the Estate, as compared with his representation of Tatyana Seamon, cannot be determined because of the competing billing statements Attorney Davis submitted in support of his petition for payment of attorney fees, one of which recites a beginning date that actually precedes

> the death of the decedent. The ending date on both billing statements is a date after the Court granted Attorney Davis' motion to withdraw from representation.
>
> . . . .
>
> 21. The work of James A. Davis as counsel to Cynthia Cuthrell improperly aligned the interest of the Estate with competing claimants, namely Tatyana Seamon. Tatyana Seamon filed a counterclaim to an action to resolve pending estate issues on November 14, 2018 to set aside the prenuptial agreement and the [c]ourt finds that Tatyana Seamon's intent was consistent with the fact that she wished to set aside the prenuptial agreement, and thereby become the sole beneficiary of the Estate, since her first contact with Attorney Davis prior to Mr. Seamon's death.
>
> 22. Attorney Davis maintained a right to proceed against Cynthia Cuthrell for payment of said attorney's fees but did not do so based on the evidence provided to the [c]ourt. Cynthia Cuthrell instituted litigation against Attorney Davis in file 18 CVS 628, Davie County Clerk of Superior Court alleging malpractice by Attorney Davis, which concluded by that Stipulation of Dismissal with Prejudice dated July 13, 2021.
>
> 23. After a thorough and conscious consideration, this [c]ourt finds that charges submitted by Attorney Davis and supported by the two competing billing documents were not necessary nor were they properly incurred in the management of the Estate of Ricky Seamon, deceased, as provided by N.C. Gen. Stat. § 28A-23-3(d)(1).

Based on these findings of fact, the Clerk made the following relevant conclusions of law:[2]

> 16. Pursuant to N.C. Gen. Stat. §28A-13-3(a)(19) a personal representative is authorized to employ persons, including attorneys to advise or assist the personal representative in the performance of his or her administrative duties. If a

2. Findings of fact 16, 17, and 20 are not findings but are instead conclusions of law, and we therefore review them de novo. *See Norwood v. Village of Sugar Mountain*, 193 N.C. App. 293, 298, 667 S.E.2d 524, 528 (2008) ("Findings of fact which are essentially conclusions of law will be treated as such on appeal." (quotation marks, brackets, ellipses, and citations omitted)).

> personal representative retains an attorney to assist in the administration of the estate, the personal representative is personally liable for the associated attorney's fees. The fees are not a debt of the estate, and the attorney does not become a creditor of the estate. *Kelly v. Odum*, 139 N.C. 278, 51 S.E. 953 (1905).
>
> 17. Unless otherwise ordered by this [c]ourt, attorney fees are to be paid by the personal representative of the Estate.
>
> . . . .
>
> 20. The [c]ourt should deny a request to recover fees from an Estate to an attorney who improperly aligns the interest of the personal representative with that of a competing claimant. *McMichael v. Proctor*, 243 N.C. 479, 91 S.E.2d 231 (1956).
>
> . . . .
>
> 2. There is no direct statutory provision governing the payment of attorney fees for an attorney representing a personal representative hired by the personal representative in the administration of an estate, but the Clerk is authorized, in its discretion, to allow such fees as a "necessary" charge incurred in the management of the estate pursuant to N.C. Gen. Stat. § 28A 23-3(d)(1).
>
> 3. The fees requested by the Petitioner are not necessary nor proper charges incurred in management of the Estate of Ricky Seamon, deceased, as provided by N.C. Gen. Stat. § 28A 23-3(d)(1). Furthermore, the nature of the representation was an improper alignment of the interest of the personal representative with a potential claimant, thus any attorney's fees incurred by Attorney Davis should not be paid from the Estate of Ricky W. Seamon.

The Clerk thus denied Petitioner's petition for attorney's fees.

Petitioner does not argue that the findings of fact are not supported by the evidence, and they are thus binding on appeal. *See In re Estate of Harper*, 269 N.C. App. 213, 215, 837 S.E.2d 602, 604 (2020). Petitioner's sole argument on appeal is that the portion of finding of fact 5 which states that Petitioner "rendered legal services to Cynthia Cuthrell in her capacity as Administrator of the Estate of Ricky Seamon" "is sufficient by itself to justify an award of attorney fees and reimbursed expenses to Petitioner[.]" We disagree.

Petitioner's argument ignores well-settled law that an attorney who improperly aligns the interests of the personal representative of the estate with those of a competing claimant is not entitled to attorney's fees paid from the estate. *See McMichael*, 243 N.C. at 485, 91 S.E.2d at 235-36 (holding that a personal representative was not entitled to attorney's fees from the estate for "assert[ing] the widow's defense to the affirmative allegations made by the heirs as the basis of their claim that the widow had forfeited her right of dower").

The Clerk found Petitioner rendered legal services to both Cuthrell, in her capacity as Administrator, and to Seamon, often contemporaneously. Petitioner knew of the prenuptial agreement barring Seamon from receiving any portion of Decedent's estate and Seamon's desire to invalidate the agreement and become the sole beneficiary of the estate. Despite his awareness of the prenuptial agreement, Petitioner filed an application for a year's allowance on behalf of Seamon, during which time he also represented Cuthrell as Administrator of Decedent's estate.

While a clerk possesses the authority to allow "reasonable sums for necessary charges and disbursements incurred in the management of the estate[,]" N.C. Gen. Stat. § 28A-23-3(d)(1), the services Petitioner rendered to Cuthrell were not "necessary charges" incurred in the management of the estate because Petitioner labored under a conflict of interest that improperly aligned Cuthrell's interests as Administrator of Decedent's estate with those of Seamon as a competing claimant. *McMichael*, 243 N.C. at 485, 91 S.E.2d at 235-36.

The findings of fact support the Clerk's conclusions of law that "[t]he fees requested by the Petitioner are not necessary nor proper charges incurred in management of the Estate of Ricky Seamon, deceased, as provided by N.C. Gen. Stat. § 28A 23-3(d)(1)" in that "the nature of the representation was an improper alignment of the interest of the personal representative with a potential claimant, thus any attorney's fees incurred by Attorney Davis should not be paid from the Estate of Ricky W. Seamon."

Accordingly, the superior court did not err by affirming the Clerk's order denying Petitioner's petition for attorney's fees.

III. Conclusion

For the foregoing reasons, we affirm the superior court's order.

AFFIRMED.

Judges TYSON and MURPHY concur.

IN THE MATTER OF K.N., K.N.

No. COA23-296

Filed 19 December 2023

1. Termination of Parental Rights—findings of fact—incorporating judicially-noticed facts—corroborated by additional evidence

An order terminating a mother's parental rights in her two children based on abuse, neglect, and failure to make reasonable progress was affirmed where clear, cogent, and convincing evidence supported each of the legally-necessary findings of fact that the mother challenged on appeal. Although many of the court's findings were based upon judicially-noticed facts from prior orders, the court did not rely solely on the evidence from which those facts were made when entering its findings; instead, the court received additional testimony to corroborate the judicially-noticed facts and then made an independent determination regarding the new evidence presented.

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

The trial court properly terminated a mother's parental rights in her two children for failure to make reasonable progress (N.C.G.S. § 7B-1111(a)(2)), where the record showed a sufficient nexus between the components of the mother's case plan that she failed to comply with and the conditions which led to the children's removal from her home. Specifically, one of the biggest factors leading to the children's removal was the mother's inability to treat or manage her bipolar disorder, which in turn caused her to discipline the children through severe physical abuse, and many of the case plan's objectives (including the ones the mother did not comply with) were geared toward addressing this issue.

3. Termination of Parental Rights—best interests of the children—consideration of factors—likelihood of adoption—parent-child bond

The trial court did not abuse its discretion by determining that termination of a mother's parental rights was in her children's best interests where it entered sufficient findings addressing the dispositional factors enumerated in N.C.G.S. § 7B-1110(a). Notably,

the court found that: the mother's eleven-year-old son had been in a stable placement with a foster family that had already expressed a desire to adopt him and likely would adopt him if the mother's parental rights were terminated; while immediate adoption was unlikely for the mother's twelve-year-old daughter, adoption was still possible given that the child wished to find a family and had shown an ability to bond with her former foster family; the mother and her son had a "bond of friendship" rather than a parent-child bond; and there was no bond at all between the mother and her daughter.

Appeal by defendant from judgment entered 21 December 2022 by Judge Theodore Kazakos in Forsyth County District Court. Heard in the Court of Appeals 1 November 2023.

Office of the Parent Defender, by Assistant Parent Defender Jacky L. Brammer, for the respondent-appellant.

Forsyth County Department of Social Services, by Melissa Starr Livesay, for the petitioner-appellee.

Manning Fulton & Skinner P.A., by Michael S. Harrell, for guardian ad litem.

TYSON, Judge.

Respondent Mother ("Respondent") appeals from an order entered on 21 December 2022, which terminated her parental rights to two of her children. We affirm.

I. Background

Respondent is the biological mother of Karen and Karl, who were twelve and eleven years old respectively when Respondent's parental rights were terminated on 21 December 2022. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of minors). Mother struggles to effectively manage her Bipolar Disorder condition, which the court found has negatively impacted her ability to parent and her relationships with her children.

Karen and Karl were removed from Respondent's home on 8 November 2018. The order terminating Respondent's parental rights was entered 21 December 2022 and summarized incidents surrounding the initial

investigation of Respondent by the Forsyth County Department of Social Services ("DSS"):

> FCDSS received a Child Protective Services Report on April 26, 2018 alleging the inappropriate discipline of the minor child [Karen].
>
> On July 12, 2018, FCDSS received a second report after [Karen] was seen running from the home in her underwear bleeding from the head.
>
> On July 12, 2018, an FCDSS Social Worker interviewed [Karen], [Karl], and their sibling [Matthew]. The children reported that [Respondent] had beaten them with a phone charger as punishment for [Matthew] having eaten all the cookies. [Karen] reported that [Respondent] had hit her in the face, arm, and back, punched her in the lip, and thrown her against a wall. [Karen] stated that [Respondent] had turned the shower on hot and was going to make her get in so [Respondent] could strike her while the water was running. [Karen] reported this was not the first time she and her siblings had been spanked while in the shower. [Karen] ran from the home to avoid this punishment. [Karl] and [Matthew] stated they saw [Karen] running out the door because she did not want to get beat [sic] in the hot shower. [Karl] stated a lady saw [Respondent] beating [Karen] and contacted law enforcement. [Karl] and [Matthew] stated [Respondent] had kicked[,] smacked, punched, and dragged [Karen] on the ground by the foot back to the apartment. [Karl] and [Matthew] told [Respondent] they ate the cookies, and [Respondent] assaulted them with the phone charger chord [sic] as a result.
>
> The Social Worker observed injuries on all three children, to include welts and broken skin on the backs of all three children, welts on [Karen]'s arms and chest and bleeding marks, and welts on [Karl]'s back and chest as well as old/healed marks on his back.
>
> On July 13, 2018, an FCDSS Social Worker spoke with [Respondent], who stated that her medication for Bipolar Disorder was not getting her in the right place mentally and leaves her very tired. [Respondent] admitted that she physically beat and assaulted [Karen], [Karl], and [Matthew] and had been criminally charged with three counts of misdemeanor child abuse.

> In August 2018, [Respondent] was referred to In Home Services. [Respondent] was asked to comply with Intensive In Home Services through Family Preservation Services, comply with mental health treatment through Monarch, and ensure that the children received trauma assessments for mental health therapy. [Respondent] failed to comply with Family Preservation Services, and the organization discontinued services and closed its case.
>
> On November 8, 2018, [Respondent] was convicted of three counts of misdemeanor child abuse and incarcerated at the Forsyth County Jail. [Respondent] requested that the children be placed with a neighbor. However, that placement did not occur and [Respondent] did not have alternative child care arrangements for [Karl] or [Karen]. [Matthew]'s father picked the child up and took him to Erie, Pennsylvania.
>
> The Mother had prior child protective services history dating back to 2015 for allegations of improper care and improper discipline.
>
> At the time of the Adjudication, [Karen's and Karl's Father] was incarcerated through the Somerset, Pennsylvania Department of Corrections.

The first adjudication and disposition hearing was held on 1 February 2019, wherein the trial court adjudicated Karen and Karl as abused, neglected, and dependent juveniles, with the order entered on 1 March 2019. Respondent was required to complete the following tasks to achieve reunification with her children: (1) "[c]omplete a Family Service Agreement and visitation plan with FCDSS," (2) "[c]omplete a Parenting Capacity Assessment/Psychological Evaluation and follow all recommendations[,]" (3) "[c]omplete parenting classes at [ ] Parenting Path, PACT, or another approved program[,]" (4) [o]btain and maintain stable housing[,]" and, (5) "[d]emonstrate the ability to meet the basic and therapeutic needs of the children."

Several permanency planning hearings were held between the initial adjudication and the hearing terminating Respondent's parental rights. Respondent completed the parenting assessment. Respondent's case plan also required her to complete the following recommendations, as were identified in the termination order:

> 29. The recommendations of the Respondent Mother's Parenting Capacity Evaluation which was completed on

or about May 14, 2019 by Dr. Bennett, were adopted and ordered by the Court as part of [Respondent]'s case plan. The Respondent Mother was therefore also required to:

a. Re-engage with Monarch, keep appointments as scheduled, and take medications as prescribed. [Respondent] was encouraged to contact Monarch as they have funding which allows them to treat individuals like [Respondent], who do not have insurance or financial resources.

b. Work with a counselor to help her review and challenge her irrational and distorted thinking so that she can begin to stabilize her life. Dr. Bennett believed cognitive approaches including rational emotive therapy would be effective models for working with [Respondent].

c. Participate in parenting classes to learn more appropriate skills to respond to her children in a manner that is less aggressive and more effective.

d. Work with FCDSS and others with the goal of stabilizing her environment in terms of housing and finances.

e. Work to expand her support network, which should include challenging some of her distorted beliefs about how she should never lean on anyone else.

f. Attend the COOL program to help manage her aggressive impulses.

g. Complete random drug testing, with no-shows or refusals being counted as positive tests.

30. As reflected by the Permanency Planning Hearing from June 12, 2020, the order from which was filed on July 6, 2020, the Court also required [Respondent] to participate in the WISH program and substance abuse treatment.

31. Additionally, following a Permanency Planning Hearing from a hearing occurring on December 12, 2020, January 6, 2021, and March 3, 2021, the order from which was the order entered April 15, 2021, the Court required the Respondent Mother to:

a. Engage in all of [Karen]'s treatment team meetings and provide information as requested by the team. However, there shall be no direct contact between [Respondent] and [Karen] unless [Karen]'s therapeutic providers determine it to be beneficial for the minor child.

b. Sign release of information forms that allow [Karen]'s therapeutic treatment team to obtain [Respondent]'s treatment records from WISH, Monarch, and COOL.

A Motion to Terminate Parental Rights was filed against Respondent on 16 June 2021, citing the grounds in N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), (a)(3), and (a)(6). Termination of parental rights hearings were held over four months on 18 July 2022, 1 August 2022, 1 September 2022, and 19 October 2022. The court made extensive findings of fact following the admission of numerous pieces of evidence and the testimony of several witnesses.

The trial court's order found the following: (1) Respondent was pregnant; (2) Respondent was "not receptive" to Cognitive Behavioral Therapy, as required by her case plan; (3) Respondent had terminated her treatment with her therapist; (4) Respondent had not consistently taken her Bipolar Disorder medication throughout the life of the case; (5) Respondent was "not currently taking mental health medication, and [wa]s unlikely to be able to do so for some period of time up to and after the baby's birth"; and (6) Respondent picked up her son, Matthew, from Pennsylvania, which was concerning because DSS' investigation in 2018 revealed Respondent had "allowed [Matthew] to take part in the over-discipline of [Karl] and [Karen] and that [Matthew] choked and beat up his sister [Karen]."

The court adopted several findings of fact from previous permanency planning orders, which were entered on 1 March 2019, 6 July 2020, 15 April 2021, 18 July 2021, and 18 July 2022. The court entered the final order terminating Respondent's parental rights on 21 December 2022.

Based upon the evidence presented at the termination of parental rights hearings and the incorporated findings and conclusions contained in the previous permanency planning orders, Respondent's parental rights to Karen and Karl were terminated for abuse, neglect, and for leaving her children in custody for more than twelve months without making reasonable progress towards correcting the circumstances that caused the children's removal pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2) (2021).

The trial court held termination of parental rights pursuant to the grounds in N.C. Gen. Stat. § 7B-1111(a)(3) and (a)(6) had not been adequately proven, and it dismissed those grounds as a basis to terminate Respondent's parental rights.

The trial court explained its reasoning in the following findings of fact:

> 120. Based upon a showing of clear, cogent, and convincing evidence, grounds have been proven to terminate the parental rights of the Respondent Mother [ ] in and to the minor children pursuant to NCGS § 7B-1111(a)(1), the ground of abuse. [Respondent] created a substantial risk of serious physical injury to the children by other than accidental means through the practice of "whooping" the children with cords in the running shower, which resulted in injuries including bleeding welts on the children's bodies. Further, [Respondent]'s conduct constituted cruel and grossly inappropriate procedures for the modification of the children's behavior.
>
> 121. Based upon a showing of clear, cogent, and convincing evidence, grounds have been proven to terminate the parental rights of the Respondent Mother [ ] in and to the minor children pursuant to NCGS § 7B-1111(a)(1), the ground of neglect. [Respondent]'s mental health was a contributing factor to the circumstances surrounding the children's removal and adjudication as abused and neglected juveniles. [Respondent] has not consistently engaged in mental health treatment during the 41 months since Disposition. She has been non-compliant with mental health medication and [ ] cannot currently take her medication as prescribed. [Respondent] has expressed distrust of treatment providers and terminated a long-term therapeutic relationship with Ms. Connelly when Ms. Connelly sought to move forward in therapy. [Respondent] has recently voiced that she did not feel she had learned anything useful during her therapy. Based upon her demeanor during her testimony, [Respondent] either fails to appreciate the serious nature of her conduct in abusing and neglecting the children or she wishes to move on and regard this as all past while her children continue to struggle with the traumatic consequences of her actions. Additionally, [Respondent] has not achieved

> stability with regard to her household and overall circumstances. [Respondent] has suddenly returned her older son, [Matthew], to her home, is expecting a baby in the near future, and has a newly obtained house and job. Based upon all of the foregoing, the likelihood that the children would be neglected if returned to her care is high.
>
> 122. Based upon a showing of clear, cogent, and convincing evidence, grounds have been proven to terminate the parental rights of the Respondent Mother [ ] in and to the minor children pursuant to NCGS § 7B-1111(a)(2), the ground that she has willfully left the minor children in custody for more than 12 months without showing to the satisfaction of the Court that she has made reasonable progress towards correcting the circumstances that caused the children's removal. [Respondent] has participated to a degree in therapy, but when her therapist Ms. Connelly sought to progress in treatment, [Respondent] chose to terminate a 4-year therapeutic relationship. When [Respondent] was confronted by information she disliked in conversation with Social Worker Baker or others, she did not respond well. [Respondent] opted to terminate her involvement with WISH, despite her acknowledged use of marijuana at that time, because she did not trust the counselor. These facts show that [Respondent] may have engaged in services to a degree, but a meaningful change in the circumstances that caused or contributed to the children's removal has not occurred. [Respondent] has not adequately prepared herself to meet the mental and emotional health needs of her children, nor has she created the stable living environment which has proven beneficial to both children.

The trial court also concluded: "Pursuant to NCGS § 7B-1110, it is in the best interests of the minor children that the parental rights of [ ] Respondent[ ] [Mother and Father] be terminated so that the minor children's primary permanent plan of adoption can move forward." Respondent filed a timely notice of appeal. Karen's and Karl's biological father, whose rights were also terminated, does not appeal the trial court's order. The order is final as it relates to his parental rights.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 7B-1001(a)(7) (2021).

III. Issues

Respondent challenges several findings of fact and argues those findings of fact are not supported by clear, cogent, and convincing evidence. She argues without those findings of fact, the trial court's termination of her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2) cannot be supported by the remaining findings of fact.

Respondent lastly asserts the trial court abused its discretion by terminating her parental rights to Karen and Karl, because termination was not in either of their best interests.

IV. Challenged Findings of Fact

[1] Respondent argues several findings of fact were not supported by, or are contrary to, the evidence presented at the hearing. She challenges the findings of fact regarding: (1) the period of time Respondent was compliant versus noncompliant with her case plan from the time the children were taken away in 2018 to the hearings held in 2022; (2) Respondent's feelings and attitude towards therapy and her progress; (3) Respondent's compliance and diligence with taking the medication to treat her Bipolar Disorder; (4) Respondent's involvement with Karen's mental health treatment; (5) the validity of Mother's healthcare plan; (6) the description of Matthew's return to Respondent's home as "sudden"; (7) Respondent's reactions when confronted with information she disliked; (8) her decision to stop attending substance abuse classes given her negative drug screenings; and, (9) the trial court's concerns regarding Respondent's stability.

A. Standard of Review

"We review a trial court's adjudication [to terminate parental rights] under N.C.G.S. § 7B-1111 to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (citation and quotation marks omitted). "The trial court's supported findings are deemed conclusive even if the record contains evidence that would support a contrary finding." *In re L.D.*, 380 N.C. 766, 770, 869 S.E.2d 667, 671 (2022) (citation and quotation marks omitted).

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) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." (citations omitted)).

B. Analysis

In a termination of parental rights hearing, "[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(f) (2021). When a challenged finding of fact is not necessary to support a trial court's conclusions, those findings "need not be reviewed on appeal." *See In re C.J.*, 373 N.C. 260, 262, 837 S.E.2d 859, 860 (2020) (citation omitted).

Here, properly-admitted testimony and other relevant and substantial evidence in the record exists to support each of the legally-necessary findings of fact Respondent challenges on appeal. *In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52; *In re L.D.*, 380 N.C. at 770, 869 S.E.2d at 671. Respondent's arguments challenging several of the trial court's findings of facts are without merit.

Respondent also argues several of the findings of fact she challenges are based upon judicially-noticed facts from prior orders. Respondent relies upon the reasoning in *In re T.N.H.*, 372 N.C. 403, 831 S.E.2d 54 (2019), and argues judicially-noticed evidence may only support a finding of fact in a current order when it is supported by new evidence received at the adjudicatory hearing.

While a trial court "may not rely *solely*" on judicially-noticed evidence from prior hearings or rely on evidence from "prior dispositional orders, which have a lower standard of proof[,]" a trial court may use testimony from former hearings to corroborate additional testimony received at the current adjudicatory hearing. *Id.* at 410, 831 S.E.2d at 60 (emphasis supplied) (citations omitted). A trial court "must receive some oral testimony at the hearing and make an independent determination regarding the evidence presented." *Id.* (citation omitted).

The trial court received additional testimony to corroborate the judicially-noticed facts and made an independent determination regarding the new evidence presented at the hearings. *Id.* at 410, 831 S.E.2d at 60-61 ("The trial court's findings of fact appear to be based, at least in part, on testimony provided at the hearing, sufficient to demonstrate that the trial court made an independent determination regarding the evidence presented. . . . [W]e conclude that respondent's argument is without merit."). Respondent's argument is overruled.

V. Termination of Parental Rights

[2] "[A]n adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination

order. . . . [I]f this Court upholds the trial court's order in which it concludes that a particular ground for termination exists, then we need not review any remaining grounds." *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (citations omitted).

A. Standard of Review

This Court reviews a trial court's adjudication of grounds to terminate parental rights by examining "whether the court's findings of fact are supported by clear, cogent[,] and convincing evidence and whether the findings support the conclusions of law. Any unchallenged findings are deemed supported by competent evidence and are binding on appeal. The trial court's conclusions of law are reviewed de novo." *In re T.B.*, 380 N.C. 807, 812, 870 S.E.2d 119, 123 (2022) (quoting *In re Z.G.J.*, 378 N.C. 500, 508-09, 862 S.E.2d 180, 187 (2021)).

B. Analysis

Our general statutes limit the grounds to terminate parental rights to a specific set of statutorily-defined grounds. N.C. Gen. Stat. § 7B-1111(a) (2021). Under the second prong, a trial court may terminate parental rights after:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 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 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).

Our Supreme Court has outlined the analysis trial courts must perform before terminating a parent's parental rights pursuant to this ground:

> Termination under this ground requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, *and* (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

In re Z.A.M., 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020) (emphasis supplied) (citation omitted).

"[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 termination of parental rights under section 7B-1111(a)(2)." *In re J.W.*, 173 N.C. App. 450, 465-66, 619 S.E.2d 534, 545 (2005) (citation and internal quotation marks omitted). "Leaving a child in foster care or placement outside the home is willful when a parent has the ability to show reasonable progress, but is unwilling to make the effort." *In re A.J.P.*, 375 N.C. 516, 525, 849 S.E.2d 839, 848 (2020) (citation, internal quotation marks, and alterations omitted).

Our Supreme Court has stated:

> Parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2). However, in order for a respondent's noncompliance with her case plan to support the termination of her parental rights, 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 815-16, 845 S.E.2d at 71 (citation, internal quotation marks, and alterations omitted).

The Court has further explained that compliance with case plan conditions are relevant, "provided that the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home." *In re T.M.L.*, 377 N.C. 369, 379, 856 S.E.2d 785, 793 (2021) (citation and quotation marks omitted).

Here, Respondent's parental rights to Karen and Karl were terminated for failure to implement "meaningful change in the circumstances that caused or contributed to the children's removal" because she had "not adequately prepared herself to meet the mental and emotional health needs of her children, nor has she created the stable living environment which has proven beneficial to both children."

One of the biggest factors in the removal of Karen and Karl was Respondent's violence and actions toward the children due to her inability to manage her Bipolar Disorder condition and the negative

ways her mental health condition caused her to find fault and discipline Karen and Karl. Respondent admitted she did not consistently take prescribed medication to treat or manage her Bipolar Disorder condition. During the termination for parental rights hearing, she further admitted she had ceased taking her Bipolar Disorder medication when she became pregnant.

Respondent failed to create and maintain a stable living environment for both children without also actively treating and managing her behaviors resulting from her mental health condition. "[T]he objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile[s'] removal from the parental home." *Id.* (citation and quotation marks omitted). The trial court did not err by terminating Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

VI. Best Interests

[3] Respondent argues the trial court abused its discretion by holding termination was in Karl's best interest, because Karl had expressed a desire to live with Respondent. She similarly argues termination was not in Karen's best interest. The trial court based its decision on Respondent's failure to participate in Karen's treatment. Respondent asserts Karen's placement in forty foster homes while in DSS custody demonstrates Karen's instability, and terminating Respondent's parental rights would not be helpful to Karen.

A. Standard of Review

"We review the trial court's dispositional findings of fact to determine whether they are supported by the evidence received during the termination hearing[.]" *In re S.C.C.*, 379 N.C. 303, 313, 864 S.E.2d 521, 528 (2021) (citation omitted). "The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed for [an] abuse of discretion." *In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52 (citation omitted). "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 J.J.B.*, 374 N.C. 787, 791, 845 S.E.2d 1, 4 (2020) (citation and quotation marks omitted).

B. Analysis

"If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage, at which it determines whether terminating the parent's rights is in the juvenile's best interest." *In re A.E.*, 379 N.C. 177, 184, 864 S.E.2d

487, 495 (2021) (citations, quotation marks, and alterations omitted). N.C. Gen. Stat. § 7B-1110(a) provides a list of factors trial courts must consider, including the child's age, their likelihood of being adopted, whether termination will result in accomplishing the permanent plan established for the child, the child's bond with their parent, the child's bond with any proposed adoptive parent or guardian, and a catch-all provision encompassing any other relevant consideration.

The trial court addressed all statutory factors required by N.C. Gen. Stat. § 7B-1110(a). The trial court made findings about Karen and Karl's age and Respondent's inability to provide and maintain a safe and stable home. The trial court made findings regarding the likelihood of Karen and Karl being adopted and whether termination of Respondent's parental rights would accomplish their permanent plan:

> 125. The Court makes the following findings consistent with the requirements enumerated in NCGS § 7B-1110:
>
> > . . .
> >
> > c. [Karl] has been in a stable placement with the same licensed foster family since November 2018, when he entered FCDSS custody. This family has expressed commitment to [Karl] and a desire to adopt him. Both FCDSS and the GAL regard it as likely that [Karl] will be adopted if he is legally free. The likelihood that [Karl] will be adopted is high.
> >
> > d. [Karen] has lacked a stable placement and has frequently required increases in therapeutic care, including periodic hospitalizations. [Karen] has clearly shared with her GAL that she wishes to have a family, and that she wants that family to include her and an older married couple. [Karen] has shown the ability to form a bond and attachment with a former foster family, those fosters being an older couple. The former foster family has continued to maintain contact with [Karen] during her current placement in a residential treatment setting. FCDSS and the GAL are hopeful that, with changes in [Karen]'s medication and continued therapy, this can be a potential adoptive home. While the immediate adoption of [Karen] is unlikely, she wishes to have a family and has shown an ability to bond, and therefore adoption is possible.

> e. The current primary plan for both children is the plan of adoption, and termination of parental rights will aid with the accomplishment of that plan.

The court also made the following findings regarding Karen's and Karl's relationship with Respondent:

> g. [Karl] has a bond with his Mother, [Respondent]. This bond, as described by the GAL and the Social Worker, is a "fun bond" associated with having fun within the context of the safety and structure provided in supervised visitation. [Karl] has repeatedly expressed a desire to remain in the home and care of his foster parents. [Karl] made a recent statement, after learning about [Respondent]'s current pregnancy, that he wanted to live with his Mother. However, this also happened around a time [Karl] was experiencing frustration with the rules and limitations of his foster home. Since that time, he has also stated he wished to remain with his foster parents. While the Court finds a bond exists between [Karl] and [Respondent], it is more accurately described as a bond of friendship or kinship than a parent-child bond.
>
> . . .
>
> i. [Karen] does not have a bond or connection with [Respondent]. [Karen] has made statements that she loves her Mother [Respondent] and forgives her Mother, but has been consistent in stating that she does not want to have a relationship with her Mother or return to [Respondent]'s care.

Respondent has failed to show the trial court abused its discretion by holding termination of her parental rights was in Karen's and Karl's best interests. N.C. Gen. Stat. § 7B-1110(a). *See also In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52. Her argument is without merit.

VII. Conclusion

Clear, cogent, and convincing evidence supports each of the legally relevant and necessary findings of fact Respondent challenged on appeal. N.C. Gen. Stat. § 7B-1109(f); *In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52; *In re L.D.*, 380 N.C. at 770, 869 S.E.2d at 671.; *In re C.J.*, 373 N.C. at 262, 837 S.E.2d at 860.

The trial court received additional testimony to corroborate the judicially-noticed facts from prior orders and made independent determinations regarding the new evidence presented. *In re T.N.H.*, 372 N.C. at 410, 831 S.E.2d at 60-61.

Respondent's failure to acknowledge, adequately address, and manage her behaviors toward the children resulting from her Bipolar Disorder condition led to Karen's and Karl's removal from her home. The trial court found Respondent had been provided many opportunities and extensions to address these conditions and did not err by terminating Respondent's parental rights for her willful failure to make reasonable progress toward her case plan objectives. These objectives relate the reasons for the children's removal to Respondent's lack of treatment and management of her mental health disorder. *In re T.M.L.*, 377 N.C. at 379, 856 S.E.2d at 793.

If one ground for the termination of Respondent's parental rights exists, we need not address the remaining two grounds. *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020).

The trial court properly addressed all statutory factors outlined in N.C. Gen. Stat. § 7B-1110(a). Respondent has not shown any abuse of discretion in its holding termination was in Karen's and Karl's best interest. *See In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges MURPHY and COLLINS concur.

IN RE M.M., E.M., J.M., S.M., C.M.

No. COA23-114

Filed 19 December 2023

1. Child Abuse, Dependency, and Neglect—subject matter jurisdiction—sufficiency of allegations in petition—emotional abuse

In an abuse and neglect proceeding, although the department of social services did not check a box on either its original or supplemental petitions specifically alleging that the children's parents created serious emotional damage to the children, the trial court had subject matter jurisdiction to adjudicate a father's five children emotionally abused where the petitions contained sufficient factual allegations and supporting material regarding the parents' behavior and its effect on the children to put the father on notice that emotional abuse was raised as a ground for adjudication.

2. Child Abuse, Dependency, and Neglect—sexual abuse allegations—expert testimony—effective assistance of counsel—no objections lodged

In an abuse and neglect proceeding regarding respondent-father's five children, respondent's counsel was not ineffective for failing to object to testimony by a forensic interviewer regarding her interviews with three of the children or to testimony by a nurse practitioner who conducted child medical evaluations of each child because neither expert's testimony was improper. When asked about one child's credibility, the forensic interviewer declined to state her personal opinion about credibility, and although the nurse practitioner concluded that several children made statements consistent with sexual abuse, she never testified that any of the children had, in fact, been sexually abused.

Appeal by Respondent-Father from order entered 28 September 2022 by Judge Justin K. Brackett in Cleveland County District Court. Heard in the Court of Appeals 28 November 2023.

Charles E. Wilson, Jr., for Petitioner-Appellee Cleveland County Department of Social Services.

Michelle FormyDuval Lynch for Guardian ad Litem.

Richard Croutharmel for Respondent-Appellant Father.

COLLINS, Judge.

Respondent-Father appeals from the trial court's order adjudicating his minor children abused and neglected. Father argues that the trial court lacked subject matter jurisdiction to adjudicate the children abused and that he received ineffective assistance of counsel because his attorney failed to object to certain testimony at trial. We affirm.

I. Background

Father and Mother were married on 26 February 2010 and separated on 13 August 2020.[1] Father and Mother share five children together: Megan, Evan, Jade, Stella, and Chloe.[2] The trial court entered an order on 26 October 2020 granting Father temporary primary physical custody of the children and awarding Mother visitation.

The Cleveland County Department of Social Services ("DSS") filed a juvenile petition on 19 February 2021, alleging that all five children were abused and neglected. The petition alleged, in part:

> There is an ongoing custody battle between the parents and every time there is a court date for custody, dad starts coaching the children and making false reports to Law Enforcement and DSS against the mother. Prior reports were made by dad and were unfounded. Dad is very possessive of the children and wants to keep them away from mom. Law Enforcement reports were made that mom choked her child [Megan]. [Megan] was interviewed, she said that mom grabbed her by throat. There was no evidence of abuse on any part of her body. [Megan] was very robotic with her answers and all of the kids are when speaking with them. . . .
>
> . . . .
>
> . . . . The Department is very concerned about the safety and emotional well-being of [the children] under the care and supervision of their parents. The children are very sad, withdrawn emotionally, continues to have unexplained marks and bruises. . . .

An order for nonsecure custody was entered that same day.

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1. Mother is not a party to this appeal.

2. We use pseudonyms to protect the identities of the children.

DSS filed a supplemental juvenile petition on 25 August 2021, alleging that Father had sexually abused Megan, Jade, Stella, and Chloe. The supplemental petition alleged, in relevant part:

> [DSS] accepted another report on May 17, 2021 which alleged possible sexual abuse of [Megan] by her father . . . . The report stated that [Megan] had disclosed that her father tickles her in places she doesn't like, and that [Megan] had stated that she did not want to return home due to her dad tickling her.
>
> . . . . [Megan] disclosed to the social worker that she did not want to return to her father's home for various reasons, including being tickled in places she didn't like. [Megan] shared with [the social worker] that she was being tickled by her father on her inner thigh near her vagina.
>
> . . . . All five children completed a Child Medical Exam (CME) as well as forensic interviews. During the interviews, [Stella, Chloe, and Jade] each disclosed being touched on their vagina by their father . . . .

On 28 September 2022, the trial court entered an order adjudicating all five children abused and neglected and concluding, in relevant part:

> 3. That the juveniles [Megan, Jade, Chloe, and Stella] are abused juveniles as defined by N.C.G.S. 7B-101(1)(d) and (e).
>
> 4. That the juvenile [Evan] is an abused juvenile as defined by N.C.G.S. 7B-101(1)(e).
>
> 5. That the juveniles [Megan, Evan, Jade, Chloe, and Stella] are neglected individuals as defined by N.C.G.S. 7B-101(15)(a) and (e) in that the juvenile[s'] parents did not provide the juveniles with proper care, supervision, or discipline; and that the juveniles' parents created or allowed to be created a living environment that was injurious to the juveniles' welfare.

Father appealed.

II. Discussion

A. Subject Matter Jurisdiction

[1] Father first argues that the trial court "lacked subject matter jurisdiction to adjudicate any of the juveniles emotionally abused because DSS had not alleged emotional abuse in either of its juvenile petitions."

Whether a trial court possesses subject-matter jurisdiction is a question of law that we review de novo. *In re A.L.L.*, 376 N.C. 99, 101, 852 S.E.2d 1, 4 (2020). Under de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower court. *In re T.N.G.*, 244 N.C. App. 398, 402, 781 S.E.2d 93, 97 (2015).

"The pleading in an abuse, neglect, or dependency action is the petition." N.C. Gen. Stat. § 7B-401(a) (2021). The petition must contain "allegations of facts sufficient to invoke jurisdiction over the juvenile." *Id.* § 7B-402(a) (2021). "If the allegations are insufficient to put the party on notice as to which alleged grounds are at issue, then the trial court lacks subject matter jurisdiction over the action." *In re K.L.*, 272 N.C. App. 30, 47, 845 S.E.2d 182, 195 (2020) (citations omitted). "While it is certainly the better practice for the petitioner to 'check' the appropriate box on the petition for each ground for adjudication, if the specific factual allegations of the petition are sufficient to put the respondent on notice as to each alleged ground for adjudication, the petition will be adequate." *In re D.C.*, 183 N.C. App. 344, 350, 644 S.E.2d 640, 643 (2007).

The statutory definition of an abused juvenile includes any juvenile whose parent, guardian, custodian, or caretaker "[c]ommits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: . . . taking indecent liberties with the juvenile[,]" or "[c]reates or allows to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others[.]" N.C. Gen. Stat. § 7B-101(1)(d), (e) (2021).

Here, in the juvenile petition, DSS checked the box next to "A. The juvenile is an ABUSED JUVENILE, in that: . . . ." Directly below, DSS checked the box next to the following allegations: "the juvenile's parent, guardian, custodian, or caretaker has created or allowed to be created a substantial risk of serious physical injury to the juvenile by other than accidental means" and "the juvenile's parent, guardian, custodian, or caretaker has used or allowed to be used upon the juvenile cruel or grossly inappropriate devices or procedures to modify behavior." DSS also attached additional pages to the juvenile petition detailing the following facts supporting the allegations:

> The reporter states to have been involved with [the family] since last year and is very concerned about the physical and emotional well- being of the children. There is an ongoing custody battle between the parents and every time there is a court date for custody, dad starts coaching the children and making false reports to Law Enforcement

> and DSS against the mother. Prior reports were made by dad and were unfounded. Dad is very possessive of the children and wants to keep them away from mom. Law Enforcement reports were made that mom choked her child [Megan]. [Megan] was interviewed, she said that mom grabbed her by throat. There was no evidence of abuse on any part of her body. [Megan] was very robotic with her answers and all of the kids are when speaking with them. They seem to be coached, withdrawn, seems very depressed, no eye contact and no affect. . . . Reporter is concerned that dad keeps putting these kids through this. Dad encourages the kids to run away whenever they are visiting with their mother and also to take mom's tablet or phone, lock themselves in the bathroom and read him the text messages from other people. The children are seen by a therapist virtually and dad never leaves them alone with the therapist. . . .
>
> . . . .
>
> . . . . The Department is very concerned about the safety and emotional well-being of [the children] under the care and supervision of their parents. The children are very sad, withdrawn emotionally, continues to have unexplained marks and bruises. . . .

In the supplemental juvenile petition, DSS checked the box next to "A. The juvenile is an ABUSED JUVENILE, in that: . . . ." Directly below, DSS checked the box next to the following allegation: "the juvenile's parent, guardian, custodian, or caretaker has committed, permitted, or encouraged the commission of a sex or pornography offense by, with, or upon the juvenile in violation of the criminal law." DSS also attached an additional page to the supplemental juvenile petition detailing the following facts supporting the allegation:

> All five children completed a Child Medical Exam (CME) as well as forensic interviews. During the interviews, [Stella, Chloe, and Jade] each disclosed being touched on their vagina by [Father]. [Megan] disclosed that her father tickled her inside of her inner [thigh] near "where she uses the restroom." The Child Medical Exam report listed high concerns that [Megan, Jade, Chloe, and Stella] have been sexually abused, emotionally abused, physically abused and neglected . . . . The Child Medical Exam reported for [Evan] listed high concerns for [Evan] having been

> emotionally abused, physically abused and neglected as well.

Father argues that, because DSS did not check the box on either petition next to the specific allegation that "the juvenile's parent, guardian, custodian, or caretaker has created or allowed to be created serious emotional damage to the juvenile[,]" the trial court lacked jurisdiction to adjudicate the children abused under N.C. Gen. Stat. § 7B-101(1)(e). Father's argument lacks merit.

Our case law requires allegations "sufficient to put the respondent on notice as to each alleged ground for adjudication[.]" *In re D.C.*, 183 N.C. App. at 350, 644 S.E.2d at 643. Here, DSS checked the box on both petitions indicating that it was alleging that the children were abused and attached additional pages to the juvenile petitions detailing the facts supporting the allegations. Although DSS did not check the box stating that "the juvenile's parent, guardian, custodian, or caretaker has created or allowed to be created serious emotional damage to the juvenile[,]" the petition contained sufficient factual allegations to put Father on notice as to the alleged abuse. *See id.*; *see also* N.C. Gen. Stat. § 7B-402(a).

Accordingly, the trial court did not lack subject matter jurisdiction to adjudicate the children abused under N.C. Gen. Stat. § 7B-101(1)(e).

B. Ineffective Assistance of Counsel

[2] Father next argues that he received ineffective assistance of counsel because "his court-appointed trial attorney failed to object to DSS's testimonial evidence that [his] daughters had been sexually abused where the witnesses had not been accepted as experts and where no physical findings supported such conclusions." Father mischaracterizes the challenged testimony, and his argument is without merit.

"In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right." N.C. Gen. Stat. § 7B-602(a) (2021). "A party alleging ineffective assistance of counsel must show that counsel's performance was deficient and the deficiency was so serious as to deprive the party of a fair hearing." *In re L.N.H.*, 382 N.C. 536, 541, 879 S.E.2d 138, 143 (2022) (quotation marks, brackets, and citations omitted). "In order to show deprivation of a fair hearing, the party must prove that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* (quotation marks and citation omitted).

Here, Vanessa Parton, a forensic interviewer, testified that she conducted forensic interviews of Evan, Stella, and Chloe. Parton did not testify at any point that sexual abuse had occurred. Rather, Parton testified, in relevant part, as follows:

> Q. Okay. So, is part of your training – is part of your training to determine the credibility of the person you're interviewing?
>
> A. That's really not as simple as a "yes" or "no" question.
>
> Do you mind if I expand on that?
>
> Q. Yeah.
>
> A. I give the child an opportunity to express themselves. It's not up to me; it's part of a bigger investigative -- you know, it's part of a bigger investigation. The forensic interview is really just a piece of that investigation. My -- it's not my role to form an opinion on that child's credibility, and there are many factors that play into a child's statement, and their disclosures during the interview.
>
> Q. So, in my questioning today, would it be fair to say, did you believe [Stella] when she said that? Did you find that credible?
>
> Would that be a fair question to ask you as a person testifying today?
>
> A. I don't generally comment on my own personal opinion on their credibility.

Moreover, Dianna Pendleton, a nurse practitioner, testified that she conducted child medical evaluations of each of the children. Pendleton testified, in relevant part:

> Q. Did you reach any type of conclusions or determinations at the end of your exam with regard to the possibility of physical or sexual or emotional abuse?
>
> A. Yes. . . .
>
> . . . .
>
> Q. Will you tell the [c]ourt what those were?
>
> A. Yes. So, with regard to sexual abuse, [Chloe] made statements consistent with sexual abuse during her medical

> interview. [Chloe] made statements consistent with sexual abuse during her forensic interview with Ms. Parton. There were no physical findings. Based on that history, it was highly concerning that [Chloe] has been sexually abused.
>
> . . . .
>
> Q. And what, if any, conclusions or determinations did you make with regard to [Stella]?
>
> A. So, sexual abuse, I said, "[Stella] made statements consistent with sexual abuse during her medical interview. She made statements consistent with sexual abuse during her forensic interview." And it was highly concerning that she has been sexually abused.
>
> . . . .
>
> Q. Okay. Did you reach any type of conclusions, or have any concerns that you expressed in your report?
>
> A. Yes.
>
> Q. Tell the [c]ourt about those, please.
>
> A. I said that [Megan] made statements consistent with sexual abuse. During her medical interview, she made statements consistent with sexual abuse. During her forensic interview, reportedly made statements consistent with sexual abuse during her forensic interview . . . . I said, "Based on this history, it is highly concerning that she may have been sexually abused."

At no point did Pendleton testify that Megan, Jade, Stella, and Chloe had, in fact, been sexually abused.

Because the challenged testimony was not improper, Father's trial counsel was not deficient by failing to object to the evidence. Accordingly, Father did not receive ineffective assistance of counsel.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order adjudicating the children abused and neglected.

AFFIRMED.

Judges CARPENTER and WOOD concur.

STEPHEN MATTHEW LASSITER, Employee, Plaintiff
v.
ROBESON COUNTY SHERIFF'S DEPARTMENT, Alleged-Employer, SYNERGY COVERAGE SOLUTIONS, Alleged-Carrier, TRUESDELL CORPORATION, Alleged-Employer, THE PHOENIX INSURANCE CO., Alleged-Carrier, Defendants

No. COA23-267

Filed 19 December 2023

1. Workers' Compensation—employer-employee relationship—status at time of injury—off-duty deputy working traffic control—independent contractor factors

The Full Commission of the N.C. Industrial Commission correctly concluded that a sheriff's deputy was not an independent contractor when he was injured while working off duty directing traffic near a highway construction project but was an employee of his sheriff's office, in accordance with the factors contained in *Hayes v. Bd. of Trustees of Elon College*, 224 N.C. 11 (1944). Plaintiff was hired for traffic control by the construction company on the basis of his official status as a law enforcement officer (as required by the company's contract with the state transportation department); he was visibly identifiable as law enforcement based on his gear; his vehicle was displaying his blue lights; he did not have the independent use of his skill, knowledge, or training as a law enforcement officer and had no ability to freely direct traffic other than to carry out the instructions given to him by a captain from the sheriff's office; he did not choose the times he worked traffic control; and he did not work for a fixed price or lump sum.

2. Workers' Compensation—employer-employee relationship—off-duty sheriff's deputy—traffic control for construction company—joint employment doctrine

The Full Commission of the N.C. Industrial Commission erred by determining that plaintiff, employed as a deputy with a county sheriff's office, worked solely for the sheriff's office at the time he was injured while working off duty directing traffic near a highway construction project, because the record showed that plaintiff was simultaneously employed by both the sheriff's office and the construction company conducting the project. First, there was an implied contract between plaintiff and the company, which directly hired and paid plaintiff and which maintained supervisory control over plaintiff's work schedule and duties. Second, the appellate court interpreted the joint employment doctrine as requiring that

the service being performed by the employee for each employer must be the same or closely related to the service for the other, and not that the nature of the work of each employer had to be the same or closely related. Since plaintiff was employed by both entities, was under the simultaneous control of both entities, and performed traffic control duty for the company similar to how he performed the same service for the sheriff's office, he was jointly employed by both, and both were liable for his workers' compensation claim.

Appeal by Defendants from opinion and award entered 17 November 2022 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 August 2023.

Musselwhite Musselwhite Branch & Grantham, by Stephen C. McIntyre, for Plaintiff-Appellee.

Goldberg Segalla LLP, by Gregory S. Horner and Allegra A. Sinclair, for Defendant-Appellants Robeson County Sheriff's Department and Synergy Coverage Solutions.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Neil P. Andrews, and Brennan C. Cumalander, for Defendant-Appellees Truesdell Corporation and The Phoenix Insurance Co.

GRIFFIN, Judge.

Defendant Robeson County Sheriff's Office[1] and Synergy Coverage Solutions (collectively, "RCSO") appeal from an opinion and award of the Full Commission of the North Carolina Industrial Commission awarding Plaintiff, Stephen Matthew Lassiter, ongoing medical expenses, to be paid solely by RCSO; and dismissing Defendant-Appellees, Truesdell Corporation and The Phoenix Insurance Company (collectively, "Truesdell"). RCSO argues the Full Commission erred in concluding Plaintiff was an employee of RCSO at the time of his injury, or in the alternative, the Full Commission erred in concluding Plaintiff was not jointly employed by both RCSO and Truesdell at the time of his injury. We hold Plaintiff was jointly employed by RCSO and Truesdell at the time of his injury making both RCSO and Truesdell jointly liable for Plaintiff's workers' compensation.

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1. Though the caption on appeal from the Industrial Commission references the party as the "Department," we use Robeson County Sheriff's "Office" throughout.

I. Factual and Procedural History

On 5 October 2017, Truesdell contracted with the North Carolina Department of Transportation ("NCDOT") to perform bridge preservation work along Interstate 95 in Cumberland and Robeson Counties. Within the contract, NCDOT required Truesdell to have law enforcement officers on scene, with blue lights activated, to direct traffic in accordance with an independently created traffic control plan. Pursuant to a referral by NCDOT, Truesdell engaged Captain Obershea of RCSO and Chief Edwards of Fairmont Police Department to secure law enforcement officers to perform the required traffic control work.

On 28 March 2019, upon reviewing the proposed traffic control plan, Captain Obershea and Chief Edwards agreed they would need additional officers to carry out the plan. After NCDOT and Truesdell signed off on their request for additional officers, Captain Obershea contacted Plaintiff, a deputy with the Robeson County Sheriff's Office, to inform him of the work opportunity. Plaintiff, who was off duty at the time, accepted.

Plaintiff reported to his designated position in his unmarked patrol car and began performing his assigned duties. At around 12:00 a.m., Captain Obershea directed Plaintiff to switch positions with him. Sometime after moving to Captain Obershea's position, Plaintiff was struck by a vehicle and sustained injuries to his head, arms, hands, and legs. Due to the severity of injuries, Plaintiff was airlifted to a hospital in Florence, South Carolina. Plaintiff underwent extensive treatment and two subsequent surgeries.

On 15 April 2019, Plaintiff, in seeking workers' compensation, filed a Form 18 notice of accident to employer, listing both RCSO and Truesdell as his employers at the time of injury. Both RCSO and Truesdell denied the existence of employment. Plaintiff filed a Form 33 request for hearing.

On 12 July 2021, subsequent to a hearing on the matter, Deputy Commissioner Peaslee entered an opinion and award, concluding Plaintiff was employed by RCSO at the time of his injury, but that no employment relationship existed between Plaintiff and Truesdell. Deputy Commissioner Peaslee dismissed Truesdell from the claim. On 19 July 2021, RCSO appealed to the Full Commission. On 17 November 2022, the Full Commission entered its opinion and award affirming the Deputy Commissioner's conclusions.

On 12 December 2022, RCSO timely filed notice of appeal to this Court.

II. Standard of Review

Ordinarily, we review an opinion and award of the Industrial Commission to determine "[1] whether the Commission's findings of fact are supported by competent evidence, and [2] whether its conclusions of law are supported by its findings of fact." *Tanner v. State Dep't of Correction*, 19 N.C. App. 689, 691, 200 S.E.2d 350, 351 (1973) (citations omitted). Where, however, an appeal concerns issues of jurisdiction, "the jurisdictional facts found by the Commission, though supported by competent evidence, are not binding on this Court and we are required to make independent findings with respect to jurisdictional facts." *Williams v. ARL, Inc.*, 133 N.C. App. 625, 628, 516 S.E.2d 187, 190 (1999) (citation and internal quotation marks omitted). Notably, "[t]he issue of whether an employer-employee relationship existed at the time of [an] injury . . . is a jurisdictional fact." *Morales-Rodriguez v. Carolina Quality Exteriors, Inc.*, 205 N.C. App. 712, 714, 698 S.E.2d 91, 93 (2010) (citation omitted). Thus, this Court reviews issues as to whether an employment relationship existed between the parties de novo. *Whicker v. Compass Group USA, Inc.*, 246 N.C. App. 791, 795–96, 784 S.E.2d 564, 568 (2016) (citation omitted).

III. Analysis

Our appellate courts have yet to address whether a law enforcement officer, working off duty as a traffic control officer, is an independent contractor excluded from coverage under the Workers' Compensation Act; or whether he is to be considered an employee of the law enforcement agency for which he is primarily employed, an employee of the private corporation for which he is providing traffic control services, or a joint employee of both.

RCSO specifically argues the Full Commission erred in concluding Plaintiff was an employee of RCSO, rather than working as an independent contractor, at the time of his injury. In the alternative, RCSO argues the Full Commission erred in concluding Plaintiff was solely employed by RCSO as he was jointly employed by both RCSO and Truesdell at the time of his injury.

A. Employer-Employee or Employer-Independent Contractor

[1] We first determine whether Plaintiff was acting as an independent contractor at the time of his injury.

In order to recover under our Workers' Compensation Act, "the claimant must be, in fact and in law, *an employee of the party from whom compensation is claimed*[,]" and must have been in an

employer-employee relationship with that party at the time of their injury. *Fagundes v. Ammons Dev. Grp., Inc.*, 261 N.C. App. 138, 150, 820 S.E.2d 350, 359 (2018) (citations and internal quotation marks omitted). Independent contractors are not entitled to compensation under the Workers' Compensation Act. *See Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988) ("An independent contractor is not a person included within the terms of the Workers' Compensation Act, and the Industrial Commission has no jurisdiction to apply the Act to a person who is not subject to its provisions." (citation omitted)). An independent contractor is an individual "who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work." *Id.* at 384, 364 S.E.2d at 437 (citations omitted). Conversely, "an employer-employee relationship exists '[w]here the party for whom the work is being done retains the right to control and direct the manner in which the details of the work are to be executed.' " *McCown v. Hines*, 353 N.C. 683, 687–88, 549 S.E.2d 175, 177 (2001) (quoting *Youngblood*, 321 N.C. at 384, 364 S.E.2d at 437). Our Supreme Court in *Hayes v. Board of Trustees* identified eight factors to consider when determining whether an individual is an independent contractor or an employee:

> The person employed [1] is engaged in an independent business, calling, or occupation; [2] is to have the independent use of his special skill, knowledge, or training in the execution of the work; [3] is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; [4] is not subject to discharge because he adopts one method of doing the work rather than another; [5] is not in the regular employ of the other contracting party; [6] is free to use such assistants as he may think proper; [7] has full control over such assistants; and [8] selects his own time.

Hayes v. Board of Trustees, 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944) (citations omitted). These factors are not independently determinative and must be "considered along with all other circumstances to determine whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee." *Id.*

While our Courts have yet to address whether a law enforcement officer, working off duty as a traffic control officer, is acting as an independent contractor, we consider our Supreme Court's decision in

State v. Gaines to be instructive here in considering the *Hayes* factors, namely, whether, at the time of his injury, Plaintiff was engaged in an independent occupation or business.

In *Gaines*, a duly sworn police officer with Charlotte Police Department was killed while working off duty providing security for Red Roof Inn. *State v. Gaines*, 332 N.C. 461, 466, 421 S.E.2d 569, 571 (1992). The officer wore his Charlotte PD uniform, service weapon, badge, and portable radio. *Id.* Further, the officer was to conform to the same standard of conduct which applied to his on-duty activities. *Id.* Nonetheless, the defendant argued he did not murder a law enforcement officer, as the officer was acting solely as a security officer for Red Roof Inn at the time of the incident. *Id.* at 470, 421 S.E.2d at 573. Our Supreme Court disagreed noting, per North Carolina law, all municipal law enforcement officers acting within their jurisdiction are to be considered peace officers—an officer who " 'when off duty is still an officer and a policeman having the authority, if not indeed the duty to exercise functions pertaining to his office in appropriate circumstances, without regard to departmental rules relating to hours.' " *Id.* at 472, 421 S.E.2d at 574 (quoting 18 McQuillion, MUNICIPAL CORPORATIONS 3D, § 53.80B at 348). Further, the Court stated the official duties of law enforcement officers include: "investigative work (including stakeouts), crowd or traffic control, and routine patrol by automobile." *Id.* at 471, 421 S.E.2d at 574. Moreover, the Court, in citing to several legislative expressions, stated, our state legislation specifically indicates "a police officer retains his official law enforcement officer status even while 'off duty' unless it is clear from the nature of his activities that he is acting solely on behalf of a private entity, or is engaged in some frolic or private business of his own." *Id.* at 472, 421 S.E.2d at 575.

In reversing the trial court, our Supreme Court held the duty of a law enforcement officer, regardless of whether he is off duty performing a secondary employment, is to act as a peace officer, whose primary duty is to "enforce the law and insure the safety of the public at large." *Id.* at 475, 421 S.E.2d at 576. Further, the Supreme Court held the officer was hired on the basis of his official status as a police officer with the advantages such a status would bring to his secondary employment—to deter crime and enforce a system of law in an area it was needed. *Id.* The Court noted that while his uniformed presence alone was a symbol of the rule of law, he also served to benefit Red Roof Inn as "his ultimate or primary purpose was to keep the peace at all times without regard to his 'off-duty' or 'off-shift' status." *Id.*

Here, we recognize Plaintiff was, at the time of his injury, acting as a law enforcement officer, conducting traffic duty—an official duty of law

enforcement officers. In so doing, Plaintiff retained his official status as he was neither acting solely on behalf of a private entity nor engaged in some private business of his own. Further, evidence at the hearing indicated Plaintiff was hired on the basis of his official status as a police officer, as required by Truesdell's contract with NCDOT, and while undoubtably benefitting Truesdell by performing traffic duty, Plaintiff was also serving and protecting the safety of the community.

Plaintiff testified he was using his knowledge, skill, experience, and training as a law enforcement officer on the job. Captain Obershea testified similarly, noting the officers were "using the skills, the tools, and the equipment that's provided to them as a result of their law enforcement training and their law enforcement position." Plaintiff was outfitted in a reflective vest with his badge visibly displayed upon his belt. He also had a service weapon and personal flashlight with him. Plaintiff testified any member of the public, driving down the interstate, would have been able to obviously identify him as law enforcement. Additionally, Plaintiff was displaying his blue lights—of which only publicly owned vehicles, used for law enforcement purposes are legally allowed to display. *See* N.C. Gen. Stat. § 20-130.1(c) (2023).

Plaintiff did not have the independent use of his skill, knowledge, or training as a law enforcement officer. He was required to comply with instruction from both Truesdell and RCSO. Chief Edwards testified he and Captain Obershea were relayed instructions through Truesdell who indicated to them the way in which traffic should flow and the number of officers approved to complete the service. Further, Chief Edwards testified Plaintiff had no independent ability to freely direct traffic and was subject to discharge if he failed to comply with the tasks assigned to him by Chief Edwards and Captain Obershea. Although Plaintiff was not in the regular employ of Truesdell, he neither selected the times he worked for Truesdell nor did he work for a fixed price or lump sum.

In applying the *Hayes* factors to the record evidence here and considering the circumstances surrounding Plaintiff's work as a traffic control officer, we hold Plaintiff failed to possess the independence necessary to classify him as an independent contractor at the time of his injury. Guided by our Supreme Court's holding in *Gaines*, Plaintiff was acting as a law enforcement officer in conducting traffic control duty and was therefore not engaged in an independent business, calling, or occupation. Further, Plaintiff did not have the independent use of his skill, knowledge, or training; was subject to discharge by RCSO if he failed to follow instruction; was under the control of both RCSO and Truesdell; was not able to select his own time or hire his own assistants; and was paid hourly instead of a fixed price or lump sum.

Because these circumstances indicate Plaintiff was not an independent contractor at the time of his injury, the Full Commission did not err in concluding Plaintiff was not an independent contractor at the time of his injury but an employee of RCSO.

B. Sole or Joint Employment

[2] We must now determine whether RCSO was Plaintiff's sole employer or whether Plaintiff was also jointly employed by Truesdell.

As noted above, a claimant is entitled to recover under our Workers' Compensation Act from a party with whom he was in an employer-employee relationship at the time of his injury. *See Fagundes*, 261 N.C. App. at 150, 820 S.E.2d at 359 (internal marks and citations omitted). Our Workers' Compensation Act defines an employee to be, among other things, a person engaged in employment under a contract of hire. N.C. Gen. Stat. § 97-2(2) (2021); *see also Hollowell v. N.C. Dep't of Conservation & Dev.*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934) (stating an employer-employee relationship "is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts" (citation omitted)).

Under certain circumstances, a person may be an employee of two different employers at the time of their injury. *Leggette v. McCotter, Inc.*, 265 N.C. 617, 625, 144 S.E.2d 849, 855 (1965). To prove simultaneous employment by two separate employers, a claimant may rely on two doctrines: the joint employment doctrine or the lent employee doctrine. *Whicker v. Compass Group USA, Inc.*, 246 N.C. App. 791, 797, 784 S.E.2d 564, 569 (2016) (citation omitted). Under the joint employment doctrine, Plaintiff must prove he was, at the time of his injury, "a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously perform[ing] services for both employers, and [] the service for each employer is the same as, or is closely related to, that for the other." *McGuine v. Nat'l Copier Logistics, LLC*, 270 N.C. App. 694, 700–01, 841 S.E.2d 333, 338 (2020) (citations and internal quotation marks omitted).

1. Contract of Employment

The joint employment doctrine requires an employment contract exist between both Plaintiff and RCSO and Plaintiff and Truesdell. While we have established there existed an employment contract between Plaintiff and RCSO, we must determine whether there also existed an employment contract between Plaintiff and Truesdell.

An employment contract may be "express or implied, oral or written[.]" N.C. Gen. Stat. § 97-2(2). An implied contract is "an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding." *Archer v. Rockingham Cnty.*, 144 N.C. App. 550, 557, 548 S.E.2d 788, 793 (2001) (citations omitted). To determine whether an implied employment contract existed between the parties, consideration must be given as to who "hired, paid, trained, and supervised" the employee. *McGuine*, 270 N.C. App. at 701, 841 S.E.2d at 339 (citations and internal marks omitted).

Plaintiff here was not under any express contract of employment with Truesdell. However, record evidence reflects the existence of an implied contract. We acknowledge Truesdell was not responsible for training Plaintiff, but Truesdell did hire, pay, and supervise Plaintiff.

A law enforcement officer, performing law enforcement duties, will always be under the command of the officers who outrank him, even when working in an off-duty capacity. Accordingly, Truesdell did not have independent direct supervision over Plaintiff. While Plaintiff was under the direct command and supervision of his superior officers—Captain Obershea and Chief Edwards—Truesdell still exercised some supervisory authority and control over the officers. Truesdell was directly responsible for the project and making sure officers were on scene. Truesdell contacted RCSO requesting officers to perform traffic duty and provided Captain Obershea and Chief Edwards with plans of how to direct or control traffic as provided by their engineer. Although Truesdell did not speak directly with every officer on site, Truesdell was directly in control of how many officers were working as neither Captain Obershea nor Chief Edwards had the independent authority to hire additional officers. Notably, Plaintiff was not originally scheduled to work on the date of his accident. Instead, Captain Obershea and Chief Edwards, after consulting the plan and recommended officer count offered by Truesdell, believed there needed to be additional officers on site. Captain Obershea and Chief Edwards contacted Truesdell to ask permission before calling Plaintiff to request his assistance in traffic control work. This indicates a consistent level of supervision or control which Truesdell had over the officers; if Truesdell had rejected the request for an additional officer or refused to present the idea to NCDOT, Plaintiff would not have been on the scene the night of his injury.

This evidence is also indicative of Truesdell's hiring authority. Truesdell engaged Captain Obershea and Chief Edwards to secure an allotted number of law enforcement officers to perform the required traffic control work. Truesdell also required each officer fill out a W-9 of

which indicated the officers who worked for them; had the officers complete timesheets on which Truesdell signed off after submission; and directly paid each officer $55 per hour.

In considering this record evidence, we hold there existed an implied contract of employment between Truesdell and Plaintiff as Truesdell, while not responsible for training Plaintiff, maintained a level of supervision and control over the Plaintiff's work for them, had independent hiring authority, and paid Plaintiff directly for his services.

2. Simultaneous Control and Performance of Closely Related Services

Although we hold there existed a contract of employment between Plaintiff and Truesdell, we must determine whether Plaintiff was under the simultaneous control of RCSO and Truesdell while simultaneously performing similar services for both RCSO and Truesdell.

Our Court's opinion in *Whicker v. Compass Group USA, Inc.*, illustrates circumstances to consider in making such a determination. In *Whicker*, Crothall Services Group entered into a contract with Novant Health, Inc., under which Crothall agreed to provide cleaning services to several Novant healthcare facilities. *Whicker*, 246 N.C. App. at 792, 784 S.E.2d at 566. The plaintiff was employed by Crothall and assigned to clean Forsyth Medical Center. *Id.* The plaintiff, while on her lunch break at Forsyth Medical Center, fell and injured her shoulder. *Id.* The plaintiff filed a claim seeking workers' compensation and asserted she was employed by both Crothall and Novant. *Id.* at 793, 784 S.E.2d at 567. The Full Commission concluded no employment relationship existed between the plaintiff and Novant under either the joint employment or lent employee doctrine. *Id.* The plaintiff appealed to this Court which affirmed the opinion and award of the Full Commission holding: the plaintiff failed to show she was a joint employee of Crothall and Novant as there was no express or implied employment contract with Novant and the plaintiff; Crothall and Novant did not engage in similar work; and Novant did not have control over the manner and execution of the plaintiff's work. *Id.* at 801, 784 S.E.2d at 571.

Our case can be distinguished from *Whicker*. Here, there existed an employment contract between both Plaintiff and RCSO and Plaintiff and Truesdell. Additionally, Plaintiff was under the simultaneous control of both RCSO and Truesdell. As noted above, Captain Obershea and Chief Edwards were directly responsible for supervising Plaintiff while Truesdell, having direct hiring authority, was directly responsible for Plaintiff being on scene at the time of his injury. Additionally, Truesdell

had control over the execution of Plaintiff's work. Truesdell had engineers draw up traffic plans with the number of officers necessary at each location point, then relayed the information, through Captain Obershea and Chief Edwards, to Plaintiff. Further, as indicated in Chief Edwards's testimony, Truesdell had control over which officers were on scene. Chief Edwards noted, rather than losing the contract, he would have asked an officer not to return to service under the direction of Truesdell if Truesdell had an issue with an officer's performance.

There are clear discrepancies between the Court's decision in *Whicker* and the instant case, but we note our inability to decisively state the nature of the work Plaintiff was performing at the time of his injury was of the same nature as the work performed by Truesdell. However, we are persuaded this requirement, per our Court's opinion in *Whicker*, is not required to show joint employment under the joint employment doctrine.

In *Whicker*, a prior panel of this Court stated, "[u]nder both the joint employment and lent employee doctrines, [the] [p]laintiff must show the work she was performing at the time of her injury was of the same nature as the work performed by Novant." *Whicker*, 246 N.C. App. at 800, 784 S.E. 2d at 570. The Court, without citing any supporting authority, reasoned that where the plaintiff was not required to show the work being performed—cleaning services—was of the same nature of the work performed by Novant—healthcare services—virtually any contractor retained by Novant to upkeep its facilities would be deemed an employee of Novant. *Id.* at 800, 784 S.E.2d at 570–71.

We interpret the joint employment doctrine differently. As stated, the doctrine requires, in relevant part, the service for each employer to be the same or closely related to that for the other. *See id.* at 797, 784 S.E.2d at 569 (citing *Anderson v. Texas Gulf, Inc.*, 83 N.C. App. 634, 636, 351 S.E.2d 109, 110 (1986)). This rule, provided by the Court in *Whicker*, can be traced back to our Court's opinion in *Anderson* and further to the authoritative treatise, *Larson's Workers' Compensation Law*. *See id.*; *see also* 5, Larson, Larson's Workers' Compensation Law § 68.02, p. 68-1. Neither our Court's opinion in *Anderson* nor *Larson's Workers' Compensation Law* interpret these rules to require the work being done by the plaintiff to be of the same nature of the work performed by the company for which the plaintiff is working when injured. *See id.*

We recognize, instead, the joint employee doctrine specifically states the service being performed by the plaintiff for each employer must be the same or closely related to the service for the other, not that the nature of the work of each employer had to be the same or

closely related. For, if we were to accept the Court's interpretation in *Whicker*, we would be effectively prohibiting, at a minimum, any off-duty law enforcement officer performing traffic duty from recovering from the company for which he was performing traffic duty, regardless of whether an express or implied contract existed, unless the officer was performing traffic duty for a private company whose business was also performing traffic duty.

Based on our interpretation of the joint employment doctrine, we need not reach whether the nature of the work Plaintiff was performing at the time of his injury, traffic duty, was of the same nature of the work traditionally performed by Truesdell. Further, we hold the Full Commission's conclusion which states, in pertinent part, "because the work Plaintiff was performing at the time of his injury was essentially law enforcement work, not concrete work . . . Truesdell is not liable as a joint or special employer[,]" was made in error.

Here, Plaintiff was, at the time of his injury: a single employee; under a contract of employment with both RCSO and Truesdell; under the simultaneous control of both RCSO and Truesdell; and performing a service similar to the service he performed for RCSO when performing traffic duty for Truesdell. Thus, we hold Plaintiff was jointly employed by both RCSO and Truesdell at the time of his injury, and the Full Commission erred in concluding otherwise.

IV. Conclusion

For the aforementioned reasons, the Full Commission correctly concluded Plaintiff was not an independent contractor but erred in concluding Truesdell was not liable as a joint employer.

AFFIRMED IN PART AND REVERSED IN PART.

Judges MURPHY and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
DESMOND JAKEEM BETHEA

No. COA22-932

Filed 19 December 2023

Criminal Law—competency to stand trial—memory loss—ability to assist in defense—findings supported by evidence

The trial court did not abuse its discretion by determining that defendant was competent to stand trial for attempted first-degree murder and other charges related to a shooting incident with law enforcement—during which defendant sustained multiple injuries, including a traumatic brain injury—where the trial court's findings that defendant could remember events before and after the shooting incident and that defendant was capable of assisting in his defense were supported by competent evidence, including a report submitted by the forensic psychologist who examined defendant and defendant's implicit concession that he was able to understand the nature of the proceedings against him.

Appeal by Defendant from judgments entered 28 March 2022 by Judge Stephan R. Futrell in Scotland County Superior Court. Heard in the Court of Appeals 18 October 2023.

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

Sarah Holladay for Defendant-Appellant.

COLLINS, Judge.

Defendant Desmond Jakeem Bethea appeals from judgments entered upon jury verdicts of guilty of three counts of attempted first-degree murder, one count of assault with a deadly weapon with intent to kill inflicting serious injury, two counts of assault with a firearm on an officer, and one count of "carrying a concealed gun." Defendant argues that the trial court abused its discretion when it found him competent to stand trial. We find no error.

I. Background

On 26 May 2018, Corporal Benjamin Teasley and Officer Jeremy Rodriguez with the Laurinburg Police Department responded to a call

about an individual who had been shot outside of a grocery store. The two officers arrived on scene and found a man who had been shot in the arm. As the officers worked to secure the crime scene, they watched Defendant walk up, cross under the police tape, and enter the secured area. The officers asked Defendant if he saw the police tape and told him to get out.

The officers moved towards Defendant, and Teasley began to arrest Defendant; Defendant resisted and started a physical altercation with Teasley. During the physical altercation, Defendant pulled a gun from his waistband and fired at Teasley, narrowly missing Teasley's ear. Teasley yelled "gun," drew his service weapon, and fired at Defendant. As Teasley fired at Defendant, Defendant pointed his gun at Rodriguez, who had fallen during the altercation and was on the ground.

Defendant attempted to flee, but Teasley fired his weapon and struck Defendant multiple times. Defendant was found incapacitated on the ground near the crime scene with injuries to his head, jaw, large intestine, liver, stomach, and right arm. Defendant was transported to the hospital for emergency surgery; it was determined that he had suffered a traumatic brain injury.

Defendant was indicted on 19 August 2019 on three counts of attempted first-degree murder; one count of assault with a deadly weapon with intent to kill inflicting serious injury; two counts of assault with a deadly weapon on a public officer; two counts of resisting, delaying, or obstructing a public officer; one count of carrying a concealed gun; and one count of discharging a weapon into an occupied dwelling. On 21 March 2022, Defendant's counsel filed a Motion for Capacity Hearing, alleging that Defendant was incompetent because he was "unable . . . to assist in his defense in a rational or reasonable manner" due to his lack of memory of the incident. Defendant's counsel attached a report written by Dr. James Hilkey, which concluded that Defendant "has no memory of the events" and thus "cannot assist his attorney in explaining his mental state or provide relevant information in offering a defense."

A competency hearing was held that same day. Dr. Hilkey was tendered and qualified as an expert in forensic psychology and testified that Defendant did not remember the days leading up to the crime and did not remember anything from the weeks directly following the crime. Dr. Hilkey also testified that Defendant had a "rational understanding" of the legal proceedings against him. The trial court then heard arguments from Defendant's counsel and the State, and it determined that Defendant was competent and therefore capable of standing trial.

Directly following the competency hearing, Defendant's case proceeded to trial. The jury convicted Defendant of all charges except for the one count of discharging a weapon into an occupied dwelling, and the trial court sentenced Defendant. Defendant gave proper oral notice of appeal in open court.

II. Discussion

Defendant argues that the trial court abused its discretion by finding him incompetent to stand trial because the "evidence showed he was unable to assist in his defense due to a total lack of memory about the days surrounding the incident."

A. Preservation

The State argues that "Defendant did not preserve the issue of competency for appeal because he failed to object to the competency finding below."

North Carolina Rule of Appellate Procedure 10 states, in relevant part:

> 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) (2022) (emphasis added).

Here, Defendant's counsel filed a Motion for Capacity Hearing, alleging that Defendant was not competent to stand trial. A competency hearing was held on 21 March 2022 and the trial court found that Defendant was competent to stand trial. As Defendant presented to the trial court a timely motion and obtained a ruling upon that motion, the issue of Defendant's competency to stand trial is properly preserved for our review.

B. Analysis

After hearing a motion on a defendant's mental capacity, a trial court shall issue an order containing "findings of fact to support its determination of the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1002(b1) (2022). The trial court's "findings of fact as to defendant's mental capacity are conclusive on appeal if supported by the evidence."

State v. Baker, 312 N.C. 34, 43, 320 S.E.2d 670, 677 (1984) (citations omitted). We review the trial court's denial of a defendant's motion for incapacity for an abuse of discretion. *State v. Flow*, 384 N.C. 528, 547, 886 S.E.2d 71, 85 (2023). An abuse of discretion requires a showing that the trial court's ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

N.C. Gen. Stat. § 15A-1001(a) provides:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. . . .

N.C. Gen. Stat. § 15A-1001(a) (2022). As to the requirement that a defendant be able to assist in his defense, our Supreme Court has explained that, "[s]o long as a defendant can confer with his or her attorney so that the attorney may interpose any available defenses for him or her, the defendant is able to assist his or her defense in a rational manner." *State v. Shytle*, 323 N.C. 684, 689, 374 S.E.2d 573, 575 (1989) (considering and rejecting the defendant's argument that the test is whether the defendant could participate in her defense in a "meaningful way"). Additionally, our Supreme Court has explained that even when a defendant's ability to participate in his defense is limited by amnesia, it does not per se render him incapable of standing trial. *See State v. Willard*, 292 N.C. 567, 576-77, 234 S.E.2d 587, 593 (1977) ("Obviously if [a] defendant is unable to recall the events of the crime, his available defenses may be limited. We do not believe this fact alone renders him incompetent to stand trial[.]"); *see also State v. Avery*, 315 N.C. 1, 11, 337 S.E.2d 786, 791 (1985) (rejecting the defendant's argument that "complete loss of memory of the events in question" prevented defendant from "rationally and reasonably consult[ing] with his defense counsel").

Here, Defendant implicitly concedes that he was able to understand the nature and object of the proceedings against him and able to comprehend his own situation in reference to the proceedings. He argues only that his memory loss rendered him unable to assist in his defense in a rational or reasonable manner and that the trial court's finding of fact as to his competency is unsupported by the evidence.

At the hearing, the trial court explained that it considered the evidence presented, along with *Willard* and *Avery*, and further stated:

> [T]he Court finds that the defendant is capable of assisting in his defense to the extent that he can remember events before and after and can stand trial in accordance with the standards in the North Carolina Constitution and General Statute 15A-1001(a), as amended.

The evidence presented at trial, which included Dr. Hilkey's written report, supports this challenged finding. Dr. Hilkey's written report shows that: Defendant retained memories of his childhood, including the years in elementary school, middle school, and the three years of high school that he completed; Defendant recalled playing and enjoying basketball; Defendant remembered beginning recreational use of marijuana in high school; and Defendant recalled being "in good health until being shot during the instant offenses." Additionally, Defendant stated that he was able to attend his grandmother's wake in June 2021, which took place after the incident and after he sustained his injuries.

This evidence supports the challenged finding that Defendant "can remember events before and after." Moreover, the record evidence shows that the trial court carefully considered Dr. Hilkey's written report and testimony, in light of *Willard* and *Avery*, when making its determination that Defendant was competent to stand trial.

III. Conclusion

As the challenged finding of fact is supported by the evidence, it is conclusive on appeal. *Baker*, 312 N.C. at 43, 320 S.E.2d at 677. Further, the record shows that the trial court carefully considered the evidence before it, along with the controlling case law. Accordingly, we cannot say that the trial court abused its discretion in determining that Defendant was mentally competent to stand trial. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

NO ERROR.

Judges GORE and FLOOD concur.

STATE OF NORTH CAROLINA
v.
CEDRIC ALDEN BURNETT

No. COA23-246

Filed 19 December 2023

1. Homicide—first-degree—premeditation and deliberation—identity of defendant as perpetrator—opportunity and means

Where the State presented substantial evidence that defendant had the motive, opportunity, and means to shoot the victim, the trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder based on premeditation and deliberation. Although the evidence was mainly circumstantial, it showed that the shooting was in retaliation for a fatal shooting that occurred two weeks earlier; about thirty minutes prior to this murder, a person was seen waiting in a car park at the corner where the victim was shot; a bullet recovered from the victim's body and a shell casing found at the scene matched the weapon defendant was carrying when he was apprehended; and defendant made incriminating statements to law enforcement.

2. Evidence—expert witness—ballistics analysis—reliability

In defendant's trial for first-degree murder, the trial court did not err by allowing the State's ballistics expert to testify regarding a firearm carried by defendant when he was apprehended by law enforcement and its connection to a bullet recovered from the victim's body and a shell casing found at the scene of the shooting. There was no violation of Evidence Rule 702(a) regarding reliability of the expert's analysis methods where the trial court's detailed findings about the expert's methods supported the court's resolution of purported contradictions between competing experts and where the court found that the expert's decision to conduct a microanalysis test rather than measuring lands and grooves—because it was a more definitive test—was a rational discretionary decision based on the state crime lab's guidelines and protocols.

3. Criminal Law—motion for appropriate relief—newly discovered evidence—mistake by ballistics expert in different trial

After defendant's conviction of first-degree murder, the trial court did not err by denying defendant's motion for appropriate relief, in which defendant asserted the existence of newly discovered evidence showing that the State's ballistics expert had made

a mistake in a different trial, that the State had suppressed this evidence, and that defendant was entitled to a new trial as a result. The trial court's determinations that the State did not possess the expert's personnel records from the state crime lab prior to trial and was not aware that the expert may have made a mistake in another case were supported by the record, and no new trial was needed where the types of purported "new evidence" raised by defendant tended merely to question the expert's past but not the State's evidence at trial.

4. Evidence—other crimes, wrongs, or acts—murder trial—removal of electronic monitoring device two weeks prior to shooting

In defendant's trial for first-degree murder based on premeditation and deliberation, in which the State introduced evidence that the victim was shot in retaliation for a fatal shooting that occurred two weeks before, the trial court did not err by allowing the State to introduce evidence that defendant had disabled his electronic monitoring device approximately one hour after the prior fatal shooting. The evidence did not violate Evidence Rule 404(b) because defendant's actions were close enough in time and proximity to the incident giving rise to the charge and were part of a chain of events that provided context for the murder.

5. Criminal Law—prosecutor's closing argument—murder trial—retaliatory motive

There was no error in defendant's trial for first-degree murder based on premeditation and deliberation where, during the State's closing statement, despite the parties agreeing not to refer to the incident as a gang killing, the prosecutor stated that defendant shot the victim in retaliation for a fatal shooting that took place two weeks before. The statement did not improperly shift the burden of proof to defendant, and the prosecutor's argument that the two shootings may have been linked was supported by competent evidence and testimony properly admitted at trial.

Appeal by defendant from judgment entered 1 April 2023 by Judge Thomas R. Wilson in New Hanover County Superior Court. Heard in the Court of Appeals 28 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert C. Montgomery, for the State.

Widenhouse Law, by M. Gordon Widenhouse, Jr., for the defendant-appellant.

TYSON, Judge.

Cedric Alden Burnett ("Defendant") appeals from judgment entered upon a jury's verdict finding him guilty of first-degree murder. Our review reveals no error.

I. Background

Fourteen-year-old Aljean Williams ("Williams") was murdered while visiting his grandmother in Wilmington on 3 January 2016. Williams was shot twice while standing on Emory Street and died at the hospital a short time later.

New Hanover County Sheriff's Sergeant Daniel Roehrig ("Sgt. Roehrig") responded to the report of a shooting on Emory Street near the intersection with Stewart Circle. Law enforcement officers were concerned about retaliation occurring in that area following another murder two weeks prior. When Sgt. Roehrig arrived, he saw Williams lying on the ground with several other people standing over him. Sgt. Roehrig did not notice any wounds on Williams and began CPR. Sgt. Roehrig did not find any weapons on the scene.

Officers found several spent casings at the scene: one 9-millimeter Luger and six .40 caliber Winchester. Lieutenant Joshua Bryant and Sheriff's Deputy Bryan Thigpen also responded to the shooting. Upon arrival on the scene, they were asked to follow the ambulance carrying Williams to the hospital. While enroute to the hospital, they were diverted by a dispatch of shots being fired at 11th Street at Castle Street.

Upon arrival, the officers saw Defendant running from the area. The officers activated their blue lights. Defendant looked back, saw the officers, and began to quickly run away from the area. The officers exited their vehicle and chased after Defendant until he was stopped and seized by the officers.

Defendant was reluctant to give his name to the officers. Defendant told the officers: "It don't matter because once you find out who I am I am not getting out of jail." Officers found a Kel-Tec P-11 9mm semi-automatic handgun on Defendant.

Defendant was arrested for carrying a concealed weapon and resisting arrest. Once Defendant revealed his name following his arrest, the officers discovered Defendant was a convicted felon in possession of a

firearm and there was an outstanding warrant for his arrest for cutting an electronic monitoring device on 20 December 2015.

The officers determined the Kel-Tec handgun contained four rounds of 9-millimeter full-metal-jacket rounds. A gunshot residue test ("GSR") performed on Defendant showed the presence of gunshot residue.

Williams' autopsy revealed two gunshot wounds, both bullets entering his back and rear. One bullet had entered the left buttock, traveled straight up, hitting the stomach and liver, before passing through the diaphragm and coming to rest in his heart. The other bullet entered Williams' upper left back, and traveled behind the heart, through the lungs, and through the spine.

The State Crime Laboratory determined the 9mm casing from the scene and the bullet removed from Williams' heart, was fired from the Kel-Tec P-11 9mm found on Defendant when he was arrested. Defendant pleaded guilty to possession of a firearm by a felon and interfering with an electronic monitoring device on 25 July 2016. Defendant was indicted for first-degree murder on 29 May 2020. Defendant was convicted of first-degree murder and was sentenced to life without parole. Defendant appealed.

Defendant filed a motion for appropriate relief ("MAR"). The superior court conducted an evidentiary hearing and denied the MAR on 30 December 2022. Defendant filed a written notice of appeal on 4 January 2023.

II. Jurisdiction

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

III. Issues

Defendant argues the trial court erred by: (1) denying his motion to dismiss the first-degree murder charge; (2) overruling objections to expert testimony; (3) denying his post-conviction MAR; (4) admitting evidence of his prior removal of an electronic monitoring device; and, (5) overruling his objections to the State's closing argument.

IV. Motion to Dismiss

A. Standard of Review

This Court's standard of review of a denial of a motion to dismiss is well established: "Upon 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 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"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), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. Even if circumstantial evidence does not rule out "every hypothesis of innocence," the motion to dismiss may be overcome and denied. *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citation omitted).

"The denial of a motion to dismiss for insufficient evidence is a question of law which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citation omitted).

B. Analysis

[1] Defendant argues the trial court erred by denying his motion to dismiss the first-degree murder charge based on premeditation and deliberation. He asserts insufficient evidence tending to show he was the perpetrator was introduced.

To support a conviction for first-degree murder, "the State must prove: (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation." *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007) (citations omitted).

Premeditation means "the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Bullock*, 326 N.C. 253, 257, 388 S.E.2d 81, 83 (1990) (citation omitted). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *State v. Davis*, 349 N.C. 1, 33, 506 S.E.2d 455, 472 (1998) (citation omitted). Premeditation and deliberation do not require a "fixed length of time." *State v. Walters*, 275 N.C. 615, 623, 170 S.E.2d 484, 490 (1969) (citation omitted).

Our Supreme Court has long held:

> Premeditation and deliberation are processes of the mind. In most cases, they are not subject to proof by direct evidence but must be proved, if at all, by circumstantial evidence. Among other circumstances from which premeditation and deliberation may be inferred are (1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulty between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Vause, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991) (citation omitted).

When evidence of whether the defendant was the perpetrator of the crime is circumstantial: "courts often [look towards] proof of motive, opportunity, capability, and identity to determine whether a reasonable inference of [the] defendant's guilt may be inferred or whether there is merely a suspicion that the defendant is the perpetrator." *State v. Hayden*, 212 N.C. App. 482, 485, 711 S.E.2d 492, 494 (2011) (citation and quotation marks omitted). "The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury." *Stone*, 323 N.C. at 452, 373 S.E.2d at 433.

To survive a motion to dismiss, evidence of motive alone is insufficient and evidence of a defendant's opportunity and means to commit the crime must also be considered. *State v. Bell*, 65 N.C. App. 234, 241, 309 S.E.2d 464, 469 (1983), *aff'd per curiam*, 311 N.C. 299, 316 S.E.2d 72 (1984).

This Court has also held:

> The real problem lies in applying the test to the individual facts of a case, particularly where the proof is circumstantial. One method courts use to assist analysis is to classify evidence of guilt into several rather broad categories. Although the language is by no means consistent, courts often speak in terms of proof of motive, opportunity, capability and identity, all of which are merely different ways to show that a particular person committed a particular

> crime. In most cases these factors are not essential elements of the crime, but instead are circumstances which are relevant to identify an accused as the perpetrator of a crime. . . .
>
> While the cases do not generally indicate what weight is to be given evidence of these various factors, a few rough rules do appear. It is clear, for instance, that evidence of either motive or opportunity alone is insufficient to carry a case to the jury. On the other hand, when the question is whether evidence of both motive and opportunity will be sufficient to survive a motion to dismiss, the answer is much less clear. The answer appears to rest upon the strength of the evidence of motive and opportunity, as well as other available evidence, rather than an easily quantifiable "bright line" test.

State v. Lowry, 198 N.C. App. 457, 466, 679 S.E.2d 865, 870-71 (2009) (internal citations and quotation marks omitted).

The State presented evidence tending to show motive, opportunity, and means. Testimony was presented tending to show the shooting was in retaliation for a fatal shooting two weeks prior, even though the trial court had granted Defendant's motion to prohibit any references to "gangs" or "gang shooting." The State also presented testimony that thirty minutes before Williams was shot, a report was received of someone seeing a car park at the corner where Williams was shot and someone in the backseat pointed out of the window.

The State also presented evidence tending to show Defendant's opportunity and means to commit the crime. Physical evidence of the 9mm shell casing at the murder scene, the bullet recovered from Williams body, weapon on Defendant's person upon arrest, and Defendant's statements to police after he was arrested tended to tie him to Williams' murder. A reasonable juror could find Defendant had the opportunity and means to commit the murder. The trial court did not err in denying Defendant's motion to dismiss the first-degree murder charge based on premeditation and deliberation. Defendant's argument is overruled.

V. Expert Witness

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).

B. Analysis

[2] Defendant argues the trial court erred in allowing the State's expert witness to testify without making necessary findings on reliability.

North Carolina Rules of Evidence 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).

Defendant contends the State's expert witness testimony was not "the product of reliable principles and methods" in violation of Rule 702(a)(2). *Id.*

The superior court made the following findings of fact in its order on allowing the expert testimony:

> 14. In error, [the State's expert] entered that the firearm, noted as K1, was "polygonal" as opposed to "conventional." This error was not caught by the peer review process[;] however[,] it did not affect the outcome or integrity of her examination.
>
> 15. Otherwise, [the State's expert]'s methods and conclusions as to this examination are not rebutted and her micro-analysis and conclusions were subject to peer review.

16. Moreover, despite and with exception to her acknowledged error, [the State's expert] testified as to each and every step taken in this examination, and each and every step drew on her training and experience which included her competency and near annual proficiency exams.

17. During the Casing Examination, [the State's expert] fired the K-1 (the firearm) three times and analyzed the casing and additionally maintained the three known projectiles. [The State's Expert] selected the ammunition to be used for these test fires.

18. Regarding, the Projectile Examination (approximately two years later) which was requested as a rush exam, [the State's expert] testified this examination was cross referenced from the Casing Examination.

19. [The State's expert] testified to each and every step taken during the Projectile Examination, and that each and every step drew on her training and experience.

20. Regarding [the State's expert's] methodoly [sic] in this regard, she was challenged in the rebuttal testimony by [the Defendant's expert] as asserted failure in following certain standard operating procedures.

21. There exists a tension between the testimony of [the State's expert] and her examination of the projectile and that of [the Defendant's expert] as set forth in her testimony and report (Defendants voir dire exhibit 25) as to the Projectile Examination. This tension is founded in a disparity in their respective interpretation and application of standard operating procedures in effect at the time of [the expert]'s examination.

22. [The expert] elected not to examine/measure the lands and grooves of the fired projectile where the submitted projectile and the maintained control projectiles initially collected as part of the Casing Examination (the three test fires) were—in accordance to the standard operating procedure she applied and pursuant to her training and experience—sufficiently similar to move to microanalysis.

23. Based on this decision and her analysis, she determined the projectile taken from the victim's heart as compared to the three projectiles maintained from the

> Casing Examination were sufficiently similar under micro-analysis for her to form an opinion.
>
> 24. [The State's expert's] opinion from her Projectile Examination was based on sufficient facts and data as taken from the three projectiles maintained from the Casing Examination and fired from the firearm in question; she clearly explained her methodology under the operating procedures in place at the time and her decision not to measure the lands and grooves of the projectile taken from the victim's heart based on her analysis of the comparative test projectiles being taken from the known source firearm and known source ammunition; and she applied her methods reliably and peer review of her micro-analysis confirmed her opinion.

The trial court found the State's expert witness' decision to conduct the micro-analysis test, instead of measuring the lands and grooves because it was more definitive, was a "rational discretionary decision" based on the State Crime Lab's "guidelines and protocols." The superior court made supported findings to resolve purported contradictions between the competing experts. The trial court did not abuse its discretion in admitting the State's expert's testimony and the superior court did not err in denying Defendant's MAR on this ground.

VI. Newly Discovered Evidence

A. Standard of Review

This Court reviews a trial court's ruling on a defendant's MAR for "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 of law are fully reviewable on appeal." *State v. Lane*, 271 N.C. App. 307, 311, 844 S.E.2d 32, 37 (2020) (citation omitted).

B. Analysis

[3] The Supreme Court of the United States held in *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), that "the suppression by the prosecution of evidence favorable to an accused upon request violates due

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 10 L. Ed. 2d at 218.

"Evidence favorable to an accused can be either impeachment evidence or exculpatory evidence." *State v. Williams*, 362 N.C. 628, 636, 669 S.E.2d 290, 296 (2008) (citing *United States v. Bagley*, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 490 (1985)). Evidence is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, 87 L. Ed. 2d at 494.

The trial court found the State was not in possession of the expert's personnel records from the State Crime Lab prior to trial and was not aware of a purported mistake she had made in another case prior to trial. "The State is not required to conduct an independent investigation to determine possible deficiencies suggested by defendant in State's evidence." *State v. Smith*, 337 N.C. 658, 664, 447 S.E.2d 376, 379 (1994). The Record does not indicate the State had suppressed material evidence. The superior court did not err in denying Defendant's MAR on this ground.

Defendant further argues the superior court erred in denying him a new trial based upon newly discovered evidence. Our Supreme Court has held the perquisites for a new trial on the grounds of newly discovered evidence are:

1. That the witness or witnesses will give the newly discovered evidence.
2. That such newly discovered evidence is probably true.
3. That it is competent, material and relevant.
4. That due diligence was used and proper means were employed to procure the testimony at trial.
5. That the newly discovered evidence is not merely cumulative.
6. That it does not tend only to contradict a former witness or to impeach or discredit him.
7. That it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.

State v. Cronin, 299 N.C. 229, 243-44, 262 S.E.2d 277, 286 (1980) (citations omitted).

Reviewing Defendant's argument in light of these factors, both pieces of purported "new evidence" proffered by Defendant concerning the State's expert: (1) a complaint by a superior court judge resulting in an investigation and (2) a prior mistake made during a firearm examination, are the sort of evidence that merely questions the expert witness' past, not the State's evidence at this trial, and does not necessitate a new trial. *Id.* The trial court did not err in denying Defendant's MAR on this ground.

VII. Rule 404(b)

[4] Defendant argues the trial court erred in admitting evidence of his removing an electronic monitoring device fifteen days earlier.

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).

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

B. Analysis

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 a 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 Supreme Court of North Carolina has repeatedly interpreted Rule 404(b) to be a rule of inclusion, and not exclusion. *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159. This inclusion of Rule 404(b) testimony or evidence is constrained by the requirements of similarity and temporal proximity of the evidence of the acts. *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002).

Rule 404(b) is "subject to but *one exception* requiring the exclusion of evidence if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Lyons*, 340 N.C. 646, 668, 459 S.E.2d 770, 782 (1995) (citation omitted).

The trial court admitted information over Defendant's objection of Defendant's removing his electronic monitoring device fifteen days prior to the shooting. The State argues the evidence of Defendant's actions is properly admitted under Rule 404(b) to show "the natural development of the facts or is necessary to complete the story of the charged crime for the jury." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 853 (1995).

Our Supreme Court has held:

> Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

State v. Agee, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (citation and internal quotation marks omitted).

Defendant disabled his electronic monitoring device approximately an hour after another murder was committed two weeks earlier in the same area of Wilmington. At the time of Williams' murder, law enforcement officers were monitoring that area for retaliation. The evidence and timing of these incidents and Defendant's actions are part of the chain of events that contextualize the crime. The trial court did not err in admitting this evidence. Defendant's argument is overruled.

VIII. State's Closing Argument

A. Standard of Review

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations omitted).

B. Analysis

[5] Defendant argues the State's closing argument was grossly improper. Defendant argues the State improperly shifted the burden of proof onto him and improperly asserted the murder was in retaliation for another murder, after agreeing not to argue Williams' murder was a gang killing.

The State's closing statement referred to Defendant's failure to refute the State's evidence concerning the physical evidence. The prosecutor's remarks concerning the two murders possibly being linked by retaliation were supported by competent evidence and testimony properly admitted at trial. The State's statement did not shift the burden of proof from the State onto Defendant. Defendant's argument is overruled.

IX. Conclusion

When viewed in the light most favorable to the State, including the reasonable inferences thereon, the State presented sufficient evidence for the first-degree murder charge based upon premeditation and deliberation to be submitted to the jury. The trial court properly denied Defendant's motion to dismiss the charges submitted to the jury.

The trial court made sufficient findings to allow the admission of the State's ballistics expert witness testimony under Rule 702(a). N.C. Gen. Stat. § 8C-1, Rule 702(a). Defendant has failed to show any error in the denial of his post-conviction MAR on his alleged new evidence.

The trial court properly admitted evidence of Defendant disabling an electronic monitoring device two weeks prior to Williams' murder as meeting temporal proximity and other circumstances required under Rule 404(b). N.C. Gen. Stat. § 8C-1, Rule 404(b). The State's closing argument did not mention "gangs" and was not improper.

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

NO ERROR.

Judges ZACHARY and FLOOD concur.

STATE v. FIGUEROA

[291 N.C. App. 610 (2023)]

STATE OF NORTH CAROLINA
v.
ZENAIDA FRANCHESCA FIGUEROA

No. COA23-313

Filed 19 December 2023

1. Evidence—expert testimony—drug trafficking case—chemical analysis identifying drugs—methodology unexplained—plain error analysis

In a prosecution for trafficking methamphetamine, where undercover law enforcement officers saw a suspected drug dealer arrive at the location of a drug transaction in a vehicle driven by defendant, the trial court did not commit plain error by admitting expert testimony and a lab report identifying the substance found inside defendant's vehicle as methamphetamine. The expert identified the type of chemical analysis she performed on the substance but did not explain the methodology of that analysis, and the trial court failed in its gatekeeping function of requiring the expert to testify to that methodology. However, this error did not amount to plain error because the expert did identify the tests she performed and the results of those tests; therefore, the expert's testimony did not amount to "baseless speculation" and was not so prejudicial that justice could not have been done.

2. Criminal Law—prosecutor's closing argument—improper statements—defendant's prior criminal convictions

In a prosecution for trafficking methamphetamine, where defendant's prior convictions for larceny and obtaining property by false pretense were admitted under Evidence Rule 609(a) for the purpose of impeaching defendant's credibility, the trial court did not err by failing to intervene ex mero motu during the prosecutor's closing argument. Although the prosecutor improperly suggested that defendant was more likely to be guilty of the trafficking offense based on her past convictions, this improper statement comprised only a few lines of the eighteen-page transcript of the prosecutor's closing argument. Further, the vast majority of the prosecutor's closing argument permissibly questioned defendant's credibility.

Appeal by Defendant from judgment entered 7 February 2022 by Judge Martin B. McGee in Guilford County Superior Court. Heard in the Court of Appeals 18 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas Sorensen, for the State-Appellee.

Joseph P. Lattimore for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from a judgment entered upon a guilty verdict of trafficking methamphetamine. Defendant argues that the trial court plainly erred by admitting expert testimony without first ensuring that the expert's methods were sufficiently reliable or reliably applied to the facts of the case, and that the trial court erred by failing to intervene ex mero motu when the prosecutor made improper remarks during closing argument. Upon review, we hold that the trial court did not plainly err by admitting the expert testimony, and that the trial court did not err by failing to intervene ex mero motu during closing argument.

I. Background

In November 2018, Guilford County law enforcement officers were conducting an undercover investigation of a suspected drug dealer ("the Suspect"). An undercover officer arranged to purchase two ounces of methamphetamine from the Suspect on 26 November 2018 and established a meeting location a few days later. The Suspect arrived at the meeting location in a vehicle driven by Defendant. When the Suspect arrived at the meeting location, Detective C.E. Sheets and a takedown team of four or five officers approached the vehicle, detained the Suspect and Defendant, and searched the vehicle. Sheets recovered a brown paper bag from the front passenger's seat, which contained what Sheets described as a "clear white crystally substance" that he suspected was methamphetamine. Sheets interviewed Defendant and informed her that she would be charged at a later date based on the suspected methamphetamine found in the vehicle. Sheets then sent the suspected methamphetamine to the state crime lab for analysis.

Defendant was indicted on 18 March 2019 for trafficking methamphetamine by possession. Defendant was also charged with trafficking methamphetamine by transportation and conspiracy to traffic methamphetamine. At trial, the State presented expert testimony from Brittnee Meyers, the forensic scientist who examined the suspected methamphetamine that Sheets recovered from the vehicle. Meyers testified that she performed a preliminary color test and a confirmatory infrared spectrophotometer test on the substance, from which she identified the substance to be methamphetamine. Meyers measured the weight of the methamphetamine to be 56.40 grams.

Sheets also testified about his interview with Defendant. Sheets testified that Defendant initially disclaimed any knowledge of the methamphetamine, but later told him that she "kind of know[s] what's going on." According to Sheets, Defendant stated that the Suspect had asked Defendant if she could "get ahold of two ounces of ice," to which Defendant responded that she could. Defendant then contacted her sister, who put her in touch with a man who goes by the name "Dread." Defendant met with Dread near the meeting location arranged by the undercover officer and the Suspect.

Defendant testified in her own defense and gave an alternate version of events. Defendant testified that the Suspect asked Defendant for a ride to Greensboro but did not explain why. The Suspect asked Defendant to park in a certain spot and within two minutes the vehicle was surrounded by law enforcement. Defendant testified that she consistently denied any knowledge of the methamphetamine while speaking to law enforcement officers, that she did not tell officers that she worked with her sister to procure methamphetamine, and that she did not know anyone named Dread.

The jury found Defendant guilty of trafficking methamphetamine by possession, and not guilty of trafficking methamphetamine by transportation and conspiracy to traffic methamphetamine. Defendant filed written notice of appeal.

II. Discussion

A. Expert Testimony

[1] Defendant argues that the trial court plainly erred by admitting Meyers' testimony and lab report identifying the substance in Defendant's vehicle as methamphetamine because her testimony failed to lay a sufficient foundation for reliability under Evidence Rule 702.

"[A]n unpreserved challenge to the performance of a trial court's gatekeeping function under Rule 702 in a criminal trial is subject to plain error review." *State v. Gray*, 259 N.C. App. 351, 354, 815 S.E.2d 736, 739 (2018) (citation omitted). To show plain error, "a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice–that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (quotation marks and citations omitted). "[B]ecause 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." *Id.* (quotation marks and citations omitted). The standard is so high "in part at least because the defendant could have prevented any error by making a timely objection." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83-84 (1986) (citation omitted).

Rule 702(a) provides a three-part test for determining whether expert testimony is admissible:

> 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) (2022). Where the State seeks to prove the identity of a controlled substance through expert testimony, such testimony is admissible only when it is "based on a scientifically valid chemical analysis and not mere visual inspection." *State v. Ward*, 364 N.C. 133, 142, 694 S.E.2d 738, 744 (2010).

At trial, Meyers was tendered and qualified as an expert in forensic science and forensic drug chemistry without objection. Upon being qualified as an expert, Meyers gave the following testimony:

> [STATE:] . . . [D]id you receive this substance at your lab?
>
> [MEYERS:] Yes, I did.
>
> [STATE:] And if you'll tell the jurors if you know when you received it and what, if anything, you did with the item.
>
> [MEYERS:] I received the evidence on February 10, 2020, and I conducted an analysis on the crystalline material that was contained inside.
>
> [STATE:] Okay. And I guess without being too technical for us, could you tell us what -- what do you do to determine what type of controlled substance -- substance that you may have received?

> [MEYERS:] In this case, I performed a preliminary color test known as the marquis color test, and I also completed a confirmatory infrared spectrophotometer test as well. And in this case, I identified methamphetamine, which is a Schedule II controlled substance.
>
> [STATE:] Okay. And that was your opinion based on your analysis?
>
> [MEYERS:] Yes.

Defendant argues that Meyers' testimony was admitted in violation of Rule 702(a) because Meyers failed to explain the procedure she employed or how that procedure was applied to the facts of this case.

This Court rejected a similar argument in *State v. Piland*, 263 N.C. App. 323, 822 S.E.2d 876 (2018). In *Piland*, defendant was charged with several drug-related offenses after law enforcement officers recovered a bottle containing a large quantity of tablets from his residence. 263 N.C. App. at 326-27, 822 S.E.2d at 881. At defendant's trial, a forensic scientist gave expert testimony that she "performed a chemical analysis on a single tablet to confirm that they did in fact contain [hydrocodone]," but the expert did not identify the chemical analysis she performed or describe how it was performed. *Id.* at 338-39, 822 S.E.2d at 888. This Court held that "it was error for the trial court not to properly exercise its gatekeeping function of requiring the expert to testify to the methodology of her chemical analysis." *Id.* at 339-40, 822 S.E.2d at 888. Nonetheless, the error did not amount to plain error because "the expert testified that she performed a 'chemical analysis' and as to the results of that chemical analysis." *Id.* at 340, 822 S.E.2d at 888. This Court reasoned that the expert's testimony did "not amount to 'baseless speculation,' " and thus "was not so prejudicial that justice could not have been done." *Id.* (citation omitted).

We reach the same conclusion here. At Defendant's trial, Meyers gave expert testimony that she "performed a preliminary color test known as the marquis color test" and "a confirmatory infrared spectrophotometer test" from which she identified the evidence in this case to be methamphetamine. Although Meyers identified the analysis that she performed, she did not explain the methodology of that analysis. Thus, the trial court erred by failing to exercise its gatekeeping function. *See id.* at 339-40, 822 S.E.2d at 888. However, the error does not amount to plain error because Meyers identified the tests she performed and the result of those tests. *See id.* at 340, 822 S.E.2d at 888. Accordingly, Meyers' testimony did "not amount to 'baseless speculation,' " and thus

"was not so prejudicial that justice could not have been done." *Id.* (citation omitted).

B. Closing Argument

[2] Defendant argues that the trial court erred by failing to intervene ex mero motu when the prosecutor used Defendant's past convictions as substantive evidence of Defendant's guilt during closing argument.

"When a defendant appears as a witness at trial, evidence of the defendant's past convictions may be admissible for the purpose of attacking the defendant's credibility as a witness." *State v. McEachin*, 142 N.C. App. 60, 69, 541 S.E.2d 792, 799 (2001) (citing N.C. Gen. Stat. § 8C-1, Rule 609(a)). However, "it is improper for the State to suggest in its closing argument to the jury that [such] evidence is substantive evidence of the defendant's guilt." *Id.* (citation omitted).

Where, as here, the defendant did not object at trial to an improper jury argument, the defendant must show that the prosecutor's argument was "so grossly improper that the trial court abused its discretion by failing to intervene ex mero motu." *State v. Campbell*, 359 N.C. 644, 676, 617 S.E.2d 1, 21 (2005) (citation omitted). "To make this showing, defendant must demonstrate that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Id.* (quotation marks and citation omitted).

Here, Defendant testified in her own defense, and her past convictions were admitted for the purpose of attacking her credibility under Rule 609(a). Throughout his closing argument, the prosecutor permissibly attacked Defendant's credibility, arguing to the jury that, "[i]f you want to believe her story, . . . you have to believe that Officer Sheets is lying," and asking the jury to discount Defendant's testimony:

> I would ask you to discount everything she said. She doesn't get to call [Sheets] – and I'll just say a liar or giving a mistruthful statement from that stand and then say, okay, believe me, believe my testimony up here. Either you're going to believe her or you don't. And my position is you don't believe her because Detective Sheets was credible and he's truthful about what took place.

The prosecutor emphasized that credibility was the crux of the jury's decision:

> What it comes down to, ladies and gentlemen, I'll contend to you is the believability of the witnesses. If you believe everything . . . Sheets has said, then she's guilty

> of transporting methamphetamine and possession of methamphetamine by trafficking. If you disbelieve what Detective Sheets has told you with regards to her statements, then you could find her not guilty.
>
> But, in essence, that's what it really boils down to. I can sit here and argue all the elements of the case[,] . . . but if you believe his testimony, she's guilty. If you don't believe his testimony, then she's not guilty.

The prosecutor also referenced Defendant's past convictions without objection:

> And so that -- that begs the question, who is this young lady? I will contend to you she's -- she's someone who's involved in drug deals. You heard about her prior record. Although it is larceny and obtaining property by false pretense, that gives you some preview as to who she is.

While the vast majority of the prosecutor's closing argument permissibly attacked Defendant's credibility, the contested statement improperly suggested that Defendant was more likely to be guilty of the charged offenses based on her past convictions. However, the improper statement comprised only a few lines of the prosecutor's eighteen-page closing argument, as transcribed, and was not so grossly improper that it warranted judicial intervention. *Cf. State v. Tucker*, 317 N.C. 532, 543-45, 346 S.E.2d 417, 423-24 (1986) (ordering a new trial when prosecutor repeatedly used defendant's past convictions as substantive evidence of defendant's guilt over objection); *McEachin*, 142 N.C. App. at 70, 541 S.E.2d at 799-800 (assuming without deciding that prosecutor's argument that defendant had 'killed before and . . . he's killed again' was grossly improper). Thus, the prosecutor's reference to Defendant's past convictions did not "so infect[] the trial with unfairness that [it] rendered the conviction fundamentally unfair." *Campbell*, 359 N.C. at 676, 617 S.E.2d at 21 (citation omitted). Accordingly, the trial court did not abuse its discretion by failing to intervene ex mero motu.

III. Conclusion

For the foregoing reasons, the trial court did not plainly err by allowing the expert to testify that the substance was methamphetamine, and the trial court did not abuse its discretion by failing to intervene ex mero motu during closing argument.

NO PLAIN ERROR AND NO ERROR.

Judges GORE and FLOOD concur.

STATE OF NORTH CAROLINA
v.
KENDRICK KEYANTI GREGORY, Defendant

No. COA22-1034

Filed 19 December 2023

1. Evidence—expert testimony—forensic psychiatrist—scope of cross-examination limited—abuse of discretion analysis

In defendant's trial for numerous charges arising from a multi-day crime spree—in which defendant entered a plea of not guilty by reason of insanity—the trial court did not abuse its discretion by limiting defense counsel's cross-examination of the State's forensic psychiatrist, who had examined defendant multiple times during his pre-trial detention to make determinations regarding defendant's competency to proceed to trial. Although the trial court prevented defense counsel from explicitly referring by name to the pre-trial hearing held pursuant to *Sell v. United States*, 539 U.S. 166 (2003), to determine whether defendant's capacity should be restored via forced medication, or from referring to forced medication in any way, the issue of forced medication was not before the jury, and defense counsel was permitted to question the State's witness regarding her testimony at that hearing and the basis for her differing opinions at different points in time in the case.

2. Criminal Law—jury instruction—insanity—commitment procedure—additional instruction properly denied

In defendant's trial for numerous charges (including murder, rape, and robbery arising from a multi-day crime spree) in which defendant entered a plea of not guilty by reason of insanity, the trial court did not err during its instructions to the jury on insanity and commitment procedures by declining to include an additional instruction requested by defendant, where the trial court used the pattern jury instructions and where there was no merit to defendant's argument that the instructions as given were misleading or incomplete.

Judge HAMPSON dissenting.

Appeal by defendant from judgments entered 4 August 2021 by Judge Thomas H. Lock in Wake County Superior Court. Heard in the Court of Appeals 31 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Zachary K. Dunn, for the State-appellee.

Thomas, Ferguson & Beskind, LLP, by Kellie Dorise Mannette, for defendant-appellant.

GORE, Judge.

Defendant Kendrick Keyanti Gregory appeals from the trial court's judgments entered upon his conviction for first-degree murder, three counts of robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree sexual offense, first-degree rape, first-degree kidnapping, two counts of assault with a deadly weapon with intent to kill, and possession of a firearm by a felon. Consistent with the jury's verdicts, the trial court imposed a sentence of life imprisonment without possibility of parole, and consecutive sentences totaling 616-800 months' imprisonment. The trial court arrested judgment on one count of robbery with a dangerous weapon and the first-degree kidnapping conviction. Defendant gave oral notice of appeal in open court. This Court has jurisdiction to hear this appeal pursuant to N.C.G.S. §§ 15A-1444 and 7A-27(b).

The instant appeal is centered on the trial court's limitation on defendant's cross-examination of Dr. Nicole Wolfe (the State's expert witness in forensic psychiatry), and the trial court's denial of defendant's request for a special jury instruction on insanity. We discern no error in the trial court's judgments.

I.

The facts of defendant's underlying crimes are mostly undisputed and hold no relevance to the issues now before us. Nonetheless, considering the severity of defendant's crimes, it is appropriate to present a summary for context.

A.

In the evening hours of 30 August 2015, defendant stole two vehicles from different locations around Raleigh, North Carolina — first a Pontiac Grand Prix from the Mini City Market, then a BMW 328 from the Royal India restaurant.

Around 9:00 a.m. the next morning, detectives from the Raleigh Police Department ("RPD") were called to the Knights Inn motel on reports of a shooting. Defendant had shot Lenin Peraza after watching

Mr. Peraza pull cash out of his wallet and purchase items at a nearby Exxon station. Video surveillance footage confirmed defendant was the shooter. The footage showed defendant pulling Mr. Peraza into a stairwell, taking money from his pocket, and then leaving in a blue BMW.

That same day, RPD received a call about a shooting at the Mini City Market. The 911 call reported that someone in a red shirt, later identified as defendant, had shot someone, and was running towards the Food Lion located in the same shopping center. Officer D.P. Patterson responded to the scene and noticed people screaming in front of a business called "Mr. Pawn." When Officer Patterson arrived at the business, he could "see the victim laying down in the doorway." The victim, later identified as Thomas Durand, died from his injuries. Defendant had shot Mr. Durand in the back of the head and stolen his gun.

A few minutes after leaving Mini City Market in the stolen BMW, defendant drove a short distance away and kidnapped a fifteen-year-old girl, J.D., from outside of her home. J.D. recognized defendant as she had seen him the previous day "staring at [her] most of the time" while she was riding bikes in her neighborhood with her friends. As J.D. walked home, now alone, defendant again approached her, "came up and put his arms around [J.D.'s] neck and told [her] [that she] would have to come with him." Defendant took J.D. to the stolen BMW and drove away. While driving, defendant showed J.D. the two handguns that he had in the car and told her "[t]hat he had murdered somebody at the pawnshop."

After driving for a while, the pair arrived at an apartment complex that was unknown to J.D. Defendant forced J.D. into the woods behind the apartment complex; he vaginally raped J.D., unsuccessfully attempted anal penetration, and then vaginally raped her again. Defendant was "hyped up" and told her that she would have his child. The pair then returned to the stolen BMW, and defendant drove J.D. back to her apartment complex. As defendant dropped J.D. off, he told her that "if [she] told somebody what happened, he would come back because he knew where [she] stayed."

Later that evening, defendant robbed a clerk at the International Food Store. During this robbery, defendant fired a shot at a clerk who chased him, but no one was hurt.

On 1 September 2015, defendant was arrested in New York City after police stopped a stolen car being driven by defendant. Defendant was extradited back to North Carolina.

B.

Shortly after being arrested, defendant was committed to Central Regional Hospital for an examination on his capacity to proceed. Defendant was found incapable to proceed on 6 February 2018 and was involuntarily committed. On 19 February 2020, the State moved to have defendant forcibly medicated, if necessary, to restore his capacity. On 5 March 2020, the trial court convened a hearing pursuant to *Sell v. United States*, 539 U.S. 166, 156 L. Ed. 2d 197 (2003), to determine whether to restore defendant's capacity to proceed via forced medication.

At the hearing, and as is relevant here, the State called Dr. Nicole Wolfe to testify regarding defendant's mental illnesses. Dr. Wolfe, a forensic psychiatrist at Central Regional Hospital, testified that she first examined defendant in late 2017 to determine whether he was competent to proceed to trial; she determined that he was not. Dr. Wolfe thereafter examined defendant twice more: once in April 2018 and again in January 2020. During the April 2018 evaluation, defendant was medicated, and Dr. Wolfe determined that defendant was able to proceed to trial. However, at the January 2020 evaluation, defendant was unmedicated, and Dr. Wolfe determined that he was no longer able to proceed to trial.

Speaking about defendant's then-current mental state in March of 2020, Dr. Wolfe stated:

> [PROSECUTOR]: And, finally, I want to talk about what's medically appropriate for the defendant. You know, aside from restoring him to capacity, what, in your opinion, is in his best interests just regarding his health?
>
> [DR. WOLFE]: Treatment of his psychotic condition is medically appropriate.
>
> [PROSECUTOR]: And why is it appropriate that he receive antipsychotic medications against his will? Go through that cost-benefit analysis for us, if you would?
>
> [DR. WOLFE]: Well, he's not going to spontaneously improve without treatment. The other thing is that there are significant risks with lack of treatment, and psychotic people do unpredictable actions, and sometimes that's dangerousness to self or others. So untreated psychosis can lead to suicide, not uncommonly, and it can also lead to aggression.

The hearing was continued, and before it concluded, defendant began taking his medication voluntarily.

C.

Defendant's trial began on 6 July 2020. The State presented dozens of witnesses in its case in chief, and six witnesses in rebuttal. Among the State's rebuttal witnesses was Dr. Wolfe, who was admitted at trial as an expert in forensic psychiatry and psychology.

1.

On direct examination, Dr. Wolfe's opinion was that in 2017, defendant exhibited symptoms of psychosis, schizophrenia, and mania, and was not capable of proceeding to trial. Defendant was then kept at Central Regional Hospital for a process called "capacity restoration," where he was given psychiatric treatment to target symptoms that were interfering with his capacity to proceed. Dr. Wolfe deemed defendant capable to proceed in April 2018.

Shortly after making that determination, the State asked Dr. Wolfe to "render an opinion about defendant's mental state at the time of the offense," 31 August 2015. When rendering an insanity determination regarding defendant's mental state when he committed his crimes, Dr. Wolfe reviewed "a compilation of understanding the mental illness, what was present, and looking at anything at the time of the offense." Dr. Wolfe interviewed defendant numerous times between 17 and 27 April 2018, produced a report of her findings (the "2018 Report"), and noted "several things that [defendant] said . . . that made [her] suspicious of some of his symptom reporting. Dr. Wolfe referred defendant to another physician who confirmed her suspicions that defendant was feigning or malingering some of his symptoms.

Dr. Wolfe "suspected malingered or feigned mental illness" in 2017 when she first evaluated defendant, "even when he was psychotic just based on his symptom presentation" and, after consulting his full psychiatric history, learned that "there were many psychiatrists who suspected that he was malingering or claiming symptoms for a secondary gain." Dr. Wolfe questioned defendant's self-reported symptoms of hallucinations, and defendant also admitted to Dr. Wolfe that he would sometimes "go on suicide watch" so he could "get more food," which Dr. Wolfe testified is "sort of an admission to malingering."

Dr. Wolfe also testified about defendant's incarcerations shortly before 30 August 2015. Defendant was incarcerated on 1 August 2015 at the Wake County Detention Center but displayed "no odd behavior"

and "no self-report. So he didn't see mental health because his behavior seemed pretty unremarkable." The 2018 Report was admitted into evidence without objection from defendant. Dr. Wolfe's underlying conclusion in the 2018 Report was that defendant's "mental illness did not prevent him from understanding the nature and quality or wrongfulness of his actions."

2.

On cross-examination, defendant's counsel began recounting Dr. Wolfe's findings in her 2017, 2018, and 2020 reports. Defense counsel asked about a January 2020 evaluation of defendant. At that time, Dr. Wolfe determined that defendant was again incapable of proceeding to trial and recommended a high dose of an antipsychotic medication to restore his competency. Shortly thereafter, the following colloquy regarding the 5 May 2020 *Sell* hearing occurred:

> [DEFENSE COUNSEL]: So after you wrote [the January 2020] report, you testified at another hearing in this case; is that correct?
>
> [DR. WOLFE]: I don't remember.
>
> [DEFENSE COUNSEL]: Well, this will be a hearing about whether or not it might be necessary to have forced medication?
>
> [DR. WOLFE]: Oh, okay. That. Yes.
>
> [DEFENSE COUNSEL]: And there's a procedure when somebody –
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.

Outside the presence of the jury, defense counsel asked whether he was permitted to go "into anything about the *Sell* hearing." The State confirmed that its objection was based on defendant's counsel asking about forced medication, and the court confirmed, "that was the basis for the [c]ourt's ruling." However, the trial court did not bar defendant from asking Dr. Wolfe about her testimony at the *Sell* hearing, "as long as [defense counsel does not], in your questions, make reference to forced medications, I would think that line of questioning would be appropriate." After hearing a proffer, the State renewed its objection to defense counsel, "talk[ing] about a *Sell* hearing or any forcible injections." After hearing from the defense, the trial court ruled that "the probative value of that line of questioning" regarding forced medication "is minimal. But

to the extent that it is relevant, that upon apply[ing] the balancing test required by 403, the [c]ourt does find that the probative value of the line of questions is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

After the trial court sustained the State's objection, defense counsel resumed asking Dr. Wolfe "about a hearing that occurred in March of 2020" — the *Sell* hearing. Defense counsel asked Dr. Wolfe to review a verbatim transcript of her testimony at the *Sell* hearing, and asked her multiple questions about her testimony in that proceeding, including the following:

> [DEFENSE COUNSEL]: If you looked at page 144 [of the *Sell* hearing transcript], did you testify that you believe that medication can restore [defendant's] competency?
>
> [DR. WOLFE]: It sounds like something I would have said.
>
> . . .
>
> [DEFENSE COUNSEL]: And you also said at the bottom of page 144, going through 115, "Without medication, I do not believe that [defendant] would regain capacity without antipsychotic medication"?
>
> [DR. WOLFE]: That is correct.
>
> [DEFENSE COUNSEL]: And 115, you also said, "Seen him in both a state where he was capable of proceeding to trial and where he is not, and it is a pretty drastic difference in terms of how he communicates, organizes his thoughts, and interacts with others"?
>
> [DR. WOLFE]: Yes.

Defense counsel continued questioning Dr. Wolfe about her testimony at the *Sell* hearing and an April 2021 report she produced about defendant's competency to proceed. Dr. Wolfe also outlined the differences between her diagnosis in 2017 and her testimony at trial:

> Diagnostically, some of the difference that – some of the things that came into play that are slightly different than 2017 is I didn't have the full breadth of the family history, the reports from friends, a lot of these criminal reports, and all these other treatment records. So the diagnosis of the psychotic disorder, it does appear that there are psychotic symptoms that started in 2014 and they appeared

> to have full manifested into a very consistent state in 2017. And the other thing that I didn't diagnose more than 2017 but that's quite relevant is antisocial personality disorder. And that's something that is a more longstanding type of behavior that somebody engages in, in terms of the way they choose to live their life. And by having all of these additional records, I was able to see his pattern – longstanding pattern of manipulative behavior, callousness, that way preceded the development of any psychotic symptom.

Dr. Wolfe admitted that she did not write a report which contained the words "antisocial personality disorder," and explained that "wouldn't be necessary because it doesn't really change the opinion, which is that he doesn't have a mental disease or defect that stops him from being able to understand what he was doing at the time." Reviewing her records, Dr. Wolfe confirmed that defendant had not taken anti-psychotic medication from roughly 8 July 2015 through his arrest in New York after the crimes in question.

D.

At the charge conference, the parties agreed that the pattern jury instruction regarding insanity, N.C.P.I. – Crim. 304.10, should be given. The pattern instruction includes the following statement regarding release from a mental facility after being found not guilty by reason of insanity:

> A defendant found not guilty by reason of insanity shall immediately be committed to a State mental facility. After the defendant has been automatically committed, the defendant shall be provided a hearing within 50 days. At this hearing the defendant shall have the burden of proving by a preponderance of the evidence that the defendant no longer has a mental illness or is no longer dangerous to others. If the court is so satisfied, it shall order the defendant discharged and released. If the court finds that the defendant has not met the defendant's burden of proof, then it shall order the inpatient commitment continue for a period not to exceed 90 days. This involuntary commitment will continue, subject to periodic review, until the court finds that the defendant no longer has a mental illness or is no longer dangerous to others.

N.C.P.I. – Crim. 304.10. In addition to this standard language, defendant requested in writing that the trial court add a subsequent paragraph to the pattern jury instruction, as follows:

> No matter how much time has passed since the crime, a defendant who committed a violent homicide "will be presumed dangerous to others" and has a "high hurdle" and "difficult burden" to overcome this presumption. Even years after the crime, when the court considers a mentally ill defendant's dangerousness, the probative value of a violent homicide *far outweighs* the fact that the crime happened years or decades ago. Thus, during a civil commitment hearing, the judge will always consider a defendant's prior violent crime and the defendant faces a difficult burden to prove he is not dangerous to others.

The State objected to the addition of the paragraph, while acknowledging some past cases where prosecutors had, during closing arguments, prejudicially misrepresented the term of a defendant's involuntary commitment upon a finding of not guilty by reason of insanity. The State disclaimed any intention to make such an argument in this case. After some consideration, the trial court declined to give defendant's requested special instruction.

During closing arguments, the State did not make any argument that defendant could be released within a short period of time. Defendant's counsel made arguments, without objection, consistent with the special instruction that the trial court declined to give. Defense counsel explained to the jury that when someone is "found not guilty by reason of insanity, they are sent to a secured location at a mental hospital." Defense counsel argued that the mental hospital would "never cure [defendant's] disease. Never. That's not a possibility." Defense counsel further stated:

> [defendant is] going to be [at a mental hospital] for a long, long time, if not forever. Because they can take into account not only the fact that he's been untreated in an uncurable disease that he will also have, but in deciding whether he's a danger, we look at what events that have happened beforehand. And they will look at the fact what happened beforehand was that somebody got killed, somebody was sexually violated, and there were violent robberies. All of that was going to be taken into consideration. It's going to prevent him from getting out.

The jury returned verdicts finding defendant guilty on all charges.

II.

A.

[1] Defendant argues the trial court abused its discretion in limiting cross-examination of Dr. Wolfe regarding the *Sell* hearing, and specifically, her testimony that defendant needed to be forcibly medicated to regain his capacity to proceed. Defendant asserts "the inability of the defense to cross-examine Dr. Wolfe on her position regarding forced medication severely impaired their ability to undermine her opinion on insanity." We disagree.

In this case, Dr. Wolfe was the State's expert witness who rebutted defendant's defense of insanity. Dr. Wolfe testified, that in her opinion, defendant was mentally ill, malingering his symptoms, and was fully able to appreciate his conduct during the crimes committed. When defense counsel attempted to impeach Dr. Wolfe with her testimony from the *Sell* hearing, the State objected, and after a proffer, the trial court sustained the State's objection to the line of questioning under Rule 403 grounds.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. "The principal purpose of confrontation is to secure to the defendant the right to test the evidence of the witnesses against him through cross-examination." *State v. Mason*, 315 N.C. 724, 729 (1986) (citing *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347 (1974)). "However, the right of cross-examination is not absolute and may be limited in appropriate cases." *Id.* at 730 (citation omitted).

"Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 88 L. Ed. 2d 15, 19 (1985) (per curiam). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 683 (1986).

"In general, we review a trial court's limitation on cross-examination for abuse of discretion. If the trial court errs in excluding witness testimony showing possible bias, thus violating the Confrontation Clause, the error is reviewed to determine whether it was harmless beyond a reasonable doubt." *State v. Bowman*, 372 N.C. 439, 444 (2019) (citations omitted).

As a preliminary matter, defendant does not explain how the fact that a *Sell* hearing occurred, or that defendant may have been subject to forced medication, was probative in any way. *See State v. Young*, 368 N.C. 188, 212 (2015) ("Evidence has 'probative value' if it 'tends to prove or disprove a point in issue.' ") (quoting *Probative Evidence*, Black's Law Dictionary (8th ed. 2004)). The issue of forced medication was not before the jury, and defendant concedes he was not forcibly medicated because he "began taking his medication voluntarily."

After the trial court sustained the State's objection, defense counsel resumed asking Dr. Wolfe "about a hearing that occurred in March of 2020" – the *Sell* hearing. Defense counsel asked Dr. Wolfe to review a verbatim transcript of her testimony at the *Sell* hearing and asked her multiple questions about her testimony in that proceeding. Dr. Wolfe explained the differences between her diagnosis in 2017 and her testimony at trial, noting that her initial diagnosis was made without the benefit of additional records.

It is true that findings of incapacity to proceed are generally admissible evidence when a defendant asserts insanity as a defense, and "when such evidence is admitted, the trial judge should clearly instruct the jury that this evidence is not conclusive but is merely another circumstance to be considered by the jury in reaching its decision." *State v. Bundridge*, 294 N.C. 45, 51 (1978). However, this is not a case where the trial court refused to admit such evidence. To the contrary, witness testimony "placed before the jury a complete history and description of defendant's mental condition." *Id*. The jury was aware that: (i) defendant was not medicated at the time of his crimes; (ii) defendant was deemed incompetent to proceed to trial by Dr. Wolfe at various times; (iii) defendant was prescribed medication by Dr. Wolfe, and others, to help treat defendant's mental illnesses; and (iv) Dr. Wolfe previously testified that medication was not only medically appropriate, but also necessary for defendant to maintain competency to proceed to trial. Although the trial court prohibited defense counsel from mentioning the *Sell* hearing or forced medication specifically, defendant was not limited in attacking Dr. Wolfe's credibility or asking about the differences between her previous testimony at the hearing and her subsequent testimony at trial.

Presuming, *arguendo*, facts that a *Sell* hearing occurred and that the State may have sought to forcibly medicate defendant were broadly relevant and had some probative value on defendant's plea of not guilty by reason of insanity, the trial court did not abuse its discretion in its determination that "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

jury . . . ." N.C.G.S. § 8C-1, Rule 403 (2022). Further, defendant's assertion that "the jury was deprived of the information about [Dr. Wolfe's] bias . . . at least in part due to her belief that he was a danger to others when he was unmedicated" lacks any real substantive support in the record.

B.

[2] Next, defendant argues the trial court erred by declining to give his requested special jury instruction on commitment procedure. We disagree. Defendant properly preserved this issue for appellate review. *See* N.C. R. App. P. 10(a)(2). We review errors "challenging the trial court's decisions regarding jury instructions . . ." de novo." *State v. Osorio*, 196 N.C. App. 458, 466 (2009).

At the charge conference, the parties agreed the pattern jury instruction regarding insanity, N.C.P.I. – Crim. 304.10, should be given, including, upon defendant's request, an instruction on commitment procedure. Defendant also requested an additional instruction paragraph that reads, in part, "a defendant who committed a violent homicide 'will be presumed dangerous to others' and has a 'high hurdle' and 'difficult burden' to overcome this presumption." Defendant's trial counsel admitted this was "a unique instruction," and there were "no cases where [the requested paragraph has] been given." Defendant requested the instruction be given because, *inter alia*, "it's consistent with the law" and not including it could be "misleading to the jury."

"[U]pon request, a defendant who interposes a defense of insanity to a criminal charge is entitled to an instruction by the trial judge setting out *in substance* the commitment procedures [now provided for in N.C.G.S §§ 15A-1321 and -1322], applicable to acquittal by reason of mental illness." *State v. Hammonds*, 290 N.C. 1, 15 (1976) (emphasis added). "This Court has recognized that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *Caudill v. Smith*, 117 N.C. App. 64, 70 (1994), *disc. rev. denied*, 339 N.C. 610 (1995). Generally, a requested jury instruction should be given when "(1) the requested instruction was a correct statement of the law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Liborio v. King*, 150 N.C. App. 531, 534 (citation omitted), *disc. rev. denied*, 356 N.C. 304 (2002).

Here, the pattern jury instruction on commitment procedures, N.C.P.I. – Crim. 304.10, sufficiently encompasses the substance of the law. *See State v. Allen*, 322 N.C. 176, 198–99 (1988) ("The trial court gave

the pattern jury instruction in N.C.P.I. –Crim. 304.10 which informed the jury of the commitment hearing procedures in N.C.G.S. §§ 15A-1321 and -1322, pursuant to article 5 of chapter 122C. This instruction adequately charged the jury regarding procedures upon acquittal on the ground of insanity.").

Defendant offers no compelling argument or authority to support his assertion that the pattern jury instruction, as written, was "incomplete" or "misleading" "in the context of this case." Our Supreme Court adopted the rule requiring an instruction on commitment procedures precisely because the "fear for the safety of the community could motivate a jury to insure that a defendant will be incarcerated for his own safety and the safety of the community at large." *Dalton*, 369 N.C. 311, 321 (Jackson, J., concurring) (cleaned up). Here, defendant interposed a defense of insanity to criminal charges based upon, in his own words, "a series of violent and dangerous acts." Defendant's case is neither so exceptional nor extraordinary such that the pattern jury instruction on commitment procedures fails to adequately encompass the law or risks misleading the jury. The uniquely abhorrent nature of defendant's criminal conduct does not entitle him to unique instruction on matters beyond the jury's consideration. Accordingly, we discern no error in the trial court's decision to deny defendant's request for an additional jury instruction.

III.

For the foregoing reasons, we discern no error in this case. The trial court did not abuse its discretion in limiting cross-examination of Dr. Wolfe, and defendant's confrontation rights were not violated. Further, the trial court did not err in declining to give defendant's requested special instruction to the jury.

NO ERROR.

Judge STADING concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

In my view, it was an abuse of discretion constituting error to exclude cross-examination of Dr. Wolfe on the purpose of her testimony at the *Sell* hearing where Defendant's defense in this case was premised

solely on a plea of insanity. In particular, the trial court erred by not permitting cross-examination on Dr. Wolfe's opinion offered at the 2020 *Sell* hearing concerning the medical appropriateness of Defendant receiving "antipsychotic medications against his will[.]"

Our Supreme Court in *Bundridge* acknowledged:

> it is well established in this jurisdiction that in criminal cases, every circumstance that is calculated to shed any light upon the supposed crime is admissible into evidence. *State v. Sneeden*, 274 N.C. 498, 164 S.E.2d 190 (1968). Likewise, our courts have allowed wide latitude in admitting evidence having a tendency to throw light upon the mental condition of a defendant who has entered a plea of not guilty by reason of insanity. For example, we allow opinion evidence by lay witnesses and lay testimony reciting irrational acts prior or subsequent to the alleged offense.

State v. Bundridge, 294 N.C. 45, 50-51, 239 S.E.2d 811, 816 (1978).

Moreover, that Court has also recognized:

> North Carolina Rules of Evidence permit broad cross-examination of expert witnesses. N.C.G.S. § 8C–1, Rule 611(b) (1992). The State is permitted to question an expert to obtain further details with regard to his testimony on direct examination, to impeach the witness or attack his credibility, or to elicit new and different evidence relevant to the case as a whole. " 'The largest possible scope should be given,' and 'almost any question' may be put 'to test the value of his testimony.' " 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 42 (3d ed.1988) (footnotes omitted) (citations omitted).

State v. Bacon, 337 N.C. 66, 88, 446 S.E.2d 542, 553 (1994). No rationale could apply to otherwise limit a Defendant's cross-examination of the State's experts.

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974).

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, Evidence s 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).

Id. at 317, 94 S. Ct. at 1110, 39 L. Ed. 2d 347.

Here, Dr. Wolfe's testimony indicated she "had suspected malingered or feigned mental illness in 2017 even when [Defendant] was psychotic just based on his symptom presentation, which was quite atypical." At Dr. Wolfe's 2018 evaluation, Dr. Wolfe testified Defendant "clearly exceeded the threshold for feigned psychotic symptoms." As the majority points out, the gist of Dr. Wolfe's trial testimony was that she suspected Defendant was malingering or feigning symptoms of mental illness as early as 2017 and eventually, upon a subsequent review of records, determined that, in her opinion, was in fact the case, even though she agreed Defendant suffered from mental illness. Nevertheless, in 2020, Dr. Wolfe not only testified that Defendant required medication to restore his competency but also testified as to why forced medication of Defendant to treat his mental illness was medically appropriate to prevent Defendant from being a danger to himself and others. The jury, however, was not permitted to hear the motivation—to compel forced medication of Defendant—for Dr. Wolfe's 2020 testimony.

The motivation for Dr. Wolfe's testimony in 2020 was quite clearly probative both of Dr. Wolfe's credibility and Defendant's mental condition. Indeed, Defendant's case hinged on the fact that while Defendant had sporadically received mental health treatment since at least 2014, Defendant was unmedicated at the time of the offenses in 2015 and, thus, incapable of knowing the nature and quality of his actions or the wrongfulness of his acts as result of his mental illness. Dr. Wolfe's testimony that not only was Defendant responsive to medication but that

she advocated for Defendant to be forcibly medicated for his own health and protection and to restore his competency was certainly relevant and probative material for cross-examination.

Moreover, there is no rationale for excluding this piece of evidence under Rule 403(b). First, the jury was permitted to hear practically everything else from and about the 2020 *Sell* hearing, except perhaps the most important part: the context in which it was held. Surely if the jury could hear evidence of the contents of that hearing as bearing on Defendant's mental health, the context of that hearing was just as probative to throw light on Defendant's mental condition. *See Bundridge*, 294 N.C. at 50-51, 239 S.E.2d at 816. Like with the other evidence of the hearing, any potential unfair prejudice could be cured by an appropriate instruction—just like the trial court gave in this case. *See id.*

In fact, neither the trial court nor the State at trial identified any unfair prejudice that would arise out of allowing the jury to hear the context of Dr. Wolfe's 2020 testimony. On appeal, the State unhelpfully contends allowing the jury to hear that the State wished to forcibly medicate Defendant might bias the jury against the State. It is true, Defendant's evidence might have hurt the State's case—but that is not *ipso facto* unfair. It is what usually happens in a trial. The State further argues that Defendant began taking his medication voluntarily after the *Sell* hearing. That, however, does not change the fact the State—supported by its expert witness—advocated for forced medication of Defendant to restore his competency prior to a trial at which the State argued—and the very same expert testified—Defendant was malingering and feigning his mental illness. As yet, nobody has articulated any actual unfair prejudice or potential confusion to the jury justifying exclusion under Rule 403. To exclude this piece of evidence—this important context—was an abuse of discretion and constituted error.

In *Bundridge*, our Court held the exclusion of a trial court's order deeming the defendant incapable of proceeding was harmless error. However, critical to that analysis was the fact multiple experts and lay witnesses "placed before the jury a complete history and description of defendant's mental condition." *Bundridge*, 294 N.C. at 51, 239 S.E.2d at 816. Here, because of the exclusion of evidence the State and Dr. Wolfe sought an order compelling Defendant's forced medication improperly limited the history and description of Defendant's mental condition before the jury.

In the end, this was a close case, and Defendant had the right to place before the jury testimony through cross-examination of the State's expert having a tendency to throw light upon Defendant's mental

condition. On the issue of Defendant's insanity, the case was primarily a battle between the Defense and State's respective experts. It is evident that substantial evidence in the Record supports Defendant's insanity defense and that this was the critical issue the jury struggled with—as illustrated by the jury's notes and initial indication it was hung. There is a reasonable possibility that, had the jury heard the context for Dr. Wolfe's 2020 *Sell* hearing testimony, it would have reached a different result. N.C. Gen. Stat. § 15A-1443(a) (2021); *see State v. Duncan*, 244 N.C. 374, 379, 93 S.E.2d 421, 424 (1956); *see also Bundridge*, 294 N.C. at 59, 239 S.E.2d at 821 (Exum, J. dissenting) ("Who knows, however, how much evidence it takes to persuade a jury? They might well have been persuaded by the evidence offered plus the evidence which defendant should have been allowed to offer but which the trial judge improperly kept out.").

Thus, the trial court exclusion of testimony regarding the purpose of the *Sell* hearing was prejudicial error. Therefore, Defendant is entitled to a new trial.

STATE OF NORTH CAROLINA
v.
DAVID JONATHAN HILL, Defendant

No. COA22-620

Filed 19 December 2023

1. Larceny—felony larceny from a merchant by product code fraud—essential elements—creation of code—mere transfer of price tag insufficient

Defendant's conviction for felony larceny by product code fraud was vacated where the State did not present substantial evidence of each essential element of the offense as defined in N.C.G.S. § 14-72.11. In particular, there was no evidence that defendant "created" a product code for the purpose of obtaining an item for less than its actual sale price, where, although defendant removed a sticker with a $7.98 product code from one item in the store and placed it on another item that actually cost $227.00 (itself punishable as a misdemeanor under a separate statute), the plain meaning of the word "created" would have required that defendant brought into existence a new code rather than merely transfer an existing one from one product to another.

2. Indictment and Information—indictment—misdemeanor larceny—fatal variance—essential and material allegations

Defendant was not entitled to dismissal of a misdemeanor larceny charge where there was no fatal variance between the indictment, which alleged that defendant took two sewing machines from a retail store, and the evidence presented, which established that defendant took only one sewing machine. The indictment adequately alleged each essential element of the offense, and the number and type of retail items allegedly taken constituted surplusage that was neither essential nor material to the charge.

3. Sentencing—restitution—larceny—value of items taken—item left in store included—remand for recalculation

Upon defendant's conviction for misdemeanor larceny, where defendant was ordered to pay an amount of restitution that not only included the value of items he took from a retail store that were never recovered but also the value of a sewing machine that defendant left behind in the store, the matter was remanded for entry of a judgment of restitution based on the damages suffered by the retail store, excluding the value of the item that was recovered.

Judge TYSON concurring in a separate opinion.

Judge STADING concurring in result only.

Appeal by defendant from judgment entered 15 December 2021 by Judge Imelda J. Pate in Superior Court, Onslow County. Heard in the Court of Appeals 27 February 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher R. McLennan, for the State.

Caryn Strickland for defendant-appellant.

STROUD, Chief Judge.

Defendant appeals his convictions for larceny from a merchant by product code fraud and for misdemeanor larceny, arguing the trial court erred in denying his motion to dismiss based on insufficiency of the evidence and fatal variances in the indictments. Defendant also contends the trial court ordered Defendant to pay an incorrect amount of restitution. Because the evidence did not show Defendant "created" a product code

"for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price" within the plain meaning of North Carolina General Statute § 14-72.11(3), the charge of larceny from a merchant should have been dismissed. There was no fatal variance in the indictment as to the remaining misdemeanor larceny since any erroneous statements in the indictment were mere surplusage. However, the trial court erroneously included property returned to Walmart when calculating the restitution Defendant should pay. Therefore, we find no error as to his conviction for misdemeanor larceny, vacate Defendant's conviction of larceny from a merchant, and remand to the trial court for re-sentencing and to enter a new order of restitution.

I. Background

On 14 February 2020, a Walmart Asset Protection Manager ("manager") saw Defendant "placing a sticker over the top of a box" in the fabrics department of a Jacksonville, North Carolina Walmart. The boxed item was identified as a Cricut Air 2 sewing machine ("Cricut"). Because Defendant's behavior was unusual, the manager followed Defendant through the store. Defendant put the box into a shopping cart and went to the electronics department, where he took several items, then moved along to the women's apparel department. Stopping between two racks, Defendant concealed unpurchased electronics inside a backpack. The manager testified these items included, "several sets of headphones, some earbuds, a movie, [and] some little odds and ends that [Defendant] just grabbed off the shelf[.]"

Once the electronics were in the backpack, Defendant put the backpack on and pushed his cart with the Cricut in it to self-checkout. At checkout, Defendant scanned the $7.98 product code he had placed on the Cricut box and paid $7.98 for the $227.00 Cricut. After Defendant passed the point of sale, the manager approached, identified himself as a Walmart representative, and asked Defendant for his identification, which Defendant provided. However, when the representative confronted Defendant about not paying the correct price for the Cricut, and asked to talk to Defendant about it, Defendant shouted "[d]on't touch me" and ran out of the store wearing the backpack full of electronics, leaving the Cricut behind in the shopping cart still inside the store.

The Walmart manager called law enforcement, who investigated the theft the same day. To help law enforcement in the investigation, the manager provided "a receipt of all the merchandise that was taken, as well as the receipt for what the defendant actually paid for in self-checkout." These receipts were admitted into evidence. At trial,

the manager testified, based on these receipts, that the items Defendant placed in his backpack included four sets of headphones, a pack of Bic lighters, a John Wick DVD, a webcam, and a portable battery. The total value of the merchandise reported stolen, including the Cricut, was $477.15. The items Defendant put in his backpack were never recovered.

The manager testified the product code Defendant scanned on the Cricut box was "for a little shoe Tupperware that you would keep a single pair of shoes in[.]" A photograph of this product code was admitted at trial and is included in the record.[1] The product code on the sticker is legible, although the sticker is wrinkled, torn on the side, and slightly curled on the side of the Cricut box. According to the manager, the Tupperware products were sold in the department located next to the fabrics and crafts department, the same place where the manager saw Defendant placing the sticker on the Cricut.

Defendant was indicted for (1) felony larceny from a merchant by product code fraud under North Carolina General Statute Section 14-72.11(3) and (2) misdemeanor larceny under North Carolina General Statute Section 14-72(a). The trial was held on 23-24 August 2021, and the State's evidence showed the facts summarized above. At trial, Defendant made a motion to dismiss at the close of the State's evidence, made no arguments to support his motion, and the motion was subsequently denied. Defendant renewed the motion to dismiss at the close of all evidence, made no arguments to support his motion, and was again denied.

The jury returned a verdict finding Defendant guilty of both larceny from a merchant by product code fraud under North Carolina General Statute Section 14-72.11(3), a felony, and misdemeanor larceny under Section 14-47(a). The trial court entered the judgment and ordered Defendant to pay $477.15 in restitution. Defendant gave oral notice of appeal.

II. Motion to Dismiss

Defendant contends the trial court erred in denying his motion to dismiss as to both charges.

A. 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) (citation omitted). "Under a *de novo* review, the court considers the matter

1. The product code is commonly known as a UPC, or "Universal Product Code -- a combination of a bar code and numbers by which a scanner can identify a product and usu[ally] assign a price[.]" Merriam-Webster's Collegiate Dictionary 1369 (11th ed. 2003).

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).

"Upon 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 omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation and quotation marks omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

B. N.C. Gen. Stat. § 14-72.11

[1] We first address Defendant's argument as to the charge of felony larceny by a product code. North Carolina General Statute Section 14-72.11 defines felonious larceny against a merchant as follows:

> A person is guilty of a Class H felony if the person commits larceny against a merchant under any of the following circumstances:
>
> (1) By taking property that has a value of more than two hundred dollars ($200.00), using an exit door erected and maintained to comply with the requirements of 29 C.F.R. § 1910.36 and 29 C.F.R. § 1910.37, to exit the premises of a store.
>
> (2) By removing, destroying, or deactivating a component of an antishoplifting or inventory control device to prevent the activation of any antishoplifting or inventory control device.
>
> (3) *By affixing a product code created for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price.*

N.C. Gen. Stat. § 14-72.11 (2019) (emphasis added). Defendant's first argument as to sufficiency of the evidence hinges on the meaning of the

word "created" as used in subsection 3 of the statute. This presents an issue of statutory interpretation and is a case of first impression as to the meaning of the word "created" under North Carolina General Statute Section 14-72.11(3).

"Statutory interpretation properly begins with an examination of the plain words of the statute." *State v. Carr*, 145 N.C. App. 335, 343, 549 S.E.2d 897, 902 (2001) (citation and quotation marks omitted). "When the language of a statute is clear and unambiguous, there is not room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Id.* (citation and quotation marks 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. When, however, a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citations and quotation marks omitted). "Statutory language is ambiguous if it is fairly susceptible of two or more meanings." *Purcell v. Friday Staffing*, 235 N.C. App. 342, 347, 761 S.E.2d 694, 698 (2014) (citation and quotation marks omitted). "We generally construe criminal statutes against the State. However, this does not require that words be given their narrowest or most strained possible meaning. A criminal statute is still construed utilizing common sense and legislative intent." *Beck*, 359 N.C. at 614, 614 S.E.2d at 277 (citations and quotation marks omitted).

The pertinent part of the statute for purposes of our analysis as to larceny from a merchant by product code fraud states that "[a] person is guilty of a Class H felony if the person commits larceny against a merchant . . . [b]y affixing a product code *created* for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price." N.C. Gen. Stat. § 14-72.11(3) (emphasis added). This statute, Section 14-72.11, was first adopted in 2007, and subsection (3) has not been amended since its adoption. *Compare* N.C. Gen. Stat. § 14-72.11(3) (2019) *with* N.C. Gen. Stat. § 14-72.11(3) (2007).

Defendant argues the word "created," as used in Section 14-72.11, is synonymous with "made" and refers to behavior found in "especially sophisticated and pernicious larceny schemes . . . where individuals *make* fake barcodes to get items at cheaper prices." (Emphasis added.) Under Defendant's interpretation of the statute, a product code made by the retailer or manufacturer for the legitimate purpose of identifying the merchandise and its sales price was not "created for the purpose of fraudulently obtaining goods or merchandise . . . at less than its

actual sale price." N.C. Gen. Stat. § 14-72.11(3). Defendant contends his conduct in the store does not fall within the statute because he transferred the product code from another product and did not "create" it. Defendant argues that his conduct at most falls under a misdemeanor statute, North Carolina General Statute Section 14-72.1(d), which states:

> [w]hoever, without authority, willfully transfers any price tag from goods or merchandise to other goods or merchandise having a higher selling price or marks said goods at a lower price or substitutes or superimposes thereon a false price tag and then presents said goods or merchandise for purchase shall be guilty of a misdemeanor[.]

N.C. Gen. Stat. § 14-72.1(d) (2019). The State, on the other hand, argues for a more expansive interpretation, asserting that "created," as used in Section 14-72.11(3), should also include cases "when an individual generates *or repurposes* a product code to commit a larceny from a merchant[.]" (Emphasis added.) To decide the question, we first look at the plain meaning of the word "create;" second, examine the word "create" within its context; and third, look at North Carolina larceny-related statutes in *pari-materia*. *See Jackson v. Charlotte Mecklenburg Hosp. Auth.*, 238 N.C. App. 351, 358, 768 S.E.2d 23, 28 (2014) ("It is also a well-established principle of statutory construction that statutes *in pari materia* must be read in context with each other." (quotation marks and citations omitted)).

a. Plain meaning of "create"

We begin with the plain meaning of the word "create." *See State v. Carr*, 145 N.C. App. at 343, 549 S.E.2d at 902. Three dictionary definitions of "create" could potentially apply here: (1) "to bring into existence," (2) "to invest with a new form, office, or rank" or (3) "to produce or bring about by a course of action or behavior[.]" Merriam-Webster's Collegiate Dictionary 293 (11th ed. 2003). The first definition, "to bring into existence," is the most commonly used definition of "create," and in the context of Section 14-72.11(3), would mean a defendant could only be convicted if they affixed a product code *specifically made* or "[brought into existence] for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price." *See* N.C. Gen. Stat. § 14-72.11(3); *see also* Merriam-Webster Collegiate Dictionary 293 (11th ed. 2003). The second definition, "to invest with a new form" supposes a situation where the form of the label is changed to the extent that it takes on a new form different than the original product code. *See* Merriam-Webster Collegiate Dictionary 293 (11th ed. 2003).

The third definition, "to produce or bring about by a course of action or behavior" still requires something to be "produced" or "brought about" by an actor. *Id.*

Said differently, the first two plain dictionary definitions of "create" seem to contemplate (1) bringing something into existence that did not exist before, or (2) changing the form of a thing, to the extent something new and different is created. *Id.* The third definition, however, "bringing about by a course of action," is closest to the State's proposed definition of "repurposing" a product code by removing it from one item and affixing it to another item. *Id.* Looking at the word "create" in isolation, an argument could be made that the word is "fairly susceptible of two . . . meanings." *See Purcell*, 235 N.C. App. at 347, 761 S.E.2d at 698 ("Statutory language is ambiguous if it is fairly susceptible of two or more meanings."). But words in a statute are not construed in isolation, so we must next look at the word in context. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("The definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

b. "Create" in Context

The meaning of a word can change depending on its context. For example, the word "fire" can be a noun describing a pile of burning wood or a verb describing the act of terminating an employee from a job. *See* Merriam-Webster's Collegiate Dictionary 470-471 (11th ed. 2003). Because the actual meaning of a word may sometimes become obvious when the word is used in a sentence, we next consider the use of the word "created" within the context of the statute to determine if the meaning is indeed ambiguous. *See C Investments 2, LLC v. Auger*, 383 N.C. 1, 10, 881 S.E.2d 270, 278 (2022) ("Ordinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context and approved usage of the language." (citation and quotation marks omitted)).

The full sentence in the statute, including the opening phrase, is:

> A person . . . commits larceny against a merchant under any of the following circumstances:
>
> . . . .

(3) By affixing a product code created for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price.

N.C. Gen. Stat. § 14-72.11(3).

Here, the phrase "created for the purpose of" modifies and characterizes the phrase "product code"[2] and means that an actor, the creator of the product code, must have had a specific purpose for creating the product code, namely a purpose or aim to "fraudulently obtain[] goods or merchandise from a merchant at less than its actual sale price." *Id.* We next consider the grammatical construction of the statute to identify who is doing the "affixing" and who is doing the "creating." *See id.*

The "person" doing the "affix[ing]" in this sentence can only be the defendant charged with committing the crime of larceny because larceny in this statute is achieved "[b]y affixing a product code[.]" *Id.* The next clause, "created for the purpose of fraudulently obtaining goods or merchandise at less than its actual sale price" uses the passive voice to modify the noun "product code." *Id.* It is the passive use of "created" that tells us the defendant who "affixes" the price code need not necessarily be the same person who physically "created" the product code because the phrase "for the purpose of" modifies "created," not "affixed." *Id.* Said differently, the "affixing" defendant may or may not have personally "created" the product code; however, the creator of the product code must have had the statutorily defined fraudulent purpose in creating the code. *Id.*

Thus, under the language of the statute, a defendant commits this crime if he (1) affixes the product code *and* (2) the product code was "created for the purpose of fraudulently obtaining goods or merchandise from a merchant at a reduced price." *Id.* Reading the word "created" in the context of the statute supports Defendant's definition of "created," and is more appropriate here because it points to the moment that the product code was "brought into existence," not the moment it was relocated by the actor affixing it to another product. *See id.*; *see also* Merriam-Webster's Collegiate Dictionary 293 (11th ed. 2003).

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2. The technical grammatical terminology for the clause "created for the purpose of" as used in this statute is a reduced restrictive relative clause. It is a specific type of adjective phrase modifying "product code" in the statute.

c. In pari materia review of North Carolina's larceny-related statutes

But if the awkward wording and grammatical structure of the statute leave any questions of ambiguity, this interpretation of "create," based on the plain reading of the statute, is supported by an *in pari materia* review of the statutory framework for various types of larceny as defined in the General Statutes within Subchapter V, entitled "Offenses Against Property" and in Article 16, entitled "Larceny." *See* N.C. Gen. Stat. § 14-70 (2019) *et seq.*; *see State v. Mayo*, 256 N.C. App. 298, 301, 807 S.E.2d 654, 657 (2017) ("In discerning the intent of the legislature statutes *in pari materia* should be construed together and harmonized whenever possible." (citation and quotation marks omitted)). We will therefore consider N.C. Gen. Stat. Section 14-72.11(3) in the context of the other related larceny statutes.

"[A] statute must be strictly construed with regard to the evil which it is intended to suppress and interpreted to give effect to the legislative intent." *State v. Stephenson*, 267 N.C. App. 475, 479, 833 S.E.2d 393, 397 (2019) (citation and quotation marks omitted).

The structure and specificity of our larceny statutes, and the context in which Section 14-72.11(3) was enacted, make it clear that "created" must be interpreted to mean "brought into existence" and not "repurposed" as the State argues, because "repurposing" is already covered under another statute. *See* N.C. Gen. Stat. § 14-72.1(d) (describing the action of "willfully transferring" (or repurposing) a price tag from one item to another to get a lower price). In general, larceny is "(1) the taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Speas*, 265 N.C. App. 351, 352, 827 S.E.2d 548, 550 (2019) (citations omitted). North Carolina's larceny-related statutes detail specific methods of committing larceny against specific property owners and delineate the particular types of property included in the offense. For example, Section 14-72(a) establishes felony larceny as larceny of goods exceeding $1,000 in value, and misdemeanor larceny as larceny of goods under that threshold, except as provided in subsections (b) and (c); subsection (c) sets out specific conduct by which a person might commit larceny and defines when such conduct rises to the level of a felony. *See* N.C. Gen. Stat. § 14-72(b)-(c) (2019). This trend continues through Article 16: the General Assembly delineates specific acts and circumstances by which a person might commit larceny and larceny-related offenses and whether those specific acts constitute a misdemeanor or felony. *See*, *e.g.*, N.C. Gen. Stat. § 14-72.5(a) (2019) ("If

any person shall take and carry away *motor fuel* valued at less than one thousand dollars ($1,000) *from an establishment where motor fuel is offered for retail sale* with the intent to steal the motor fuel, that person shall be guilty of a Class 1 misdemeanor." (emphasis added)); N.C. Gen. Stat. § 14-72.6 (2019) ("A person is guilty of a Class I felony if he commits . . . [l]arceny of *goods from a permitted construction site*." (emphasis added)). The structure of Article 16 indicates that the *specific act* defendant is alleged to have committed dictates which specific type of larceny the defendant may have committed. *See* N.C. Gen. Stat. § 14-70 (2019) *et seq*.

Defendant was correct that the State's evidence was insufficient to convict him of a felony under Section 14-72.11(3), because his conduct was, at most, punishable as a misdemeanor. *See also* N.C. Gen. Stat. § 14-72.1(d) ("Whoever, without authority, willfully *transfers any price tag from goods or merchandise to other goods or merchandise having a higher selling price* or marks said goods at a lower price *or substitutes or superimposes thereon a false price tag* and then presents said goods or merchandise for purchase shall be guilty of a misdemeanor[.]" (emphasis added)). Here, two statutes criminalize the similar acts of purchasing a product at a fraudulently reduced price, *see* N.C. Gen. Stat. §§ 14-72.11(3), 14-72.1(d), but for the purposes of this case, an important distinction between the two statutes lies in the nature of the "label," whether it was simply a transferred price tag, regardless of how it was created, or if it was a product code "created for the purpose of" fraudulent activity.[3] *Compare* N.C. Gen. Stat. § 14-72.1(d) (describing the price tag required for the misdemeanor offense as "any price tag") *with* N.C. Gen. Stat. § 14-72.11 (describing the "product code" necessary for the offense as being created for the purpose of fraud).

The General Statutes provide no definition for either "product code" or "price tag," so we must use the ordinary definitions of these terms. *See Surgical Care Affiliates, LLC v. N.C. Indus. Comm'n*, 256 N.C. App. 614, 621, 807 S.E.2d 679, 684 (2017) ("When a statute employs a term without redefining it, the accepted method of determining the word's plain meaning is not to look at how other statutes or regulations have used or defined the term–but to simply consult a dictionary.").

A "price tag" is defined as "a tag on merchandise showing the price at which it is offered for sale[.]" Merriam-Webster's Collegiate Dictionary 985 (11th ed. 2003). Prior cases have used the term "price

3. Here, we use the term "label" to include both product codes and price tags.

tag" with its ordinary meaning: a tag affixed to a product to show the price of the product. *See, e.g.*, *State v. Odom*, 99 N.C. App. 265, 269, 393 S.E.2d 146, 149 (1990) (describing a price tag with the brand-name, item code and number, followed by the price). The price tag may show a hand-written or typed price, or it may show the price by using a "product code" instead. A "product code" is defined as a "Universal Product Code," or UPC, which is "a combination of a bar code and numbers by which a scanner can identify a product and usu[ally] assign a price[.]" Merriam-Webster's Collegiate Dictionary 1369 (11th ed. 2003). Thus, it would be possible for an item offered for sale to have two separate indications of price – both a price tag and a product code – or an item may have only a price tag, or only a product code, or the price tag and the product code may be the same thing.

Here, the evidence shows the product code was on a sticker which also served as the price tag. Neither State nor Defendant contends there is any relevant difference between these two terms based on the evidence in this case. The tag affixed to the Cricut box was a partially torn rectangular sticker – commonly known as a "price tag" – with a printed product code, or a "combination of a bar code and numbers by which a scanner can identify a product." *Id.* Based on the evidence, this tag was both the price tag and product code for the Tupperware box, and it was substituted for the price tag and product code of the Cricut. Walmart's scanner identified the item as a Tupperware box priced at $7.98 based on the "product code" printed on the "price tag."

Assuming *arguendo* that "created" in Section 14-72.11(3) could apply to repurposed or transferred product codes or to price tags obtained from another product, there would have been no need for two separate statutes, one a misdemeanor and the other a felony. N.C. Gen. Stat. §§ 14-72.1 (misdemeanor), 14-72.11 (felony). Indeed, it would be absurd to interpret the statutes as creating both a misdemeanor and felony achieved by the exact same action. *See Duplin Cnty. Bd. of Educ. v. Duplin Cnty. Bd. of Cnty. Comm'rs*, 201 N.C. App. 113, 119, 686 S.E.2d 169, 173 (2009) ("It is well settled that in construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results. Accordingly, an unnecessary implication arising from one statutory section, inconsistent with the express terms of another on the same subject, yields to the expressed intent." (citations, quotation marks, and brackets omitted)).

Because the larceny statues are explicit about the conduct which constitutes each level of offense, we conclude the word "created" in

Section 14-72.11(3) applies to the *specific scenario* where (1) an actor (the defendant or another person) created a false product code "for the purpose of fraudulently obtaining goods or merchandise at a reduced price" and (2) the defendant affixed it to the merchandise. Section 14-72.11(3) does not apply where a defendant transfers a legitimate product code printed on the price tag from one product to another, which is already punishable as a misdemeanor under Section 14-72.1. *Compare* N.C. Gen. Stat. § 14-72.11(3), *with* N.C. Gen. Stat. § 14-72.1.

Even viewed "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor[,]" *Rose*, 339 N.C. at 192, 451 S.E.2d at 223, there is insufficient evidence of larceny from a merchant by product code fraud because there is no evidence the product code that was affixed was "created for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price." N.C. Gen. Stat § 14-72.11(3). The trial court erred by denying Defendant's motion to dismiss as to the charge of larceny from a merchant by product code fraud.

III. Variance in Indictment

[2] We still must address Defendant's conviction for misdemeanor larceny under North Carolina General Statute Section 14-72(a). N.C. Gen. Stat. § 14-72(a). Defendant argues, "[t]he trial court erred in denying [Defendant's] motion to dismiss because there were fatal variances between the indictment and the evidence presented at trial."[4] Defendant specifically argues the indictment alleged he took two Cricuts, and at trial, the State only proved Defendant took one machine. Defendant does not, however, argue that the indictment otherwise failed to allege that he committed misdemeanor larceny of the other electronic items he placed in the backpack; his argument is limited to the reference to two Cricuts, where the evidence showed only one Cricut was taken.

A. Standard of Review

"We review *de novo* the issue of a fatal variance." *State v. Clagon*, 279 N.C. App. 425, 431, 865 S.E.2d 343, 347 (2021). "Under a *de novo* review,

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4. The State argues this issue was not preserved for appellate review under North Carolina Rules of Appellate Procedure 10. We note, "Our Supreme Court recently clarified that merely moving to dismiss at the proper time under Rule 10(a)(3) preserves *all* issues related to the sufficiency of the evidence for appellate review. [An indictment] variance-based challenge is essentially, a contention that the evidence is insufficient to support a conviction." *State v. Clagon*, 279 N.C. App. 425, 431, 865 S.E.2d 343, 347 (2021) (emphasis in original) (citations, quotations, and brackets omitted). Defendant's general motions to dismiss, therefore, preserved his variance challenge for review.

the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Williams*, 362 N.C. at 632-33, 669 S.E.2d at 294 (citations and quotations omitted).

B. Fatal Variance

Generally, "the evidence in a criminal case must correspond with the allegations of the indictment which are *essential and material* to charge the offense." *State v. Simmons*, 57 N.C. App. 548, 551, 291 S.E.2d 815, 817 (1982) (emphasis added) (citation and quotation marks omitted). This rule is based on "the obvious requirements that the accused . . . be definitely informed as to the charges against him, so that he may be enabled to present his defense and be protected against another prosecution for the same offense." *Id.* (citation omitted). "However, a variance will not result where the allegations and proof, although variant, are of the same legal signification. An immaterial variance in an indictment is not fatal." *Id.* at 551, 291 S.E.2d at 817-18 (citations, quotation marks, and brackets omitted). An indictment need only "reasonably notif[y] [a] defendant of the crime for which he was being charged by plainly describing *who did what and when* and by indicating which statute was violated by such conduct." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981) (emphasis in original). "[T]o be fatal, a variance must relate to an essential element of the offense. Alternately, when an averment in an indictment is not necessary in charging the offense, it will be deemed to be surplusage." *State v. Bacon*, 254 N.C. App. 463, 467-68, 803 S.E.2d 402, 406 (2017) (citation, quotation marks, and original brackets omitted).

Here, there was a variance between the indictment and the State's evidence. The indictment alleged:

> [T]hat on or about [14 February 2020] and in Onslow County [Defendant] unlawfully and willfully did steal, take, and carry away *2 Cricut sewing machines*, 1 pack of 3 BIC lighters, 1 John Wick Movie DVD, 4 sets of headphones, 1 webcam, 1 FM Transmitter, 1 BW 10k gray battery pack, and 1 Anker battery pack, the personal property of Wal-Mart Stores, INC., a Corporation d/b/a Walmart Store, such property having a value of $477.15.

(Emphasis added.) The indictment alleged Defendant violated North Carolina General Statute Section 14-72(a) (a misdemeanor) by this conduct, and, the evidence at trial indicates Defendant only took one Cricut machine.

Defendant asserts this variance is fatal and his motion to dismiss should have been granted. We disagree. The indictment's allegation that Defendant took 2 Cricut sewing machines is "surplusage" and "not necessary in charging the offense" of misdemeanor larceny. *See Bacon*, 254 N.C. App. at 468, 803 S.E.2d at 406.

Defendant was charged with misdemeanor larceny in violation of North Carolina General Statute Section 14-72(a). N.C. Gen. Stat. § 14-72(a) (2019). "The essential elements of larceny are: (1) the taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *Speas*, 265 N.C. App. at 352, 827 S.E.2d at 550. Reading the indictment without reference to the 2 Cricut sewing machines, the indictment states:

> [T]hat on or about the date of offense shown and in Onslow County [Defendant] unlawfully and willfully did steal, take, and carry away . . . 1 pack of 3 BIC lighters, 1 John Wick Movie DVD, 4 sets of headphones, 1 webcam, 1 FM Transmitter, 1 BW 10k gray battery pack, and 1 Anker battery pack, the personal property of Wal-Mart Stores, INC., a Corporation d/b/a Walmart Store, such property having a value of $477.15.

This indictment, even without mention of the Cricut machines, still alleges the four essential elements of larceny. *See id.*; *see also Bacon*, 254 N.C. App. at 470-71, 803 S.E.2d at 408 (holding an indictment is sufficient to allege larceny after omitting a variance between the property alleged to have been taken and the evidence proven at trial).[5]

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5. We also note fatal variances between the indictment and the evidence offered at trial as to the property taken tend to arise where property is inadequately described by the use of "general and broadly comprehensive words," *see State v. Ingram*, 271 N.C. 538, 542-44, 157 S.E.2d 119, 123-24 (1967) (noting fatal variance where property taken described as "merchandise, chattels, money, valuable securities and other personal property"); where the property proven to be stolen at trial deviates *entirely* from the property alleged in the indictment, *see Simmons*, 57 N.C. App. at 552, 291 S.E.2d at 818 (reversing trial court's judgment where indictment alleged the defendant stole eight freezers with unique serial numbers, but evidence of only one freezer at trial was shown and the serial number did not match any of the alleged eight freezers); or where the property is alleged to be owned by one party but at trial is proven to be owned by another. *See Bacon*, 254 N.C. App. at 467-71, 803 S.E.2d at 406-08. The present case is dissimilar, because the indictment specifically alleged several items were taken, these items were proven at trial, and there is only a variance as to the quantity of one item which is not a "necessary element of the offense of which the defendant is found guilty." *State v. Clark*, 208 N.C. App. 388, 390, 702 S.E.2d 324, 326 (2010).

Here, the indictment "definitely inform[s Defendant] as to the charges against him, so that he may be enabled to present his defense and . . . be protected against another prosecution for the same offense." *Simmons*, 57 N.C. App. at 551, 291 S.E.2d at 817.

Therefore, the variance between the evidence presented at trial and the indictment is not fatal. *See id.* at 551, 291 S.E.2d at 817-18. The trial court did not err by denying Defendant's motion to dismiss as to his conviction for misdemeanor larceny.

IV. Restitution

[3] Finally, Defendant makes an argument as to the amount of restitution. "On appeal, we review *de novo* whether the restitution order was supported by evidence adduced at trial or at sentencing." *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011) (citation and quotation marks omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Williams*, 362 N.C. at 632-33, 669 S.E.2d at 294.

Here, the trial court ordered Defendant to pay restitution of $477.15. Based on the evidence, this amount includes the value of the Cricut and the various items in Defendant's backpack when he fled Walmart. But the State acknowledges Defendant left the Cricut behind in the cart when he ran from the store. The other items in the backpack were not recovered. Our statutes governing restitution only require Defendant to repay Walmart "for any injuries or damages arising directly and proximately" by Defendant's larceny. N.C. Gen. Stat. § 15A-1340.34 (2019). The trial court must consider the return of property to the injured owner and the condition in which that property was returned. *See id.* ("In determining the amount of restitution, the court shall consider . . . in the case of an offense resulting in the damage, loss or destruction of property of a victim: [r]eturn of the property to the owner of the property or someone designated by the owner[.]").

We therefore reverse the judgment as to the amount of restitution ordered and remand for entry of a judgment of restitution based on the damages Walmart suffered for the loss of the other items stolen, excluding the value of the Cricut which was never removed from the store.

V. Conclusion

We conclude the trial court erred by denying Defendant's motion to dismiss as to the charge of larceny from a merchant by product code fraud under North Carolina General Statute Section 14-72.11(3). We vacate Defendant's conviction for this charge. However, the trial

court did not err in denying Defendant's motion to dismiss the charge of misdemeanor larceny based on a fatal variance under North Carolina General Statute Section 14-72(a). Finally, we conclude the trial court erred in calculating restitution and remand for the trial court to enter a new restitution order.

NO ERROR IN PART; VACATED IN PART; AND REMANDED FOR RESENTENCING.

Judge TYSON concurs in a separate opinion.

Judge STADING concurs in result only.

TYSON, Judge, concurring by separate opinion.

We all agree the evidence presented to the trial court did not show Defendant "created" a product code "for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price" to elevate the charge of larceny from a merchant to a felony by switching an unrelated and lower price tag. *See* N.C. Gen. Stat. § 14-72.11(3) (2021). We also all agree no fatal variance in the indictment is shown concerning the remaining misdemeanor larceny charge, and there is no error. Finally, we all agree Defendant's restitution order improperly calculated the amount of restitution, because the items stolen were recovered in a re-sellable condition by Wal-Mart. I concur and write separately to address the proper additional larceny from a merchant charge, which should have been charged, based upon the evidence.

The evidence clearly showed Defendant: (1) willfully; (2) "transfer[ed] a price tag from goods or merchandise to other goods or merchandise having a higher selling price;" (3) "without authority;" and, (4) "present[ed] the goods for purchase. N.C. Gen. Stat. § 14-72.1(d) (2021). Defendant should have been charged with shoplifting by substitution of price tags for the Cricut machine and using an unrelated lower price tag to pass the point of sale to steal the merchant's property. *Id.*

STATE OF NORTH CAROLINA
v.
RONALD McCRORY, Defendant

No. COA23-592

Filed 19 December 2023

1. Drugs—death by distribution—motion to dismiss—sufficiency of evidence—cause of death—proximate cause

The trial court properly denied defendant's motion to dismiss a charge of death by distribution where, when viewed in the light most favorable to the State, the evidence was sufficient to persuade a rational juror to conclude that defendant sold fentanyl to the victim, fentanyl caused the victim's death, and defendant's act proximately caused the victim's death. Although the victim's friend requested that defendant sell them heroin and cocaine, the State presented enough circumstantial evidence suggesting that defendant sold them fentanyl, including the fact that the only drugs found in the victim's toxicology report were cocaine and fentanyl. Further, although the victim's autopsy revealed lethal amounts of both cocaine and fentanyl in her system, there was ample evidence suggesting that the fentanyl killed her, including the tourniquet around her arm and the needles found at the scene of her death. Finally, defendant's argument regarding proximate cause—that the victim's simultaneous consumption of all the drugs he sold her was not reasonably foreseeable—lacked merit.

2. Evidence—other crimes, wrongs, or acts—previous drug sales—intent, identity, and common scheme or plan—danger of unfair prejudice

In a prosecution for death by distribution, where evidence showed that defendant sold drugs to the victim's friend (to be split between the victim and her friend) and that the victim died after consuming those drugs, the trial court neither abused its discretion nor committed prejudicial error when it allowed the friend to testify about previous transactions in which defendant sold drugs to her and to the victim. This testimony was admissible under Evidence Rule 404(b), since it demonstrated not only the common scheme or plan behind defendant's drug sales but also defendant's intent during the transaction at issue in the case. Additionally, the friend's statement that she put individuals in contact with defendant for the purpose of buying drugs from him tended to confirm defendant's

identity. Furthermore, given the copious amounts of other evidence showing that defendant sold drugs to the victim and her friend, it could not be said that the probative value of the friend's testimony was outweighed by a danger of unfair prejudice under Rule 403.

Appeal by defendant from judgment entered 17 November 2022 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 15 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Justin Isaac Eason, for the State.

Sarah Holladay for defendant-appellant.

FLOOD, Judge.

Ronald McCrorey ("Defendant") appeals his conviction for Death by Distribution, arguing the trial court erred when it (1) denied his motion to dismiss and (2) improperly admitted Rule 404(b) evidence. For the reasons discussed below, we hold the trial court did not err.

I. Facts and Procedural Background

In March 2020, Michelle Hooper ("Michelle") returned home to live with her mother, Lisa Hooper ("Ms. Hooper"), after having spent a few months at a residential drug treatment center in Charlotte, North Carolina. In an effort to keep Michelle away from heroin and cocaine, Ms. Hooper imposed strict rules: curfews were to be observed, random drug tests were to be performed, and substance abuse group meetings were to be attended via Zoom. Ms. Hooper feared that Michelle returning home to her "former using area" might trigger a relapse.

On the evening of 24 March 2020, Michelle attended an Alcoholics Anonymous meeting on Zoom from 7:00 p.m. until 8:00 p.m. At 9:33 p.m., Michelle sent a text message to her childhood friend, Kayla Wood ("Kayla"), saying "[s]et your alarm for 830. I'll be there at 9am and leave by 1:30. And like I said I wanna [sic] buy some crack[.]"

The next morning, Michelle left home and told Ms. Hooper that she had a doctor's appointment but would return home around 1:00 p.m. Michelle did not have a doctor's appointment—instead, Michelle drove to the hotel room where Kayla was staying. Upon arrival, Michelle gave Kayla fifty dollars with the understanding that the money would be used to buy crack cocaine and heroin. Approximately fifteen minutes later,

Defendant arrived at the hotel, and Kayla met him downstairs while Michelle waited in Kayla's hotel room. Kayla paid Defendant one hundred dollars for one gram of crack cocaine and one gram of heroin, which were to be split between Kayla and Michelle. The drugs purchased from Defendant came in four separate baggies, each containing one half gram of a substance Michelle and Kayla believed to be either crack cocaine or heroin. After purchasing the drugs, Kayla went back to her hotel room, where she gave Michelle two baggies—one containing crack cocaine and one containing heroin. Michelle and Kayla each did a small amount of heroin from Kayla's baggie and smoked crack cocaine from each of their respective baggies. From there, Kayla and Michelle went to a parking lot and smoked more crack cocaine. Michelle then dropped Kayla off at a park and drove back home so as not to break the curfew imposed by Ms. Hooper.

Michelle arrived back home and spent some time with her family before going to a church gathering with Ms. Hooper. After leaving the church gathering, Michelle and Ms. Hooper returned home and went to bed.

The following morning on 26 March 2020, Ms. Hooper awoke at 6:00 a.m. and noticed a light on in Michelle's room. Speaking through the door, Michelle told Ms. Hooper that she had a headache and was going back to bed. Ms. Hooper went on with her morning, left the house to run errands, and eventually returned at approximately noon. When she returned home, Ms. Hooper noticed the light in Michelle's room was still on. When Ms. Hooper opened the door, she found Michelle doubled over, deceased, with an address book open to the contact information for Kayla on the bed next to her.

Ms. Hooper immediately called 911. Upon arriving at the home, officer Dallas Hurley ("Officer Hurley") went into Michelle's room where he found her with a tourniquet around her arm and several needles in the room. A second officer, Sergeant Christopher Gorman ("Sergeant Gorman") secured the scene. Sergeant Gorman collected four empty baggies from Michelle's room. No drugs were recovered from Michelle's room or car. The four empty baggies found in Michelle's room were not sent off for lab testing.

When the police later located Kayla, she was "spaced out" and "nodding off" in front of a convenience store. When the officers told Kayla about Michelle's death, Kayla began crying and explained that she and Michelle had purchased drugs from Defendant at a hotel the day before. Kayla then consented to the officers seizing her cell phone. A review of

the data on Kayla's cell phone revealed text messages sent on 25 March 2020 between Kayla and Defendant, setting up the sale of drugs.

After Michelle's death, forensic pathologist Dr. Jonathan Privette ("Dr. Privette") performed an autopsy and sent tissue samples to Dr. Justin Brower ("Dr. Brower"), a forensic toxicologist, for testing. When the results of the toxicology report were returned, they showed the presence of benzoylecgonine, which is a metabolite of cocaine, and fentanyl in Michelle's blood. Both Dr. Privette and Dr. Brower opined that the level of fentanyl in Michelle's blood was within the fatal range, and given the totality of the circumstances, Michelle's death was consistent with a fentanyl overdose. Both doctors also agreed, however, that the level of cocaine metabolites in Michelle's system were, by themselves, high enough to be fatal. Notably absent from the toxicology report was the presence of heroin, which was one of the two substances Michelle and Kayla believed they had purchased from Defendant.

On 11 April 2021, Defendant's trial began in Cabarrus County Superior Court. At trial, several witnesses were called to testify including Officer Hurley, Sergeant Gorman, Dr. Privette, Dr. Brower, Ms. Hooper, and Kayla. Of particular note on appeal is the testimony given by Kayla regarding previous drug sale transactions she had with Defendant. After a lengthy exchange between counselors and the trial judge outside the presence of the jury, the trial court allowed Kayla to testify regarding prior drug sales involving Defendant as evidence under Rule 404(b) to show Defendant's intent, identity, and common scheme or plan.

On direct examination, when asked if she ever "put any other individuals in contact with [] Defendant for the purpose of buying drugs," Kayla answered "[y]eah." Additionally, Kayla testified about the two or three times where she and Michelle purchased drugs from Defendant, and she indicated that the sale on 25 March was "generally consistent with how [they] had previously purchased drugs from [] Defendant."

At the conclusion of the trial, a jury found Defendant guilty of Death by Distribution. Defendant was sentenced to seventy to ninety-six months' imprisonment. Defendant gave an oral notice of appeal following the verdict.

II. Jurisdiction

This case is properly before this Court as an appeal from a final judgment of a superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2021).

III. Analysis

On appeal, Defendant argues the trial court made two errors: first, when it denied his motion to dismiss; and second, when it admitted evidence of his prior drug sales under Rule 404(b) of the North Carolina Rules of Evidence. We take the analysis of each argument in turn.

A. Motion to Dismiss

[1] Defendant begins by arguing the trial court erred when it denied his motion to dismiss because the State failed to present substantial evidence that (1) he sold fentanyl, rather than heroin, to Kayla; (2) fentanyl was the cause of Michelle's death; and (3) the drugs he sold were the proximate cause of Michelle's death. For the reasons discussed below, we disagree.

"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). "Upon defendant's motion for dismissal, the question for the [trial c]ourt 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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). Evidence is considered "substantial" if it would be relevant and "necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002). Finally, "in ruling on a motion to dismiss[,] the trial court is to consider the evidence in the light most favorable to the State." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982).

In our present case, Defendant was charged with the unlawful, willful, and felonious sale of fentanyl, the ingestion of which caused the death of Michelle. Under North Carolina's Death by Distribution statute, a person may be found guilty if all of the following requirements are met:

> (1) the person unlawfully sells at least one certain controlled substance; (2) the ingestion of the certain controlled substance or substances causes the death of the user; (3) the commission of the offense in subdivision (1) of this subsection was the proximate cause of the victim's death; and (4) the person did not act with malice.

N.C. Gen. Stat. § 14-18.4(b) (2021). Under our *de novo* standard of review, we now consider each of Defendant's three arguments regarding why the trial court erred in denying his motion to dismiss, construing all the evidence in the light most favorable to the State.

First, Defendant contends the State failed to present substantial evidence that he sold fentanyl to Kayla, rather than heroin. Specifically, Defendant argues that "[t]he State assumed from the absence of heroin in [Michelle's] blood on [26 March] that what she purchased on [25 March] was fentanyl." In essence, Defendant argues that assumptions cannot be substantial evidence. What Defendant describes as an assumption, however, can more appropriately be called circumstantial evidence—evidence which "may withstand a motion to dismiss and support a conviction when [it] does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). "Circumstantial evidence is proof of a chain of facts and circumstances" and need only give rise to a reasonable inference of guilt in order for it to be admitted to the jury. *State v. Wilkie*, 289 N.C. App. 101, 103, 887 S.E.2d 485, 486 (2023) (citing *State v. Lee*, 213 N.C. App. 392, 396, 713 S.E.2d 174, 177 (2011)). As long as the record contains actual evidence, either direct or circumstantial, that supports a reasonable inference of the defendant's guilt, a motion to dismiss should be denied. *State v. Golder*, 374 N.C. 238, 250, 839 S.E.2d 782, 790 (2020) (clarifying that substantial evidence may be justified by direct or circumstantial evidence).

Here, the uncontroverted facts in the Record show that: Kayla requested Defendant sell her one gram of heroin and one gram crack cocaine, to be split between Kayla and Michelle; Michelle ingested the drugs sold by Defendant; Michelle was found dead the following morning; and the only drugs found in Michelle's toxicology report were cocaine and fentanyl. Viewed in the light most favorable to the State, this evidence, while circumstantial, could be enough to "persuade a rational juror to accept a conclusion" that the substance sold by Defendant was fentanyl, not heroin. *See Mann*, 355 N.C. at 301, 560 S.E.2d at 781.

Next, Defendant argues there was not substantial evidence that fentanyl was, in fact, the cause of Michelle's death. The Record confirms Michelle had both cocaine and fentanyl in her system. Likewise, the Record shows that Dr. Privette stated Michelle had enough cocaine in her system to be lethal on its own. Those two facts, however, are dwarfed by the overwhelming direct evidence from both medical experts and the conditions observed by law enforcement responding to the scene of Michelle's death: the tourniquet around Michelle's arm; the needles in Michelle's room; the four empty baggies; the toxicology report; and the autopsy revealing lethal amounts of both cocaine and fentanyl in Michelle's system.

While the evidence does not foreclose the possibility that fentanyl may not have been the sole cause of Michelle's death, there is ample evidence to support a conclusion that it was, in fact, fentanyl that killed

Michelle. When this evidence is viewed in the light most favorable to the State, we hold it is enough to survive a motion to dismiss. *See Golder*, 374 N.C. at 250, 839 S.E.2d at 790.

Finally, Defendant argues the State failed to present substantial evidence of the element of proximate cause, which is required under the Death by Distribution statute. Defendant posits that Michelle's decision to consume, at once, all of the drugs she had purchased, broke the causal chain because Defendant could not have reasonably foreseen Michelle would do such a thing.

> Foreseeability is an essential element of proximate cause. This does not mean that the defendant must have foreseen the injury in the exact form in which it occurred, but that, in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.

State v. Powell, 336 N.C. 762, 771–72, 446 S.E.2d 26, 31 (1994) (quoting *Williams v. Boulerice*, 268 N.C. 62, 68, 149 S.E.2d 590, 594 (1966)) (internal citations omitted). "[T]he question of whether [a] defendant's conduct was the proximate cause of death is a question for the jury." *State v. Noble*, 226 N.C. App. 531, 535, 741 S.E.2d 473, 478 (2013) (quoting *State v. Bailey*, 184 N.C. App. 746, 749, 646 S.E.2d 837, 839 (2007)).

Here, Defendant's argument that Michelle's consumption of all the drugs she had purchased from him was not reasonably foreseeable is not only disingenuous, it misses the mark. To survive a motion to dismiss, the State must present the evidence "necessary to persuade a rational juror to accept a conclusion." *Mann*, 355 N.C. at 301, 560 S.E.2d at 781. Our *de novo* review of the Record reveals evidence that Michelle had obtained drugs sold by Defendant, Michelle had ingested drugs sold by Defendant, and Defendant knew the drugs he was selling to Kayla were to be shared between Kayla and Michelle. This evidence is enough to survive a motion to dismiss and submit the question of proximate cause to the jury. *See Noble*, 226 N.C. App. at 535, 741 S.E.2d at 478.

Viewed in the light most favorable to the State, the evidence in the Record was enough to persuade a rational juror that Defendant might not be innocent of the crime charged. Because the evidence presented did not "rule out every hypothesis of innocence," we hold the trial court did not err when it denied Defendant's motion to dismiss. *Stone*, 323 N.C. at 452, 373 S.E.2d at 433; *see Mann*, 355 N.C. at 301, 560 S.E.2d at 781.

B. Rule 404(b)

[2] Finally, Defendant argues the trial court committed a prejudicial error when it allowed testimonial evidence that he sold drugs on prior occasions. Specifically, Defendant argues the prior sales to Kayla were not sufficiently similar to show intent, identity, and a common plan or scheme. We disagree.

Whether Rule 404(b) evidence was improperly admitted is a question of law reviewed *de novo*. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). This Court reviews whether Rule 404(b) evidence should have nonetheless been excluded under Rule 403 for abuse of discretion. *State v. Al-Bayyinah*, 359 N.C. 741, 747, 616 S.E.2d 500, 506 (2005). An error is prejudicial and requires a new trial if "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 (2021).

Under Rule 404(b), evidence of a defendant's other crimes, wrongs, or acts, may be admissible as proof of intent, identity, or a common scheme or plan. N.C. Gen. Stat. § 8C-404(b) (2021). Generally, Rule 404(b) is considered a rule of inclusion. *See State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990). This evidence, however, is barred "if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-403 (2021). In reviewing a trial court's determination under Rule 403, this Court will overturn the trial court only if the trial court's ruling was "so arbitrary that it could not have been the result of a reasoned decision." *State v. Thomas*, 268 N.C. App. 121, 135, 834 S.E.2d 654, 665 (2019) (quoting *State v. Hagans*, 177 N.C. App. 17, 23, 628 S.E.2d 776, 781 (2006)).

"In drug cases, evidence of other drug violations is often admissible to prove many of the purposes under Rule 404(b)." *State v. Williams*, 156 N.C. 661, 663–64, 577 S.E.2d 143, 145 (2003). In order to show intent or motive, evidence of the prior act must " 'pertain to the chain of events explaining the context, motive, and set-up of the crime' and 'form an integral and natural part of an account of the crime . . . necessary to complete the story of the crime for the jury.' " *State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) (quoting *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174-75 (1990)). Additionally, "temporal and geographic proximity" as well as the aid of an accomplice are factors that may tend to show both identity and a common plan or scheme under Rule 404(b). *Thomas*, 268 N.C. App. at 135, 834 S.E.2d at 664–65.

Here, our *de novo* review of the Record reveals the trial court engaged in a lengthy analysis regarding the admissibility of Kayla's testimony regarding prior drug sales involving Defendant. Testimony about previous transactions in which Defendant sold drugs to Kayla and Michelle demonstrates not only the common plan or scheme of Defendant's drug sales, but also his intent when transacting with Kayla on 25 March 2020. *See White*, 349 N.C. at 552, 508 S.E.2d at 264. Additionally, Kayla's testimony that she put individuals in contact with Defendant for the purpose of buying drugs from him is evidence that tends to confirm Defendant's identity. *See Thomas*, 268 N.C. App. at 135, 834 S.E.2d at 664–65.

Given the propriety of the testimonial evidence under Rule 404(b), the trial court did not err when it allowed the inclusion of Kayla's testimony. *See* N.C. Gen. Stat. § 15A-1443. Further, considering the copious amount of evidence showing Defendant sold drugs to Kayla and Michelle, it cannot be said that the probative value of Kayla's testimony showing Defendant's intent, common plan or scheme, and identity was outweighed by a danger of unfair prejudice. *See* N.C. R. Evid. 403. For those reasons, we hold the trial court neither abused its discretion nor committed a prejudicial error when it allowed Kayla's testimony regarding prior drug sales involving Defendant.

IV. Conclusion

For the aforementioned reasons, we hold the trial court did not err when it denied Defendant's motion to dismiss; further, the trial court did not commit prejudicial error when it allowed evidence of his prior drug sales under Rule 404(b).

NO ERROR.

Judges CARPENTER and GORE concur.

STATE OF NORTH CAROLINA
v.
KEVIN BRIAN MICHAEL, DEFENDANT

No. COA22-846

Filed 19 December 2023

1. Search and Seizure—traffic stop—extended stop—alternate bases—plain error analysis

There was no plain error in the trial court's denial of defendant's motion to suppress drugs found by law enforcement during a vehicle search, where, although the trial court's order appeared to be based on its conclusion that the officer had reasonable suspicion to search the vehicle—after the initial reason for the stop had been resolved—based on the vehicle occupants' nervous behavior, even if that conclusion was in error, there was also evidence presented at trial from which the trial court could have found as an alternate basis for its ruling that defendant voluntarily consented to a search of the vehicle (based on his responses to the officer's request to search the vehicle that, as a probationer, he could not refuse, and then giving his affirmative consent).

2. Drugs—possession—constructive—driver of vehicle—inference of control

The State presented sufficient evidence in a drug prosecution from which a jury could find that defendant constructively possessed cocaine found in the car that he was driving, even though two other passengers were also in the car. Defendant's status as the driver of a vehicle gave rise to an inference that he had control over the vehicle and, therefore, constructively possessed the drugs that were discovered during a search of the car.

Judge ARROWOOD concurring with separate opinion.

Appeal by defendant from judgment entered 3 February 2022 by Judge Lori I. Hamilton in Davidson County Superior Court. Heard in the Court of Appeals 4 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew W. Bream, for the State.

Kimberly P. Hoppin, for the Defendant.

DILLON, Judge.

Defendant Kevin Brian Michael appeals his conviction for possession of a controlled substance. We conclude that Defendant received a fair trial, free of reversible error.

I. Background

On 11 July 2019, Defendant was driving with two passengers. He was pulled over by Officer Kattner of the Thomasville police for failing to yield.

During the stop, Officer Kattner called another officer, Officer Rowe, to the scene. At the conclusion of the traffic stop, Officer Kattner returned to Defendant and the passengers their identification cards and told them that they were free to go.

However, based on the nervous behavior of Defendant and the other passengers, Officer Kattner asked Defendant for permission to search the vehicle. Defendant stated that he was on probation and that, therefore, he was required to allow the search. Officer Kattner again asked for Defendant's consent, whereupon Defendant consented.

During the search of the vehicle, Officer Kattner found cocaine and drug paraphernalia. Defendant and the two occupants were arrested.

Defendant filed a motion to suppress the results of the search, which the trial court denied. Defendant renewed his motion prior to jury selection, and the trial court reconfirmed its ruling. However, Defendant did not object during the trial when the State introduced the results of the search into evidence. Defendant was convicted of possession of a controlled substance. He appeals.

On appeal, Defendant argues that the search violated his Fourth Amendment right against unreasonable search and seizure, and further, that the trial court erred when it denied Defendant's motion to dismiss because there was insufficient evidence that he knowingly possessed cocaine.

II. Analysis

Defendant argues that the trial court erred by not suppressing the evidence of the search and by not granting his motion to dismiss. We address each argument in turn.

A. Motion to Suppress

[1] We first consider whether Defendant's Fourth Amendment right was violated by Officer Kattner's search of the vehicle.

Our appellate review is limited to plain error, as Defendant failed to object during the trial to the admission of cocaine found in the vehicle. *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000) ("[A] motion *in limine* [is] not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial."). Plain error occurs if "absent the error, the jury would have probably reached a different verdict." *State v. Faison*, 330 N.C. 347, 361, 411 S.E.2d 143, 151 (1991).

Both the federal and our state constitutions generally render evidence obtained from a suspect in violation of the Fourth Amendment inadmissible at trial. *Mapp v. Ohio*, 367 U.S. 643 (1961); *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006).

"A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008). "[R]easonable suspicion is the necessary standard for traffic stops." *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008). Further, "the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop." *State v. Bullock*, 370 N.C. 256, 257, 805 S.E.2d 671, 673 (2017).

"[A]n investigation unrelated to the reasons for the traffic stop must not prolong the roadside detention." *State v. Reed*, 373 N.C. 498, 509, 838 S.E.2d 414, 423 (2020). To prolong a detention "beyond the scope of a routine traffic stop" requires that an officer "possess a justification for doing so other than the initial traffic violation that prompted the stop in the first place," which requires "either the driver's consent or a 'reasonable suspicion' that illegal activity is afoot." *Id.* at 510, 838 S.E.2d at 423.

Here, Officer Kattner testified that as she approached the vehicle . . .

> [t]he backseat passenger was making it a point to avoid any eye contact with me. She was trying to hide her face from me. The front two were -- I could at least see their faces, but they were still nervous upon initial interaction… [t]hey were not wanting to maintain eye contact. They were short in their responses to me…. They were a little fidgety…anxious.

She ran the information of all the vehicle occupants, which revealed that Defendant and one of the passengers did not have any outstanding warrants but that the other passenger had an outstanding warrant for failure to appear in another county.

As Officer Kattner was completing the traffic stop, Officer Rowe arrived on the scene. Officer Kattner approached the vehicle with Officer Rowe to give Defendant a verbal warning and to return identification cards to Defendant and the other passengers. She gave a verbal warning to Defendant and told him and the passengers that they were free to leave. We conclude that the seizure associated with the traffic stop was concluded at this point. *See Reed*, 373 N.C. at 513, 838 S.E.2d at 425-26.

Officer Kattner testified that the vehicle occupants, however, continued to appear "nervous" even though "they knew they weren't getting in trouble for a traffic violation." She reiterated that the traffic stop was completed but then asked Defendant if there was anything illegal in the vehicle, to which he responded, "No." She then proceeded to ask for consent to search the vehicle, to which Defendant replied, "By law, since I am on probation, I cannot tell you no."

Officer Kattner, though, responded by asking Defendant "to confirm yes or no," to which Defendant responded in the affirmative. It was during the search of the vehicle that Officer Kattner found cocaine and other drug paraphernalia.

The State argues that Defendant consented to the search or, otherwise, Officer Kattner had reasonable suspicion to conduct the search.

Defendant, as a probationer, is considered to have given consent to a search where an officer has reasonable suspicion of a crime. Specifically, our General Statutes provide that a probationer agrees to:

> (14) Submit to warrantless searches by a law enforcement officer of the probationer's person and of the probationer's vehicle, *upon a reasonable suspicion* that the probationer is engaged in criminal activity…

N.C. Gen. Stat. § 15A-1343 (2021) (emphasis added).

Defendant, otherwise, may consent to a search absent reasonable suspicion where his consent is given freely and voluntarily. *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967) ("Implicit in the very nature of the term 'consent' is the requirement of voluntariness. To be voluntary the consent must be 'unequivocal and specific,' and freely and intelligently given."). "[T]he question whether a consent to search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). *See also State v. Romano*, 369 N.C. 678, 691, 800 S.E.2d 644, 652-53 (2017) (holding that whether consent to a search was voluntary is a question of fact, not law).

The trial court judge did not articulate in her written order her reasoning for denying Defendant's suppression motion. However, she stated in open court that she was denying the motion based on her conclusion that Officer Kattner had reasonable suspicion to conduct the search:

> The motion to suppress with regard to the basis for -- I'm not going to refer to it as extending the traffic stop, because it's something else. But it's so dangerously close to extending the traffic stop as to be almost indistinguishable – is denied, because I believe the North Carolina courts have held as long as the officer can articulate a reasonable suspicion of additional criminal activity, they may, at least minimally, extend the stop without getting into constitutionally unreasonable conduct. And I will find from a totality of the circumstances, based just on Kattner's testimony of what she observed, that she had that very minimal reasonable articulable suspicion.

We note that the trial court judge did not articulate any finding as to whether Defendant had otherwise validly consented to the search as an alternative ground for denying Defendant's suppression motion.

We hold that the trial court did not plainly err in allowing the results of the search of Defendant's vehicle into evidence at trial. Even assuming Officer Kattner lacked reasonable suspicion to conduct the search of Defendant's vehicle, we conclude that Defendant has failed to show plain error. Specifically, we note that there was sufficient evidence from which the trial court could have found as fact *at trial* that Defendant voluntarily consented to the search had Defendant objected when the evidence was offered by the State. That is, whether the outcome of the trial "probably" would have been different hinges on whether the trial court probably would not have found *at trial* had Defendant objected that Defendant had voluntarily consented to the search, at least as an alternate ground to uphold her prior ruling. *See State v. Mann*, 355 N.C. 294, 311, 560 S.E.2d 776,787 (2002) (holding that "[t]o establish plain error, defendant must demonstrate not only that there was error, but also had the error not occurred, the outcome of the proceeding probably would have been different.").

B. Motion to Dismiss

[2] To survive a motion to dismiss, there must be 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). Whether the evidence is sufficient to survive a motion to dismiss, it must

be considered in the light most favorable to the State; and the State is entitled to every reasonable inference from the evidence. *Id.* at 574, 780 S.E.2d 826.

Here, Defendant contends that the State failed to present sufficient evidence that he constructively possessed the cocaine found in his car, contending that his mere presence "in an automobile in which illicit drugs are found does not, without more, constitute sufficient proof of his possession of such drugs." *State v. Weems*, 31 N.C. App. 569, 571, 230 S.E.2d 193, 194 (1976). However, our Court has likewise recognized that:

> [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.

State v. Mitchell, 224 N.C. App. 171, 177, 735 S.E.2d 438, 443 (internal citations omitted). *See also State v. Alson*, 193 N.C. App. 712, 716, 668 S.E.2d 383, 386-87 (2008), *aff'd per curiam*, 363 N.C. 367, 677 S.E.2d 455 (2009).

It is undisputed that Defendant was the driver of the vehicle and, therefore, exercised a degree of dominion and control over the vehicle. Additionally, the State also presented evidence of other incriminating circumstances, including the placement of the cocaine in the driver's door, as well as the Defendant's nervous behavior. We conclude that the State's evidence was, therefore, sufficient to survive a motion to dismiss.

III. Conclusion

For the reasons stated above, we conclude that the trial court did not plainly err by allowing the results of Officer Kattner's search of Defendant's vehicle into evidence. We further conclude that the trial court did not err by denying Defendant's motion to dismiss the charge of possession of cocaine for insufficiency of the evidence.

NO ERROR.

Judge STADING concurs.

Judge ARROWOOD concurs with separate opinion.

ARROWOOD, Judge, concurring.

I agree with the majority that the trial court did not plainly err because of the evidence indicating defendant voluntarily consented to the search. However, because it appears that the trial court's primary analysis turned on whether the officer had a reasonable suspicion to extend the traffic stop rather than on the defendant's consent to search his car, I believe the trial court's analysis of that issue is incorrect. Thus, I write separately to clarify the issue of reasonable suspicion.

Officer Kattner testified that when she approached defendant's car during the traffic stop, defendant and his passengers were acting "nervous." When asked what made her believe they were nervous, Officer Kattner stated, "They were not wanting to maintain eye contact[,] [t]hey were short in their responses[,]" and "were a little fidgety." Officer Kattner further testified that such signs of nervousness continued after giving defendant a verbal warning for failing to yield.

When ruling on defendant's motion to dismiss, the trial court concluded that reasonable suspicion existed based on these observations alone. However, such a conclusion is sharply at odds with North Carolina law. Specifically, an appearance of nervousness does not give police carte blanche to extend a stop or conduct a search. *See State v. Fields*, 195 N.C. App. 740, 745 (2009) (citing *United States v. Sokolow*, 490 U.S. 1, 9, 104 L. Ed. 2d 1, 11 (1989)) ("In order to preserve an individual's Fourth Amendment rights, it is of the utmost importance that we recognize that the presence of [extreme nervousness] is not, by itself, proof of any illegal conduct and is often quite consistent with innocent travel."); *see also State v. Myles*, 188 N.C. App. 42, 50 (2008), *aff'd*, 362 N.C. 344 (2008) ("[O]ur Supreme Court has never said nervousness alone is sufficient to determine whether reasonable suspicion exists when looking at the totality of the circumstances.").

For example, in *State v. McClendon*, our Supreme Court explained that "several factors . . . gave rise to reasonable suspicion under the totality of the circumstances." 350 N.C. 630, 637 (1999). Such factors specified by the *McClendon* Court were (1) extreme nervousness, which involved defendant sweating, breathing rapidly, sighing heavily, chuckling nervously when answering questions, and refusing to make eye contact; (2) inconsistent and confusing statements; and (3) the fact that

"although defendant seemed unsure of who owned the car, the address of the owner listed seem[ed] to indicate that [defendant and the owner] both lived in the same residence." *Id.* Thus, in *McClendon*, "extreme nervousness" constituted reasonable suspicion only when combined with two other pertinent factors.

Here, unlike in *McClendon*, no factors were present other than Officer Kattner's perception of nervousness. The perceived fidgetiness, eye contact avoidance, and short responses were not separate factors supporting reasonable suspicion; rather, they were physical mannerisms that—when combined—led Officer Kattner to believe defendant and the passengers were nervous. *See State v. Downey*, 251 N.C. App. 829, 834 (2017) (explaining that police testimony that defendant avoided eye contact supported the trial court's finding that defendant exhibited nervous behavior). Moreover, a general statement that defendant was acting nervous—without specific facts to support such observation like the ones discussed here—does not constitute a factor supporting reasonable suspicion. *See United States v. Crawford*, 891 F.2d 680, 682 n.4 (8th Cir. 1989). ("The statement that [defendant] appeared nervous . . . is a mere rephrasing of the other evidence, offered in an attempt to enhance the value of that evidence."). Accordingly, Officer Kattner's observations were inadequate to support a finding of reasonable suspicion.

It is also important to point out that nothing in the record suggests that Officer Kattner had prior knowledge of defendant or his passengers before the traffic stop. I thus find it hard to understand how Officer Kattner would know whether they were indeed nervous or simply behaving normally. Without such prior knowledge, Officer Kattner's observations likely constitute subjective and "unparticularized suspicion." *See State v. Watkins*, 337 N.C. 437, 442 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)) (stating that reasonable suspicion must be " 'based on objective facts, that the individual is involved in criminal activity.' ").

STATE OF NORTH CAROLINA
v.
LEO GEORGE RUBENSTAHL, Defendant

No. COA23-314

Filed 19 December 2023

1. Homicide—first-degree murder—jury instruction—voluntary intoxication—evidence of premeditation and deliberation

In a prosecution for first-degree murder, where defendant was tried for the death of his wife, the trial court did not commit plain error by declining to instruct the jury on voluntary intoxication as an affirmative defense. Although defendant drank multiple beers throughout the twelve hours leading up to the murder, the evidence did not show that he was so completely intoxicated that he could not form a deliberate and premeditated purpose to kill. Notably, the evidence showed that: defendant had been a heavy drinker for years, and therefore had a high tolerance for alcohol; defendant testified that he got drunk after he killed his wife, indicating that he was not already drunk before the murder; defendant's memory of the events leading up to the murder was both clear and detailed; and, at the time of the killing, he was cognizant enough to hide the murder weapon and confess his actions to his daughter before law enforcement arrived.

2. Homicide—first-degree murder—premeditation and deliberation—jury instruction—lesser-included offense not supported

In a prosecution for first-degree murder, where defendant was tried for the death of his wife, the trial court did not err in declining to instruct the jury on the lesser-included offense of second-degree murder, since the evidence supported only one inference: that defendant specifically intended to kill his wife, acting with both premeditation and deliberation on the day of the murder. The evidence showed that: defendant shot his wife ten times with a single-action revolver, which would have required a great deal of effort (manually cocking the gun before pulling the trigger for each shot, then unloading and reloading it to continue shooting since its cylinder only held six bullets at a time); before the killing, defendant had both threatened and physically abused his wife; and his wife's body did not show any defensive wounds, suggesting that defendant continued to shoot her after she was already rendered helpless.

Appeal by defendant from judgment entered 23 September 2022 by Judge James F. Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 18 October 2023.

Attorney General Joshua H. Stein, by Assistant General Counsel South A. Moore, for the State.

The Sweet Law Firm, PLLC, by Kaelyn N. Sweet, for defendant-appellant.

DILLON, Judge.

Defendant Leo George Rubenstahl appeals from judgment entered upon a jury's verdict convicting him of first-degree murder for causing the death of his wife. Our review shows no error.

I. Background

At approximately 2 a.m. on 25 February 2021, Defendant's wife Enelrae Rubenstahl was found dead in the home she shared with Defendant in Linden. Evidence at trial tended to show as follows:

Leading up to her death, Enelrae expressed fears to friends and family that Defendant was going to shoot her. In particular, she was uncomfortable that Defendant kept his handgun on his nightstand while they slept; her friend testified that Enelrae said, "I sleep scared." A co-worker even offered to intervene to protect her from Defendant. Three weeks before her murder, Enelrae met with her church's pastor and deacon. They noticed bruises on both sides of her neck consistent with strangulation, and she admitted that Defendant had "been holding her head down[.]"

On 24 February 2021, the day before her death, Enelrae spent the afternoon and evening with Defendant, his daughter Christina, and her children. At approximately 1 a.m. the next morning, Defendant called Christina to confess that he had killed Enelrae. Christina testified,

> All he kept saying over and over again was I messed up. I messed up. I did something that I can't come back from. I just wanted you to know that I love you and I love the kids. . . . And he said, I shot [Enelrae]. . . . while we were on the phone, he said that he had no regrets about it and that he had shot her and then realized she was still breathing and kept shooting her. . . . it eventually got to the point of him talking about taking his own life because he didn't want to deal with the consequences of what he had done.

When Christina arrived at the house, she asked Defendant about the location of his handgun. He initially lied to her—saying he "threw it in the pond"—before admitting that he hid it within a pile of towels in the bathroom. Before the police arrived, Christina heard Defendant call his sister and "explain[ ] to her on voicemail . . . what he had done."

When law enforcement arrived at the scene, they found Enelrae deceased in the bedroom hallway. She was unclothed except for her undergarments, which were on inside out. They also found Defendant's handgun hidden within the towels. They promptly arrested Defendant, and he was subsequently indicted.

At trial, the medical examiner testified that Enelrae was shot ten times on her chest, arms, and face (including both eyes) at a close range, injuries which "would take probably several minutes for her to die[,]" rather than cause an instantaneous death. Enelrae also had a large bruise covering the right side of her neck and face and her right ear, likely caused by blunt force trauma prior to her death. The medical examiner did not observe any defensive wounds.

The firearms forensic examiner testified regarding Defendant's handgun found at the scene: a 45 Colt single-action revolver. This type of revolver requires the user to first cock the hammer and then pull the trigger each time the gun is fired—in other words, pulling the trigger does not automatically cock the hammer, as it would in a double-action revolver. The cylinder holds only six cartridges when fully loaded. To load it, one must rotate the cylinder and load each cartridge (containing a bullet) individually. After firing the six cartridges, one must repeat the process of rotating the cylinder to unload each one individually before reloading the gun. In sum, this is a cumbersome process.

At trial, Defendant took the stand and testified that Enelrae's niece had shot and killed Enelrae.

Defendant was convicted of first-degree murder and sentenced to life imprisonment without parole. Defendant timely appealed.

II. Analysis

Defendant argues the trial court erred when it did not instruct the jury on (1) the affirmative defense of voluntary intoxication and (2) the lesser-included offense of second-degree murder. We disagree.

A. Voluntary Intoxication Jury Instruction

[1] On appeal—for the first time—Defendant asserts the defense of voluntary intoxication. Defendant did not request a jury instruction on

voluntary intoxication at trial. Thus, we review this argument for plain error. *State v. Collington*, 375 N.C. 401, 410, 847 S.E.2d 691, 698 (2020) ("[U]npreserved issues related to jury instructions are reviewed under a plain error standard, while preserved issues are reviewed under a harmless error standard."). *See also State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) ("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.").

During the charge conference, the trial court explicitly asked if Defendant wanted to include voluntary or involuntary intoxication instructions, to which his counsel declined. Thus, this challenge was not preserved. Assuming the trial court otherwise erred by not giving the intoxication instruction, for the reasoning below, we conclude that the trial court did not plainly err.

To warrant a jury instruction on voluntary intoxication,

> [t]he evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. In the absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.

State v. Strickland, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987) (citations omitted). Our Supreme Court warns our courts to apply "great caution" in allowing a voluntary intoxication instruction. *State v. Meader*, 377 N.C. 157, 162, 856 S.E.2d 533, 537 (2021) (quoting *State v. Murphy*, 157 N.C. 614, 617-18, 72 S.E. 1075, 1076-77 (1911)). "[A]n instruction on voluntary intoxication is not required in every case in which a defendant claims that he killed a person after consuming intoxicating beverages[.]" *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992). In making this determination, the evidence must be viewed in the light most favorable to the defendant. *Meader*, 377 N.C. at 162, 856 S.E.2d at 537.

Courts consider a variety of factors when determining whether a defendant should receive a voluntary intoxication jury instruction. One important factor is the amount of alcohol consumed. *See State v. Golden*, 143 N.C. App. 426, 431-33, 546 S.E.2d 163, 167-68 (2001). Further, the defendant's alcohol tolerance affects the determination—particularly if the defendant is an alcoholic with a presumably higher tolerance. *See State v. Walls*, 342 N.C. 1, 46, 463 S.E.2d 738, 761-62 (1995). Another factor is the defendant's memory of the killing and the time

leading up to and following the killing, with a detailed memory weighing against a voluntary intoxication instruction. *See State v. Herring*, 338 N.C. 271, 276, 449 S.E.2d 183, 186 (1994); *Golden*, 143 N.C. App. at 431, 546 S.E.2d at 167.

In this case, Defendant was a heavy drinker and had been for years, suggesting a higher tolerance for alcohol than the average person. He was unsure how many beers he consumed, speculating the number could be approximately ten or eleven from the afternoon of 24 February 2021 through the midnight hours of 25 February 2021 (a nearly twelve-hour period). Further, Defendant testified that he was "slowly drinking" throughout the day and it was a "normal" day for himself.

In his own testimony, Defendant said he "got drunk" *after* the killing because his wife was dead, indicating he was not already drunk during the killing. Additionally, Defendant's memory of that day and night are clear. He was able to describe the people he saw and what they were wearing, his activities that evening, and a detailed timeline (including his mental processes) leading up to the killing, the killing itself, and the time and events afterwards. He was also cognizant enough to hide the revolver and call Christina to confess his actions before Christina and law enforcement arrived at the scene.

Though Defendant may have been intoxicated from drinking a number of beers throughout the course of the afternoon, evening, and night, the evidence does not show that he was "so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." *Strickland*, 321 N.C. at 41, 361 S.E.2d at 888. Thus, we conclude Defendant has failed to show plain error by the trial court not instructing the jury on the affirmative defense of voluntary intoxication.

B. Second-Degree Murder Jury Instruction

[2] Defendant argues the jury could have reasonably found that Defendant committed only second-degree murder because he lacked the requisite deliberation and premeditation elements for first-degree murder. In his brief, Defendant characterizes himself as "a volatile alcoholic who fired his gun at anything that frustrated him" and claims he could have shot his wife during an "explosive marital argument" during which he lacked a "cool state of mind."

A request for jury instructions on a lesser-included offense during the charge conference is sufficient to preserve the issue for appellate review. *See State v. Collins*, 334 N.C. 54, 61-62, 431 S.E.2d 188, 193 (1993).

Here, defense counsel requested a jury instruction on second-degree murder during the charge conference, but the trial court denied this request. Even though counsel did not repeat his objections after the charge was given, he nevertheless preserved this issue for review.

In 1979, our Supreme Court stated that a second-degree murder instruction *must* be given where the State seeks a conviction for first-degree murder based on premeditation and deliberation, so as to leave it up to the jury to decide whether the defendant premeditated/deliberated to kill rather than merely to assault:

> Assuming *arguendo* that there was no positive evidence of the absence of premeditation and deliberation, the trial court was still required to submit the issue of second degree murder to the jury. In the instant case the [S]tate relied upon premeditation and deliberation to support a conviction of murder in the first degree. In *State v. Harris*, 290 N.C. 718, 730, 228 S.E.2d 424, 432 (1976), we held that, "in all cases in which the State relies upon premeditation and deliberation to support a conviction of murder in the first degree, the trial court must submit to the jury an issue of murder in the second degree." This requirement is present because premeditation and deliberation are operations of the mind which must always be proved, if at all, by circumstantial evidence. If the jury chooses not to infer the presence of premeditation and deliberation, it should be given the alternative of finding the defendant guilty of second degree murder. *State v. Keller*, 297 N.C. 674, 256 S.E.2d 710 (1979).

State v. Poole, 298 N.C. 254, 258, 258 S.E.2d 339, 342 (1979).

However, four years later, our Supreme Court stated that a second-degree murder instruction is not required "in *every case* in which the State relies on premeditation and deliberation to support a conviction of first-degree murder." *State v. Strickland*, 307 N.C. 274, 281, 298 S.E.2d 645, 651 (1983) (emphasis in original). And where the State has put forth evidence which establishes premeditation and deliberation of the intent to kill "and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial court should properly exclude from jury consideration the possibility of a conviction of second-degree murder." *Id.* at 293, 298 S.E.2d at 658.

The Court has since stated that "a defendant is not entitled to an instruction on [second-degree murder] merely because the jury could possibly believe some of the State's evidence [supporting first-degree

murder] but not all of it." *State v. Leazer*, 353 N.C. 234, 240, 539 S.E.2d 922, 926 (2000) (cleaned up).

However, where the State's evidence, if believed, is capable of conflicting reasonable inferences either that (1) the defendant premeditated/deliberated a specific intent to kill or, alternatively, (2) the defendant merely premeditated/deliberated an assault, the defendant is entitled to both first-degree and second-degree murder instructions.[1] *See*, *e.g.*, *State v. Jerrett*, 309 N.C. 239, 263, 307 S.E.2d 339, 352 (1983) (stating that it is "for the jury to resolve the conflicting inferences arising from the evidence"); *State v. Benton*, 299 N.C. 16, 24, 260 S.E.2d 917, 922 (1980) (concluding that testimony permitting conflicting inferences is for the jury to resolve).

Here, though, we conclude that the evidence only leads to one inference regarding premeditation and deliberation: Defendant specifically intended to kill his wife. The evidence indicates that Defendant shot Enelrae many times with a firearm that required a great deal of effort to operate, manually cocking the gun and pulling the trigger for each shot. And to shoot Enelrae ten times with the Colt 45 single-action revolver, Defendant must have unloaded and reloaded the revolver during the killing (since the cylinder only held six bullets at a time).

Defendant also made threats to Enelrae prior to her killing. For example, Defendant allegedly once shot holes into his above-ground pool; while recounting what happened, he looked into Enelrae's eyes and said, "I should have shot you." Further, Enelrae did not have defensive wounds, suggesting Defendant continued to shoot her after she was rendered helpless. Finally, there was evidence of prior physical and domestic abuse, such as the bruises on Enelrae's neck three weeks before her murder that suggested strangulation.

III. Conclusion

In sum, we conclude Defendant received a fair trial, free of reversible error.

NO ERROR.

Judges TYSON and GRIFFIN concur.

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1. Where the evidence is capable of conflicting inferences on premeditation and deliberation, and if the defendant fails to request that a second-degree murder instruction be given and he is subsequently convicted for first-degree murder, he would only be entitled to plain error review of the trial court's failure to instruct on second-degree murder where he would have to show that the jury "probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

STATE v. SALDANA

[291 N.C. App. 674 (2023)]

STATE OF NORTH CAROLINA
v.
LUIS FERNANDO SALDANA

No. COA23-51

Filed 19 December 2023

Criminal Law—motion to withdraw guilty plea—conditional discharge—treated as motion for appropriate relief—manifest injustice standard applied

The trial court did not err by denying defendant's motion to withdraw his guilty plea (entered in 2005), which defendant filed nearly eighteen years later after he was detained by federal immigration officials on the basis of that guilty plea. Although defendant argued in his motion that since his 2005 charges were dismissed (pursuant to a conditional discharge after successfully completing various conditions), he misunderstood the consequences of his plea and thus had a "fair and just" reason for withdrawal, the trial court correctly categorized defendant's motion as a post-judgment motion for appropriate relief (MAR) and properly applied the standard of whether "manifest injustice" had occurred. The standard had not been met where defendant, an undocumented immigrant, acknowledged at the time of his plea that he was subject to deportation and where he received the benefit of what he had bargained for by having his remaining charges dismissed and receiving the conditional discharge of the felony to which he had pleaded guilty.

Appeal by Defendant from an order entered 10 May 2022 by Judge William W. Bland in Wayne County Superior Court. Heard in the Court of Appeals 6 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden W. Hayes, for the State.

Appellant Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for the Defendant.

North Carolina Advocates for Justice, by Christopher J. Heaney and North Carolina Justice Center, by Daniel Melo, Amici Curiea.

WOOD, Judge.

Luis Fernando Saldana ("Defendant") appeals from the trial court's order denying his motion to withdraw his guilty plea entered 8 February 2005. After careful consideration of the record and applicable law, we affirm the trial court's order.

I. Factual and Procedural Background

On 3 January 2005, Defendant was indicted by a grand jury for felony possession of cocaine, misdemeanor possession of a controlled substance, and misdemeanor possession of drug paraphernalia. On 8 February 2005, Defendant, through counsel, entered a plea of guilty to felony possession of cocaine in order to receive a conditional discharge pursuant to N.C. Gen. Stat. § 90-96. As a part of the plea transcript, Defendant affirmed, under oath, that he was satisfied "with [his] lawyer's legal services"; that he understood "the nature of the charges" and discussed "possible defenses" with his lawyer; that he had "the right to plead not guilty and be tried by a jury"; and that "if [he] was not a citizen of the United States of America, [his] plea[] of guilty . . . may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law." The State, as part of the agreement, agreed to dismiss the pending misdemeanor charges.

The trial court accepted Defendant's plea on 8 February 2005 and, pursuant to the provisions of § 90-96, "defer[red] further proceedings" pending successful completion of various conditions, including payment of all fees, completion of a drug education program, and supervised probation. On 7 February 2006, the trial court, satisfied Defendant had complied with the previously imposed conditions for a conditional discharge, dismissed the charges against Defendant pursuant to the provisions of § 90-96.

At the time of these proceedings, Defendant, an undocumented immigrant, resided in North Carolina, had been married since 2004 to an American citizen, and was the father to a child born of the marriage. After the charges were dismissed against Defendant, he continued to reside in the United States and raise his three children with his wife. In 2021, Defendant was detained by immigration officials and sent to Stewart Detention Center in Lumpkin, Georgia as a consequence of the 2005 guilty plea entered pursuant to § 90-96. Because of his undocumented status and guilty plea to a felony, Defendant was subject to mandatory detention without bond.

On 19 January 2022, Defendant, through new counsel, filed a motion to withdraw his § 90-96 guilty plea. Defendant asserted that he had a "fair and just" reason to withdraw his guilty plea, because he was

"confused" and did not know "that the conditional discharge would not result in the withdrawal of his guilty plea and that the guilty plea would still continue to constitute a conviction for [federal law] immigration purposes." Specifically, Defendant alleged he did not "understand that the guilty plea would not be fully withdrawn upon his discharge from the post-plea diversion program." Defendant further alleged his guilty plea "is unfairly preventing Defendant from applying [for] cancellation of removal for non-lawful permanent residents or consular processing with a 1-601A waiver" in order for Defendant to remain in the United States. Defendant's motion also specifically stated he was not contending his original trial attorney rendered ineffective assistance of counsel.

On 6 May 2022, the trial court heard Defendant's motion. At the hearing, Defendant's counsel argued Defendant "was confused, he was misled by the circumstances" when he entered the § 90-96 guilty plea and based on communications with "officers of the court, . . . he believed that he would be left with, quote, a clean slate." During the hearing, Defendant's wife testified that shortly after Defendant's guilty plea was dismissed, the couple met with an immigration attorney "about what process we would need to go through to get him legal status." According to Defendant's wife, the immigration attorney told them there were "some laws or something hindering at the time, but they didn't tell him specifically what it was, that it would be better if we waited and came back because there was going to be an election at the time, and they didn't know if that would affect things."

Following Defendant's wife's testimony and arguments from the parties, the trial court denied Defendant's motion. On 10 May 2022, the trial court entered a written order, formally denying Defendant's motion. In its written order, the trial court treated Defendant's motion as a motion for appropriate relief ("MAR") but noted that under either the "fair and just" standard or the "manifest injustice" standard, Defendant had not shown entitlement to relief. The "fair and just" standard applies to motions to withdraw a plea, and the "manifest injustice" standard applies to MARs. The trial court found "[D]efendant was represented by competent counsel . . . well-known to the court as a skilled attorney with years of experience." Additionally, the trial court noted that in the plea transcript Defendant marked the box acknowledging that he understood the plea could have immigration consequences and "nothing was presented or shown to support any assertion that [D]efendant was 'misled' by the court or by his trial counsel." Accordingly, the court found "[t]he plea was not the result of misunderstanding, haste, coercion, or confusion, but was entered knowingly and voluntarily." The trial court further found that while "[t]he contention that sentencing was never

entered is probably correct," this is "not a dispositive issue" because the case "was fully dismissed by the court in a fair and just manner." On 11 May 2022, Defendant filed written notice of appeal.

II. Analysis

A. Appellate Jurisdiction

Defendant alleges the trial court addressed his claim as a motion to withdraw a plea and as a MAR. Defendant contends his pleading should have been treated by the trial court solely as a pre-sentence motion to withdraw his plea allowing him a right of direct appeal, but he has also filed a petition for *writ of certiorari* with this Court requesting appellate review of the merits of his appeal if his motion is treated as a MAR. According to Defendant, in consideration of the "seriousness of the consequences of allowing this plea to remain, the questionable constitutional validity of the plea itself, and the unusual procedural posture of his case," this Court should grant his *writ of certiorari* to "address the meritorious claim raised in [his] brief." In response, the State has filed a motion to dismiss Defendant's appeal.

Because Defendant filed the MAR "long after the time for taking appeal had expired, he can obtain appellate review of the court's ruling only by a petition for a *writ of certiorari*." *State v. Isom*, 119 N.C. App. 225, 227, 458 S.E.2d 420, 421 (1996) (emphasis added); N.C. Gen. Stat. § 15A-1422(c)(3) (2023). In our discretion, we grant Defendant's petition for *writ of certiorari* to consider the merits of Defendant's appeal and deny the State's motion to dismiss Defendant's appeal.

B. Standard of Review

Defendant argues the trial court "erred by denying [his] motion to withdraw his [§ 90-96] guilty plea because [he] gave fair and just reasons for doing so." The basis of Defendant's argument rests on the misapprehension that his motion to withdraw was asserted before sentencing on his plea and thus can be withdrawn if he can show a fair and just reason to do so. In refuting Defendant's characterization of the motion to withdraw, the State argues the trial court appropriately categorized Defendant's motion as a MAR which requires Defendant to prove his guilty plea amounts to "manifest injustice" and that Defendant is unable to do so.

Whether a defendant should be allowed to withdraw a guilty plea is a question of law, which is reviewed *de novo*. *State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 163 (1990). Under the *de novo* standard of review, the reviewing court considers the matter anew and freely

substitutes its own judgment for the lower court's judgment. *Sutton v. N.C. Dep't of Lab.*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999) (citation omitted).

When considering rulings on MARs, we review the trial court's order 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. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (citation omitted). When a trial court's findings on a MAR 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). Because the facts underlying this case as described in the trial court's findings of fact are undisputed, we only consider whether the trial court correctly concluded that Defendant was not entitled to relief.

C. N.C. Gen. Stat. § 90-96 Conditional Discharge Guilty Plea

Under § 90-96, in certain circumstances, when an individual who has not previously been convicted of "(i) any felony offense under any state or federal laws . . . pleads guilty to or is found guilty of" certain drug and controlled substances offenses, the trial court "shall, without entering a judgment of guilt and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable terms and conditions as it may require . . ." N.C. Gen. Stat. § 90-96(a) (2023). Thus, § 90-96 provides a special form of conditional discharge wherein certain qualifying defendants may, for only their first qualifying offense, plead guilty or no contest, and "[u]pon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings." N.C. Gen. Stat. § 90-96(a). The statute further provides that after successful completion of these terms and conditions, the discharge and dismissal of the case "shall be without court adjudication of guilt and shall not be deemed a conviction." N.C. Gen. Stat. § 90-96(a). Such a dismissal is "final for the purpose of appeal." N.C. Gen. Stat. § 90-96(a).

The record evidence shows Defendant entered a guilty plea pursuant to § 90-96 to defer further prosecutorial proceedings, complied with the conditions set forth in the guilty plea, and after successfully complying with the conditions, the trial court discharged and dismissed the proceedings against him. N.C. Gen. Stat. § 90-96. However, Defendant and the State characterize Defendant's motion to withdraw his guilty plea as two different procedural mechanisms for requesting relief.

In *State v. Handy*, our Supreme Court examined the distinction between the treatment of a motion to withdraw a guilty plea made prior to sentencing and one made after sentencing. 326 N.C. at 536, 391 S.E.2d at 161. According to *Handy*, "[a] motion to withdraw a guilty plea made before sentencing is significantly different from a post-judgment or collateral attack on such a plea, which would be by a motion for appropriate relief." *Id.* (citations omitted).

> A motion for appropriate relief is a *post-verdict* motion (or a post-sentencing motion where there is no verdict) made to correct errors occurring prior to, during, and after a criminal trial. N.C.G.S. § 15A-1411 (1988); Bailey, *Trial Stage and Appellate Procedure Act: An Overview*, 14 Wake Forest L. Rev. 899, 905-06 (1978). A party may make the motion "[a]fter the verdict but not more than 10 days after entry of judgment." N.C.G.S. § 15A-1414(a) (1988). "Entry of [j]udgment" occurs "when sentence is pronounced." N.C.G.S. § 15A-101(4a) (1988).

Id. at 535, 391 S.E.2d at 160-61. The Court reasoned that a "fundamental distinction exists between situations in which a defendant pleads guilty but changes his mind and seeks to withdraw the plea before sentencing and in which a defendant only attempts to withdraw the guilty plea after he hears and is dissatisfied with the sentence." *Id.* at 536, 391 S.E.2d at 161. In explaining the difference in treatment of the two motions, the Court noted:

> [i]n a case where the defendant seeks to withdraw his guilty plea before sentence, he is generally accorded that right if he can show any fair and just reason. On the other hand, where the guilty plea is sought to be withdrawn by the defendant after sentence, it should be granted only to avoid manifest injustice.

Id. (citations omitted).

In the present case, the trial court correctly interpreted Defendant's motion as a post-judgment motion on a guilty plea and thus, treated the motion as a MAR. The trial court's dismissal of Defendant's charge in 2006 pursuant to § 90-96, constituted the "final judgment" of this matter. When Defendant pleaded guilty in 2005, the trial court imposed various conditions to the § 90-96 conditional discharge, including payment of restitution and community service, which Defendant eventually fulfilled. On 7 February 2006, the trial court entered final judgment on Defendant's felony possession of cocaine charge by dismissing the

charge under the terms of the § 90-96 judgment. Therefore, Defendant's motion, brought nearly eighteen years after his case was dismissed, is a post-sentence MAR requiring Defendant to show manifest injustice in order to withdraw his guilty plea.

Our case law sets forth six non-exclusive factors to consider when determining whether a defendant has shown sufficient cause to withdraw his plea and these factors remain the same whether defendant has made a "pre-" or "post-sentencing" motion. *State v. Konakh*, 266 N.C. App. 551, 556-57, 831 S.E.2d 865, 869 (2019) (citation omitted). The six factors include: (1) defendant's assertion of legal innocence; (2) the strength of the State's case; (3) the length of time between entry of the plea and the motion to withdraw; (4) the competency of counsel; (5) misunderstanding the consequences of the guilty plea, hasty entry, confusion, and coercion; and (6) prejudice to the State. *See State v. Taylor*, 374 N.C. 710, 719-25, 843 S.E.2d 46, 52-56 (2020) (citing *Handy*, 326 N.C. at 539, 391 S.E.2d at 163).

If a defendant makes a *prima facie* showing of the existence of manifest injustice, "[t]he State may refute the movant's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea. *Prejudice to the State is a germane factor against granting a motion to withdraw.*" *Id.* at 725, 843 S.E.2d at 56 (citing *Handy*, 326 N.C. at 539, 391 S.E.2d at 163).

In the present case, Defendant does not argue the first four factors related to the denial of his motion to withdraw his plea. Defendant has not asserted his legal innocence and he has not contested the strength of the State's proffer of evidence for his felony possession of a controlled substance. Furthermore, Defendant filed his "motion to withdraw" the guilty plea nearly eighteen years after it was entered. Additionally, Defendant's motion at trial and in his brief before this Court clearly states he is not raising an argument as to his attorney's competency or effective assistance. Instead, Defendant alleges he should be permitted to withdraw his guilty plea based upon a "[m]isunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion." Defendant contends

> his hasty plea was marred by confusion and a lack of understanding about the severe immigration consequences that would result from the plea. In the month between indictment and plea, [Defendant] was not informed about, nor did he come to understand, the certain and grave immigration-related consequences his conditional

> discharge plea would entail. Instead, [Defendant] reasonably understood a conditional discharge to mean dismissal of the charges and restoration to the position he was in before any allegations were made. [Defendant] had no inkling that a dismissal would be used against him to bar granting him a green card, to deport him, and to permanently bar him from reentering the United States.

Defendant asserts he believed that his guilty plea would be "fully withdrawn" upon his completion of the conditions imposed by the trial court pursuant to § 90-96, so that the dismissed felony charge would be wiped clean from his record and could not later be used against him. Defendant argues he did not learn until 2021 that his "conviction in this matter was only discharged for state purposes but not for immigration purposes" and that his guilty plea could lead to him being "held in immigration custody subject to mandatory detention." Defendant contends he was unaware that his entering a guilty plea under a § 90-96 conditional discharge agreement would qualify as a "conviction" under federal immigration law. Defendant argues had he "fully understood the consequences of taking the plea, in light of the extreme immigration consequences, [he] likely would have made a different choice and taken his chance at trial." While we are sympathetic to Defendant's purported misunderstanding of the consequences of his guilty plea, Defendant has not demonstrated the existence of a manifest injustice.

A plea agreement is contractual in nature, and the parties are bound by its terms. *State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002) (citation omitted). A court may accept a guilty plea only if it is "made knowingly and voluntarily." *State v. Wilkins*, 131 N.C. App. 220, 224, 506 S.E.2d 274, 277 (1998) (citations omitted). A plea is voluntarily and knowingly made if the defendant is made fully aware of the direct consequences of his plea. *Id.* at 224, 506 S.E.2d at 277 (citations omitted).

In consideration of whether there is manifest injustice on the grounds of a misunderstanding of the consequences of a guilty plea, a defendant "must show that the misunderstanding related to the *direct consequences* of his plea, not a misunderstanding regarding the effect of the plea on some collateral matter." *State v. Marshburn*, 109 N.C. App. 105, 109, 425 S.E.2d 715, 718 (1993). "Direct consequences are those having a definite, immediate and largely automatic effect on the range of the defendant's punishment for the crime charged." *Id.* (cleaned up).

In *Marshburn*, we considered the effect a defendant's guilty plea would have upon his pending federal criminal proceedings. In that case, the defendant sought to withdraw his eight-month-old guilty plea prior to "sentencing." *Id.* Seeking to withdraw his plea, the defendant argued he entered the plea "with the understanding that it would not count as a conviction in a pending federal drug case when in fact it was considered by the federal court as a conviction." *Id.* at 108, 425 S.E.2d at 718. This Court rejected such a contention and concluded that "[a]ny effect [the defendant's] plea had on the pending federal criminal proceedings was collateral and therefore not a basis for supporting a motion to withdraw the plea at issue." *Id.* at 109, 425 S.E.2d at 718. Accordingly, the defendant did not even satisfy the "fair and just reason" standard. *Id.*

Here, Defendant's contention that he misunderstood the consequences of his guilty plea under a state statute would qualify as a conviction under federal immigration law is similar to the defendant's argument in *Marshburn*. Here, as in *Marshburn*, the effect of Defendant's guilty plea on his federal immigration proceedings is a collateral rather than a direct consequence of his plea.

Furthermore, this Court has previously determined "if the defendant signed a Transcript of Plea and the record reveals the trial court made 'a careful inquiry' of the defendant, it is sufficient to show the defendant's plea was knowingly and voluntarily made, with full awareness of the direct consequences." *Russell*, 153 N.C. App. at 511, 570 S.E.2d at 248 (citation omitted). Here, Defendant acknowledged under oath his awareness that his "plea[] of guilty . . . may result in deportation . . . or the denial of naturalization under federal law[.]" Therefore, at the time Defendant entered his guilty plea, he was warned he was subject to deportation as an undocumented immigrant residing in the United States. Defendant has not presented any "clear and convincing evidence to the contrary." *State v. Ager*, 152 N.C. App. 577, 584, 568 S.E.2d, 328, 332 (2002) (noting that when a defendant states something under oath in conjunction with a plea, he is bound by such assertion "absent clear and convincing evidence to the contrary."). Furthermore, we note that at the time of Defendant's guilty plea, he was subject to removal from the United States regardless of the conditional discharge because of his status as an undocumented immigrant.

The State also aptly notes that at the time Defendant entered his guilty plea,

> the law was unclear as to whether a conditional discharge would qualify as a "conviction" for immigration purposes.

> Indeed, it was not until 2017 that the Fourth Circuit definitively ruled that a conditional discharge guilty plea is a conviction under federal immigration law. *See Jacquez v. Sessions*, 859 F.3d, 258, 261-64 (2017). Before that, the Fourth Circuit had ruled that, at least in some instances, a conditional discharge was not a "conviction," for immigration purposes. *See Crespo v. Holder*, 631 F.3d 130, 136 (2011).

Defendant has not presented "clear and convincing" evidence to show he misunderstood the consequences of his plea or that he did not do so willingly and knowingly at the time his § 90-96 guilty plea was entered. Under North Carolina law, Defendant received exactly what he bargained for under his plea agreement: in exchange for his plea of guilty to the felony possession of cocaine charge, Defendant's remaining charges were dismissed, and he received a conditional discharge of the felony upon the completion of the conditions set by the court under state law. While Defendant may now regret the consequences of his guilty plea in light of its implications under federal law, his remorse does not reflect a misunderstanding of the guilty plea *at the time* he entered into it. Based upon the record evidence before us, Defendant has not presented sufficient evidence to establish "manifest injustice" in order for his guilty plea under N.C. Gen. Stat. § 90-96 to be withdrawn.

III. Conclusion

For the reasons stated above, we affirm the trial court's order denying Defendant's motion to withdraw his guilty plea under N.C. Gen. Stat. § 90-96.

AFFIRMED.

Judges CARPENTER and STADING concur.

STATE v. SHUMATE

[291 N.C. App. 684 (2023)]

STATE OF NORTH CAROLINA
v.
ROBBIE EUGENE SHUMATE, Defendant

No. COA23-256

Filed 19 December 2023

1. Firearms and Other Weapons—discharging firearm into occupied vehicle while in operation—jury instructions—lesser-included offense not required

In defendant's prosecution for discharging a firearm into an occupied vehicle while in operation, the trial court did not commit plain error by failing to instruct the jury on the lesser-included offense of discharging a firearm into an occupied vehicle. The evidence supported each element of the greater offense, including that the vehicle was "in operation" where, after three persons took a puppy from defendant's property and began to drive away, although the driver had to stop the vehicle to prevent it from going off a ledge, the engine was still running and an occupant was still in the driver's seat when defendant fired a gun into the vehicle.

2. Firearms and Other Weapons—discharging firearm into occupied vehicle while in operation—jury instructions—definition of "in operation" not required

In defendant's prosecution for discharging a firearm into an occupied vehicle while in operation pursuant to N.C.G.S. § 14-34.1, where defendant did not object to the jury instructions as given, the trial court did not commit plain error by failing to define the phrase "in operation," which is not defined in the statute, because those words were of common usage and meaning to the general public.

3. Firearms and Other Weapons—discharging firearm into occupied vehicle while in operation—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of discharging a firearm into an occupied vehicle while in operation where the State presented substantial evidence of each essential element of the offense and that defendant was the perpetrator, including that defendant deliberately fired a gun into a vehicle while the engine was still running and an occupant was still in the driver's seat, even though the vehicle was not moving.

Appeal by Defendant from judgment entered 13 July 2022 by Judge Bradley B. Letts in McDowell County Superior Court. Heard in the Court of Appeals 28 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher R. McLennan, for the State.

Gilda C. Rodriguez, for Defendant-Appellant.

CARPENTER, Judge.

Robbie Eugene Shumate ("Defendant") appeals from judgment after a jury convicted him of discharging a firearm into an occupied vehicle in operation and of possessing of a firearm as a felon. On appeal, Defendant argues the trial court erred by: (1) not instructing the jury on the lesser included offense of discharging a firearm into an occupied vehicle; (2) not defining "in operation" during its jury instructions; and (3) denying Defendant's motion to dismiss. After careful review, we disagree with Defendant and find no error.

I. Factual & Procedural Background

On 3 August 2020, a McDowell County grand jury indicted Defendant for discharging a firearm into an occupied vehicle in operation, possessing a firearm as a felon, and being a habitual felon. On 11 July 2022, the State tried Defendant in McDowell County Superior Court.

Evidence at trial tended to show the following. On 8 June 2022, Defendant's former girlfriend and two accomplices (collectively, the "Intruders") agreed to enter Defendant's property to take a puppy from Defendant's home. After driving a vehicle onto Defendant's property, the Intruders called for Defendant's puppy, the puppy entered the Intruders' vehicle, and the Intruders attempted to drive away.

But when the Intruders attempted to drive away, their vehicle "almost fell off a ledge on the driveway," so they had to stop. From there, testimony differed. One Intruder testified that Defendant approached the vehicle with a rifle. And while the vehicle was running, Defendant fired the rifle through the rear passenger-side window. On the other hand, Defendant testified that he did not have a rifle when he approached the vehicle. Rather, he attempted to grab a rifle from one of the Intruders, and the rifle accidentally fired. Defendant did not dispute that the vehicle's engine was running or that an Intruder was in the driver's seat.

The trial court instructed the jury on discharging a firearm into an occupied vehicle in operation, but the trial court did not instruct the jury on the lesser included offense of discharging a firearm into an occupied vehicle. The trial court also did not instruct the jury on the meaning of "in operation." Defendant did not object to the trial court's instructions.

The jury found Defendant guilty of discharging a firearm into an occupied vehicle in operation and of possessing a firearm as a felon. Defendant admitted to attaining habitual-felon status. On 13 July 2022, the trial court entered a consolidated judgment, sentencing Defendant to between 96 and 128 months of imprisonment. That same day, Defendant gave oral notice of appeal in open court.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

The issues on appeal are whether the trial court erred by: (1) not instructing the jury on the lesser included offense of discharging a firearm into an occupied vehicle; (2) not defining "in operation" during its jury instructions; and (3) denying Defendant's motion to dismiss.

IV. Analysis

A. Lesser Included Offense

[1] Defendant first argues that the trial court erred by failing to instruct the jury on the lesser included offense of discharging a firearm into an occupied vehicle. We disagree.

Defendant failed to object to the trial court's jury instructions; therefore, we review the instructions for plain error. *State v. Wright*, 252 N.C. App. 501, 506, 798 S.E.2d 785, 788 (2017) ("Because Defendant failed to object to the trial court's jury instructions, our review of this issue is limited to plain error."); *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) ("[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error.").

To find plain error, this Court must first determine that an error occurred at trial. *See State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Second, the defendant must demonstrate the error was "fundamental," which means the error probably caused a guilty verdict and " 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.' " *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d

312, 320–21 (2015) (quoting *Lawrence*, 365 N.C. at 518–19, 723 S.E.2d at 334–35). Notably, the " 'plain error rule . . . is always to be applied cautiously and only in the exceptional case . . . .' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

"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). "The test is whether there 'is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.' " *Id.* at 562, 572 S.E.2d at 772 (quoting *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)).

"The elements of discharging a firearm into an occupied vehicle while in operation are (1) willfully and wantonly discharging (2) a firearm (3) into an occupied vehicle (4) that is in operation." *State v. Juarez*, 369 N.C. 351, 357 n.2, 794 S.E.2d 293, 299 n.2 (2016) (citing N.C. Gen. Stat. § 14-34.1(b)). The crime is codified in section 14-34.1, but "in operation" is undefined in the body of the statute. *See* N.C. Gen. Stat. § 14-34.1 (2021). And until now, our Court has only defined "in operation" through an unpublished case, *see State v. Garner*, 2013 N.C. App. LEXIS 1080 at *20–21 (Oct. 15, 2013), and in other statutory contexts, *see*, *e.g.*, *State v. Fields*, 77 N.C. App. 404, 406–07, 335 S.E.2d 69, 70 (1985) (discussing "operating" and "operator" concerning section 20-138.1).

Although unpublished, we think the *Garner* Court took the correct approach in defining "in operation." *See Garner*, 2013 N.C. App. LEXIS 1080 at *20–21 (using a dictionary to define "operation"). This is because when examining statutes, words undefined by the General Assembly "must be given their common and ordinary meaning." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202–03 (1974). And absent precedent, we look to dictionaries to discern a word's common meaning. *Midrex Techs., Inc. v. N.C. Dept. of Rev.*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016).

Merriam-Webster's defines "operation" as "the quality or state of being functional or operative." *Operation*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003). Although this definition is a bit circular, we understand its application to a vehicle to mean this: A vehicle is "in operation" if it is "in the state of being functional," i.e., if it can be driven under its own power. *See id.* For a vehicle to be driven, there must be a person in the driver's seat, and its engine must be running.

Defendant, however, suggests that "in operation" means the vehicle must be moving. But this would create absurd results. For example, if someone shot into a vehicle temporarily stopped at a redlight, it would be unreasonable to say the vehicle was not "in operation." Accordingly, until the General Assembly adopts a different definition, we hold that "in operation" carries its common meaning: For a vehicle to be in operation, a person must be in the driver's seat with the vehicle's engine running.

Here, the State charged Defendant with discharging a firearm into an occupied vehicle in operation, and the trial court declined to instruct the jury on the lesser included offense of discharging a firearm into an occupied vehicle. Because the only difference between the charges is whether the vehicle was "in operation," the question here is whether "the evidence would permit" a rational jury to find the Intruders' vehicle was not in operation. *See Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771; N.C. Gen. Stat. § 14-34.1(a)–(b).

Defendant presented no evidence indicating the Intruders' vehicle engine was off or that no one was in the driver's seat. Indeed, the only evidence concerning these two questions was testimony in the affirmative. In other words, there is no "evidence in the record which might convince a rational trier of fact" that the Intruders' vehicle was not "in operation." *See Millsaps*, 356 N.C. at 562, 572 S.E.2d at 772; N.C. Gen. Stat. § 14-34.1(a)–(b). Therefore, the trial court did not err by failing to instruct the jury on the lesser included offense of discharging a firearm into an occupied vehicle. *See Millsaps*, 356 N.C. at 562, 572 S.E.2d at 772.

B. Defining "In Operation"

[2] Defendant next argues that the trial court erred because it failed to define "in operation" during its jury instruction. We disagree.

Defendant's "in operation" argument also concerns the trial court's jury instructions, which we must review for plain error because Defendant failed to object at trial. *See Wright*, 252 N.C. App. at 506, 798 S.E.2d at 788.

"It is the duty of the trial court to instruct the jury on the law applicable to the substantive features of the case arising on the evidence . . . ." *State v. Robbins*, 309 N.C. 771, 776–77, 309 S.E.2d 188, 191 (1983). But " '[i]t is not error for the court to fail to define and explain words of common usage and meaning to the general public.' " *State v. Mylett*, 262 N.C. App. 661, 676, 822 S.E.2d 518, 530 (2018) (quoting *S. Ry. Co. v. Jeffco Fibres, Inc.*, 41 N.C. App. 694, 700, 255 S.E.2d 749, 753 (1979)).

As detailed above, "in operation" under section 14-34.1 carries its common meaning. Therefore, the trial court did not err by failing to

explain “in operation” during its jury instructions. *See id.* at 676, 822 S.E.2d at 530.

C. Motion to Dismiss

[3] In his final argument, Defendant asserts the trial court erred when it failed to grant his motion to dismiss the charge of discharging a firearm into an occupied vehicle in operation. Again, we disagree.

“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 court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

“ ‘Upon 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) (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).

In evaluating the sufficiency of the evidence concerning a motion to dismiss, 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 . . . .’ ” *State v. Winkler*, 368 N.C. 572, 574–75, 780 S.E.2d 824, 826 (2015) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). 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.’ ” *Id.* at 575, 780 S.E.2d at 826 (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)).

“ ‘Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve. Defendant’s evidence, unless favorable to the State, is not to be taken into consideration.’ ” *State v. Agustin*, 229 N.C. App. 240, 242, 747 S.E.2d 316, 318 (2013) (quoting *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787 (1990)).

Again, "[t]he elements of discharging a firearm into an occupied vehicle while in operation are (1) willfully and wantonly discharging (2) a firearm (3) into an occupied vehicle (4) that is in operation." *Juarez*, 369 N.C. at 357 n.2, 794 S.E.2d at 299 n.2 (citing N.C. Gen. Stat. § 14-34.1(b)).

Here, the State offered testimony concerning each element of discharging a firearm into an occupied vehicle in operation. An Intruder testified that Defendant deliberately fired a gun into a vehicle while the vehicle's engine was running and while an Intruder was in the driver's seat. *See Juarez*, 369 N.C. at 357 n.2, 794 S.E.2d at 299 n.2. This evidence is substantial because it is relevant, and a "reasonable mind might accept [it] as adequate to" conclude that Defendant discharged a firearm into an occupied vehicle in operation. *See Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

Therefore, the trial court did not err by denying Defendant's motion to dismiss because the State presented substantial evidence "of each essential element of the offense charged" and of Defendant "being the perpetrator of such offense." *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

V. Conclusion

We conclude that the trial court did not err by failing to instruct the jury on the lesser included offense of discharging a firearm into an occupied vehicle, by not defining "in operation" during its jury instructions, or by denying Defendant's motion to dismiss.

NO ERROR.

Judges COLLINS and WOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 DECEMBER 2023)

BETTIS v. WEISS No. 23-514	Craven (21CVS294)	Dismissed
GLOB. OUTREACH TELE-REHAB. SERVS., INC. v. WOODS No. 23-325	Cumberland (20CVS2439)	Affirmed
HONEYCUTT v. VELASQUEZ-MORALES No. 23-406	Wayne (20CVS592)	No Error
IN RE A.C. No. 23-188	Cumberland (19JA301)	Affirmed
IN RE D.A.M. No. 23-399	Mecklenburg (19JT151)	Affirmed
IN RE D.L. No. 23-219	Alexander (20JA42)	Affirmed in Part; Vacated in Part, and Remanded
IN RE E.R.B. No. 23-435	Haywood (21JT27)	Affirmed.
IN RE G.R.N. No. 23-499	Davidson (21JA5)	Affirmed
IN RE H.R.M. No. 23-97	Chatham (17JT37)	Vacated and Remanded
IN RE I.G. No. 23-445	Beaufort (22JT42) (22JT43) (22JT44) (22JT45) (22JT46)	Affirmed
IN RE I.K. No. 23-518	Rowan (19JT153-155)	Affirmed
IN RE J.H. No. 23-402	Perquimans (19JT12)	Reversed
IN RE J.K. No. 23-265	Edgecombe (22JA19) (22JA20) (22JA21) (22JA22)	Affirmed.

IN RE K.R.C. No. 23-587	Alamance (21JT101)	Affirmed
IN RE L.A.R. No. 23-428	New Hanover (17JT139)	Affirmed
IN RE L.A.S. No. 23-574	McDowell (21JT88)	Affirmed
IN RE M.E.W. No. 23-21	Guilford (20JB697)	Affirmed in Part; Remanded in Part
IN RE N.T. No. 23-456	Durham (18J130) (18J132) (18J133)	Affirmed
IN RE R-M.M.A. No. 23-276	Yancey (21JT2)	Affirmed
IN RE S.O.R. No. 23-422	Yancey (19JT31)	Affirmed
IN RE S.Z.H. No. 23-536	Alamance (21JT146) (21JT147) (21JT148) (21JT149)	Affirmed
IN RE T.L.A. No. 23-506	Randolph (21JT69)	Affirmed
IN RE Z.J. No. 22-835	Mecklenburg (18JT199)	Affirmed
IN RE Z.Y. No. 23-522	Alexander (21JA43)	Vacated and Remanded
LITTLE v. CLAY No. 23-213	New Hanover (22CVS353)	Remanded
LOPEZ v. PRUDENTIAL INS. CO. OF AM. No. 23-427	Gaston (20CVS1700)	Affirmed
MATTHEWS v. HERRING No. 22-1026	Johnston (19SP654)	Affirmed
NELSON v. GOODYEAR TIRE & RUBBER, CO. No. 23-595	N.C. Industrial Commission (18-053490)	Affirmed

PARKER v. McCOY No. 23-341	Guilford (20CVD3674)	Vacated and Remanded
PORTER v. ALLIANCE CREDIT COUNSELING No. 23-363	N.C. Industrial Commission (16-053823)	Affirmed
RIFFLE v. EST. OF MORGAN No. 23-560	Mecklenburg (21CVS3868)	Dismissed
ROBERTSON v. ZAXBY'S OF KNIGHTDALE No. 23-513	Wake (22CVS129)	Affirmed
SIMMONS v. SIMMONS No. 22-855	Pitt (19CVD2825)	Reversed in part; vacated in part
STATE v. BERRYMAN No. 23-225	Graham (21CRS285) (21CRS288) (21CRS299)	Affirmed in part and remanded for correction to the judgment.
STATE v. BLUE No. 23-450	Dare (21CRS50682-83) (22CRS30-31)	Affirmed
STATE v. BOWEN No. 23-776	Forsyth (17CRS53913)	Dismissed
STATE v. BURRUS No. 23-85	Beaufort (18CRS51590)	Affirmed
STATE v. C.K.D. No. 23-204	Iredell (19CRS51918) (22R306)	Affirmed
STATE v. DUNCAN No. 22-906	Catawba (19CRS53701-02) (20CRS1227)	Dismissed
STATE v. FREEMAN No. 23-654	Buncombe (21CRS86691-98) (22CRS335860) (22CRS84072) (23CRS54-56)	Reversed in Part and Remanded
STATE v. GARCIA No. 23-110	Mecklenburg (17CRS210128)	No Error
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ADMINISTRATIVE LAW

Animal waste management system permitting—new conditions for general permits—rules under NCAPA—required rulemaking process—In a case involving the permitting process for farmers who use certain animal waste management systems, where the North Carolina Farm Bureau filed petitions in the Office of Administrative Hearings alleging that the Division of Water Resources had unlawfully added three new conditions for general permits, the superior court erred by concluding that the challenged general permit conditions were not rules under the North Carolina Administrative Procedure Act (NCAPA). Because the new conditions were regulations (authoritative rules dealing with details of animal waste management systems) of general applicability (intended to be used for most animal waste management systems), the new conditions were rules under the NCAPA and therefore were invalid because they were not adopted through the NCAPA's rulemaking process. **N.C. Dep't of Env't Quality v. N.C. Farm Bureau Fed'n, Inc., 188.**

Medicaid reimbursements—prepayment review—definition of "clean claim" —federal regulation controls—The decision of the Department of Health and Human Services terminating petitioners' continued participation in North Carolina's Medicaid program was properly upheld by the administrative law judge (ALJ) and, subsequently, the superior court, based on the ALJ's findings and conclusion that petitioners failed to achieve a minimum level of accuracy when submitting "clean claims" during prepayment review. The agency properly applied the definition of "clean claim" (which is undefined in the governing statute) used in the Code of Federal Regulations pertaining to prepayment claims review; there was no merit to petitioners' contention that the agency should have applied the definition that appears in the North Carolina Administrative Code in a section that is solely applicable to local management entities (LMEs) or to services payable from funds administered by an LME, since petitioners are not LMEs and had never submitted claims to or through an LME. **Elite Home Health Care, Inc. v. N.C. Dep't of Health & Hum. Servs., 537.**

State employee retirement—contribution-based cap factor—application—not retroactive—In a contested case filed by a county board of education (petitioner) challenging the validity of the "Cap-Factor Rule" in the Contribution-Based Benefit Cap Act (the Act)—which established a benefit cap for certain state employees while requiring employers to make additional contributions to cap-exempt employees—where the Retirement Systems Division of the Department of the State Treasurer (respondent) refunded petitioner's additional contribution to an employee after the Rule was declared invalid in a different litigation, validly re-adopted the Rule under the requisite rule-making procedures, and then informed petitioner that it would have to pay the additional contribution under the re-adopted Rule, respondent's actions did not constitute an impermissible retroactive application of the Rule. Rather, under the plain language of the Act, the benefit cap applied to all retirements occurring after January 2015, and therefore respondent properly required petitioner to make an additional contribution where the employee at issue had retired in 2017. Further, petitioner's contention that the Act only applied to retirements occurring after the validly-adopted Rule's effective date in 2019 lacked merit. **Harnett Cnty. Bd. of Educ. v. Ret. Sys. Div., 14.**

State employee retirement—contribution-based cap factor—rule-making requirements—substantial compliance—In a contested case filed by a county board of education (petitioner) challenging the validity of the "Cap-Factor Rule" in the Contribution-Based Benefit Cap Act—which established a benefit cap (calculated using a statutory cap factor) on certain members of the Teachers' and

ADMINISTRATIVE LAW—Continued

State Employees' Retirement System (TSERS) while requiring employers to make additional contributions (also calculated using the statutory cap factor) to cap-exempt employees—the superior court properly ruled against petitioner where the Retirement Systems Division of the Department of the State Treasurer (respondent) had substantially complied with the rule-making requirements of the Administrative Procedure Act (APA) in adopting the Rule. Specifically, where the Rule undisputedly had a "substantial economic impact" as defined under the APA, respondent properly prepared a fiscal note identifying the entities subject to the Rule—namely, all public agencies participating in TSERS—and the types of expenditures they would be expected to make. Additionally, respondent was not required to consider the Rule's impact on every individual school system when crafting the Rule—it was sufficient that respondent had acknowledged the greater impact the Rule would have on school systems compared to other state agencies. Finally, respondent adequately considered potential alternatives to the Rule by considering different values for the cap factor. **Harnett Cnty. Bd. of Educ. v. Ret. Sys. Div., 14.**

APPEAL AND ERROR

Abandonment of issues—Rule 28(b)(6)—no argument or legal authority—attorney fees in divorce action—In defendant father's appeal from an order denying his motion to modify his child support and alimony obligations, defendant challenged the trial court's award of attorney fees without citing any legal authority or making any substantive arguments, relying instead upon arguments he laid out in other parts of his appellate brief relating to other issues. Consequently, any argument he had regarding the attorney fees award was deemed abandoned pursuant to Appellate Rule 28(b)(6). **Groseclose v. Groseclose, 409.**

Abandonment of issues—Rule 28(b)(6)—no authority—In an equitable distribution matter, where defendant provided no authority in support of his argument regarding a debt, the argument was deemed abandoned pursuant to Appellate Rule 28(b)(6). **Roberts v. Kyle, 69.**

Interlocutory order—custody action—motion to intervene allowed—substantial right—In a child custody matter, the trial court's interlocutory order allowing a grandparent's motion to intervene affected the natural parents' constitutional right to the care, custody, and control of their child and was therefore immediately appealable as affecting a substantial right. **Linker v. Linker, 343.**

Interlocutory order—denying motion to dismiss for improper venue—substantial right—breach of contract action—enforceability of forum selection clauses—In an action alleging breach of contract, fraud, and other claims arising from a set of contracts plaintiff entered into with defendant companies, defendants were entitled to immediate appeal from an interlocutory order in which the trial court denied defendants' motion to dismiss the action for improper venue under Civil Procedure Rule 12(b)(3). A key issue in the case dealt with the enforceability of forum selection clauses found in the contracts between the parties, and therefore the denial of defendants' Rule 12(b)(3) motion affected a substantial right. **Clapper v. Press Ganey Assocs., LLC, 136.**

Interlocutory order—substantial right test—more than mere assertion required—In an action to enforce a non-compete clause filed by a roofing contractor (plaintiff) against a former employee, the appellate court lacked jurisdiction to review the trial court's interlocutory order denying plaintiff's motion for a preliminary

APPEAL AND ERROR—Continued

injunction where plaintiff failed to include in its statement of the grounds for appellate review any factual support—particular to this case—for its conclusory assertions that the order affected a substantial right, or a specific explanation of how the order would work injury absent appellate review. **Mecklenburg Roofing, Inc. v. Antall, 351.**

Interlocutory order—substantial right—contract dispute—forum for arbitration—In a contract dispute between plaintiff (a North Carolina plumbing company) and defendants (a Tennessee building corporation and a North Carolina property company), the trial court's order requiring the parties to conduct arbitration in North Carolina was immediately appealable as affecting a substantial right. The court's determination that the forum-selection clause in the contract (allowing arbitration to be held in another state) was unenforceable as against public policy deprived defendants of their contractual right to select an arbitration forum, and this right would be lost absent immediate review. **Earnhardt Plumbing, LLC v. Thomas Builders, Inc., 1.**

Interlocutory order—substantial right—denial of motion to dismiss—public official immunity—In plaintiff's negligence action against a school principal and a school employee regarding an injury sustained on the grounds of a public high school, the trial court's order denying the school principal's second motion to dismiss was immediately appealable as affecting a substantial right where the motion asserted the defense of public official immunity. Further, although the principal's first motion to dismiss (based on governmental immunity) had also been denied, she was not estopped from pursuing her second motion because it asserted a different basis for immunity. **Petrillo v. Barnes-Jones, 62.**

Interlocutory order—substantial right—denial of summary judgment—Tort Claims Act—sovereign immunity—In a property-damage case filed against a county board of education under the Tort Claims Act, where a bus driver employed by the board accidentally crashed his bus into plaintiff's vehicle while en route to deliver food to students learning remotely during the Covid-19 pandemic, the Industrial Commission's interlocutory order denying the board's motion for summary judgment based on sovereign immunity was immediately appealable because the order affected a substantial right. **Williams v. Charlotte-Mecklenburg Schs. Bd. of Educ., 126.**

Interlocutory orders—having effect of determining the action—enforcement of federal money judgment—In a case concerning a state court's enforcement of a federal court judgment requiring an individual (defendant) to pay an insurance company (plaintiff) hundreds of millions of dollars, defendant had a right to immediately appeal two orders entered by the state court: one enjoining defendant from encumbering or withdrawing from any entity he owned or controlled without prior authorization, and another requiring defendant to send plaintiff any distributions he was to receive from several LLCs he had an interest in. Although both orders were interlocutory, their purpose was to enforce the underlying federal judgment, which was a final judgment in the case. Furthermore, both interlocutory orders had the effect of determining the action given that, absent immediate appeal, defendant would have to either comply with the potentially invalid orders or be held in contempt for noncompliance in order to appeal. **Universal Life Ins. Co. v. Lindberg, 506.**

Preservation of issues—custody standard—different theory argued on appeal—In a custody dispute, the child's father failed to preserve for appellate review the issue of whether the trial court erred by determining custody based on the best interests

APPEAL AND ERROR—Continued

of the child rather than the substantial change of circumstances standard, where he argued exclusively before the trial court that best interests would determine the outcome. Even assuming the argument was properly preserved, it had no merit because the appealed-from order was an initial custody determination for which best interests was the appropriate standard. **Urvan v. Arnold, 300.**

Preservation of issues—double jeopardy—multiple assault convictions—separate and distinct offenses—In an appeal from various charges arising from a domestic violence incident, the Court of Appeals declined to invoke Appellate Rule 2 to address defendant's unpreserved argument that his multiple assault convictions were based on one continuous assault and therefore violated the constitutional prohibition against double jeopardy. The evidence showed that, throughout the time that defendant attacked his romantic partner in their shared home, there were "interruptions in the momentum" of the attack—where he would pause to do something else, including hitting the victim's mother or momentarily changing location—such that the record supported a finding of several, separate assaults. Thus, defendant failed to show the requisite manifest injustice or merit to justify applying Rule 2 to his appeal. **State v. Tucker, 379.**

ARBITRATION AND MEDIATION

Arbitration agreement—forum selection clause—federal preemption—interstate commerce—findings required—In a contract dispute between plaintiff (a North Carolina plumbing company) and defendants (a Tennessee building corporation and a North Carolina property company) over payment for services rendered, the trial court's order compelling arbitration in North Carolina was vacated and the matter was remanded for further findings of fact regarding whether the contract involved interstate commerce. Without those findings—required to support the court's conclusion that the Federal Arbitration Act (FAA) did not preempt state law and, therefore, that the forum-selection clause in the parties' contract was unenforceable as against public policy—the appellate court could not properly evaluate whether the FAA applied in this instance. **Earnhardt Plumbing, LLC v. Thomas Builders, Inc., 1.**

ASSAULT

Inflicting serious bodily injury—by strangulation—distinct interruption between two assaults—separate convictions upheld—In an appeal from multiple convictions arising from a domestic violence incident, during which defendant attacked his romantic partner in the home that she shared with him and with her mother, defendant's separate convictions for assault inflicting serious bodily injury and assault by strangulation were upheld where the record showed a distinct interruption in the momentum of the attack, which supported a finding of two separate assaults of the victim rather than one continuous assault. Specifically, defendant inflicted serious bodily injury on the victim by head-butting, punching, and then kicking her in the bedroom; then, he left the bedroom to hit the victim's mother, busting her lip, before returning to the bedroom to choke the victim to the point of blackout. **State v. Tucker, 379.**

With deadly weapon inflicting serious injury—knife as deadly weapon per se—manner of use—In defendant's trial for assault with a deadly weapon inflicting serious injury arising from an altercation over macaroni and cheese at a neighborhood cookout—during which the victim sustained numerous stab wounds to her

ASSAULT—Continued

head, face, chest, arm, and hand—the trial court did not err by instructing the jury that the knife used by defendant to attack the victim was a deadly weapon per se. Although the folding knife that was allegedly used in the attack was never found, the trial court's determination that it was a deadly weapon as a matter of law was supported by the circumstances and manner of defendant's use of the weapon, which caused the victim great bodily harm. Further, where the State presented evidence of each element of the offense and there was no conflicting evidence about any element, the trial court was not required to instruct the jury on any lesser-included offenses. **State v. Webster, 392.**

ATTORNEY FEES

Petition for attorney fees—attorney representing administrator of estate—contemporaneously working for decedent's wife—improper alignment of interests—The trial court properly affirmed the clerk of court's order denying a lawyer's petition for attorney fees in an estate action, in which the decedent's cousin had hired the lawyer to represent her in her capacity as administrator of the decedent's estate. At the same time that the lawyer was representing the decedent's cousin, he also filed an application for a year's allowance on behalf of decedent's wife, even though he was aware of a prenuptial agreement barring the wife from receiving any part of the estate. Therefore, although the clerk of court had discretionary authority (under N.C.G.S. § 28A-23-3(d)(1)) to allow an award of attorney fees as a "necessary charge" incurred in the management of the estate, the legal services that the lawyer provided here did not constitute "necessary charges" because he labored under a conflict of interest that improperly aligned the interests of the personal representative of the estate with those of a competing claimant. **In re Est. of Seamon, 547.**

BAIL AND PRETRIAL RELEASE

Bond forfeiture—petition for relief—statutory requirements—extraordinary circumstances not shown—The trial court's order granting a surety's petition for relief from a final judgment of forfeiture was reversed where there was no showing by the surety or evidence in the record that extraordinary circumstances existed to provide the relief requested. After a prior motion to set aside forfeiture was denied and sanctions were imposed because no documentation supported the bail agent's statement that defendant had died, the surety filed its petition two months later with only a photograph of defendant's death certificate attached. Although the surety argued during the hearing that the bail agent was unable to obtain a copy of the death certificate from the out-of-state county clerk where defendant had died and therefore had to locate defendant's family to get a copy, the bail agent did not appear at the hearing and there was no sworn evidence to support the surety's assertions. **State v. Mohammed, 122.**

Kidnapping—connected to domestic violence—no pretrial release hearing—no flagrant constitutional violation—no prejudice shown—After defendant was incarcerated for multiple charges arising from a domestic violence incident, the trial court did not err in denying defendant's motion to dismiss a kidnapping charge even though the State had failed to hold a pretrial release hearing relating to that charge as required under N.C.G.S. § 15A-534.1 (requiring pretrial release hearings for domestic violence crimes). The State's violation of defendant's constitutional rights was not a flagrant violation, since the record suggested that the State's mistake was inadvertent rather than intentional where the State did hold pretrial release hearings for all of defendant's other charges and quickly arranged for a hearing

BAIL AND PRETRIAL RELEASE—Continued

for defendant's kidnapping charge after defendant filed his motion to dismiss. Moreover, defendant failed to show irreparable prejudice to the preparation of his case, where defendant did not post bond for any of his other charges and, therefore, would have remained incarcerated even if the State had complied with the statutory mandate in section 15A-534.1. **State v. Tucker, 379.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Sexual abuse allegations—expert testimony—effective assistance of counsel—no objections lodged—In an abuse and neglect proceeding regarding respondent-father's five children, respondent's counsel was not ineffective for failing to object to testimony by a forensic interviewer regarding her interviews with three of the children or to testimony by a nurse practitioner who conducted child medical evaluations of each child because neither expert's testimony was improper. When asked about one child's credibility, the forensic interviewer declined to state her personal opinion about credibility, and although the nurse practitioner concluded that several children made statements consistent with sexual abuse, she never testified that any of the children had, in fact, been sexually abused. **In re M.M., 571.**

Subject matter jurisdiction—sufficiency of allegations in petition—emotional abuse—In an abuse and neglect proceeding, although the department of social services did not check a box on either its original or supplemental petitions specifically alleging that the children's parents created serious emotional damage to the children, the trial court had subject matter jurisdiction to adjudicate a father's five children emotionally abused where the petitions contained sufficient factual allegations and supporting material regarding the parents' behavior and its effect on the children to put the father on notice that emotional abuse was raised as a ground for adjudication. **In re M.M., 571.**

CHILD CUSTODY AND SUPPORT

Custody—awarded to grandparents—factual findings—evidentiary support—The trial court did not err in awarding custody of plaintiff-mother's minor daughter to the child's paternal grandparents where clear and convincing evidence supported the court's findings of fact, including that: the mother failed to ensure that her child regularly attended school, which caused the child's academic performance to suffer; the conditions of the mother's home were unsafe and unsuitable for the child; the mother once took her daughter to play in the park at night despite the dangers of doing so; and the child had expressed to others that she did not want to be with her mother. Furthermore, these findings supported the court's conclusion that the mother had acted inconsistently with her constitutionally protected status as a parent. **Evans v. Myers, 312.**

Custody—final decision-making authority—effect of parties' inability to communicate—In a custody dispute, the trial court did not err by granting the child's mother (who was the primary custodial parent) final decision-making authority regarding major decisions affecting the parties' child in the event the parties could not reach a mutual decision, where the court's award was supported by findings of fact detailing the parties' past contentious communications and the negative effect that such communications would have on the child. **Urvan v. Arnold, 300.**

Custody—modification—findings of fact—substantial evidence—In a child custody modification matter, the appellate court rejected the mother's numerous

CHILD CUSTODY AND SUPPORT—Continued

challenges to the trial court's findings of fact—including those regarding the mother's disdain and contempt for anyone she perceived to be "against" her, an incident in which her children were "beating on the door and crying" because they wanted to travel with their father, and the mother's erratic behavior and poor decision-making. Having reviewed the record, the appellate court concluded that substantial evidence supported each of the legally relevant and necessary findings of fact that the mother challenged on appeal. **Conroy v. Conroy, 145.**

Custody—modification—substantial change of circumstances—long history of relational problems—effect on children—In a child custody modification matter—where the mother asserted on appeal that she always had poor interpersonal relationships, that her overall behavior toward the father had been erratic and unpredictable for years, and that she has often made disparaging remarks about the father while the children were present—the trial court did not err by determining that a substantial change of circumstances had occurred affecting the welfare of the children. Notwithstanding the long history of the mother's behavior and the parties' poor communication, there was no error in the trial court's finding that those issues were presently having a negative impact on the children that constituted a change of circumstances. Furthermore, the trial court did not abuse its discretion by awarding primary custody of the children to the father. **Conroy v. Conroy, 145.**

Custody—motion to continue—waiver—duration of hearing—In a child custody modification matter, the trial court did not abuse its discretion by denying the mother's motion to continue where the mother fired her attorney the day before the prior-noticed scheduled date of the hearing. By failing to argue at trial that the denial of the motion to continue denied her the constitutional right to parent her children, the mother waived the constitutional argument on appeal. Furthermore, the appellate court rejected the mother's argument that the trial court abused its discretion by limiting each side to two-and-one-half hours to present evidence, as the duration of the hearing was within the trial court's discretion. **Conroy v. Conroy, 145.**

Modification of custody—substantial change in circumstances—previously disclosed events—lack of support—In an action to modify custody, the trial court erred by concluding that a substantial change in circumstances had occurred where it primarily relied on evidence—including that the child's mother had gotten married, had given birth to another child, had gotten honorably discharged from the military, and had moved back to North Carolina—that had been previously disclosed to and considered by the trial court, as shown by facts contained in a prior motion filed by the mother and in the first custody order itself. Without those previously addressed events, the remaining evidence considered by the court—that the child had incurred various injuries, none of which amounted to abuse or neglect according to relevant authorities, and that the father failed to inform the mother that he had tested positive for a viral infection before returning the child to the mother's custody—was insufficient to support modification. **Smith v. Dressler, 197.**

Standing—grandparent—motion to intervene—filed prior to death of party—ongoing case—In a child custody matter between the child's parents, where the child's paternal grandmother filed a motion to intervene after the father filed a motion to modify custody and before the father died, the trial court properly concluded that the grandmother had standing to seek visitation because, although the court did not grant the motion to intervene until after the father's death, the underlying custody action was ongoing at the time the motion was filed. Therefore, the trial court properly denied the mother's motion to dismiss pursuant to Civil Procedure Rule 12(b)(1) (lack of subject matter jurisdiction). **Linker v. Linker, 343.**

CHILD CUSTODY AND SUPPORT—Continued

Subject matter jurisdiction—modification of out-of-state child support order—registration required—In an action to modify the child support provisions of a Virginia order (which contained both child custody and child support provisions), the trial court's order modifying the mother's child support obligation from $0.00 to $777.00 per month was vacated for lack of subject matter jurisdiction because, although the mother registered the Virginia order in North Carolina pursuant to N.C.G.S. § 50A-305 regarding the custody provisions, neither party registered the foreign order in this state pursuant to the Uniform Interstate Family Support Act (UIFSA) (Chapter 52C) for purposes of enforcement or modification of the Virginia Order's child support provisions. **Sinclair v. Sinclair, 435.**

CHILD VISITATION

Parent's visitation—limited to twice a year—required finding—unfitness or best interests of the child—In a child custody matter, where the trial court awarded primary custody of a mother's minor daughter to the paternal grandparents, the court erred by denying the mother her right to reasonable visitation—limiting her to only two visits per year—without entering a finding that the mother was an unfit person to visit the child or that visitation with the mother was not in the child's best interests. **Evans v. Myers, 312.**

CONSPIRACY

Criminal conspiracy—to traffic drugs—evidence of agreement—hotel room rental application—In a drug prosecution of three defendants arising from a search by law enforcement of two apartments (all three defendants were apprehended in one apartment, while both apartments contained illegal substances and drug paraphernalia), the State presented substantial evidence from which a jury could conclude that each defendant agreed to participate in a conspiracy to traffic in opium or heroin and in a conspiracy to traffic in cocaine. In addition to the illegal substances found in both apartments, there was sufficient evidence of other incriminating circumstances to prove defendants' constructive possession of the drugs in the unoccupied apartment, and, in the apartment where defendants were found, there was a key and a rental agreement for the other apartment; the rental agreement was signed by one of the defendants and dated the same day the search warrants were executed. **State v. Clawson, 234.**

To commit trafficking in methamphetamine—sufficiency of the evidence—The trial court properly denied defendant's motion to dismiss a charge of conspiracy to commit trafficking in methamphetamine where the State presented sufficient evidence to submit the charge to the jury. According to the evidence, law enforcement saw defendant repeatedly enter and leave a motel room along with three other individuals, each of whom were later found with methamphetamine in their possession; one of the three individuals was a known drug dealer who was seen taking a large box out of a car that was parked outside the motel and bringing the box to the motel room; law enforcement found defendant driving the car where the drug dealer had retrieved the large box; at the time of his arrest, defendant had thousands of dollars and a set of digital scales in his possession; and, days later, two hidden packages of methamphetamine were retrieved from the car that defendant was driving. **State v. King, 264.**

CONTEMPT

Civil—failure to pay alimony—ability to pay—purge conditions—additional findings needed—In an action between divorced parents, the trial court properly held defendant father in civil contempt for failure to pay alimony, a distributive award to plaintiff mother, and attorney fees, where competent evidence supported the court's conclusion that defendant had the ability to pay each of those court-ordered obligations. Notably, the evidence showed that, despite a pattern of fluctuating income, defendant had maintained a relatively high standard of living, often spending significant amounts of money on alcohol and shopping at high end grocery stores. However, because the court's civil contempt order lacked sufficient findings of fact establishing that defendant had the present ability to satisfy the purge conditions detailed in the order, the case was remanded for additional findings of fact addressing that issue. **Groseclose v. Groseclose, 409.**

CORPORATIONS

Foreign LLC—transacting business—certificate of authority—summary judgment—In a lawsuit alleging breach of contract, the superior court erred by granting summary judgment—on the basis that the out-of-state plaintiff LLC lacked a certificate of authority to transact business in North Carolina and therefore could not maintain any proceeding in a state court (N.C.G.S. § 57D-7-02(a))—in favor of defendant. Section 57D-7-02(a) requires any foreign LLC transacting business in North Carolina to obtain a certificate of authority prior to trial, and it gives the trial judge (not the summary judgment judge, who might not be the same judge who presides over the trial) the authority to determine the foreign LLC's compliance with the statute; therefore, summary judgment was a premature stage to conclude that the non-moving party had failed to satisfy section 57D-7-02(a). Indeed, plaintiff obtained the requisite certificate of authority before the superior court entered its written order granting defendant's motion for summary judgment. **JDG Env't, LLC v. BJ & Assocs., Inc., 46.**

CRIMINAL LAW

Competency to stand trial—memory loss—ability to assist in defense—findings supported by evidence—The trial court did not abuse its discretion by determining that defendant was competent to stand trial for attempted first-degree murder and other charges related to a shooting incident with law enforcement—during which defendant sustained multiple injuries, including a traumatic brain injury—where the trial court's findings that defendant could remember events before and after the shooting incident and that defendant was capable of assisting in his defense were supported by competent evidence, including a report submitted by the forensic psychologist who examined defendant and defendant's implicit concession that he was able to understand the nature of the proceedings against him. **State v. Bethea, 591.**

Cross-examination of defendant—irrelevant and improper impeachment—plain error analysis—In a prosecution for two counts of robbery with a dangerous weapon, the trial court did not commit plain error when it failed to intervene ex mero motu during the State's cross-examination of defendant. The State's questions regarding defendant's use of curse words in his interactions with the court were irrelevant to the case and constituted improper impeachment. However, the court's failure to intervene did not rise to the level of plain error where there was ample evidence that defendant committed the robberies he was charged with, and therefore it was unlikely that the court's error impacted the jury's finding that defendant was guilty. **State v. Hamilton, 368.**

CRIMINAL LAW—Continued

Defenses—voluntary intoxication—jury instructions—sufficiency of evidence—In a prosecution for charges arising from a pharmacy break-in, the trial court did not err by denying defendant's request for a jury instruction on voluntary intoxication. According to the evidence, defendant and an accomplice successfully broke into the pharmacy by prying open and sliding under a roll-up door leading to the stock room, after which they stole items from the pharmacy, ran out the front door through a parking lot into a field across the street, and then attempted to climb over a fence. Although some evidence indicated that defendant was very sleepy during police interviews, had a hard time standing up, and had consumed cocaine over the previous few days, defendant failed to show that he was so intoxicated on the day of the break-in that he could not form the specific intent to commit the charged offenses. **State v. Mitchell, 490.**

Expungement—eligibility—multiple unrelated charges—guilty plea to lesser-included offenses—The district court did not err by denying defendant's petition to expunge multiple unrelated speeding misdemeanors pursuant to N.C.G.S. § 15A-146 where, for each charge, defendant had pleaded guilty to lesser-included offenses. Contrary to defendant's argument on appeal, pleading guilty to a lesser-included offense does not equate to a "dismissal" of the original charge for purposes of the expungement statute; further, because this argument was meritless, the superior court did not abuse its discretion by denying defendant's petition for a writ of certiorari. **State v. Lebedev, 274.**

Joinder—multiple defendants—trafficking and conspiracy charges—lack of conflicting defenses—The trial court did not err by granting the State's motion to join the cases of three defendants, who were each charged with the same drug-related trafficking and conspiracy offenses after law enforcement apprehended them in an apartment in which illegal substances and drug paraphernalia were found. There were no confessions, affirmative defenses such as alibi, or conflicting defenses that would have deprived defendants of a fair trial. **State v. Clawson, 234.**

Jury instruction—insanity—commitment procedure—additional instruction properly denied—In defendant's trial for numerous charges (including murder, rape, and robbery arising from a multi-day crime spree) in which defendant entered a plea of not guilty by reason of insanity, the trial court did not err during its instructions to the jury on insanity and commitment procedures by declining to include an additional instruction requested by defendant, where the trial court used the pattern jury instructions and where there was no merit to defendant's argument that the instructions as given were misleading or incomplete. **State v. Gregory, 617.**

Motion for appropriate relief—newly discovered evidence—mistake by ballistics expert in different trial—After defendant's conviction of first-degree murder, the trial court did not err by denying defendant's motion for appropriate relief, in which defendant asserted the existence of newly discovered evidence showing that the State's ballistics expert had made a mistake in a different trial, that the State had suppressed this evidence, and that defendant was entitled to a new trial as a result. The trial court's determinations that the State did not possess the expert's personnel records from the state crime lab prior to trial and was not aware that the expert may have made a mistake in another case were supported by the record, and no new trial was needed where the types of purported "new evidence" raised by defendant tended merely to question the expert's past but not the State's evidence at trial. **State v. Burnett, 596.**

CRIMINAL LAW—Continued

Motion for mistrial—first-degree murder prosecution—juror knowledge of witness killed during trial—abuse of discretion analysis—In a first-degree murder trial, the trial court did not abuse its discretion by denying defendant's two motions for a mistrial concerning jurors who learned about the murder of one of the State's witnesses during trial. At the time of the hearing on the first motion, which led to one juror being excused for cause, there was no evidence that any other impaneled jurors knew of the witness's death. With regard to the second motion, which defendant filed after another juror belatedly disclosed—after the verdict was reached—that he had inadvertently learned about the death of the witness by seeing a headline on his cell phone, the trial court was in the best position to gauge the juror's truthfulness regarding the lack of impact the knowledge had on his ability to be fair and impartial. **State v. Dixon, 444.**

Motion for new counsel—insufficient basis—blindness—In a prosecution for two counts of robbery with a dangerous weapon, the trial court did not abuse its discretion in denying defendant's motion for new counsel, where the sole basis for defendant's motion was that his counsel was blind. Defendant did not offer a valid reason explaining why his counsel was not "reasonably competent" to present his case, nor did defendant assert that a conflict existed between them that would have rendered his appointed counsel "incompetent or ineffective." **State v. Hamilton, 368.**

Motion to withdraw guilty plea—conditional discharge—treated as motion for appropriate relief—manifest injustice standard applied—The trial court did not err by denying defendant's motion to withdraw his guilty plea (entered in 2005), which defendant filed nearly eighteen years later after he was detained by federal immigration officials on the basis of that guilty plea. Although defendant argued in his motion that since his 2005 charges were dismissed (pursuant to a conditional discharge after successfully completing various conditions), he misunderstood the consequences of his plea and thus had a "fair and just" reason for withdrawal, the trial court correctly categorized defendant's motion as a post-judgment motion for appropriate relief (MAR) and properly applied the standard of whether "manifest injustice" had occurred. The standard had not been met where defendant, an undocumented immigrant, acknowledged at the time of his plea that he was subject to deportation and where he received the benefit of what he had bargained for by having his remaining charges dismissed and receiving the conditional discharge of the felony to which he had pleaded guilty. **State v. Saldana, 674.**

Prosecutor's closing argument—comparison of punishments—objection sustained—curative instruction not requested—In defendant's trial for first-degree murder, where the trial court sustained defendant's objection to the prosecutor's statement during closing argument comparing the punishment for second-degree murder to the punishment for first-degree murder and where defendant did not request a curative instruction, there was no prejudice to defendant given that the objection was sustained and that the court gave the jury a general instruction to disregard material for which an objection had been sustained. **State v. Branche, 214.**

Prosecutor's closing argument—defendant's admission of guilt—no reference on failure to plead guilty—In defendant's trial for first-degree murder, the trial court was not required to intervene ex mero motu during the portion of the prosecutor's closing statement regarding defendant's inability to directly admit to his guilt, in which the prosecutor noted that defendant admitted his guilt only through his counsel. The statement did not constitute an improper comment on defendant's failure to plead guilty, but was part of the State's broader argument that defendant

CRIMINAL LAW—Continued

had the requisite intent for first-degree murder based on premeditation and deliberation. **State v. Branche, 214.**

Prosecutor's closing argument—improper statements—defendant's prior criminal convictions—In a prosecution for trafficking methamphetamine, where defendant's prior convictions for larceny and obtaining property by false pretense were admitted under Evidence Rule 609(a) for the purpose of impeaching defendant's credibility, the trial court did not err by failing to intervene ex mero motu during the prosecutor's closing argument. Although the prosecutor improperly suggested that defendant was more likely to be guilty of the trafficking offense based on her past convictions, this improper statement comprised only a few lines of the eighteen-page transcript of the prosecutor's closing argument. Further, the vast majority of the prosecutor's closing argument permissibly questioned defendant's credibility. **State v. Figueroa, 610.**

Prosecutor's closing argument—murder trial—retaliatory motive—There was no error in defendant's trial for first-degree murder based on premeditation and deliberation where, during the State's closing statement, despite the parties agreeing not to refer to the incident as a gang killing, the prosecutor stated that defendant shot the victim in retaliation for a fatal shooting that took place two weeks before. The statement did not improperly shift the burden of proof to defendant, and the prosecutor's argument that the two shootings may have been linked was supported by competent evidence and testimony properly admitted at trial. **State v. Burnett, 596.**

Prosecutor's closing argument—right against self-incrimination—reference to lack of witnesses—harmless error—In defendant's trial for first-degree murder, although the prosecutor's statement during closing argument pointing out that defendant did not call any witnesses on his behalf was improper because it was an indirect reference to defendant's failure to testify, any error was harmless where the trial court sustained defendant's objection to the prosecutor's direct statement referencing defendant's failure to testify and where defendant's identity as the perpetrator of the shooting was not in doubt given his admission at trial, through counsel, that he killed the victim. **State v. Branche, 214.**

Prosecutor's closing statement—law regarding provocation—curative instruction—In defendant's trial for first-degree murder based on premeditation and deliberation, where, after the prosecutor's request to include a statement in the jury instructions that provocation required more than "mere words" was denied by the trial court, the prosecutor still argued during closing that provocation required more than "mere words," to the extent that the statement was not entirely applicable—because it came from a case that discussed provocation in the context of voluntary manslaughter and not first-degree murder—any misstatement of law was cured by the court's jury instructions explaining what the State had to prove regarding the required state of mind for premeditation and deliberation. **State v. Branche, 214.**

DAMAGES AND REMEDIES

Restitution—fraud and false pretense—evidence of monetary loss—proximate cause—In a case involving forgery, residential mortgage fraud, and obtaining property by false pretenses regarding a home loan application, the trial court did not err in ordering defendant to pay restitution to a credit union in the amount of $25,061.46, where there was sufficient evidence that defendant's wrongdoing—by submitting false documentation in order to obtain a loan and, later, forbearance of

DAMAGES AND REMEDIES—Continued

mortgage payments—was a direct and proximate cause of the credit union's monetary loss in issuing the original loan and granting subsequent forbearance requests. **State v. Hussain, 253.**

Restitution—mortgage fraud case—ability to pay—In a case involving forgery, residential mortgage fraud, and obtaining property by false pretenses regarding a home loan application, the trial court did not err in ordering defendant to pay restitution to a credit union in the amount of $25,061.46, where, despite defendant's argument that the trial court failed to take into consideration defendant's ability to pay, the record reflected that the court was aware of defendant's marital status, childcare obligations, and employment status and that the court extended the length of defendant's probation to allow her more time to pay back the amount of restitution. **State v. Hussain, 253.**

DEEDS

Residential restrictive covenants—enforceability—sufficiency of pleadings—instrument in chain of title—In an action for injunctive relief and monetary damages for alleged violations of restrictive covenants in a residential neighborhood, plaintiff adequately pleaded a claim for relief to survive defendants' motion to dismiss where, although the deed by which plaintiff conveyed one lot in the subdivision to defendants did not reference plaintiff's previously registered Declaration of Covenants, the instrument was in the chain of title for defendants' lot discoverable upon a proper examination of the public records for that subdivision; there was no ambiguity about which subdivision was subject to the Declaration; and plaintiff's Declaration, which was applicable to the eleven (out of sixteen total) lots that plaintiff owned at the time of its registration, was evidence of a general plan and scheme to impose uniform characteristics on the subject lots. **Gouch v. Rotunno, 7.**

DIVORCE

Equitable distribution—classification of property—personal property—evidence—trial court's discretion—In an equitable distribution matter, the trial court did not err by classifying certain personal property as the plaintiff husband's separate property. Although the deceased wife's son (defendant, who was executor of the wife's estate) argued that he relied to his detriment on plaintiff's pre-trial equitable distribution affidavits and discovery responses describing the items as marital property, plaintiff's trial testimony that he had acquired all of the items before the marriage was competent evidence of the items' status as separate property, and any contradictions in the evidence were for the trial court to resolve. In addition, defendant failed to rebut plaintiff's testimony regarding his pre-marital acquisition of the items. **Roberts v. Kyle, 69.**

Equitable distribution—classification of property—subdivision property—marital presumption—rebuttal—In an equitable distribution matter, the trial court did not err by classifying certain real property as plaintiff husband's separate property. Although the deceased wife's son (defendant, who was executor of the wife's estate) argued that Section Two of the subdivision that plaintiff and his cousin had developed together was acquired during marriage through repayment of marital debt and active appreciation, defendant failed to offer evidence to rebut plaintiff's evidence that the subdivision was not purchased or otherwise originally acquired with marital property. Plaintiff's evidence showed that he acquired the property with his separate funds and that he used his separate funds to pay down his portion of

DIVORCE—Continued

the notes secured by the deeds of trust; finally, defendant failed to offer any credible evidence showing the amount or nature of any increase in value of the property during the marriage. **Roberts v. Kyle, 69.**

Modification—child support—alimony—no change in circumstances—calculation of income—additional findings needed—A trial court's order denying defendant father's motion for modification of child support and alimony was affirmed in part where: the court properly determined that defendant's decrease in employment income was insufficient on its own to show a substantial change of circumstances warranting a modification of his support or alimony obligations; competent evidence supported the court's finding that certain "loans" the father received from friends and his girlfriend were actually gifts to be included in the calculation of his actual gross income; and the court did not err in declining to make detailed findings regarding the father's health. However, because the court did not enter sufficient findings explaining precisely how it calculated the father's actual gross income, the case was remanded for additional findings regarding that issue. **Groseclose v. Groseclose, 409.**

DRUGS

Death by distribution—motion to dismiss—sufficiency of evidence—cause of death—proximate cause—The trial court properly denied defendant's motion to dismiss a charge of death by distribution where, when viewed in the light most favorable to the State, the evidence was sufficient to persuade a rational juror to conclude that defendant sold fentanyl to the victim, fentanyl caused the victim's death, and defendant's act proximately caused the victim's death. Although the victim's friend requested that defendant sell them heroin and cocaine, the State presented enough circumstantial evidence suggesting that defendant sold them fentanyl, including the fact that the only drugs found in the victim's toxicology report were cocaine and fentanyl. Further, although the victim's autopsy revealed lethal amounts of both cocaine and fentanyl in her system, there was ample evidence suggesting that the fentanyl killed her, including the tourniquet around her arm and the needles found at the scene of her death. Finally, defendant's argument regarding proximate cause—that the victim's simultaneous consumption of all the drugs he sold her was not reasonably foreseeable—lacked merit. **State v. McCrorey, 650.**

Maintaining a vehicle—for keeping or using controlled substance—sufficiency of the evidence—The trial court properly denied defendant's motion to dismiss a charge of maintaining a vehicle for unlawfully keeping and/or using a controlled substance where sufficient evidence showed that, based on a totality of the circumstances, defendant maintained the car he was driving when law enforcement arrested him (for a different drug crime) for the purpose of keeping controlled substances, including two packages of methamphetamine that were hidden in the car's taillights. Factors supporting the "maintaining" element included: upon arrest, defendant admitted to possessing marijuana located in the center console of the car; a duffel bag belonging to defendant and containing thousands of dollars and a set of digital scales was found inside the trunk of the car; although the two packages of methamphetamine were not discovered until a few days after defendant's arrest, evidence showed that the bags were already hidden inside the car when defendant was driving it; and defendant made a phone call from jail in which he described the hidden location of the packages to another individual and instructed that individual on how to properly extract them from the car. **State v. King, 264.**

DRUGS—Continued

Possession—constructive—driver of vehicle—inference of control—The State presented sufficient evidence in a drug prosecution from which a jury could find that defendant constructively possessed cocaine found in the car that he was driving, even though two other passengers were also in the car. Defendant's status as the driver of a vehicle gave rise to an inference that he had control over the vehicle and, therefore, constructively possessed the drugs that were discovered during a search of the car. **State v. Michael, 659.**

Possession—constructive—other incriminating circumstances—suspicious actions— The State presented substantial evidence in a drug prosecution from which a jury could conclude that defendant constructively possessed marijuana and methamphetamine that law enforcement discovered in the center console of a truck in which defendant had been riding as a passenger. While defendant did not have exclusive possession of the vehicle, other incriminating circumstances supported a finding of constructive possession, including that, when defendant gave consent for a pat down of his person after he exited the vehicle, he reached into his pockets, pulled out his cupped hand, turned and made a throwing motion, and admitted to the officer that he had thrown a marijuana blunt. **State v. Burleson, 83.**

Trafficking by possession—constructive possession—knowingly possess—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss a charge of trafficking in methamphetamine by possession, where the State presented substantial evidence that defendant knowingly, constructively possessed two packages of methamphetamine that were hidden inside the taillights of a car. Specifically, the evidence showed that defendant regularly used that car and was driving it when law enforcement arrested him for a different drug crime; upon searching the vehicle, law enforcement found a duffel bag belonging to defendant and containing thousands of dollars and a set of digital scales; and, in a phone call he made from jail, defendant instructed another individual on where to find the hidden packages of methamphetamine and how to retrieve them. **State v. King, 264.**

Trafficking by transportation—elements—knowingly transporting drugs—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss a charge of trafficking in methamphetamine by transportation, where the State presented substantial evidence that defendant knowingly transported two packages of methamphetamine that were hidden inside the taillights of a car that he was driving when law enforcement arrested him (for a different drug crime). The fact that the packages were not discovered until days after defendant's arrest did not support a finding that he lacked knowledge of their existence. To the contrary, the evidence showed that defendant made a phone call from jail in which he described the hidden location of the packages to another individual and instructed that individual on how to properly extract them from the car. **State v. King, 264.**

Trafficking offenses—possession—constructive—other incriminating circumstances—In a drug trafficking prosecution arising from a search by law enforcement of two apartments, the State presented substantial evidence from which a jury could conclude that two defendants each had constructive possession of the heroin and fentanyl mixture and the cocaine base that were each discovered in both apartments, even though defendants were apprehended in just one of the apartments. Although neither defendant had exclusive possession of the premises in which the substances were found, the State presented other incriminating circumstances of constructive possession, including that each defendant had a large amount of money on their person and that both apartments contained the same illegal substances and similar drug-related items. **State v. Clawson, 234.**

EMINENT DOMAIN

Inverse condemnation—access to main road from property—collapsed driveway—After the gravel driveway connecting plaintiffs' property to the main road collapsed due to a three-day continuous rain event, the trial court properly dismissed plaintiffs' complaint alleging that the Department of Transportation (DOT)—which had performed some work near plaintiffs' driveway after acquiring a right-of-way to convert the main road into a two-lane paved highway—had taken a compensable interest in plaintiffs' property through inverse condemnation. Plaintiffs failed to show that DOT's actions contributed to the driveway's collapse or otherwise denied plaintiffs of their physical and lawful access to the main road. Further, competent evidence supported the trial court's findings and conclusions about the credibility of the parties' respective witnesses, which could not be reweighed on appeal. **Elliott v. Dep't of Transp., 404.**

ENFORCEMENT OF JUDGMENTS

State court action—enforcement of federal money judgment—charging order—Limited Liability Company Act—interest owner—exclusive remedy provision—In a case concerning a state court's enforcement of a federal court judgment requiring an individual (defendant) to pay an insurance company (plaintiff) hundreds of millions of dollars, where the state court entered a charging order requiring defendant to send plaintiff any distributions he was entitled to receive from several LLCs, the court erred by including a significant number of LLCs in the charging order of which defendant was neither a member nor an assignee of an economic interest. Further, the charging order violated the North Carolina Limited Liability Company Act by requiring defendant to produce all governing company documents and compelling the LLCs to freeze distributions to defendant, which went beyond the "exclusive remedy" established under the Act (providing that entry of a charging order is the "exclusive remedy" by which a judgment creditor of an interest owner may satisfy the judgment). **Universal Life Ins. Co. v. Lindberg, 506.**

State court enforcement—federal money judgment—jurisdiction to issue injunction—unsatisfied writ of execution required—In a case concerning a state court's enforcement of a federal court judgment requiring an individual (defendant) to pay an insurance company (plaintiff) hundreds of millions of dollars, the state court lacked jurisdiction to enter an order enjoining defendant from encumbering or withdrawing from any entity he owned or controlled without prior authorization. Although Chapter 1, Article 31 of the General Statutes allows a court to forbid transfers or other dispositions of a judgment debtor's property (under section 1-358) and permits a court to order that a judgment debtor's non-exempt property be applied toward the judgment (under section 1-362), both sections 1-358 and 1-362 required plaintiff to return an unsatisfied writ of execution in order for the court to have had jurisdiction; here, plaintiff returned an unsatisfied writ, but the record showed that plaintiff never attempted to execute it. **Universal Life Ins. Co. v. Lindberg, 506.**

EVIDENCE

Defendant as driver of vehicle—hearsay analysis—personal observation—explanation for subsequent surveillance—There was no error in a drug prosecution by the admission of testimony from detectives regarding their identification of defendant as the driver of a particular vehicle on multiple occasions and their knowledge of previous complaints made about the vehicle. The statements were not hearsay because they were either based on direct knowledge and/or were offered not to

EVIDENCE—Continued

prove the truth of the matter asserted but, rather, to explain the reason why law enforcement subsequently targeted that vehicle for surveillance. **State v. Clawson, 234.**

Expert testimony—drug trafficking case—chemical analysis identifying drugs—methodology unexplained—plain error analysis—In a prosecution for trafficking methamphetamine, where undercover law enforcement officers saw a suspected drug dealer arrive at the location of a drug transaction in a vehicle driven by defendant, the trial court did not commit plain error by admitting expert testimony and a lab report identifying the substance found inside defendant's vehicle as methamphetamine. The expert identified the type of chemical analysis she performed on the substance but did not explain the methodology of that analysis, and the trial court failed in its gatekeeping function of requiring the expert to testify to that methodology. However, this error did not amount to plain error because the expert did identify the tests she performed and the results of those tests; therefore, the expert's testimony did not amount to "baseless speculation" and was not so prejudicial that justice could not have been done. **State v. Figueroa, 610.**

Expert testimony—forensic psychiatrist—scope of cross-examination limited—abuse of discretion analysis—In defendant's trial for numerous charges arising from a multi-day crime spree—in which defendant entered a plea of not guilty by reason of insanity—the trial court did not abuse its discretion by limiting defense counsel's cross-examination of the State's forensic psychiatrist, who had examined defendant multiple times during his pre-trial detention to make determinations regarding defendant's competency to proceed to trial. Although the trial court prevented defense counsel from explicitly referring by name to the pre-trial hearing held pursuant to *Sell v. United States*, 539 U.S. 166 (2003), to determine whether defendant's capacity should be restored via forced medication, or from referring to forced medication in any way, the issue of forced medication was not before the jury, and defense counsel was permitted to question the State's witness regarding her testimony at that hearing and the basis for her differing opinions at different points in time in the case. **State v. Gregory, 617.**

Expert witness—ballistics analysis—reliability—In defendant's trial for first-degree murder, the trial court did not err by allowing the State's ballistics expert to testify regarding a firearm carried by defendant when he was apprehended by law enforcement and its connection to a bullet recovered from the victim's body and a shell casing found at the scene of the shooting. There was no violation of Evidence Rule 702(a) regarding reliability of the expert's analysis methods where the trial court's detailed findings about the expert's methods supported the court's resolution of purported contradictions between competing experts and where the court found that the expert's decision to conduct a microanalysis test rather than measuring lands and grooves—because it was a more definitive test—was a rational discretionary decision based on the state crime lab's guidelines and protocols. **State v. Burnett, 596.**

Other crimes, wrongs, or acts—murder trial—removal of electronic monitoring device two weeks prior to shooting—In defendant's trial for first-degree murder based on premeditation and deliberation, in which the State introduced evidence that the victim was shot in retaliation for a fatal shooting that occurred two weeks before, the trial court did not err by allowing the State to introduce evidence that defendant had disabled his electronic monitoring device approximately one hour after the prior fatal shooting. The evidence did not violate Evidence Rule 404(b) because defendant's actions were close enough in time and proximity to the incident

EVIDENCE—Continued

giving rise to the charge and were part of a chain of events that provided context for the murder. **State v. Burnett, 596.**

Other crimes, wrongs, or acts—previous drug sales—intent, identity, and common scheme or plan—danger of unfair prejudice—In a prosecution for death by distribution, where evidence showed that defendant sold drugs to the victim's friend (to be split between the victim and her friend) and that the victim died after consuming those drugs, the trial court neither abused its discretion nor committed prejudicial error when it allowed the friend to testify about previous transactions in which defendant sold drugs to her and to the victim. This testimony was admissible under Evidence Rule 404(b), since it demonstrated not only the common scheme or plan behind defendant's drug sales but also defendant's intent during the transaction at issue in the case. Additionally, the friend's statement that she put individuals in contact with defendant for the purpose of buying drugs from him tended to confirm defendant's identity. Furthermore, given the copious amounts of other evidence showing that defendant sold drugs to the victim and her friend, it could not be said that the probative value of the friend's testimony was outweighed by a danger of unfair prejudice under Rule 403. **State v. McCrorey, 650.**

Photographs—burial site and condition of victim's body—first-degree murder—plain error analysis—There was no plain error in defendant's trial for first-degree murder by the introduction of over 150 photographs of the area where the victim's body was found and of the victim's remains because the photos were not overly duplicative or irrelevant; they were used to illustrate the State's theories of the case and witness testimony, including how the investigation to find the victim's body unfolded; they did not depict gory or gruesome material; and there was no suggestion that the photos were displayed in a prejudicial manner. **State v. Branche, 214.**

Testimonial evidence—Confrontation Clause—hearsay—exceptions—phone records—statutory rape case—Defendant was entitled to a new trial on charges of statutory rape of a child and related sexual offenses arising from his interactions with a thirteen-year-old girl, where the trial court erroneously admitted into evidence defendant's cell phone records along with a derivative record showing communications between his phone and the girl's phone. The records' admission violated defendant's rights under the Confrontation Clause of the Sixth Amendment, since the records constituted direct testimonial evidence and defendant was not given any prior or in-court opportunity to confront the records' source or assertions. Although the court properly determined that the records were inadmissible under the business records exception to the hearsay rule—because the State failed to authenticate defendant's phone records, and the derivative record was expressly made for litigation purposes rather than in the regular course of the phone company's business—the court erred in admitting the records under the "catch-all" exception to the hearsay rule. Further, because the records were the only evidence that corroborated the girl's testimony at trial, the State failed to show that the court's error was harmless beyond a reasonable doubt. **State v. Lester, 480.**

FALSE PRETENSE

Obtaining property by false pretenses—home loan—elements—actual deception—In defendant's trial for forgery, residential mortgage fraud, and related offenses regarding a home loan application and subsequent mortgage modification requests, the State presented substantial evidence of each element of the offense of obtaining property by false pretenses to send the charge to the jury, including

FALSE PRETENSE—Continued

that the credit union was actually deceived by altered paystubs and a child support order which defendant submitted—first, to illustrate her income for a loan and, later, to show loss of income to receive forbearance of her mortgage payments. There was no merit to defendant's argument that, because the credit union had flagged the documents as suspicious, it was not actually deceived, since defendant's loan was contingent upon verification of her income, and the loan was granted only after the credit union received the flawed and altered documentation. **State v. Hussain, 253.**

FIREARMS AND OTHER WEAPONS

Discharging firearm into occupied vehicle while in operation—jury instructions—definition of "in operation" not required—In defendant's prosecution for discharging a firearm into an occupied vehicle while in operation pursuant to N.C.G.S. § 14-34.1, where defendant did not object to the jury instructions as given, the trial court did not commit plain error by failing to define the phrase "in operation," which is not defined in the statute, because those words were of common usage and meaning to the general public. **State v. Shumate, 684.**

Discharging firearm into occupied vehicle while in operation—jury instructions—lesser-included offense not required—In defendant's prosecution for discharging a firearm into an occupied vehicle while in operation, the trial court did not commit plain error by failing to instruct the jury on the lesser-included offense of discharging a firearm into an occupied vehicle. The evidence supported each element of the greater offense, including that the vehicle was "in operation" where, after three persons took a puppy from defendant's property and began to drive away, although the driver had to stop the vehicle to prevent it from going off a ledge, the engine was still running and an occupant was still in the driver's seat when defendant fired a gun into the vehicle. **State v. Shumate, 684.**

Discharging firearm into occupied vehicle while in operation—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of discharging a firearm into an occupied vehicle while in operation where the State presented substantial evidence of each essential element of the offense and that defendant was the perpetrator, including that defendant deliberately fired a gun into a vehicle while the engine was still running and an occupant was still in the driver's seat, even though the vehicle was not moving. **State v. Shumate, 684.**

Possession of a firearm by a felon—jury instructions—type of firearm not specified—plain error analysis—In a prosecution for charges arising from a pharmacy break-in, where law enforcement saw defendant drop what looked like a gun while fleeing the scene through the pharmacy parking lot, the trial court did not commit plain error when it instructed the jury on the charge of possession of a firearm by a felon without identifying the specific firearm listed in defendant's indictment: a revolver found in the parking lot. The court properly instructed the jury on the requirement that defendant have actual possession of a firearm in order to be convicted of the crime. Although law enforcement found two other guns (in addition to the revolver) inside a vehicle that was parked outside the pharmacy during the break-in, defendant was never seen near that vehicle; therefore, because defendant could not have had actual possession of the other two guns, the court did not plainly err in failing to single out the revolver in its jury instructions. **State v. Mitchell, 490.**

HOMICIDE

First-degree murder—jury instruction—voluntary intoxication—evidence of premeditation and deliberation—In a prosecution for first-degree murder, where defendant was tried for the death of his wife, the trial court did not commit plain error by declining to instruct the jury on voluntary intoxication as an affirmative defense. Although defendant drank multiple beers throughout the twelve hours leading up to the murder, the evidence did not show that he was so completely intoxicated that he could not form a deliberate and premeditated purpose to kill. Notably, the evidence showed that: defendant had been a heavy drinker for years, and therefore had a high tolerance for alcohol; defendant testified that he got drunk after he killed his wife, indicating that he was not already drunk before the murder; defendant's memory of the events leading up to the murder was both clear and detailed; and, at the time of the killing, he was cognizant enough to hide the murder weapon and confess his actions to his daughter before law enforcement arrived. **State v. Rubenstahl, 667.**

First-degree murder—premeditation and deliberation—actions of defendant—sufficiency of evidence—The State presented sufficient evidence of premeditation and deliberation in a first-degree murder prosecution, including that defendant and the victim had been seen arguing but not physically fighting on the afternoon that the victim was killed, which indicated that defendant had not become so impassioned as to lose the ability to reason; that defendant, by using a smaller gun than the one he usually carried to shoot the victim, demonstrated some planning because the smaller gun would have been cleaner and quieter; and that the steps taken by defendant after the killing to dispose of the body and conceal his identity as the perpetrator by lying could be seen as part of a planned strategy. Evidence that the victim made threats to arouse defendant's jealousy could have been viewed by the jury as motivation for the murder rather than provocation, and defendant's description of his state of mind that "something clicked off" in his head—which defendant alleged was exculpatory—was offset by the State's other evidence supporting first-degree murder. **State v. Branche, 214.**

First-degree murder—premeditation and deliberation—jury instruction—lesser-included offense not supported—In a prosecution for first-degree murder, where defendant was tried for the death of his wife, the trial court did not err in declining to instruct the jury on the lesser-included offense of second-degree murder, since the evidence supported only one inference: that defendant specifically intended to kill his wife, acting with both premeditation and deliberation on the day of the murder. The evidence showed that: defendant shot his wife ten times with a single-action revolver, which would have required a great deal of effort (manually cocking the gun before pulling the trigger for each shot, then unloading and reloading it to continue shooting since its cylinder only held six bullets at a time); before the killing, defendant had both threatened and physically abused his wife; and his wife's body did not show any defensive wounds, suggesting that defendant continued to shoot her after she was already rendered helpless. **State v. Rubenstahl, 667.**

First-degree—premeditation and deliberation—identity of defendant as perpetrator—opportunity and means—Where the State presented substantial evidence that defendant had the motive, opportunity, and means to shoot the victim, the trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder based on premeditation and deliberation. Although the evidence was mainly circumstantial, it showed that the shooting was in retaliation for a fatal shooting that occurred two weeks earlier; about thirty minutes prior to this

HOMICIDE—Continued

murder, a person was seen waiting in a car park at the corner where the victim was shot; a bullet recovered from the victim's body and a shell casing found at the scene matched the weapon defendant was carrying when he was apprehended; and defendant made incriminating statements to law enforcement. **State v. Burnett, 596.**

IDENTIFICATION OF DEFENDANTS

First-degree murder—witness testimony—evidentiary impossibility—sufficiency of evidence—In a prosecution for first-degree murder and other charges arising from an incident in which a hooded gunman entered a house and shot multiple people, killing two, the trial court properly denied defendant's motion to dismiss where the State presented sufficient evidence to allow a jury to conclude that the sole witness who identified defendant as the shooter was physically located where she could make that identification. Although defendant argued that the identification was an evidentiary impossibility, the testimony was not inherently incredible as being in conflict with physical facts or laws of nature, and any contradictions in the evidence or issues with the witness's credibility were for the jury to resolve. **State v. Wilson, 279.**

IMMUNITY

Public official—school principal—negligence action—injury on school grounds—no malice or corruption alleged—In plaintiff's negligence action brought against a school principal in her individual capacity (defendant) regarding an injury sustained on the grounds of a public high school, the trial court erred by denying defendant's motion to dismiss, in which defendant asserted the defense of public official immunity, since defendant was a public official entitled to the protections of that defense and, further, plaintiff did not include allegations of malice or corruption in her complaint that would have overcome the defense. **Petrillo v. Barnes-Jones, 62.**

Qualified—hospital and licensed professional counselor—medical malpractice case—no allegation of gross negligence—In a medical malpractice case filed by plaintiff, the wife of a nursing student who committed suicide days after being treated at defendant hospital's emergency room and undergoing a psychiatric evaluation performed by defendant professional counselor, the trial court properly granted defendants' motion for summary judgment based on immunity under N.C.G.S. § 122C-210.1 (providing qualified immunity to health care providers from liability for actions arising out of their care for individuals with mental health issues, substance abuse issues, or developmental disabilities). Plaintiff's argument that the statute only provides immunity for claims other than medical malpractice claims was meritless, as it was based on inapposite case law. Furthermore, plaintiff failed to include in her complaint an allegation of gross negligence, which was required in order to overcome defendants' statutory immunity. **Kirkman v. Rowan Reg'l Med. Ctr., Inc., 178.**

Sovereign—waiver—Tort Claims Act—school bus accident—emergency management exception—applicability—In a property-damage case filed against a county board of education under the Tort Claims Act (TCA), where a bus driver employed by the board accidentally crashed his bus into plaintiff's vehicle while en route to deliver food to students learning remotely during the Covid-19 pandemic, the Industrial Commission properly denied the board's motion for summary judgment based on sovereign immunity. Importantly, under the TCA, the State waives

IMMUNITY—Continued

sovereign immunity for claims resulting from the alleged negligence "of the driver" of a "school bus," but under the North Carolina Emergency Management Act (EMA), neither the State nor any of its agencies may be sued concerning accidents involving "school buses" used for "emergency-management activity." Here, although it was undisputed that the crash occurred during a state of emergency, a genuine issue of material fact existed as to whether the bus involved in the crash was a "school bus" such that the EMA would apply to the bus driver's conduct in this case. **Williams v. Charlotte-Mecklenburg Schs. Bd. of Educ., 126.**

INDICTMENT AND INFORMATION

Indictment—misdemeanor larceny—fatal variance—essential and material allegations—Defendant was not entitled to dismissal of a misdemeanor larceny charge where there was no fatal variance between the indictment, which alleged that defendant took two sewing machines from a retail store, and the evidence presented, which established that defendant took only one sewing machine. The indictment adequately alleged each essential element of the offense, and the number and type of retail items allegedly taken constituted surplusage that was neither essential nor material to the charge. **State v. Hill, 633.**

JUDGES

Motion to recuse—first-degree murder trial—hearing on motion for mistrial—In a first-degree murder trial, the trial judge did not err by refusing to recuse himself from hearing defendant's motion for mistrial concerning a juror who failed to report that he had learned about the murder of a State's witness during trial. Defendant failed to show that the trial judge was a witness for or against one of the parties in the case and there was no indication that the judge exhibited such a bias or prejudice as to be unable to rule impartially. **State v. Dixon, 444.**

JURISDICTION

Trial court—Rule 60(b) motion for relief—from lifetime satellite-based monitoring—appeal already perfected—exception to general rule—The trial court's order denying a criminal defendant's motion filed pursuant to Civil Procedure Rule 60(b)(6), which sought relief from the court's prior order imposing lifetime satellite-based monitoring (SBM) upon defendant, was reversed and the matter remanded because the court incorrectly concluded that it lacked jurisdiction over defendant's motion. As a general matter, a perfected appeal divests a trial court of jurisdiction over the matter appealed from, and defendant's pending appeal from the SBM order had already been perfected before the court heard defendant's Rule 60(b) motion. However, under an exception to the general rule, the court still had jurisdiction to consider the motion for the limited purpose of indicating how it would be inclined to rule on it were the appeal not pending. The court's exercise of jurisdiction would have been especially fitting considering defendant's novel contention that the General Assembly's revision of the SBM laws weeks after he was ordered to submit to lifetime SBM necessitated extraordinary relief. **State v. Harvey, 473.**

JURY

Selection—Batson challenge—third step of inquiry—insufficient findings—In defendant's first-degree murder trial, the trial court erred by overruling defendant's

JURY—Continued

Batson challenge—regarding the State's exercise of peremptory challenges to excuse two African-American female prospective jurors—without meeting the procedural requirements of *State v. Hobbs*, 374 N.C. 345 (2020). Where the trial court's determination that defendant had not established a prima facie case of racial discrimination during jury selection was made only after hearing the State's race-neutral reasons for its challenges, the court, by effectively engaging in steps two and three of the *Batson* inquiry, was required to make findings of fact explaining how it weighed various factors regarding purposeful discrimination, including a comparative juror analysis between those who were excused and those alleged to have been similarly situated. The matter was remanded for the trial court to conduct a full analysis of defendant's arguments that the State engaged in purposeful discrimination. **State v. Wilson, 279.**

Selection—Batson challenge—third step—clear error analysis—In a first-degree murder trial, the trial court did not clearly err by denying defendant's *Batson* challenge to the State's use of a peremptory strike against an African American potential juror—the only one of two in the jury pool to be peremptorily struck after others were excused for cause—where the trial court accepted the State's race-neutral reason that the potential juror had expressed reservations about the death penalty, and where there was no evidence of racially discriminatory intent. **State v. Dixon, 444.**

Selection—challenge for cause—failure to preserve issue on appeal—use of peremptory strikes—In a prosecution for felony larceny and felony breaking and entering arising from an incident where defendant—an attorney and animal rights activist—stole a baby goat from a family farm as part of an "open rescue," defendant failed to preserve for appellate review his argument that the trial court erred in denying his request to dismiss a juror for cause (based on the juror's alleged bias against animal rights activists). To preserve his argument, defendant needed to have exhausted all of his peremptory strikes and then attempted to exercise an additional peremptory strike on another juror after this exhaustion. Instead, after the court denied defendant's request to remove the juror for cause, defendant used his last available peremptory strike on that juror and did not attempt to exercise any other peremptory strikes afterward. **State v. Hsiung, 104.**

JUVENILES

Delinquency—disposition—statutory factors—insufficient findings—In a juvenile delinquency matter in which a minor admitted to simple affray and unauthorized use of a motor vehicle, the trial court's disposition order was vacated for failure to make written findings addressing each of the five factors in N.C.G.S. § 7B-2501(c). The deficiency of the findings were not overcome by the court's incorporation of the predisposition report, risk assessment, and needs assessment, or by the inclusion of "other findings," which provided details of the juvenile's difficulties with her living situation but did not relate to the offenses or the juvenile's degree of culpability. **In re A.G.J., 322.**

KIDNAPPING

First-degree—distinct from underlying felony—sufficiency of evidence—double jeopardy—domestic violence incident—In a prosecution for multiple convictions arising from a domestic violence incident, during which defendant attacked his romantic partner in the home that she shared with him and with her

KIDNAPPING—Continued

mother, the trial court did not violate the constitutional prohibition against double jeopardy by convicting defendant of both kidnapping and of the underlying assault. The evidence showed that defendant dragged the victim by the hair into the bedroom, ripping her hair out, and then choked her; because the act of dragging her into the bedroom was separate from the act of choking her, and because this and other acts of confining the victim to the bedroom were not necessary to defendant's assault of the victim (he could have assaulted her anywhere in the home), there was sufficient evidence to support separate convictions for kidnapping and assault. **State v. Tucker, 379.**

LARCENY

Common law—jury instructions—elements—stolen property—value—In a prosecution for felony larceny and felony breaking and entering arising from an incident where defendant—an attorney and animal rights activist—stole a baby goat from a family farm as part of an "open rescue," the trial court did not commit plain error by denying defendant's request for a special jury instruction stating that, to find defendant guilty of larceny, the jury needed to find that the stolen goat had value. Despite older case law stating otherwise, the Supreme Court's more recent (and, therefore, binding) precedent states that the essential elements of common law larceny do not include a requirement that the stolen property have some monetary value. **State v. Hsiung, 104.**

Felony larceny from a merchant by product code fraud—essential elements—creation of code—mere transfer of price tag insufficient—Defendant's conviction for felony larceny by product code fraud was vacated where the State did not present substantial evidence of each essential element of the offense as defined in N.C.G.S. § 14-72.11. In particular, there was no evidence that defendant "created" a product code for the purpose of obtaining an item for less than its actual sale price, where, although defendant removed a sticker with a $7.98 product code from one item in the store and placed it on another item that actually cost $227.00 (itself punishable as a misdemeanor under a separate statute), the plain meaning of the word "created" would have required that defendant brought into existence a new code rather than merely transfer an existing one from one product to another. **State v. Hill, 633.**

MORTGAGES AND DEEDS OF TRUST

Foreclosure—power of sale—alleged violations of Chapter 45—applicability of Civil Procedure Rules—Where grantors, who had defaulted on a loan, attempted to challenge the foreclosure sale by seeking relief pursuant to Civil Procedure Rule 60(b)—arguing that there were violations of N.C.G.S. §§ 45-10 and 45-21.16(c)—the trial court did not err by denying the motion. Because the General Assembly made Chapter 45 of the General Statutes to be the comprehensive and exclusive statutory framework governing non-judicial foreclosures by power of sale, and because the Rules of Civil Procedure were not specifically engrafted into the statutory sections at issue, Rule 60 relief was not available to grantors. **In re Foreclosure of Simmons, 30.**

NEGLIGENCE

Professional negligence—engineering—summary judgment—standard of care—expert testimony—In a professional negligence action filed against an

NEGLIGENCE—Continued

engineering business (defendant) that performed civil engineering services on land that a corporation (plaintiff) was in the process of purchasing, where plaintiff discovered that the water flow on the property did not meet the minimum requirements for fire suppression despite defendant's statements to the contrary, the trial court did not err in granting defendant's motion for summary judgment and dismissing plaintiff's claims for negligence and negligent misrepresentation. Plaintiff failed to meet its burden of establishing the standard of care applicable to engineers, since none of plaintiff's expert witnesses were able to testify as to what that standard was and whether defendant breached it. Consequently, plaintiff failed to show that a genuine issue of material fact existed at the summary judgment phase. **Cranes Creek, LLC v. Neal Smith Eng'g, Inc., 532.**

OBSTRUCTION OF JUSTICE

Altering court documents—lack of evidence—conviction vacated—In a case involving forgery, residential mortgage fraud, and related offenses regarding a home loan application, the trial court erred by denying defendant's motion to dismiss the charge of altering court documents where, as the State conceded, no evidence was presented that defendant altered an official court document, as required by N.C.G.S. § 14-221.2, since the Florida child support order that she had submitted with her loan application as documentation of her income was a copy that she had altered, while the official order remained unaltered. The conviction was vacated and, where the offense had been consolidated with other convictions and defendant did not receive the lowest possible sentence in the presumptive range, the matter was remanded for resentencing. **State v. Hussain, 253.**

PLEADINGS

Complaint—medical malpractice—motion for leave to amend—to add allegation of gross negligence—undue delay—prejudice—In a medical malpractice case filed by plaintiff, the wife of a nursing student who committed suicide days after being treated at defendant hospital's emergency room and undergoing a psychiatric evaluation performed by defendant professional counselor, the trial court properly denied plaintiff's motion for leave to amend her complaint to add an allegation of gross negligence, which was intended to overcome defendants' assertion of immunity under N.C.G.S. § 122C-210.1 (providing qualified immunity for health care providers from liability for actions arising out of their care for individuals with mental health issues, substance abuse issues, or developmental disabilities). Plaintiff did not seek to amend her complaint until four and a half years after defendants first raised their statutory immunity defense and only three weeks before trial. Further, this undue delay prejudiced defendants given that discovery in the matter had concluded at the time plaintiff filed her motion to amend. **Kirkman v. Rowan Reg'l Med. Ctr., Inc., 178.**

PROBATION AND PAROLE

Extended term imposed—based on restitution award—Where the trial court properly imposed a restitution award against defendant after her conviction of forgery, fraud, and obtaining property by false pretenses—based on her submission of false documents to a credit union in order to obtain a home loan and, later, to receive forbearance of mortgage payments—the trial court's imposition of an extended term of probation pursuant to N.C.G.S. § 15A-1343.2(d) was proper. **State v. Hussain, 253.**

PROBATION AND PAROLE—Continued

Extension of probation—after expiration of probationary term—finding of good cause—The trial court erred by extending defendant's probation after his probationary term had expired, where the court failed to make a specific finding of good cause pursuant to N.C.G.S. § 15A-1344(f)(3). The matter was vacated and remanded to the trial court for a determination of whether good cause existed. **State v. Jackson, 116.**

Probation revocation—new criminal offense—sufficiency of evidence—admission to viewing pornography—The trial court did not abuse its discretion by revoking defendant's probation where the State's evidence that defendant had admitted to downloading and viewing child pornography was sufficient to reasonably satisfy the court that defendant had violated a condition of his probation by committing a new offense. Although the court did not specify which new crime defendant had committed, defendant's actions fulfilled the elements of third-degree exploitation of a minor, which was also the underlying crime for which defendant had been placed on probation. **State v. Bowman, 359.**

Probation revocation—notice—allegations of behavior—sufficiency—The trial court had jurisdiction to revoke defendant's probation where the allegations in the probation violation report provided sufficient notice of the probation hearing and its purpose. Although the report did not explicitly allege that defendant had committed a criminal offense, the report's description of defendant's behavior—that defendant admitted to downloading and viewing child pornography even though he was subject to a condition of probation that he not possess pornography—put defendant on notice of possible revocation. **State v. Bowman, 359.**

Special probation—active term—maximum length—statutory deadline—The trial court erred by ordering defendant probationer, who had willfully violated the conditions of his probation, to serve an active term of 45 days as a condition of special probation where the maximum sentence of imprisonment for the convicted offense was 60 days and therefore, pursuant to N.C.G.S. § 15A-1351(a), the maximum period of confinement that could have been imposed as a condition of special probation was 15 days. Furthermore, at the time the active term of 45 days was imposed as a condition of special probation, two years had already passed since defendant's conviction; thus, the 45-day active term also violated N.C.G.S. § 15A-1351(a)'s deadline for confinement other than an activated suspended sentence. **State v. Jackson, 116.**

ROBBERY

With a dangerous weapon—jury instruction—lesser included offense—common law robbery—After defendant and his accomplice robbed a gaming business together, the trial court in defendant's criminal prosecution committed plain error by failing to instruct the jury on the lesser included offense of common law robbery with respect to one of defendant's two counts of robbery with a dangerous weapon, which was based on defendant acting in concert with his accomplice to rob one of the business patrons. Although defendant did demand money from the business manager by pointing a firearm at the manager, which supported a conviction on the first count of robbery with a dangerous weapon, nothing in the record suggested that defendant or his accomplice approached the business patron with a weapon. Therefore, a rational jury could have found defendant guilty of common law robbery on the second count. **State v. Hamilton, 368.**

SEARCH AND SEIZURE

Motion to suppress—erroneous finding and conclusion—plain error analysis—no constitutional violation—In a drug prosecution, there was no plain error in the trial court's denial of defendant's motion to suppress evidence found during a traffic stop where, although the trial court's order contained a factual error (regarding the contents of an anonymous tip about possible drug activity) and an erroneous conclusion of law (that Fourth Amendment scrutiny was not triggered during the stop even though an officer assisted defendant out of the vehicle, at which point no reasonable person would have felt free to leave), those errors did not amount to fundamental error seriously affecting the fairness of the proceedings. Defendant's constitutional rights were not violated during the stop because officers' initial interactions with the vehicle's occupants were consensual, and the occupants were not seized until after officers had reasonable suspicion that illegal drug activity was taking place based on smelling an odor of marijuana coming from the car, seeing marijuana crumbs in plain view, and soliciting an explanation from one of the occupants that he possessed no marijuana but that he "was just making a blunt." **State v. Williams, 497.**

Motion to suppress—vehicle search—lawfulness—conflicting evidence—sufficiency of findings—In a drug prosecution, the trial court properly denied defendant's motion to suppress evidence of drugs found by law enforcement during the search of a vehicle that had been stopped at a license checkpoint and in which defendant had been riding as a passenger. The court's determination that the vehicle search was lawful—based on consent given by the vehicle's driver—was supported by the unchallenged findings of fact, which in turn were supported by competent evidence and resolved the material conflicts in the evidence. **State v. Burleson, 83.**

Traffic stop—extended stop—alternate bases—plain error analysis—There was no plain error in the trial court's denial of defendant's motion to suppress drugs found by law enforcement during a vehicle search, where, although the trial court's order appeared to be based on its conclusion that the officer had reasonable suspicion to search the vehicle—after the initial reason for the stop had been resolved—based on the vehicle occupants' nervous behavior, even if that conclusion was in error, there was also evidence presented at trial from which the trial court could have found as an alternate basis for its ruling that defendant voluntarily consented to a search of the vehicle (based on his responses to the officer's request to search the vehicle that, as a probationer, he could not refuse, and then giving his affirmative consent). **State v. Michael, 659**.

SENTENCING

Double jeopardy—convictions for offense and lesser-included offense—judgment arrested—resentencing not required—Where defendant was convicted of driving while impaired (DWI), felony hit and run, felony serious injury by vehicle, and habitual felon status, the trial court erred by failing to arrest judgment on defendant's conviction for DWI, because it is a lesser-included offense of felony serious injury by vehicle. Accordingly, the appellate court arrested judgment on the DWI conviction; however, the matter did not need to be remanded for resentencing because the trial court had consolidated defendant's convictions for DWI, felony hit and run, and habitual felon status together and sentenced defendant in the presumptive range, then sentenced defendant in the presumptive range for his felony serious injury by vehicle and habitual felon status convictions, and then ordered both sentences to run concurrently. **State v. Harper, 246.**

SENTENCING—Continued

Prior record level—out-of-state conviction—substantial similarity—federal carjacking and common law robbery—In sentencing defendant for numerous convictions arising from a shooting and high-speed chase, the trial court did not err by concluding that the federal offense of carjacking—which defendant stipulated he had been previously convicted of—and the state offense of common law robbery were substantially similar, resulting in defendant being sentenced at a higher prior record level. Although defendant argued that the two offenses bore substantial dissimilarities—in that the federal carjacking statute required that the stolen property be connected to interstate commerce, the federal carjacking statute contained sentencing enhancements, and the state common law robbery offense was broader in scope (applying to any property)—the offenses nonetheless were substantially similar based on holdings in previous cases. **State v. Daniels, 93.**

Restitution—larceny—value of items taken—item left in store included—remand for recalculation—Upon defendant's conviction for misdemeanor larceny, where defendant was ordered to pay an amount of restitution that not only included the value of items he took from a retail store that were never recovered but also the value of a sewing machine that defendant left behind in the store, the matter was remanded for entry of a judgment of restitution based on the damages suffered by the retail store, excluding the value of the item that was recovered. **State v. Hill, 633.**

SEXUAL OFFENDERS

Registration—older federal conviction—substantial similarity test—newer version of statute insufficient—The trial court's order requiring defendant to register as a sexual offender was vacated and the matter was remanded for a new hearing because the State failed to show that defendant's prior conviction in 2003 of a federal offense was substantially similar to a sexually violent offense under North Carolina law. Instead of presenting the trial court with the 2003 version of the federal statute, the State instead presented the 2021 version, and did not provide any evidence that the statute had remained unchanged from 2003 to 2021. **In re Alcantara, 430.**

STATUTES OF LIMITATION AND REPOSE

Action for renewal of judgment—judgment amended—no jurisdiction to amend—limitations period running as of initial judgment—In an action seeking to renew a money judgment, where plaintiffs filed their complaint for renewal over ten years after the judgment was entered but less than ten years after the trial court amended the judgment (to correct the name of a party), the trial court properly granted summary judgment to defendants on the ground that plaintiffs did not file their complaint within the applicable ten-year statute of limitations. The limitations period could not have begun on the date that the amended judgment was entered because the trial court lacked jurisdiction to amend the judgment: (1) under Civil Procedure Rule 59(e), since there was no evidence that plaintiffs filed a motion to amend the initial judgment within the requisite ten-day period; (2) under Civil Procedure Rule 60(b)(1), since there was no evidence that plaintiffs moved to amend the judgment under this rule, and even if they had, a Rule 60(b) amendment would not have affected the finality of the initial judgment; or (3) as a *nunc pro tunc* judgment, where the amended judgment did not include language designating it as *nunc pro tunc* and where the record did not suggest that the initial judgment was never entered to begin with. **Carcano v. JBSS, LLC, 522.**

STATUTES OF LIMITATION AND REPOSE—Continued

Summary judgment granted—individual defendant—did not raise affirmative defense—corporate defendant—appearing pro se and without agent—In an action seeking to renew a money judgment, an order granting summary judgment to defendants—on the ground that plaintiffs failed to file their complaint within the applicable ten-year statute of limitations—was affirmed in part and reversed in part. Although one of the individual defendants did not join in the other defendants' pro se answer to plaintiffs' complaint, in which defendants asserted their statute of limitations argument as an affirmative defense, plaintiffs conceded to having executed a release of their claim of judgment against that individual defendant. Because there was no existing claim against the individual defendant that the court could have renewed, plaintiffs failed to present a genuine issue of material fact as to that defendant, and therefore it did not matter that the defendant had failed to personally raise an affirmative defense to plaintiffs' complaint. Conversely, the court did err in granting summary judgment as to a corporate defendant, since corporations cannot appear pro se and this particular defendant was not represented by an agent in the action. **Carcano v. JBSS, LLC, 522.**

TERMINATION OF PARENTAL RIGHTS

Best interests of the children—consideration of factors—likelihood of adoption—parent-child bond—The trial court did not abuse its discretion by determining that termination of a mother's parental rights was in her children's best interests where it entered sufficient findings addressing the dispositional factors enumerated in N.C.G.S. § 7B-1110(a). Notably, the court found that: the mother's eleven-year-old son had been in a stable placement with a foster family that had already expressed a desire to adopt him and likely would adopt him if the mother's parental rights were terminated; while immediate adoption was unlikely for the mother's twelve-year-old daughter, adoption was still possible given that the child wished to find a family and had shown an ability to bond with her former foster family; the mother and her son had a "bond of friendship" rather than a parent-child bond; and there was no bond at all between the mother and her daughter. **In re K.N., 555.**

Findings of fact—incorporating judicially-noticed facts—corroborated by additional evidence—An order terminating a mother's parental rights in her two children based on abuse, neglect, and failure to make reasonable progress was affirmed where clear, cogent, and convincing evidence supported each of the legally-necessary findings of fact that the mother challenged on appeal. Although many of the court's findings were based upon judicially-noticed facts from prior orders, the court did not rely solely on the evidence from which those facts were made when entering its findings; instead, the court received additional testimony to corroborate the judicially-noticed facts and then made an independent determination regarding the new evidence presented. **In re K.N., 555.**

Grounds for termination—failure to make reasonable progress—findings of fact—evidentiary support—The termination of a mother's parental rights in her daughter was affirmed where clear, cogent, and convincing evidence supported the trial court's findings of fact (including all except one of the findings that were challenged on appeal), which supported a conclusion that the mother willfully left the child in placement outside of the home for more than twelve months without making reasonable progress in correcting the conditions that led to the child's removal. Specifically, the evidence showed that the mother failed to: consistently visit her child, follow the department of social services' (DSS) recommendations for addressing her substance abuse problems, complete parenting classes, maintain stable and

TERMINATION OF PARENTAL RIGHTS—Continued

appropriate housing, and provide verification of income demonstrating her ability to care for the child. Although the mother was repeatedly incarcerated throughout the relevant twelve-month period, she did spend at least five months out of jail during which she could have taken steps to address the issues that led to the child's placement with DSS, but did not. **In re A.N.R., 333.**

Grounds for termination—failure to make reasonable progress—nexus between case plan and conditions that led to removal—The trial court properly terminated a mother's parental rights in her two children for failure to make reasonable progress (N.C.G.S. § 7B-1111(a)(2)), where the record showed a sufficient nexus between the components of the mother's case plan that she failed to comply with and the conditions which led to the children's removal from her home. Specifically, one of the biggest factors leading to the children's removal was the mother's inability to treat or manage her bipolar disorder, which in turn caused her to discipline the children through severe physical abuse, and many of the case plan's objectives (including the ones the mother did not comply with) were geared toward addressing this issue. **In re K.N., 555.**

Grounds for termination—sexually related offense resulting in conception of juvenile—indecent liberties with a child—The trial court did not err in determining that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(11) ("the parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the juvenile") to terminate respondent-father's parental rights to his son where the father had been convicted of taking indecent liberties with a child pursuant to N.C.G.S. § 14-202.1—which is a sexually related offense—for the sexual relations with the mother—who was fifteen years old at the time—which resulted in the conception of the child. **In re N.J.R.C., 174.**

Parental right to counsel—forfeiture—egregious, dilatory, and abusive conduct—causing numerous court-appointed attorneys to withdraw—frivolous lawsuits and appeals—In a termination of parental rights proceeding, the trial court did not err by concluding that both parents had forfeited their statutory right to court-appointed counsel where the trial court found, among other things, that the parents had purposefully attempted to delay their court proceedings by causing numerous court-appointed attorneys to withdraw and filing frivolous lawsuits and appeals. Abundant evidence in the record supported these findings, which in turn supported the trial court's conclusion that the parents' actions amounted to egregious, dilatory, and abusive conduct that totally undermined the purpose of the right to court-appointed counsel by effectively making representation impossible and seeking to prevent a trial from happening. **In re D.T.P., 165.**

Subject matter jurisdiction—allegations in verified pleadings—juveniles "found in" judicial district where petition filed—at time of filing—The trial court had subject matter jurisdiction over a private termination of parental rights action, where petitioner-grandparents alleged in their verified petitions that the children were in their legal custody and resided with them in a different county than the one where the petitions were filed, but that the children "were present" in the same county where the petitions were filed at the time of filing. The grandparents' allegations established the jurisdictional requirement under N.C.G.S. § 7B-1101 that the children be "found in" the same judicial district where the petitions were filed; and, because the allegations came from verified pleadings, they were competent evidence for the prima facie presumption that the trial court rightfully exercised jurisdiction in the case. Conversely, respondent-mother's unverified answers to the petitions did

TERMINATION OF PARENTAL RIGHTS—Continued

not constitute competent evidence rebutting the presumption of rightful jurisdiction. **In re M.A.C., 35.**

VENUE

Motion to dismiss—improper venue—breach of contract—enforceability of forum selection clauses—place of last act—In an action alleging breach of contract, fraud, and other claims arising from a set of contracts plaintiff entered into with defendant companies, including a limited partnership agreement with a forum selection clause identifying Delaware as the venue for any legal disputes arising from the agreement, the trial court erred in denying defendants' motion to dismiss the action for improper venue under Civil Procedure Rule 12(b)(3). Under North Carolina law, the enforceability of a forum selection clause depends on the place where the contract was entered into, which, under the applicable legal test, is defined as the place where the last act "essential to a meeting of minds" was done by either of the parties to the contract. Here, the "last act" was committed in Delaware when the general partners for one of the defendants signed the limited partnership agreement; therefore, the forum selection clause in the agreement was presumptively valid, thereby making North Carolina an improper venue for plaintiff's action. **Clapper v. Press Ganey Assocs., LLC, 136.**

WORKERS' COMPENSATION

Employer-employee relationship—off-duty sheriff's deputy—traffic control for construction company—joint employment doctrine—The Full Commission of the N.C. Industrial Commission erred by determining that plaintiff, employed as a deputy with a county sheriff's office, worked solely for the sheriff's office at the time he was injured while working off duty directing traffic near a highway construction project, because the record showed that plaintiff was simultaneously employed by both the sheriff's office and the construction company conducting the project. First, there was an implied contract between plaintiff and the company, which directly hired and paid plaintiff and which maintained supervisory control over plaintiff's work schedule and duties. Second, the appellate court interpreted the joint employment doctrine as requiring that the service being performed by the employee for each employer must be the same or closely related to the service for the other, and not that the nature of the work of each employer had to be the same or closely related. Since plaintiff was employed by both entities, was under the simultaneous control of both entities, and performed traffic control duty for the company similar to how he performed the same service for the sheriff's office, he was jointly employed by both, and both were liable for his workers' compensation claim. **Lassiter v. Robeson Cnty. Sheriff's Dep't, 579.**

Employer-employee relationship—status at time of injury—off-duty deputy working traffic control—independent contractor factors—The Full Commission of the N.C. Industrial Commission correctly concluded that a sheriff's deputy was not an independent contractor when he was injured while working off duty directing traffic near a highway construction project but was an employee of his sheriff's office, in accordance with the factors contained in *Hayes v. Bd. of Trustees of Elon College*, 224 N.C. 11 (1944). Plaintiff was hired for traffic control by the construction company on the basis of his official status as a law enforcement officer (as required by the company's contract with the state transportation department); he was visibly identifiable as law enforcement based on his gear; his vehicle was

WORKERS' COMPENSATION—Continued

displaying his blue lights; he did not have the independent use of his skill, knowledge, or training as a law enforcement officer and had no ability to freely direct traffic other than to carry out the instructions given to him by a captain from the sheriff's office; he did not choose the times he worked traffic control; and he did not work for a fixed price or lump sum. **Lassiter v. Robeson Cnty. Sheriff's Dep't, 579.**