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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

TYSON BATES AND REGINA BATES, PLAINTIFFS
v.
CHARLOTTE-MECKLENBURG HISTORIC LANDMARKS COMMISSION; DANIEL MORRILL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CONSULTING DIRECTOR OF THE CHARLOTTE-MECKLENBURG HISTORIC LANDMARKS COMMISSION; HAROLD LEONARD NORMAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PROJECTS COMMITTEE; AND JACK THOMSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE CHARLOTTE-MECKLENBURG HISTORIC LANDMARKS COMMISSION, DEFENDANTS

No. COA23-57

Filed 2 January 2024

1. **Appeal and Error—interlocutory order—sovereign immunity defense—motion to dismiss—multiple bases—Rule 12(b)(1) dismissed**

   In an appeal from an interlocutory order regarding plaintiffs' action against a county historic landmarks commission and several of its members over two failed real estate transactions, where the trial court's order allowing in part and denying in part defendants' motion to dismiss plaintiff's suit—in which defendants asserted governmental and public official immunity—cited all three subsections of Civil Procedure Rule 12 relied upon by defendants—12(b)(1), 12(b)(2), and 12(b)(6)—defendants' appeal was dismissed to the extent it was based on 12(b)(1) (which was not immediately appealable as affecting a substantial right) but was allowed to the extent it was based on Rules 12(b)(2) and (6).

2. **Immunity—governmental—real estate transaction—waiver not alleged—not a defense to breach of covenant of good faith and fair dealing**

In an action brought by plaintiffs against a county historic landmarks commission and several of its members over two failed real estate transactions (regarding a former school plaintiffs sought to purchase), the trial court erred by denying defendants' motion to dismiss the claims of negligence in the care of historic property, conversion, and unjust enrichment as to the commission and the individual defendants in their official capacities, because plaintiffs failed to allege that defendants waived their governmental immunity. However, the trial court did not err by denying defendants' motion to dismiss plaintiffs' claim for breach of the covenant of good faith and fair dealing, to which governmental immunity is not a defense, because that claim is contract-based, and immunity cannot be claimed by a government entity that has entered into a valid contract.

3. Immunity—public official—real estate transaction—individual defendants sued in individual capacity—malice or corruption not alleged

In an action brought by plaintiffs against a county historic landmarks commission and several of its members over two failed real estate transactions (regarding a former school plaintiffs sought to purchase), the trial court erred by denying defendants' motion to dismiss the claims of negligence in the care of historic property and unjust enrichment as to the individual defendants in their individual capacities, because plaintiffs failed to allege that defendants acted with malice, corruption, or outside the scope of their official duties, as required to defeat defendants' claim of public official immunity. However, with regard to plaintiff's claim of conversion, which is not an intentional tort, no such allegation was required; therefore, the trial court's order denying the motion to dismiss the claim of conversion against the individual defendants in their individual capacities was affirmed.

4. Appeal and Error—interlocutory appeal—petition for writ of certiorari regarding additional issues—mootness

In an action arising from two failed real estate transactions in which plaintiffs sought to buy a former school from a county historic landmarks commission, where the appellate court addressed several issues in the appeal from an interlocutory order, defendants' petition for certiorari review of two additional issues was dismissed in part as moot—where the appellate court had reversed portions of the trial court's order—and denied in part as to an issue regarding a motion for which no ruling appeared in the record on appeal.

Appeal by defendants from order entered 14 October 2022 by Judge Reggie E. McKnight in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 September 2023.

Ruff Bond Cobb Wade & Bethune, LLP, by Ronald L. Gibson, for defendant-appellants.

Q Byrd Law, by Quintin D. Byrd, for plaintiff-appellees.

THOMPSON, Judge.

In this interlocutory appeal which concerns two failed real estate transactions, defendants contend that the trial court erred in denying their motion to dismiss some of plaintiffs' claims based upon defendants' assertions of governmental and sovereign immunity. As discussed below, in light of controlling precedent and certain deficiencies in plaintiffs' complaint, we agree in part and therefore we reverse the trial court's denial of defendants' motion to dismiss (1) claims for negligence in the care of historic property and unjust enrichment as to all defendants and (2) the claim of conversion as to the entity defendant and the individually named defendants in their official capacities. However, we leave undisturbed the trial court's denial of defendants' motion to dismiss plaintiffs' (3) claim of breach of the covenant of good faith and fair dealing against all defendants and their (4) conversion claim against the individual defendants in their individual capacities.

Defendants have also filed a petition for writ of certiorari in this Court, (5) seeking consideration of additional issues for which there is no right of immediate appeal, which we dismiss as moot in part and deny in part.

I. Factual Background and Procedural History

This case arises from plaintiffs' attempt to purchase from defendants a property located in Huntersville and known as the Torrence-Lytle School. According to plaintiffs' complaint, the property, which is no longer in use as a school and has fallen into disrepair, "is one of the oldest remaining African-American school buildings in Mecklenburg County" and is therefore of historic significance. In November 2007, the property was transferred to defendant Charlotte-Mecklenburg Historic Landmarks Commission (HLC),[1] an entity created by the

1. The individual defendants are the former consulting director, director, and a member of HLC.

City of Charlotte and Mecklenburg County pursuant to N.C. Gen. Stat. § 160D-941 *et seq.*, for the purpose of identifying and preserving historic properties. Plaintiffs attempted to purchase the property from HLC by entering into contracts for purchase[2] in 2016 and again in 2019 but were never able to obtain ownership. As a result of this frustration of their purpose, plaintiffs filed a complaint in the Superior Court, Mecklenburg County on 22 March 2022 which alleged eight claims against defendants[3]: discriminatory real estate practices, breach of the covenant of good faith and fair dealing, breach of contract, negligence in the care of historic property, unfair and deceptive trade practices, conversion, unjust enrichment, and punitive damages.

On 10 June 2022, defendants filed a motion for summary judgment on plaintiffs' breach of contract claim and a motion to dismiss all of plaintiffs' claims pursuant to Rule of Civil Procedure 12(b)(1), (2), and (6), raising governmental immunity on behalf of HLC and the individual defendants in their official capacities, and public official immunity on behalf of the individual defendants in their individual capacities, along with other defenses. After the motions were heard at the 11 July 2022 civil session of the Superior Court, Mecklenburg County, the trial court allowed defendants' motion to dismiss plaintiffs' claims for discriminatory real estate practices, unfair and deceptive trade practices, and punitive damages. The trial court, however, denied the motion to dismiss as to plaintiffs' claims for breach of the covenant of good faith and fair dealing, breach of contract, negligence in the care of historic property, conversion of earnest money deposits, and unjust enrichment. No ruling by the trial court on defendants' motion for summary judgment appears in the record on appeal. Defendants filed their notice of appeal on 2 November 2022.

II. Analysis

Defendants argue that the trial court erred in denying their motion to dismiss plaintiffs' claims for breach of the covenant of good faith and fair dealing, negligence in the care of historic property, conversion, and unjust enrichment based upon defendants' assertion of sovereign immunity defenses: governmental immunity on behalf of HLC and the individual defendants in their official capacities and public official immunity on

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2. Preservation commissions such as HLC are authorized to "exchange or dispose of the property by public or private sale, lease or otherwise, subject to covenants or other legally binding restrictions that will secure appropriate rights of public access and promote the preservation of the property." N.C. Gen. Stat. § 160D-942(3) (2021).

3. The individual defendants were sued in both their official and individual capacities.

behalf of the individual defendants in their individual capacities. As to HLC and the individual defendants in their official capacities, we agree as to plaintiffs' claims for negligence in the care of historic property, conversion, and unjust enrichment, but we conclude that neither governmental nor public official immunity is a defense to a claim of breach of the covenant of good faith and fair dealing. As to the claim of conversion against the individual defendants in their individual capacities, we hold that the trial court properly denied defendants' motion to dismiss, as plaintiffs' complaint was sufficient to survive those defendants' immunity defense at the pleading stage, and accordingly, we reverse the trial court's order as to that portion of that claim. Plaintiffs' petition for writ of certiorari seeking review of other issues is denied in part and dismissed as moot in part.

A. Appellate jurisdiction

[1] The order from which this appeal is taken is interlocutory. *See*, *e.g.*, *Bartley v. City of High Point*, 381 N.C. 287, 293, 873 S.E.2d 525, 532 (2022) ("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." (citation omitted)). "As a general proposition, interlocutory orders are not immediately appealable unless the order in question affects a substantial right." *State ex rel. Stein v. Kinston Charter Academy*, 379 N.C. 560, 571, 866 S.E.2d 647, 655 (2021) (citing N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019)). *See also* N.C. Gen. Stat. § 1-277(a) (2021) (providing that "[a]n appeal may be taken from every judicial order or determination of a judge of a superior . . . court, upon or involving a matter of law or legal inference . . . that affects a substantial right").

Where a defendant asserts a form of sovereign immunity,[4] "such immunity is more than a mere affirmative defense, as it shields a defendant entirely from having to answer for its conduct at all in a civil suit, for damages." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citing *Mitchell v. Forsyth*, 472 U.S. 511,

4. "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," with sovereign immunity applying to claims against the State and governmental immunity applying to claims against counties and cities. *Wray v. City of Greensboro*, 247 N.C. App. 890, 892, 787 S.E.2d 433, 436 (2016) (citations omitted), *affirmed*, 370 N.C. 41, 802 S.E.2d 894 (2017). In turn, "[t]he defense of public official immunity is a 'derivative form' of governmental immunity." *Fullwood v. Barnes*, 250 N.C. App. 31, 38, 792 S.E.2d 545, 550 (2016) (citation omitted).

525 (1985)). For this reason, a trial court's ruling "on grounds of sovereign immunity is immediately appealable, though interlocutory, because it represents a substantial right, as '[t]he entitlement is an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial.' " *Craig*, 363 N.C. at 338, 678 S.E.2d at 354 (quoting *Mitchell*, 472 U.S. at 526).

We are mindful, however, that "[o]rders denying Rule 12(b)(1) motions to dismiss based on sovereign immunity, and therefore public official immunity, 'are not immediately appealable because they neither affect a substantial right nor constitute an adverse ruling as to personal jurisdiction.' " *Green v. Howell*, 274 N.C. App. 158, 164, 851 S.E.2d 673, 668 (2020) (quoting *Can Am South, LLC v. State*, 234 N.C. App. 119, 124, 759 S.E.2d 304, 308 (citation omitted), *disc. review denied*, 367 N.C. 791, 766 S.E.2d 624 (2014)). *See also Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982) (holding, in the context of interlocutory appeals implicating sovereign immunity, that "while [N.C. Gen. Stat. §] 1-277(b)[5] permits the immediate appeal of an order denying a motion made pursuant to Rule 12(b)(2) to dismiss for lack of jurisdiction over the person, that statute does not apply to orders denying motions made pursuant to Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction"). However, the " 'denial of a Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b),' " while "the denial of a 12(b)(6) motion based on the defense of sovereign immunity affects a substantial right and is immediately appealable under section 1-277(a)." *Green*, 274 N.C. App. at 164, 851 S.E.2d at 668 (quoting *Can Am South, LLC*, 234 N.C. App. at 124, 759 S.E.2d at 308) (other citations omitted).

As noted above, defendants' motion to dismiss asserting governmental and public official immunity was made pursuant to Rule of Civil Procedure 12(b)(1), (2), and (6), but although the trial court's order allowing in part and denying in part defendants' motion cites all three subsections of Rule 12 as the basis for the motion, the order does not specifically state the ground or grounds upon which the court ruled. Accordingly, we dismiss defendants' appeal from the trial court's order to the extent it was premised upon Rule 12(b)(1) but allow the appeal to the extent that the trial court's ruling was based upon Rule 12(b)(2) and (6).

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5. "Any interested party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant." N.C. Gen. Stat. § 1-277(b).

B. Standard of review

When reviewing a trial court's ruling on a motion to dismiss, this Court must consider all of the allegations in the complaint as true. *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022). We then consider legal questions, such as the applicability of governmental and public official immunity, de novo. *Wray*, 370 N.C. at 47, 787 S.E.2d at 436.

C. Governmental immunity

[2] HLC and the individual defendants in their official capacities contend that the trial court erred in denying their motion to dismiss the claims for breach of the covenant of good faith and fair dealing, negligence in the care of historic property, conversion, and unjust enrichment because plaintiffs' complaint fails to allege that defendants waived their governmental immunity.[6] We agree in part, but we are not persuaded that governmental immunity is a defense to a claim of breach of the covenant of good faith and fair dealing.

"Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity," *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (citations omitted), and in turn, "a municipal corporation has immunity for acts committed in its governmental capacity." *Evans v. Hous. Auth. of City of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004).

> *In order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity.* Absent such an allegation, the complaint fails to state a cause of action. No particular language is required to allege a waiver of governmental immunity, but the complaint must allege facts that, if taken as true, are sufficient to establish a waiver by the State of governmental immunity.

Fullwood, 250 N.C. App. at 37, 792 S.E.2d at 550 (emphasis added) (citations, quotation marks, and brackets omitted).

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6. Defendants do not contest the trial court's denial of their motion to dismiss the breach of contract claim on the basis of their assertion of sovereign immunity because "[a] State or local government . . . waives that immunity when it enters into a valid contract, to the extent of that contract." *Wray*, 370 N.C. at 47, 802 S.E.2d at 899 (citations omitted). Thus, sovereign immunity is not a defense to a breach of contract claim. *Id.* Accordingly, that claim is not before the Court in this interlocutory appeal and remains pending in the trial court.

Here, the complaint does not allege a waiver of governmental immunity. In their brief to this Court, plaintiffs acknowledge their failure to include such an allegation in their pleading and agree that precedent holds, "[a]bsent an allegation of waiver of immunity, . . . HLC is entitled to governmental immunity" on their claims of negligence in the care of historic property, conversion, and unjust enrichment. But while conceding error by the trial court in denying defendants' motion to dismiss as to the claims for negligence in the care of historic property, conversion, and unjust enrichment, as against HLC and the individual defendants in their official capacities, plaintiffs contend that governmental immunity is not available as a defense to claims of breach of the covenant of good faith and fair dealing because that cause of action arises from a contract, and thus plaintiffs ask that we leave the trial court's ruling as to that claim undisturbed. We find merit in this argument.

The specific question of whether governmental immunity is potentially applicable upon a claim of breach of the covenant of good faith and fair dealing appears to be a matter of first impression in North Carolina. No party cites, and our research has not revealed, any North Carolina appellate decision explicitly addressing this specific issue. However, reasoning from our precedent regarding the implied covenant, breach of contract, and sovereign immunity, we hold that sovereign immunity in its various forms is not a defense to this contract-based claim.

"In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Bicycle Transit Authority v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation and internal quotation marks omitted). Because the covenant of good faith and fair dealing is in effect an unstated term of every contract, where, as here, the underlying factual allegations supporting both causes of action are the same, appellate courts in North Carolina have treated a claim of breach of the implied covenant in a similar manner to a traditional breach of contract claim:

> As a general proposition, where a party's claim for breach of the implied covenant of good faith and fair dealing is based upon the same acts as its claim for breach of contract, we treat the former claim as "part and parcel" of the latter. *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 19, 472 S.E.2d 358, 368 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 173 (1997); *see Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833, 732 S.E.2d 594, 603 ("As the jury determined that

> plaintiff did not breach any of its contracts with defendants, it would be illogical for this Court to conclude that plaintiff somehow breached implied terms of the same contracts."), *disc. review denied*, 366 N.C. 417, 735 S.E.2d 180 (2012).

Cordaro v. Harrington Bank, FSB, 260 N.C. App. 26, 38–39, 817 S.E.2d 247, 256, *disc. review denied*, 371 N.C. 788, 821 S.E.2d 181 (2018). *See also Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 451, 781 S.E.2d 1, 9 (2015). Further, our Supreme Court has recently clarified:

> A plaintiff may rely on the implied covenant [of good faith and fair dealing] when there is a gap in the contract and a defendant behaves in an unexpected manner, thereby frustrating the fruits of the bargain that the asserting party reasonably expected. Stated another way, breach of the implied covenant is a claim available to a plaintiff who could not have contracted around a defendant's allegedly arbitrary or unreasonable behavior.

Value Health Sols., Inc. v. Pharm. Rsch. Assocs., 385 N.C. 250, 268, 891 S.E.2d 100, 115 (2023) (citation omitted).

As noted previously, "[a] State or local government . . . waives [sovereign or governmental] immunity when it enters into a valid contract, *to the extent of that contract*." *Wray*, 370 N.C. at 47, 802 S.E.2d at 899 (citations omitted). Thus, because *every* contract—including those to which a governmental entity is a party—includes as an implied term a covenant of good faith and fair dealing, we hold that the general rule—that sovereign immunity is waived upon the entry by a government entity into a valid contract—encompasses a waiver of immunity against suit for a breach of the implied covenant term just as it does for the explicit terms of the contract.

Accordingly, we reverse the trial court's order denying the motion to dismiss plaintiffs' claims for negligence in the care of historic property, conversion, and unjust enrichment as to HLC and the individual defendants in their official capacities, but affirm the denial of defendants' motion to dismiss plaintiffs' claim for a breach of the covenant of good faith and fair dealing.

D. Public official immunity

[3] The individual defendants in their individual capacities contend that the trial court should have dismissed the remaining claims against them on the basis of public official immunity because plaintiffs failed to allege

malice, corruption, or actions outside defendants' official duties—and facts supporting such allegations—that if true would be sufficient to rebut the applicable presumption of good faith accorded to public officials. Our review of the complaint reveals that the individual defendants are correct, both as to the controlling precedent on this point and the contents of plaintiffs' complaint.

> It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. The rule in such cases is that an official may not be held liable unless it be alleged and proved that his act, or failure to act, was corrupt or malicious . . . , or that he acted outside of and beyond the scope of his duties. . . . As 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, he is protected from liability.

Smith v. State, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (citations and quotation marks omitted). Moreover,

> absent evidence to the contrary, it will always be presumed that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. This presumption places a heavy burden on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence.
>
> *To rebut the presumption and hold a public official liable in his individual capacity, a plaintiff's complaint must allege, and the facts alleged must support a conclusion, that the official's act, or failure to act, was corrupt or malicious, or that the official acted outside of and beyond the scope of his duties.*

Green, 274 N.C. App. at 165–66, 851 S.E.2d at 679 (emphasis added) (citations, quotation marks, and brackets omitted).[7]

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7. "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another. An act is corrupt when it is done with a wrongful design to

Here, plaintiffs' complaint fails to allege that any of the individual defendants acted outside the scope of their duties or acted with malice or corruption, a point they appear to concede given that their entire appellate argument regarding public official immunity is as follows:

> Defendants' argument for the denial of personal liability for the individual defendants should be discarded by this Court as they focus solely on the issue of malice or corruption. This Court has repeatedly held that the normal analysis of whether a public official acted with malice or corruption sufficient to remove qualified immunity is "unnecessary" when they are being sued (1) in their individual capacities and (2) for intentional torts. *Wells v. N.C. Dep't of Corr.*, 152 N.C. App. 307, 320–21, 567 S.E.2d 803, 812–13 (2002); *see also Beck v. City of Durham*, 154 N.C. App. 221, 230, 573 S.E.2d 183, 190 (2002) and *Richmond v. City of Asheville*, 2015 N.C. App. LEXIS 551, at *9, 242 N.C. App. 252, 775 S.E.2d 925 (2015) (unpublished).

We find the cases cited by plaintiffs inapposite as to all but one of their claims against the individual defendants in their individual capacities given that the rules on which plaintiffs rely apply only where *intentional torts* are alleged. In such cases, "[b]ecause malice encompasses intent, . . . if a party alleges an intentional tort claim, the doctrine of qualified immunity does not immunize public officials . . . from suit in their individual capacities." *Hawkins v. State*, 117 N.C. App. 615, 630, 453 S.E.2d 233, 242 (applying the rule in a case where the plaintiff alleges, *inter alia*, intentional infliction of emotional distress), *disc. rev. denied*, 342 N.C. 188, 463 S.E.2d 79 (1995); *see also Wells*, 152 N.C. App. at 320, 567 S.E.2d at 813 (applying the rule in a case where the plaintiff alleges, *inter alia*, intentional infliction of emotional distress) and *Beck*, 154 N.C. App. at 230, 573 S.E.2d at 190 (applying the rule to claims of constructive willful discharge, intentional infliction of emotional distress, tortious interference with contract, and tortious interference with prospective advantage).

As noted above, because a claim for breach of the covenant of good faith and fair dealing is treated in this context as akin to a breach of contract claim, public official immunity, a derivative form of governmental immunity, is not an available defense for the individual defendants in any capacity. Two of the other claims which are the subject of this

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acquire some pecuniary profit or other advantage." *Green*, 274 N.C. App. at 167, 851 S.E.2d at 679–80 (citations and internal quotation marks omitted).

appeal—negligence in the care of historic properties and unjust enrichment—are not intentional torts. One claim, negligence in the care of historic property, specifically concerns the individual defendants' official duties, as demonstrated by the pertinent allegations in the complaint which concern various votes, the review of expert recommendations, and the consideration of cost in stabilizing the historic property in question, and moreover asserts negligence rather than intentional acts by the individual defendants. Further, there is no inferred malice in the tort of unjust enrichment, which the Supreme Court has defined as having

> five elements[:] First, one party must confer a benefit upon the other party[; s]econd, the benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances[; t]hird, the benefit must not be gratuitous[; f]ourth, the benefit must be measurable[; and l]ast, the defendant must have consciously accepted the benefit.

JPMorgan Chase Bank, N.A. v. Browning, 230 N.C. App. 537, 541–42, 750 S.E.2d 555, 559 (2013) (citations and quotation marks omitted).

Because negligence in the care of historic properties and unjust enrichment are not intentional torts, there is no "stand-in" implication of bad intent which could serve to cover for the absence in the complaint of allegations of malice, corruption, or acting outside of the scope of official duties by the individual defendants as to those claims. Accordingly, we reverse the portion of the trial court's order which denied the motion to dismiss plaintiffs' claims for negligence in the care of historic properties and unjust enrichment against the individual defendants.

"Conversion, however, is an intentional tort." *Kawai Am. Corp. v. Univ. of N.C. at Chapel Hill*, 152 N.C. App. 163, 167, 567 S.E.2d 215, 218 (2002) (citations omitted).[8] Thus, under *Hawkins*, there was no need for plaintiffs to allege malice in order to surmount the affirmative defense of public official immunity as to their claim of conversion against the

8. "[T]he tort of conversion is well defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956) (citation and internal quotation marks omitted); s*ee also Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) ("There are, in effect, two essential elements of a conversion claim: ownership in the plaintiff and wrongful possession or conversion by the defendant." (citation omitted)).

individual defendants in their individual capacities. *See Hawkins*, 117 N.C. App. at 630, 453 S.E.2d at 242. The trial court's denial of the motion to dismiss is therefore affirmed as to the claim of conversion against the individual defendants in their individual capacities.[9]

III. Defendants' Petition for Writ of Certiorari

[4] In addition to their interlocutory appeal, defendants seek review by certiorari of two issues which they acknowledge are not immediately appealable: whether the trial court erred in denying defendants' motion for summary judgment on plaintiffs' breach of contract claim and whether the trial court erred in denying defendants' motion to dismiss plaintiffs' claims for breach of the covenant of good faith and fair dealing, negligence in the care of historic property, conversion of two earnest money payments, and unjust enrichment. Defendants contend that these matters should be addressed by this Court now because these issues are interrelated with those raised in their appeal based upon governmental and public official immunity such that immediate review would "serve the expeditious administration of justice," citing *Jessee v. Jessee*, 212 N.C. App. 426, 431, 713 S.E.2d 28, 32–33 (2011), and because defendants believe that they "have meritorious defenses in addition to governmental and public official immunity."

As an initial matter, we cannot review by certiorari, or otherwise, any ruling on defendants' motion for summary judgment on plaintiffs' breach of contract claim because no order resolving that motion appears in the record before this Court.[10] The order entered by the trial court on 14 October 2022 and appealed from as a matter of right is captioned as resolving defendants' motion to dismiss and addresses only that motion, as defendants themselves note in their "Statement of the Organization of the Trial Court." Accordingly, there is simply nothing for this Court to review regarding defendants' motion for summary judgment.

In this decision, we have reversed the trial court's denial of defendants' motion to dismiss plaintiffs' claims for negligence in the care

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9. As discussed in section II-C, plaintiffs' conversion claim against the individual defendants *in their official capacities* is barred by governmental immunity, *see*, *e.g.*, *DeMurry v. N.C. Dep't of Corr.*, 195 N.C. App. 485, 492, 673 S.E.2d 374, 380 (2009), and the portion of the trial court's order to the contrary is reversed.

10. If the trial court did not in fact rule on defendants' summary judgment motion and defendants wished to obtain such a ruling on their motion for summary judgment, they could have filed a motion with the trial court alleging a mistake pursuant to Rule of Civil Procedure 60(b)(1) or a petition with this Court seeking a writ of mandamus pursuant to Rule of Appellate Procedure 22. Defendants did not elect to do either.

of historic property, conversion of two earnest money payments, and unjust enrichment, and thus the petition for writ of certiorari regarding those issues is rendered moot. As for the trial court's denial of defendants' motion to dismiss plaintiffs' claim for breach of the covenant of good faith and fair dealing, defendants do not explain how that matter is "interrelated" with the issues of governmental and public official immunity which are before this Court as a matter of right and instead focus the majority of their petition for writ of certiorari on their "meritorious defenses in addition to governmental and public official immunity." We see no obvious overlap between the immunity issues addressed above and the defenses presented in defendants' certiorari petition, and accordingly, we leave for the trial court an evaluation of their merits.

IV. Conclusion

For the reasons discussed above, we reverse the trial court's order denying defendants' motion to dismiss plaintiffs' claims for negligence in the care of historic property and unjust enrichment against all defendants, and the claim for conversion against HLC and the individual defendants in their official capacities, but we affirm the denial of the motion to dismiss as to the claims for breach of the covenant of good faith and fair dealing against all defendants and for conversion against the individual defendants in their individual capacities. Put simply, plaintiffs' case may proceed on their breach of contract and breach of the covenant of good faith and fair dealing claims against all defendants and on their claim of conversion against the individual defendants in their individual capacities.

Defendant's petition for writ of certiorari is dismissed as moot in part and denied in part.

REVERSED IN PART; AFFIRMED IN PART; DISMISSED IN PART; DENIED IN PART; REMANDED.

Judges HAMPSON and STADING concur.

WILLIAM T. CULPEPPER, III, PETITIONER
v.
N.C. OFFICE OF ADMINISTRATIVE HEARINGS, RESPONDENT

No. COA23-236

Filed 2 January 2024

Public Officers and Employees—position designated exempt—political affiliation discrimination—prima facie case—lack of discriminatory intent

An administrative law judge did not err by granting summary judgment in favor of the Office of Administrative Hearings (OAH) in a contested case in which petitioner, who was employed at OAH as general counsel, challenged the designation of his position as an exempt managerial position by the OAH director (which was allowed after the legislature enacted a special provision). Petitioner failed to establish a prima facie case of political affiliation discrimination pursuant to N.C.G.S. § 126-34.02 where the evidence did not show that the director made the designation with discriminatory intent, primarily since petitioner's arguments about the director's state of mind amounted to mere speculation, but also because the director designated three additional positions as managerial exempt, one of which was held by someone who had a different political affiliation than petitioner.

Appeal by Petitioner from a final decision entered 2 December 2022 by Administrative Law Judge Beecher R. Gray in the Office of Administrative Hearings. Heard in the Court of Appeals 20 September 2023.

Hornthal, Riley, Ellis & Maland, L.L.P., by John D. Leidy, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for respondent-appellee.

WOOD, Judge.

William Culpepper ("Petitioner") alleges the Office of Administrative Hearings ("OAH" or "Respondent") engaged in political affiliation discrimination by designating the position of General Counsel at OAH as exempt from the provisions of the Human Resources Act, a position he

held from 1 January 2015 to 30 June 2022. We hold the trial court did not err by granting summary judgment in Respondent's favor because Petitioner failed to carry his burden of establishing a *prima facie* case of political affiliation discrimination.

I. Factual and Procedural History

Petitioner is a member of the North Carolina State Bar and practiced law in Edenton, North Carolina from 6 September 1973 until 1 January 2006. Petitioner served as an elected Democrat member of the North Carolina House of Representatives from 5 May 1993 until 1 January 2006 and alleges his reputation as a prominent Democrat was widely known and reported in the news during his time in office.

In October 2014, Petitioner applied for the position of General Counsel with the OAH. The Job Class Title for this position was "Attorney II." The description of work provided in the job posting for the position stated the hired employee:

> "performs a full range of legal services in matters affecting the legal responsibilities of OAH[,] . . . provides the delivery of legal services involving legal advice, opinions, research, writing, adjudications, consultations, mediations, and judicial administration[,] . . . act[s] as the agency rule coordinator[,] . . . [and] prepares opinions on North Carolina law for the three divisions [Civil Rights, Rules, and Hearings].

Petitioner was appointed to the position effective 1 January 2015.

On 1 July 2021, Chief Justice Paul Newby of our Supreme Court appointed Donald van der Vaart ("Director van der Vaart") as the Director and Chief Administrative Law Judge of OAH. Petitioner alleges Director van der Vaart is a registered Republican. Petitioner further alleges that, according to OAH's Senior Administrative Law Judge Fred Morrison ("Judge Morrison"), shortly after Director van der Vaart assumed his position at OAH, Director van der Vaart asked Judge Morrison why Petitioner was at OAH.[1] Judge Morrison allegedly replied to Director van der Vaart that he and Petitioner had a long association over the years, Petitioner was no longer involved in politics, was loyal to OAH, and he would be loyal to Director van der Vaart.

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1. Director van der Vaart states in his affidavit he was aware Petitioner had been appointed to serve on the North Carolina Utilities Commission by a former Democrat Governor.

As part of the Current Operations Appropriations Act of 2021 (S.L. 2021-180, S.B. 105) enacted on 18 November 2021, the General Assembly included a provision (the "Special Provision") allowing the Chief Administrative Law Judge to designate five OAH employees as exempt from the Human Resources Act. The Special Provision reads:

> The number of administrative law judges and employees of the Office of Administrative Hearings shall be established by the General Assembly. The Chief Administrative Law Judge and five employees of the Office of Administrative Hearings as designated by the Chief Administrative Law Judge are exempt from provisions of the North Carolina Human Resources Act as provided by [N.C. Gen. Stat. §] 126-5(c1)(27). All other employees of the Office of Administrative Hearings are subject to the North Carolina Human Resources Act.

Current Operations Appropriations Act of 2021, S.L. 2021-180 (S.B. 105).

Petitioner alleges Judge Morrison told him about a purported meeting between Director van der Vaart and Kenan Drum ("Drum") at the Legislative Building prior to the Special Provision becoming public on 15 November 2021. Drum was the Policy Advisor for General Government Appropriations to the Senate President Pro Tempore. Petitioner alleges that, according to Judge Morrison, the meeting was arranged by Ashley Berger Snyder ("Ms. Snyder"), Senator Berger's daughter. Petitioner alleges the appropriations budget for OAH is formulated by the General Government Appropriations Subcommittee of the General Assembly's House and Senate. Petitioner further alleges Judge Morrison was told by Director van der Vaart that Drum had referred to Judge Morrison as an "old time Democrat."

After the Special Provision became public, "much talk and concern" arose among OAH personnel, particularly among the Administrative Law Judges ("ALJ"). According to Judge Morrison, when Director van der Vaart heard about these concerns, he sought to allay the ALJs' fears by proclaiming that the Special Provision was not meant for them. Judge Morrison allegedly told Director van der Vaart one person felt the Special Provision was directed at him. Judge Morrison told Petitioner that he felt that Director van der Vaart was referring to Petitioner, but neither specifically stated Petitioner's name. Director van der Vaart replied to Judge Morrison, "that might be right," or words to that effect. The Petitioner discussed with Judge Morrison his fears regarding the Special Provision adversely affecting his employment.

By letter dated 4 January 2022, Director van der Vaart notified Petitioner he was designating the position of General Counsel as exempt from the State Human Resources Act, pursuant to the authority in the Special Provision. The letter informed Petitioner of the right to appeal the designation pursuant to N.C. Gen. Stat. § 126-5(h) and provided information on commencing a contested case under N.C. Gen. Stat. § 150B-23. On 2 February 2022, Petitioner filed a Petition for a Contested Case Hearing in which he alleged Respondent: (1) designated his position as an exempt managerial position based on Respondent's discrimination against Petitioner due to his political affiliation in violation of N.C. Gen. Stat. § 126-34.02(b) (2022); (2) improperly designated his position as an exempt managerial position as defined by N.C. Gen. Stat. § 126-5(b)(2) (the "Designation Claim"); and (3) violated Petitioner's state and federal constitutional rights by changing the position's designation.

On 10 February 2022, Respondent filed its letter to Petitioner notifying him of his position's designation change. This letter documented the agency action from which Petitioner filed his petition for a contested case hearing. On 11 February 2022, Respondent filed a Partial Motion to Dismiss pursuant to N.C. R. Civ. P. 12(b)(1) and 12(b)(6), arguing that as to Petitioner's political affiliation discrimination claim, he had failed to exhaust his administrative remedies as required by N.C. Gen. Stat. § 126-34.01 (2022) and failed to establish a *prima facie* case of political discrimination.

On 24 February 2022, Petitioner filed an Amended Petition for a Contested Case Hearing, specifying his and Director van der Vaart's political affiliations. On 8 March 2022, Respondent filed a Partial Motion to Dismiss Petitioner's amended petition. On 18 May 2022, ALJ Gray issued an order in which he dismissed Petitioner's constitutional claims for lack of subject matter jurisdiction and deferred judgment on Petitioner's political affiliation discrimination claim and requested additional briefing. On 10 June 2022, ALJ Gray denied Respondent's motion to dismiss Petitioner's political affiliation discrimination claim. Director van der Vaart discharged Petitioner from employment on 30 June 2022.

On 31 August 2022, Respondent filed a motion for summary judgment, supported by affidavits by Director van der Vaart and Judge Morrison, on Petitioner's political affiliation claim. Petitioner filed his own affidavit in response to Respondent's motion for summary judgment on 15 September 2022. After a hearing on 10 November 2022, ALJ Gray issued an order on 2 December 2022 in which he found no genuine dispute exists as to any material fact in Petitioner's designation and political affiliation claims.

ALJ Gray entered summary judgment for Petitioner on his claim that his position was improperly designated as an exempt managerial position, and ordered he be "reinstated to his status as a Career State Employee under [N.C. Gen. Stat.] § 126-1.1 and further that he be awarded back pay and benefits for any pay and benefits he has lost or loses before he is so reinstated." ALJ Gray entered summary judgment in favor of Respondent on Petitioner's political affiliation claim, dismissing it with prejudice.

On 3 January 2023, Petitioner filed written notice of appeal to this Court pursuant to N.C. Gen. Stat. §§ 126-34.02 and 7A-29. On 9 April 2023, upon the parties' cross-Motions for Judicial Review, the superior court vacated ALJ Gray's order granting summary judgment in favor of Petitioner on his Designation Claim, and remanded to ALJ Gray for consideration of whether Director van der Vaart's designation of Petitioner's position as exempt from the Human Resources Act was other than as required by law, including under the state and federal constitutions. *Culpepper v. N.C. Office of Administrative Hearings*, Nos. 22 CVS 110 and 213 (N.C. Super. Ct. Apr. 9, 2023). Petitioner has filed a separate contested case regarding his discharge, which is not at issue here. All other relevant facts are provided as necessary in our analysis.

II. Analysis

The sole issue before this Court is whether ALJ Gray erred in granting summary judgment in favor of Respondent on Petitioner's political affiliation discrimination claim.

Appellate courts review an appeal from a summary judgment de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper when:

> there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

Id. at 573, 669 S.E.2d at 576 (citations omitted).

Under N.C. Gen. Stat. § 126-34.02, a petitioner of a contested case in OAH is entitled to this Court's judicial review of a final decision of

OAH if a State employee alleges discrimination based on political affiliation in the terms and conditions of his employment. N.C. Gen. Stat. § 126-34.02(a), (b)(1); *see* N.C. Gen. Stat. § 7A-29. North Carolina courts "look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." *N.C. Dep't of Correction v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983). Specifically, North Carolina courts have adopted the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Gibson*, 308 N.C. at 136, 301 S.E.2d at 82. This framework requires the claimant to establish a *prima facie* case of discrimination. *Id.* at 137, 301 S.E.2d at 82.

First, a claimant must show:

> (1) the employee worked for a public agency in a non-policymaking position (i.e., a position that does not require a particular political affiliation), (2) the employee had an affiliation with a certain political party, and (3) the employee's political affiliation was the cause behind, or motivating factor for, the adverse employment action.

N.C. Dep't of Pub. Safety v. Ledford, 247 N.C. App. 266, 288, 786 S.E.2d 50, 65 (2016) (brackets and ellipsis omitted). The court in *Ledford* provided further guidance on establishing a *prima facie* case:

> [T]he burden of establishing a *prima facie* case of discrimination is not onerous and may be established in various ways, including a showing of dissimilar treatment of the claimant as compared to other employees. This is because the showing of a *prima facie* case is not equivalent to a finding of discrimination. Rather, it is proof of actions taken by the employer from which a court may infer discriminatory intent or design because experience has proven that in the absence of an explanation, it is more likely than not that the employer's actions were based upon discriminatory considerations.

Id. at 287–88, 786 S.E.2d at 64 (citation, quotation marks, and brackets omitted).

Second, if the claimant establishes a *prima facie* case of political discrimination, "[t]he burden shifts to the employer to articulate some legitimate nondiscriminatory reason for the applicant's rejection." *Gibson*, 308 N.C. at 137, 301 S.E.2d at 82; *see id.* at 293, 786 S.E.2d at 67–68 ("Our case law makes [it] clear that once the employee has satisfied the three elements of his *prima facie* case, the burden shifts to

the employer to articulate some nondiscriminatory reason for taking adverse action against him.").

Third, and finally, "[i]f a legitimate nondiscriminatory reason for rejection has been articulated, the claimant has the opportunity to show that the stated reason for rejection was, in fact, a pretext for discrimination." *Gibson*, 308 N.C. at 137, 301 S.E.2d at 82. "To carry this burden, it is permissible for the employee to rely on evidence offered to establish his *prima facie* case." *Ledford*, 247 N.C. App. at 294, 786 S.E.2d at 68. Nevertheless, "[t]o raise a factual issue regarding pretext, the plaintiff's evidence must go beyond that which was necessary to make a *prima facie* showing by pointing to specific, non-speculative facts which discredit the [employer's] nondiscriminatory motive." *Head v. Adams Farm Living, Inc.*, 242 N.C. App. 546, 558, 775 S.E.2d 904, 912 (2015) (brackets omitted).

Respondent concedes Petitioner has satisfied the first two prongs of establishing a *prima facie* case. Respondent, however, contends Petitioner failed to establish Respondent's alleged discriminatory intent as a matter of law. We agree.

The Human Resources Act and its employment protections apply to all State employees not specifically exempted in N.C. Gen. Stat. § 126-5. Exempt positions are either "exempt managerial" or "exempt policy-making." N.C. Gen. Stat. § 126-5(b)(2)–(3a). Exempt managerial positions are those "delegated with significant managerial or programmatic responsibility that [are] essential to the successful operation of a State department, agency, or division, so that the application of [N.C. Gen. Stat. §] 126-35 (2022)[2] to an employee in the position would cause undue disruption to the operations of the agency, department, institution, or division." N.C. Gen. Stat. § 126-5(b)(2).

The General Assembly amended N.C. Gen. Stat. § 126-5, effective 18 November 2021, to allow the OAH Director to designate five OAH employees as exempt from the Human Resources Act. N.C. Gen. Stat. § 126-5(c1)(27). Director van der Vaart designated Petitioner and three other positions as managerially exempt.

Considering the evidence of Respondent's alleged discriminatory intent chronologically, the first event relevant to Respondent's asserted state of mind occurred shortly after Director van der Vaart assumed his

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2. N.C. Gen. Stat. § 126-35 provides: "No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a).

position as OAH Director and Chief Administrative Law Judge when he asked Judge Morrison why Petitioner was at OAH. There is no explanation in the Record regarding why Director van der Vaart asked Judge Morrison this question. In his affidavit, Petitioner quotes Director van der Vaart's affidavit in which he states he was aware Petitioner had been appointed to serve on the Utilities Commission by a Democrat Governor. However, this "admission" followed his statement asserting he had not considered the political affiliation of any of the individuals whose positions he designated as managerial exempt, although he was aware Petitioner was registered as a Democrat. Director van der Vaart's "admission" is also relevant to Respondent's concession of prong two of Petitioner's *prima facie* case, that Petitioner is affiliated with a certain political party, but it does not explain a discriminatory reason behind him asking Judge Morrison why Petitioner worked at OAH. *Ledford*, 247 N.C. App. at 288, 786 S.E.2d at 65.

According to Petitioner, Judge Morrison apparently interpreted Director van der Vaart's inquiry as displaying concern regarding Petitioner's loyalty because Judge Morrison assured Director van der Vaart that Petitioner was no longer involved in politics and was loyal to OAH. Judge Morisson's response to Director van der Vaart is not evidence of Respondent's discriminatory intent when there is a total absence of context surrounding Director van der Vaart's question to Judge Morrison. To conclude that Director van der Vaart's question held discriminatory intent would require looking beyond his question and speculating about his motive based on Judge Morrison's seeming interpretation of his question.

Petitioner next alleges that before the Special Provision became public, Director van der Vaart had a meeting with Drum at the Legislative Building in which Drum had referred to Judge Morrison as an "old time Democrat." The statement has very little, if any, relevance to discerning Respondent's motivation for designating Petitioner's position as managerial exempt. Director van der Vaart is not the person alleged to have made the statement. Moreover, no connection to Drum's alleged statement and Director van der Vaart's statement is asserted, such as adoption by Director van der Vaart of what Drum said (for example, "I know, right?" or "I agree."). No evidence is shown of any disparaging or discriminatory remark made by Director van der Vaart in response to Drum's purported statement concerning Judge Morrison. Its relevance is limited to Director van der Vaart's knowledge that Judge Morrison is a registered Democrat, but it does not demonstrate any discriminatory intent in designating Petitioner's position as managerial exempt.

We next consider the concern among OAH personnel regarding the Special Provision as well as Director van der Vaart's comment stating, "that might be right." The fact that the Special Provision was a subject of "much talk and concern" among OAH personnel demonstrates, if anything, that it was not clear which positions would be designated managerial exempt. After Judge Morrison stated to Director van der Vaart that there was one person who felt the Special Provision was meant for him, Director van der Vaart responded, "that might be right," or words to that effect, without identifying Petitioner by name, leaving any effort to determine whether Director van der Vaart had targeted Petitioner based on political affiliation merely speculative.

Moreover, even if Petitioner were the person to whom Judge Morrison referred, the conversation could just as easily, and perhaps even more logically, be interpreted to mean the *General Assembly*, rather than Director van der Vaart, had targeted Petitioner with its Special Provision. In his affidavit, Director van der Vaart stated that he "had no conversations with members of the General Assembly about establishing exempt positions at OAH and was therefore surprised to learn of legislators' revisions to [N.C. Gen. Stat.] § 126-5(c1)(27) giving me, as the Director, the authority to designate five additional positions within OAH as exempt from the" Human Resources Act.

The Record does not show whether Plaintiff was the subject of their conversation, and we will not rely upon mere conjecture to reach a conclusion. *Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 505, 451 S.E.2d 650, 658 (1995) (summary judgment properly entered for defendants where plaintiffs could only "rely on mere conjecture and have shown no facts sufficient to support their allegations of a common agreement and objective" of gender discrimination).

In summary, the Record indicates Director van der Vaart only mentioned Petitioner by name once to inquire of Judge Morrison why he was working at OAH, and it is mere conjecture to presume Judge Morrison and Director van der Vaart were speaking of Petitioner when Director van der Vaart commented "that might be right."

Director van der Vaart designated three other positions as managerial exempt: Lamont Goins, the Director of the Civil Rights Division; Ms. Snyder, the Codifier of Rules; and Angeline Hariston, the Human Resources Director. Director van der Vaart designated the Codifier of Rules as exempt, even though he was aware the employee was a registered Republican. Additionally, the Record reveals Director van der Vaart was not aware of the political affiliations of the Director of the

Civil Rights Division or of the Human Resources Director. Therefore, we cannot "infer discriminatory intent or design." *Ledford*, 247 N.C. App. at 288, 786 S.E.2d at 64.

The Record does not provide an explanation for the designation or evidence that amounts to more than mere speculation. We are unpersuaded that it is more likely than not Director van der Vaart designated Petitioner's position as exempt based on political discrimination, especially in the light of the fact that Director van der Vaart designated three other positions as exempt, including at least one of which was occupied by a registered Republican. *Ledford*, 247 N.C. App. at 287–88, 786 S.E.2d at 64. Petitioner has not established a *prima facie* case of discrimination. Accordingly, ALJ Gray did not err in granting summary judgment in Respondent's favor.

We briefly address Petitioner's argument that his position's lack of managerial responsibility demonstrates the pretextual nature of Respondent's explanation for designating it as managerial exempt. Petitioner argues Respondent failed to consider the Division of State Archives' Functional Schedule for North Carolina State Agencies, which states that communications by "agency staff who are involved in decision-making, policy development, or other high-level planning for the agency" shall be archived permanently. Petitioner further argues Respondent failed to consider the definition of "Managerial positions" as is defined in 25 N.C. Admin. Code 1L.0306 (2023):

> Managerial positions are defined as positions which manage established divisions or subdivisions of a department, agency or university. These employees direct the work of one or more supervisors and have the authority to hire, reward, discipline, or discharge employees. These employees may also provide suggestions for changes in policy to senior executives with policy-making authority.

25 N.C. Admin. Code 1L.0306(b) (2023).

First, we note these arguments are more properly aimed at Petitioner's Designation Claim, which is focused on the legality of Respondent's designation. This claim is not before us on appeal. Second, the manner by which the Division of Archives classifies communications lacks any discernable relevance to Respondent's state of mind in designating Petitioner's position as exempt. Third, 25 N.C. Admin. Code 1L.0306(b) is written in the context of Title 25 of our Administrative Code, Subchapter 1L, Section 0.300, titled, "Equal Employment Opportunity Institute" ("EEOI").

The definition of "Managerial positions" in that section answers the question of who must participate in the EEOI, as is required in 25 N.C. ADMIN. CODE 1L.0302 (2023): "Supervisors and managers hired, promoted or appointed on or after July 1, 1991 shall participate in the EEOI." Whether Respondent did or did not consider this part of our State's Administrative Code is not probative of his state of mind in designating Petitioner's position as exempt.

Petitioner's argument asserting Respondent should have designated other positions as managerial exempt concerns the propriety and legality of Respondent's designation, which are not currently before us. The only issue before us is whether Respondent acted with impermissible political motive.

III. Conclusion

The General Assembly vested Director van der Vaart with statutory authority to designate five employees at OAH as exempt. The Record does not establish a *prima facie* case that Director van der Vaart did so with political motivations in Petitioner's position. Therefore, we conclude ALJ Gray did not err in granting summary judgment in Respondent's favor on Petitioner's political affiliation discrimination claim. The judgment appealed from is affirmed.

AFFIRMED.

Judges TYSON and COLLINS concur.

IN RE B.M.T.

[292 N.C. App. 26 (2024)]

IN THE MATTER OF THE ADOPTION OF B.M.T., A MINOR

No. COA22-377-2

Filed 2 January 2024

Adoption—petition to adopt—legitimation of child prior to petition—parent's consent for adoption required

After a mother placed her child up for adoption without the knowledge or consent of the child's biological father (respondent), the trial court properly denied petitioners' petition to adopt the child where, before the petition was filed, respondent and the mother had executed a "voluntary acknowledgement of paternity" in the child's home state of Tennessee. Because the acknowledgement of paternity constituted a legitimation of the child under Tennessee law, respondent's consent to the child's adoption was required under N.C.G.S. § 48-3-601(2)(b)(3).

Judge STADING concurring in result.

On remand from the Supreme Court of North Carolina by Order dated 15 November 2023. Appeal by Petitioners from Order entered 16 September 2021 by Judge Teresa H. Vincent in Guilford County District Court. Originally heard in the Court of Appeals 1 November 2022 with opinion issued 20 December 2022. *Matter of Adoption of B.M.T.*, 287 N.C. App. 95, 882 S.E.2d 145 (2022).

Manning, Fulton, & Skinner, P.A., by Michael S. Harrell, for Petitioners-Appellants.

Lindley Law Firm, PLLC, by Kathryn S. Lindley, for Respondent-Appellee.

HAMPSON, Judge.

Background

Respondent is the biological father of Layla.[1] Petitioners are the prospective adoptive parents of Layla. Without Respondent's knowledge or consent, on 13 June 2019, Layla's biological mother placed Layla with

1. A pseudonym used for the minor child designated in the caption as B.M.T.

Petitioners for the purpose of adoption. On 20 June 2019, Respondent and Mother executed a Voluntary Acknowledgement of Paternity with the State of Tennessee. Subsequently, Respondent's name was added to Layla's birth certificate, and Layla's surname was changed to the surname of Respondent. Petitioners filed a Petition to adopt Layla on 27 June 2019. On 16 September 2021, the trial court entered an Order concluding Respondent's consent to the minor child's adoption is required pursuant to N.C. Gen. Stat. § 48-3-601.

On 20 December 2022, we issued a unanimous opinion affirming the trial court and concluding Respondent's consent to adoption was required before Petitioners could adopt Layla. *Matter of Adoption of B.M.T.*, 287 N.C. App. 95, 882 S.E.2d 145 (2022). We held Respondent's consent was required under N.C. Gen. Stat. § 48-3-601 because we agreed with the trial court's determination that Respondent provided, in accordance with his financial means, reasonable and consistent payments for the support of both Layla's biological mother and Layla to satisfy the requirement of N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) (2021).

On 24 January 2023, Petitioners filed a Petition for Discretionary Review in the Supreme Court of North Carolina. The Supreme Court granted discretionary review on 4 April 2023. On 15 November 2023, the Supreme Court issued an Order stating in full: "Reversed for the reasons stated in *In re C.H.M.*, 371 N.C. 22 (2018), and remanded for consideration of any outstanding issues on appeal."

Analysis

In our prior opinion, we analyzed, applied, and—solely on the facts of this case—ultimately distinguished *In re C.H.M.*, explaining our reasoning, discussing related cases, and how we reached our conclusion in this case. Our Supreme Court, however, provided no explanation for its decision as to why our prior decision should be reversed, thereby leaving a rather significant question mark in this important area of law. Nevertheless, we are bound by the Supreme Court's Order to simply consider any remaining outstanding issues on appeal.

Our faithful consideration of the outstanding issues on appeal here reveals an alternative basis for affirming the trial court's decision. On appeal to this Court, Respondent, in his principal Appellee's Brief, argued the parties' execution of a Voluntary Acknowledgement of Paternity in Tennessee prior to the filing of the North Carolina adoption petition served as a legitimation under Tennessee law. As such, Respondent contends Respondent's consent is required prior to Layla's adoption under the separate ground of N.C. Gen. Stat. § 48-3-601(2)(b)(3).

N.C. Gen. Stat. § 48-3-601(2)(b)(3) provides in a direct placement, consent is required of a man who may or may not be the biological father but who "[b]efore the filing of the [adoption] petition, has legitimated the minor under the law of any state[.]" N.C. Gen. Stat. § 48-3-601(2)(b)(3) (2021). Here, the trial court found:

> 10. The Respondent filed a Voluntary Acknowledgment of Paternity in Tennessee on June 20, 2019, before the petition for adoption was filed with the Clerk of Superior Court in Guilford County; further that the mother of the child executed the document on June 20, 2019 and that both signatures were notarized on June 20, 2019.
>
> 11. The Tennessee Voluntary Acknowledgment of Paternity specifically provides that this document allows the legal father "the ability to protect your legal rights by having a say in any attempted adoption of your child by others"; a certified copy of this document dated July 18, 2019, was provided to this Court as Respondent's Exhibit 20; further the Acknowledgment and the certified copy were dated prior to Respondent being served with the Notice of the Petition for Adoption in this case.
>
> 12. Tennessee was the home state of the minor child and Tennessee law clearly provides that once the father has voluntarily acknowledged paternity the father's consent is necessary.

To the extent these are Factual Findings, Petitioners have not challenged the sufficiency of the evidence to support these Findings, and these Findings are binding on appeal. *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) ("Unchallenged findings of fact are presumed correct and are binding on appeal."). Moreover, as noted by the trial court, the evidence in the Record quite plainly supports the Finding Respondent filed a Voluntary Acknowledgement of Paternity in Tennessee before the filing of the adoption petition in North Carolina. Respondent's Exhibit 20, contained in the Record Supplement, is a certified copy of the Voluntary Acknowledgement of Paternity from the Tennessee Department of Health with the notarized signatures of both Respondent and the biological mother dated 20 June 2019. Thus, the trial court's Factual Findings are supported by evidence in the Record. *See Hanson v. Legasus of N.C., LLC*, 205 N.C. App. 296, 299, 695 S.E.2d 499, 501 (2010).

In their Reply Brief to this Court, Petitioners contended the Voluntary Acknowledgement of Paternity is itself insufficient to establish legitimation in Tennessee and that Tennessee instead requires an Order of Parentage. The Tennessee Court of Appeals has, however, held the opposite:[2]

> Mother also appears to rely somewhat on Chapter 36 of the Tennessee Code, arguing that "[t]here is nothing in the statute which establishes the procedure by which parentage is ordered which substitutes a Voluntary Acknowledgment of Paternity for an Order of Parentage." Respectfully, we disagree with Mother's interpretation of the applicable Tennessee statutes to the extent that she maintains that an order of parentage is the only mechanism by which a father may establish parentage and acquire standing to sue for custody or visitation. Tennessee Code Annotated section 36-2-301 serves as a statement of purpose regarding the subsequent statutes regarding paternity and legitimation in the Tennessee Code. It expressly states that "[t]his chapter provides a single cause of action to establish parentage of children other than by adoption . . . *or by acknowledgment of parentage* . . ." Tenn. Code Ann. § 36-2-301. Furthermore, Tennessee Code Annotated section 36-2-305(b)(1) states that "[a]bsent an agreement or *an acknowledgement of parentage* as prescribed by § 68-3-203(g), § 68-3-302, or § 68-3-305(b), a complaint to establish parentage may be filed." Tenn. Code Ann. § 36-2-305(b)(1). These referenced provisions from Title 68 are the very provisions pursuant to which a VAP under Tennessee Code Annotated section 24-7-113 is completed. *See* Tenn. Code Ann. 24-7-113(a) ("A voluntary acknowledgment of paternity which is completed under § 68-3-203(g), § 68-3-302, or § 68-3-305(b) or under similar provisions of another state or government shall constitute a legal finding of paternity on the individual named as the father of the child in the acknowledgment[.]").
>
> Based on our plain reading of the applicable statutes, it appears that the Code provides for multiple ways in which

2. We quote extensively from the Tennessee Court of Appeals' opinion as we defer to that Court on matters of Tennessee law rather than apply our own interpretation.

> parentage may be established rather than the sole option of filing suit to specifically establish same. As indicated above, the statement of purpose in section 36-2-301 itself notes that parentage may be established by ways other than a cause of action to establish parentage of children by its inclusion of "other" along with express mentions of both adoption and acknowledgment of parentage. This language alone indicates that an order establishing parentage is not the sole manner in which a father may obtain standing to sue for custody and visitation rights.

Baxter v. Rowan, 620 S.W.3d 889, 895-96 (Tenn. Ct. App. 2020). Indeed, as *Baxter* points out, under the Tennessee statute:

> A voluntary acknowledgment of paternity which is completed under § 68-3-203(g), § 68-3-302, or § 68-3-305(b) by an unwed father or under similar provisions of another state or government shall constitute a legal finding of paternity on the individual named as the father of the child in the acknowledgment, subject to rescission as provided in subsection (c). The acknowledgment, unless rescinded pursuant to subsection (c), shall be conclusive of that father's paternity without further order of the court.

Tenn. Code Ann. § 24-7-113(a).

Here, the Voluntary Acknowledgement of Paternity constitutes a legal finding of paternity. Moreover, Tennessee statutes provide for a unified process equating establishing paternity with legitimation.[3] Again re-emphasizing the Tennessee Court of Appeals' decision in *Baxter*:

> Tennessee Code Annotated section 36-2-301 serves as a statement of purpose regarding the subsequent statutes regarding paternity and legitimation in the Tennessee Code. It expressly states that "[t]his chapter provides a single cause of action to establish parentage of children other than by adoption . . . *or by acknowledgment of parentage* . . ." Tenn. Code Ann. § 36-2-301. Furthermore, Tennessee Code Annotated section 36-2-305(b)(1) states that "[a]bsent an agreement *or an acknowledgement of parentage* as prescribed by § 68-3-203(g), § 68-3-302, or § 68-3-305(b), a complaint to establish parentage may be filed." Tenn. Code Ann. § 36-2-305(b)(1). These referenced provisions

3. Unlike North Carolina. *See* N.C. Gen. Stat. § 49-14(a) (2021).

> from Title 68 are the very provisions pursuant to which a VAP under Tennessee Code Annotated section 24-7-113 is completed. *See* Tenn. Code Ann. 24-7-113(a) ("A voluntary acknowledgment of paternity which is completed under § 68-3-203(g), § 68-3-302, or § 68-3-305(b) or under similar provisions of another state or government shall constitute a legal finding of paternity on the individual named as the father of the child in the acknowledgment[.]").

Baxter, 620 S.W.3d at 896; *see* Tenn. Code Ann. § 36-2-301 ("This chapter provides a single cause of action to establish parentage of children other than establishment by adoption pursuant to chapter 1 of this title, or by acknowledgement of parentage pursuant to § 68-3-203(g), § 68-3-302 or § 68-3-305(b)."). Under Tennessee law, and in light of *Baxter*, the Voluntary Acknowledgement of Parentage entered in this case constitutes legitimation. This legitimation occurred prior to the filing of the adoption petition in this case.

Thus, before the filing of the adoption petition in this case, Respondent legitimated the minor under the law of Tennessee. Therefore, under N.C. Gen. Stat. § 48-3-601(2)(b)(3), Respondent's consent is required prior to Layla's adoption by Petitioners. Consequently, on this alternative basis, the trial court did not err in concluding Respondent's consent was required in order for Layla to be legally adopted.

Conclusion

Accordingly, for the foregoing reasons, we again affirm the trial court's 16 September 2021 Order requiring Respondent's consent prior to the adoption of the minor child.

AFFIRMED.

Chief Judge STROUD concurs.

Judge STADING concurs in result.

LUCINDA M. MEEKER, PLAINTIFF
v.
JAMES E. MEEKER, DEFENDANT

No. COA22-931

Filed 2 January 2024

1. Contracts—breach of separation agreement—spousal support provision—no cohabitation by ex-wife—support obligation not terminated

In a breach of contract action, where an ex-husband stopped making spousal support payments to his ex-wife pursuant to their separation agreement because he believed that she was cohabiting with another man—which, if true, would have terminated his spousal support obligation under the agreement—the trial court properly found that the ex-husband's support obligation had not been terminated because his ex-wife was not "cohabiting" within the statutory or common law definition of the term. The court made extensive findings to support its determination, including that: the ex-wife's relationship with the other man began as a sexual relationship but eventually ceased to be so; although the ex-wife spent most nights at the man's home for two years, she did so to care for him due to his deteriorating mental health; the ex-wife maintained a separate residence at all times, never kept clothes at the man's home, and did not sleep in the same room as him; and there had been "no assumption of marital duties, rights and/or obligations" between the ex-wife and the man.

2. Damages and Remedies—breach of separation agreement—spousal support provision—specific performance—inadequacy of remedies at law—ability to pay support

In a breach of contract action, where an ex-husband stopped making spousal support payments to his ex-wife pursuant to their separation agreement, the trial court erred in awarding specific performance of the ex-husband's monthly support obligation as the ex-wife's remedy. Although the agreement contained a provision stating that any remedies at law would be inadequate for any breach thereof, the ex-wife was still required to show to the court that her remedies at law were, in fact, inadequate. Further, the court entered insufficient findings regarding the ex-husband's ability to make the required support payments under the agreement.

3. Contempt—civil—order requiring specific performance of separation agreement—spousal support—appeal from order still pending

In a breach of contract action, where the trial court entered an order requiring an ex-husband to specifically perform his obligation under a separation agreement to pay spousal support to his ex-wife, the court lacked jurisdiction to enter a second order finding the ex-husband in civil contempt of the initial order while the ex-husband's appeal from the initial order was still pending. Consequently, the court's civil contempt order was vacated.

4. Divorce—breach of separation agreement—spousal support provision—payment made pursuant to vacated contempt order—claim for attorney fees

In a breach of contract action, where the appellate court vacated the trial court's order holding an ex-husband in civil contempt for failing to pay spousal support, but where the appellate court affirmed the trial court's finding in a prior order that the ex-husband owed his ex-wife over $113,000 in spousal support arrearages under the parties' separation agreement, it was not unjust for the ex-wife to retain a $38,800 payment that the ex-husband made as a purge condition under the vacated contempt order. Therefore, the ex-husband's request for an order on remand that he be reimbursed the $38,800 payment was denied on appeal. Additionally, defendant's request that he be awarded attorney fees based on his claim that his ex-wife breached the separation agreement was meritless, where the ex-wife was not cohabiting with another man and, even if she were, such cohabitation would not have constituted a breach—rather, it would have merely terminated the ex-husband's spousal support obligation under the agreement.

Appeal by Defendant from Order entered on 28 June 2021 and from Contempt Order entered 30 November 2021 by Judge Lawrence J. Fine in Forsyth County District Court. Heard in the Court of Appeals 5 September 2023.

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

Jonathan McGirt, for defendant-appellant.

DILLON, Judge.

James E. Meeker ("Husband") appeals from an Order entered finding him in breach of a support provision in a separation agreement and from a Contempt Order finding him in contempt of the Order.

I. Background

Husband and Lucinda M. Meeker ("Wife") were married in 1982, had two children by 1996, separated in 2009, and divorced in May 2011.

In 2010, after separating but before divorcing, Husband and Wife entered into a separation agreement (the "Agreement"). The Agreement provided, among other matters, that Husband pay Wife spousal support of $7,577.78 each month[1] until 2025 and that Wife waive any right to alimony in any subsequent divorce action. The Agreement also provided that, while each party was free to reside anywhere and with anyone (s)he "may deem fit or as each of them may desire[,]" Husband's obligation to pay spousal support would terminate prior to 2025 upon the "death, remarriage, or cohabitation" of Wife.

The Agreement and the trial court orders in this matter all refer to the monthly spousal support payments due under the Agreement as "alimony." However, the Agreement was never adopted by any trial court in an order. Accordingly, the monthly spousal support payments are better characterized as a contractual obligation (or "spousal support payments") rather than as "alimony." *See* N.C. Gen. Stat. § 50-16.1A(1) (defining "alimony" as "an order [by a court] for payment for the support and maintenance of a spouse or former spouse").

In 2011, the parties divorced.

In 2018, Wife began dating a man and stayed almost every night at his home for over two years.

In 2019, Husband stopped paying Wife monthly spousal support under the Agreement, based on his belief that Wife was cohabiting with another man and that, accordingly, his obligation to pay monthly support to Wife had terminated.

Wife commenced this action alleging Husband had breached the Agreement and seeking, in part, an order directing Husband to specifically perform his obligation to pay her monthly spousal support under that Agreement.

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1. Pursuant to the Agreement, the monthly support payments of $7,577.78 were initially characterized as $6,000.00 for spousal support and the remainder for child support. However, the monthly payment was entirely characterized as a spousal support payment by late 2014, when the parties' younger child turned 18 years of age.

In June 2021, after extensive hearings on the matter, the trial court entered its Order, finding that Wife had not been cohabiting. The trial court directed Husband to "specifically perform under the [Agreement] for the payment of [spousal support]" which "shall be ongoing in the future." The trial court separately determined Husband owed fifteen months in back support payments and that Husband was obligated to continue making payments as they came due.

In July 2021, Husband noticed an appeal from the Order. This Order was not stayed.

In November 2021, the trial court entered its Contempt Order, holding Husband in civil contempt for his willful failure to comply with the earlier Order to specifically perform his obligation to pay the $113,666.70 in arrearages. Recognizing that Husband did not have the present ability to pay all the arrearages, the trial court directed that Husband could purge himself of contempt (1) by paying $38,800.00 by 29 November 2021 and (2) by paying $2,500.00 per month beginning January 2022 until he satisfied the remaining balance of $74,866.70.

On 30 November 2021, Husband tendered a check for $38,800.00. He then appealed the Contempt Order.

II. Analysis

This appeal concerns the July 2021 Order and the November 2021 Contempt Order. Husband makes three arguments on appeal, which we address below.

A. Cohabitation

[1] Husband has contended all along that his obligation to pay spousal support ceased under the terms of the Agreement before 2019, when Wife began cohabiting with a man Husband alleges to be Wife's boyfriend. He argues the trial court erred by applying a statutory interpretation of "cohabitation" as used in the Agreement to find that Wife was not cohabiting.

In 1995, our General Assembly amended the law concerning alimony *orders*, such that an obligation to pay alimony would terminate if the dependent spouse "engages in cohabitation[.]" N.C. Gen. Stat. § 50-16.9(b) (2021). In that amendment, our General Assembly defines "cohabitation," in part, as "the act of two adults dwelling together continuously and habitually in a private heterosexual relationship" which is evidenced "by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married

people, and which include, but are not necessarily dependent on, sexual relations." *Id.*

This statutory definition of "cohabitation" is similar to the definition that had been applied earlier by our Supreme Court and by this Court:

> Cohabitation is defined as: "To live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations." Black's Law Dictionary 236 (5th ed. 1979). In *Young v. Young*, 225 N.C. 340, 34 S.E.2d 154 (1945), [our Supreme] Court stated . . . "[C]ohabitation means living together as man and wife, though not necessarily implying sexual relations." *Id.* at 344, 34 S.E.2d at 157. In *Dudley v. Dudley*, 225 N.C. 83, 33 S.E.2d 489 (1945) . . . the Court stated:
>
> > Cohabit, according to Winston's Dictionary, Encyclopedia Edition (1943), means: "To live together as man and wife, usually, though not necessarily, implying sexual intercourse." Black's Law Dictionary, Third Edition, defines the meaning of cohabitation, as: "Living together, living together as man and wife; sexual intercourse." Cohabitation includes other marital duties besides marital intercourse.
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> *Id.* at 85-86, 33 S.E.2d at 490-91.

Rehm v. Rehm, 104 N.C. App. 490, 493, 409 S.E.2d 723, 724 (1991).

In its Order, the trial court stated that it was applying the statutory definition of "cohabitation" found in N.C. Gen. Stat. § 50-16.9(b). We agree with Husband that the statutory definition of "cohabitation" does not *per se* dictate the proper interpretation of "cohabitation" as used in the Agreement. Rather, "[t]he intention of the parties is the controlling guide to [a contract's] interpretation." *Duke v. Mut. Life Ins. Co. of N.Y.*, 286 N.C. 244, 247, 210 S.E.2d 187, 189 (1974).

However, given the similarities between the statutory definition and the definition found in our case law, we conclude that any error by the trial court in relying on the statutory definition does not warrant a new trial on the issue of cohabitation. The trial court made extensive findings regarding the nature of Wife's relationship with the man she was caring for which support its determination that Wife was

not cohabiting under either the definition of cohabitation found in the statute or under our case law. We note that Husband does not point to any evidence that either he or Wife intended some other interpretation to control, and that the Agreement otherwise allows Wife to "reside" with anyone she deems fit.

Specifically, based on competent evidence, the trial court found the following concerning Wife's relationship with her male friend: Wife and the man engaged in a sexual relationship earlier in their relationship; however, their sexual relationship did not continue. Wife, though, did begin staying most nights at the man's home for two years. However, she did so in order to care for him, as the man's mental health was deteriorating. But, at all times, Wife maintained a separate residence. She did not keep clothes at the man's home. They did not sleep in the same room. They never showed any public displays of affection. They did not share expenses. She did not benefit financially from the relationship. She did no chores at his house. And "[t]here has been no assumption of marital duties, rights and/or obligations between [Wife] and [the man], that are associated with married people."[2]

B. Specific Performance Order

[2] Husband makes several arguments challenging the trial court's authority to grant Wife the remedy of specific performance in its Order.

Our Supreme Court has held that specific performance may be an appropriate remedy to enforce payment obligations under a separation agreement. *Moore v. Moore*, 297 N.C. 14, 17, 252 S.E.2d 735, 738 (1979), *overruled on other grounds by Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986). More recently, the Court stated that if the trial court finds "the state of defendant's finances warrants it, the trial judge may order specific performance of all or any part of the separation agreement unless plaintiff otherwise has an adequate remedy at law." *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 658, 347 S.E.2d 19, 23 (1986).

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2. In its Order, the trial court placed the burden on Husband to show that Wife was cohabiting, holding that Husband had "failed to prove by the greater weight of the evidence that [Wife] has cohabited[.]" Certainly, if Husband's obligation was to pay court-ordered alimony, the burden would be on him to show that Wife was cohabiting to avoid his obligation to continue paying. *See, e.g.*, *Cunningham v. Cunningham*, 345 N.C. 430, 438, 480 S.E.2d 403, 407 (1997). However, since the Agreement was never incorporated by the trial court, contract principles apply. And for a breach of contract claim, the burden is typically on the party alleging the breach. *See, e.g.*, *Cater v. Baker*, 172 N.C. App. 441, 445, 617 S.E.2d 113, 116 (2005). Husband makes no argument that the trial court improperly placed on him the burden of proving that wife was cohabiting in this contract case. Accordingly, we do not address this issue.

Indeed, our Court has recently reiterated that "[a] separation agreement may be enforced through the equitable remedy of specific performance"; that "[s]pecific performance is appropriate if the remedy at law is inadequate, the obligor can perform, and the obligee has performed her obligations"; and that "damages are usually an inadequate remedy in the context of separation agreements." *Diener v. Brown*, 290 N.C. App. 273, 278, 892 S.E.2d 212, 215 (2023).

In its Order, the trial court decreed that Husband "is ordered to specifically perform under the contract for the payment of [spousal support]; and [Husband's] obligation shall be ongoing in the future"; that there were fifteen missed payments that were due at the time the Order was entered; and that Husband's "failure to pay alimony will be ongoing."

In their respective briefs, Husband and Wife agree that the remedy of specific performance granted by the trial court in the July 2021 Order only applied to Husband's obligation to make monthly payments going forward and, otherwise, did not apply to the fifteen months of arrearages. For instance, Husband contends the trial court erred in ordering specific performance as to his obligation to pay the arrearages, because the trial court failed to determine that Wife lacked an adequate remedy at law. And Wife contends that "[t]he Specific Performance Order states what [Husband] was obligated to do under the Agreement and what he is now obligated to do under the court order. The court does not order Defendant to *actually* perform payment of the arrears at this time; therefore, it was not necessary to make a finding or conclusion that [Wife] lacks an adequate remedy at law to collect the arrears."

Given the language in the Order including the lack of findings regarding Husband's ability to pay arrearages, we likewise construe the language of the Order concerning the arrearages as a statement that they were owed and *not* as a decree of specific performance concerning those arrearages.

We now address whether the trial court erred in its Order by decreeing that Husband specifically perform his obligation under the Agreement to make monthly $7,577.78 support payments to Wife as they become due going forward.

It is true, as Wife notes, that the parties agreed in the Agreement itself that remedies at law would be inadequate for any breach thereof. However, our Court has held that such a contractual provision does not relieve a party from her obligation to otherwise show to the court that her remedies at law are, indeed, inadequate:

> Plaintiff first argues that the Settlement Agreement expressly requires specific performance upon a party's breach. Upon review, we determine the Settlement Agreement does not extinguish Plaintiff's burden to prove the requirements for specific performance.

Reeder v. Carter, 226 N.C. App. 270, 276, 740 S.E.2d 913, 918 (2013).

In any event, our Supreme Court has held that specific performance "will not be decreed against a defendant who is incapable of complying with his contract[,]" *Cavenaugh*, 317 N.C. at 657, 347 S.E.2d at 23, and that "when a defendant has offered evidence tending to show that he is unable to fulfill his obligations under a separation agreement . . . the trial judge must make findings of fact concerning the defendant's ability to carry out the terms of the agreement before ordering specific performance." *Id.*

Here, Husband put at issue his ability to pay $7,577.78 per month going forward. In its Order, the trial court found that Husband's income and assets had decreased after he had sold his business and started a new one. The trial court, though, made no determination that Husband had the ability to pay $7,577.78 per month or otherwise to what amount Husband could pay. Rather, the trial court merely determined that Husband had "the ability to comply partially or in whole" in making the full monthly payments. Accordingly, the trial court's findings fail to support its Order directing specific performance. We, therefore, vacate the portion of the trial court's order directing Husband to specifically perform his obligation to pay monthly spousal support going forward.

We note Husband's argument that the trial court failed to determine whether Wife otherwise has an adequate remedy at law. However, since we are vacating the portion of the Order directing specific performance, we do not reach this or the other arguments of Husband. On remand, the trial court may reconsider whether Wife is entitled to a decree of specific performance.

C. Civil Contempt Order

[3] Husband next argues the trial court erred by entering the Contempt Order, finding Husband in contempt for failing to pay the arrearages and setting forth purge provisions, months after entering the Order. We agree.

Generally, a trial court has no jurisdiction to enforce its order by contempt while that order is on appeal. N.C. Gen. Stat. § 1-294 (providing that a perfected appeal "stays all further proceedings in the court

below upon the judgment appealed from, or upon the matters embraced therein"); *see Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 582, 273 S.E.2d 247, 259 (1981) (holding that upon a party noticing an appeal, "the court lost jurisdiction to take further action on the contempt matter").

Here, based on the record before us, it does not appear the trial court had jurisdiction to enter the Contempt Order. The record shows Husband noticed his appeal from the Order in July 2021, four months before the trial court held a hearing regarding Husband's alleged contempt of that Order and entered its Contempt Order finding Husband in civil contempt of the Order.

We recognized that our General Assembly has provided "[n]otwithstanding the provisions of G.S. 1-294 . . . an order for the periodic payment of alimony that has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal." N.C. Gen. Stat. § 50-16.7(j) (2021). However, here, the Order was not one directing the payment of "alimony." No court had ever directed Husband to pay alimony. Rather, the Order directed Husband to pay a contractual obligation. Therefore, the trial court had no jurisdiction to enforce its Order through civil contempt after Husband properly noticed his appeal from that Order. We, therefore, must vacate the Contempt Order.

D. Other Matters

[4] In the "Conclusion" section of his brief, Husband asks our Court, in part, "to remand the cause for entry of an order dismissing [Wife's] claim for specific performance, with instructions for (1) reimbursement of sums unjustly paid by [Husband] to [Wife], and (2) determination of reasonable attorney's fees owed by Wife to Husband for her breach of contract."

Regarding the request for "reimbursement of sums unjustly paid," it appears Husband is requesting an order on remand that he be reimbursed the $38,800 he paid to Wife in November 2021 as a purge condition under the Contempt Order. Though we are vacating the Contempt Order itself, we cannot say that it would be unjust for Wife to retain the $38,800 paid to her by Husband in November 2021. Indeed, we are affirming the trial court's findings in the earlier Order that Wife had not cohabited and that Husband owed Wife $113,666.70 in arrearages. And Husband has not otherwise shown why it would be unjust for Wife to retain the $38,000 paid to her by Husband to reduce the arrearages he owes.

We find no merit in Husband's request that he be awarded attorney's fees for Wife's breach of contract. First, we affirm the trial court's

determination that Wife has not cohabited. Further, cohabitation by the Wife would not be a "breach" of the Agreement. Wife is free to cohabitate, as she is to remarry. Rather, cohabitation by Wife merely terminates Husband's obligation to continue paying spousal support.

III. Conclusion

We affirm the trial court's finding in the Order that Wife has not cohabited, and that Husband continues to be obligated to pay Wife spousal support, including arrearages. We vacate the portion of the trial court's Order granting Wife the remedy of specific performance concerning Husband's obligation to pay her spousal support. And we vacate the Contempt Order, as the trial court lacked jurisdiction to enter that order while the original Order was on appeal.

We remand the matter for further proceedings. On remand, the trial court may, in its discretion, take on further evidence, make new findings, and order relief (including, for example, a money judgment on arrearages still owed) supported by its findings and conclusions.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges MURPHY and THOMPSON concur.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, PLAINTIFF
v.
ANITA D. PEACE, DEFENDANT

No. COA22-918

Filed 2 January 2024

Administrative Law—contested case—entry in Health Care Personnel Registry—substantiation of abuse—definition of abuse—burden of proof

In a contested case brought by a health care technician (petitioner), whose name the Department of Health and Human Services (DHHS) had entered into the Health Care Personnel Registry after petitioner kicked an elderly, intellectually disabled patient, the superior court erred in upholding an administrative law judge's (ALJ) decision to reverse DHHS's substantiation of abuse based on the kicking incident. First, the ALJ mistakenly concluded that

petitioner's behavior did not meet the definition of "abuse" found in 10A N.C. Admin. Code 13O.0101 where, in her conclusion of law, the ALJ stated that evidence of "resulting physical harm, pain, or mental anguish" to the patient was required to support a finding of abuse. Additionally, the ALJ erred by improperly placing on DHHS the burden of proving that petitioner abused her patient rather than placing on petitioner the burden of proving the facts alleged in her petition for a contested case hearing.

Judge HAMPSON concurring in result only.

Appeal by plaintiff from order entered 8 July 2022 by Judge Cindy King Sturges in Vance County Superior Court. Heard in the Court of Appeals 17 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Farrah R. Raja, for plaintiff-appellant.

Ajulo E. Othow, for defendant-appellee.

THOMPSON, Judge.

This appeal has resulted from administrative and legal proceedings arising from the entry in the Health Care Personnel Registry of substantiated findings of neglect and abuse of a patient by defendant-petitioner, a health care technician. Plaintiff-respondent agency appeals from the superior court's reversal of its final agency decision to make such entries upon a petition for judicial review in the lower tribunal. Before this Court, plaintiff-respondent raises the following issues: (1) whether the superior court erred by concluding that defendant-petitioner did not abuse a resident of Murdoch Developmental Center (Murdoch) in Butner within the meaning of 42 C.F.R. § 488.301, as incorporated by reference at 10A N.C. Admin. Code 13O.0101; (2) whether the superior court erred in determining that the Administrative Law Judge (ALJ) did not exceed her statutory authority by placing a burden of proof on plaintiff-respondent in the contested case; and (3) whether there was substantial evidence in the record to support plaintiff-respondent's finding of abuse against defendant-petitioner. After careful review, we hold that the superior court erred in upholding the ALJ's statement of the law regarding the proof of abuse and its improper placement of the burden of proof on plaintiff-respondent. Accordingly, we reverse the order entered by the superior court and remand for further proceedings as described below. In light of these holdings, we do

not address plaintiff-respondent's substantial evidence argument as the evidence in this matter will need to be reconsidered on remand under the appropriate legal standards discussed herein.

I. Factual Background and Procedural History

Plaintiff-respondent, the Division of Health Service Regulation, is a division of the North Carolina Department of Health and Human Services and is statutorily required to maintain the North Carolina Health Care Personnel Registry (the Registry), which is a compilation of the names of all unlicensed health care personnel working in North Carolina health care facilities against whom plaintiff has substantiated neglect, abuse, misappropriation, diversion of drugs, or fraud. N.C. Gen. Stat. § 131E-256(a)(1) (2021). Pursuant to N.C. Gen. Stat. § 131E-256(d) and (d1), health care personnel who wish to challenge plaintiff's allegations or findings of, *inter alia*, neglect and abuse are entitled to an administrative hearing in the Office of Administrative Hearings (OAH) upon the filing of a petition to initiate a contested case, as provided by the Administrative Procedure Act. In turn, pursuant to N.C. Gen. Stat. §§ 150B-43 and 150B-45 (2021), any party aggrieved by a final decision from OAH is entitled to judicial review by filing a petition for judicial review in superior court.

The record on appeal in this matter reveals the following: Defendant-petitioner was employed at Murdoch as a Health Care Technician I, providing direct care services to sixteen individual residents at Murdoch, each of whom has severe or profound intellectual disabilities. Defendant-petitioner had been employed at Murdoch from 2004 to 2020 and had no disciplinary issues during the time she worked there. In her position, defendant-petitioner had worked closely on a daily basis with D.L., a 71-year-old resident of Murdoch, from the time of his readmission to the facility in 2008 and ongoing to the time of the incident at issue here. D.L. is nonverbal but can provide limited communication through a combination of signs, a communication board, very limited word approximation, facial expressions, and body language. D.L. had been diagnosed with profound intellectual disability, other conduct disorders, age-related osteoporosis, osteopenia of the hip, irritable bowel syndrome, and various other physical and psychological disorders. D.L. also wore Saucony brand shoes to accommodate a condition known as bilateral pronation.[1] D.L.'s Behavioral Support Plan (BSP) advised

1. Pronation is a condition in which the weight tends to be more on the inside of the foot when walking. *See* https:www.healthline.com/health/bone-health/whats-the-difference-between-supination-and-pronation (last visited on 4 October 2023.).

staff of D.L.'s bone health issues and did not allow staff to use therapeutic holds, walks, or carries on D.L. except in extreme emergencies. D.L.'s BSP further prohibited staff from using their feet to move D.L. if he was noncompliant and from removing D.L.'s property in an effort to induce compliance. Defendant-petitioner stated she felt that she and D.L. understood each other based on the years defendant-petitioner had spent caring for D.L., and that she knew when something was wrong with him.

On 4 December 2019, defendant-petitioner was working in a location at Murdoch known as Newport Cottage. Around 9:15 a.m., defendant-petitioner discovered D.L. in the dayroom there. D.L. had stooled and soiled his clothes. When defendant-petitioner asked D.L. to get up so that she could clean and redress him, D.L. would not get up and replied, "No." After several attempts to get D.L. to comply with her requests, defendant-petitioner enlisted the aid of her co-worker, Ian Denson, to lift D.L. from his seat. D.L. "straightened his legs, bore down his weight, and slid to the floor" where he lay partially on top of one of defendant-petitioner's feet. D.L. did not respond when defendant-petitioner twice requested that he get up and off of her foot. At that point, defendant-petitioner "moved her legs and feet in a forward motion, kicking D.L.'s body, then pushing or scooting D.L.'s body around the floor with her foot. [Defendant-petitioner] kicked D.L.'s foot or lower leg and pushed his body again with her foot." Defendant-petitioner testified that she then took D.L.'s shoes and walked to the door of the dayroom because she knew he would get up and follow her if she took them. D.L. stood up, assisted by a male staff member, and followed defendant-petitioner to the bathroom to be cleaned.

The 4 December 2019 incident between defendant-petitioner and D.L. was captured on the facility's video surveillance. Additionally, there were five other staff members in the dayroom at the time the incident occurred, although only one—Quavella Warren—reported that she saw defendant-petitioner kick D.L. After a facility investigation of the incident, and an interview with defendant-petitioner in which she denied that her foot made physical contact with D.L., the facility found that defendant-petitioner abused D.L. when she struck him with her foot and also found defendant-petitioner to be neglectful of D.L. for taking his shoes. The facility's findings resulted in a substantiation of physical abuse and neglect against defendant-petitioner and a report of the incident to the Registry; defendant-petitioner was notified by certified letter dated 1 April 2020 of the substantiation of the abuse and neglect allegations and advised that her name would be placed in the Registry.

On 15 January 2020, defendant-petitioner submitted to the OAH a petition for a contested case hearing against plaintiff-respondent. The hearing was set for 27 August 2020 by the OAH before ALJ Melissa Owens Lassiter. In a final decision issued 8 February 2021, the ALJ affirmed the plaintiff-respondent's decision "to substantiate an allegation of neglect and place such finding of neglect next to [defendant-petitioner's] name on the Health Care Personnel Registry," but reversed plaintiff-respondent's substantiation of the allegation of abuse against defendant-petitioner, finding that plaintiff-respondent "substantially prejudiced [defendant-petitioner's] rights and exceeded its authority or jurisdiction" in so doing. Among the ALJ's conclusions of law and pertinent to the dispositive issue we address in this appeal are the following:

> 9. On or about December 4, 2019, Petitioner abused a resident of a health care facility when she willfully kicked D.L., a 71-year-old man with intellectual developmental disability and osteoporosis, multiple times while he was lying on the floor. Petitioner willfully inflicted intimidation and punishment on D.L. to get him to get off the floor when he did not wish to do so. . . .
>
> 10. The evidence at hearing showed that not all forward movements of the leg or foot are made with the same force, and not all forward movements of the leg or the foot will result in physical harm. Five of the seven forward movements Petitioner made towards D.L. were a softer "scoot" or push of D.L.'s body across the floor. Nonetheless, Petitioner still kicked D.L. with her foot or leg, at least twice, on December 4, 2019. The evidence at hearing proved that Petitioner willfully struck D.L., intimidated D.L., and punished D.L. with her foot, regardless of the force used.
>
> 11. The second part of the definition of "abuse" only becomes relevant once the willfulness prong is satisfied, and requires that "physical harm, pain, or mental anguish" result from the acts of the Petitioner. In this case, there was no evidence presented at hearing proving that Petitioner's kicking and/or scooting of D.L.'s body resulted in physical harm, pain, mental anguish, or emotional distress to D.L. Even Ms. Norwood noted in her report that D.L.'s psychologist found "it is difficult to determine" if D.L.'s change in behavior surrounding this incident was a result of the December 4, 2019 incident. Resp. Ex. M.

> Absent evidence of resulting physical harm, pain, mental anguish, or emotional distress, Respondent failed to prove that Petitioner "abused" D.L. on December 4, 2019 in violation of 10A [N.C. Admin. Code] 13O.0101 and 42 C.F.R. Part 488 Subpart E.
>
> 12. A preponderance of the evidence at hearing established that Respondent otherwise substantially prejudiced Petitioner's rights and exceeded its authority or jurisdiction by substantiating the allegation that Petitioner abused resident D.L. on December 4, 2019 and by listing that finding of abuse by Petitioner's name on the Health Care Personnel Registry.

Plaintiff-respondent sought judicial review of the ALJ's reversal as to substantiation of the abuse allegation by filing a petition on 9 March 2021 in the Superior Court, Vance County. Plaintiff-respondent specifically objected to Conclusions of Law 11 and 12 from the ALJ's final decision, contending that Conclusion of Law 11 contained errors of law and was in excess of the ALJ's statutory authority, and that Conclusion of Law 12 was an error of law and unsupported by substantial evidence in the record. The hearing on plaintiff-respondent's petition took place on 18 April 2022, and on 8 July 2022, the superior court entered its order affirming the ALJ's 8 February 2021 decision, citing the definition of abuse found in 42 C.F.R. § 488.301 and concluding, *inter alia*, that (1) the ALJ's decision to reverse the abuse finding was proper because there was no evidence of resulting physical harm, pain, or mental anguish to D.L.; (2) plaintiff-respondent's argument that the ALJ improperly placed a burden of proof on plaintiff-respondent to provide evidence of physical harm, pain, or mental anguish was meritless; and (3) review of the whole record indicated the ALJ's decision to reverse the abuse finding was supported by substantial evidence because only the first prong of the "abuse" definition was satisfied. Plaintiff-respondent timely appealed on 2 August 2022.

II. Analysis

We find dispositive the first legal error identified by plaintiff-respondent: that the superior court erred in affirming the ALJ's mistaken conclusion that defendant-petitioner did not abuse D.L. within the definition of 42 C.F.R. § 488.301, as incorporated by reference at 10A N.C. Admin. Code 13O.0101. As a result, the superior court order must be reversed, and the case remanded for further proceedings as discussed in more detail below. We are also persuaded by plaintiff-respondent's contention regarding the inappropriate placement of the burden of proof

and address that issue as well, in an effort to prevent the error from being repeated on remand.

A. Standard of review

Where a party appeals from the ruling of a superior court sitting in an appellate capacity to review a final agency decision under the Administrative Procedure Act (APA), this Court reviews the superior court's order for errors of law. *Allen v. Dep't of Health & Hum. Servs.*, 155 N.C. App. 77, 80, 573 S.E.2d 565, 567 (2002) (citation omitted), *disc. review denied*, 357 N.C. 163, 580 S.E.2d 358 (2003). Where an

> appellant argues that the agency's decision was based on an error of law, then de novo review is required. . . . This Court's scope of review is the same as that utilized by the [superior] court.
>
> De novo review requires a court to consider a question anew, as if not considered or decided by the agency. In conducting de novo review, the court may freely substitute its own judgment for that of the agency.

Allen, 155 N.C. App. at 80–81, 573 S.E.2d at 567–68 (citations, internal quotation marks, and brackets omitted). "The proper allocation of the burden of proof is purely a question of law." *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 703, 635 S.E.2d 442, 447 (2006) (citing *Lindsay v. Brawley*, 226 N.C. 468, 471, 38 S.E.2d 528, 530 (1946)), *disc. review denied*, 361 N.C. 220, 642 S.E.2d 445 (2007).

B. Conclusion that defendant-petitioner did not "abuse" D.L.

Plaintiff-respondent first contends that the superior court erred as a matter of law by concluding that defendant-petitioner did not "abuse" D.L. because "controlling case law from this Court in *Allen v. Dep't of Health & Hum. Servs.* . . . indicate[s] that evidence of physical harm, pain, or mental anguish does not have to be admitted at hearing to support a finding of abuse." We agree.

The definition of abuse that the North Carolina General Assembly has adopted for the purposes of the Registry reads as follows:

> *Abuse is the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.* Abuse also includes the deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being.

> Instances of abuse of all residents, irrespective of any mental or physical condition, cause physical harm, pain or mental anguish. It includes verbal abuse, sexual abuse, physical abuse, and mental abuse including abuse facilitated or enabled through the use of technology. Willful, as used in this definition of abuse, means the individual must have acted deliberately, not that the individual must have intended to inflict injury or harm.

42 C.F.R. § 488.301 (2021); *see* 10A N.C. Admin. Code 13O.0101(1) (2021) (" 'Abuse' is defined by 42 C.F.R. Part 488 Subpart E which is incorporated by reference, including subsequent amendments."). Citing this definition, in the contested case at bar, the ALJ stated that "[t]he second part of the definition of 'abuse' only becomes relevant once the willfulness prong is satisfied, and requires that 'physical harm, pain, or mental anguish' result. . . . Absent evidence of resulting physical harm, pain, mental anguish, or emotional distress, [r]espondent failed to prove that [p]etitioner 'abused' D.L." We consider de novo whether the superior court and the ALJ applied an incorrect definition of "abuse" in this context. *See Allen*, 155 N.C. App. at 84, 573 S.E.2d at 570 (noting that de novo review is appropriate when considering whether, "as a matter of law, [the] petitioner's statement to [a patient was] not sufficiently egregious to constitute abuse" for purposes of the Registry).

We believe plaintiff-respondent is correct in its assertion that the definition of "abuse" employed by the lower tribunals in this case conflicts with the holding in *Allen*, an appeal in which this Court addressed the issue raised by plaintiff-respondent and which is therefore binding in our resolution of this question here. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

In *Allen*, the petitioner, a certified nurse aide working at a nursing home, was overheard to say to an uncooperative and combative patient, "If you kick me, I will knock the f–king hell out of you." *Id.* at 78–79, 573 S.E.2d at 566 (alteration in original). During the ensuing investigation of the incident, the petitioner denied making that remark and instead testified that she had actually told the patient either "You've kicked the hell out of my hand and, if you kick me again, I'm going to have to pinch your foot off" or "If you kick me in the face, little girl, I just don't know what I might have to do to you." *Id.* at 79–80, 573 S.E.2d at 567.

After concluding that the "petitioner verbally abused [the patient] by stating, 'You've kicked the hell out of me and if you do it again I'll have to pinch your foot off,' DHHS notified the petitioner that an allegation of abuse had been substantiated against her, and that the substantiated allegation would be entered into the . . . Registry."[2] *Id.* at 80, 573 S.E.2d at 567. The petitioner filed a petition for a contested case, and the ALJ upheld the Agency decision, as did the superior court upon judicial review. *Id.*

In considering the petitioner's appeal from the superior court order, this Court considered, *inter alia*, whether the petitioner's statement to the patient was "sufficiently egregious to constitute abuse" under the definition provided in 42 C.F.R. § 488.301 (" 'Abuse' means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish")—the same definition as we consider in this appeal. *Id.* at 84, 573 S.E.2d at 569–70. This Court began by noting that, "in the context of this extremely regulated profession and the patient's dependency on a person in the trusted position of nurse aide, the definition of abuse may fairly be understood to reach behavior short of more flagrant forms dealt with in other settings." *Id.* at 85, 573 S.E.2d at 570 (citation and quotation marks omitted). Although it appears that there was no evidence introduced at any level of the proceedings regarding the impact of petitioner's remark on the patient—whether physical or emotional—the Court held:

> Though the record discloses various accounts of the exact statement made to [the patient] by [the] petitioner, the evidence is uncontroverted that [the] petitioner made some statement of a threatening nature to her patient . . . . *While there was no evidence of record that petitioner's threats resulted in physical harm or pain to* [*the patient*], [the] petitioner's threat to do violence to the elderly Alzheimer's patient is certainly sufficient evidence from which a rational factfinder could determine it was such as to cause that patient "mental anguish."

Id. at 88, 573 S.E.2d at 572 (emphasis added). "Accordingly, [the Court] conclude[d] that DHHS properly determined that [the] petitioner's

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2. The petitioner in *Allen*, as a nurse aide, was subject to potential findings in both the Nurse Aide Registry and the Health Care Personnel Registry. *Id.* at 78–79, 573 S.E.2d at 567. Defendant-petitioner here, a health care technician, contests only a finding being noted in the Health Care Personnel Registry. However, both Registries incorporate the same definition of "abuse" as found in 42 C.F.R. § 488.301. *See* 10A N.C. Admin. Code 13O.0101.

actions constituted abuse within the meaning of 42 C.F.R. § 488.301 (as incorporated by reference at 10 [N.C. Admin. Code] 3B.1001(1))." *Id.* In other words, even in the absence of direct evidence of any harm sustained by a patient, the "willful infliction of injury" by a health care professional to a patient was held sufficient to sustain an inference that mental anguish would have been suffered by the patient as a result and therefore to substantiate abuse for purposes of an entry in the Registry.

We find this binding precedent controlling in our resolution of this matter. Defendant-petitioner acknowledges that *Allen* "is on point" but emphasizes that it does not stand for the proposition that a factfinder "must find abuse as a matter of law." We agree that nothing in *Allen requires* a conclusion of abuse in the absence of evidence of the specific harms noted in the pertinent definition; however, under *Allen*, in such absence, the defined harms *may be inferred*. Yet, the ALJ in its Conclusion of Law 11 twice stated that evidence of the listed harms is required to prove abuse for purposes of the Registry:

> [t]he second part of the definition of "abuse" . . . *requires that "physical harm, pain, or mental anguish" result from the acts of the Petitioner*. In this case, there was no evidence presented at hearing proving that Petitioner's kicking and/or scooting of D.L.'s body resulted in physical harm, pain, mental anguish, or emotional distress to D.L. . . . *Absent evidence of resulting physical harm, pain, mental anguish, or emotional distress*, Respondent failed to prove that Petitioner "abused" D.L. on December 4, 2019 in violation of 10A [N.C. Admin. Code] 13O.0101 and 42 C.F.R. Part 488[.301] Subpart E.

(Emphasis added.) This conclusion misstates the law, as under *Allen*, even where there is "no evidence of record that petitioner's threats resulted in physical harm or pain to [the patient], [the] petitioner's [willful infliction of injury] is certainly sufficient evidence from which a rational factfinder *could* determine it was such as to cause that patient 'mental anguish.' " *Id.* at 88, 573 S.E.2d at 572 (emphasis added). Because the ALJ in this case appears to have acted under a misapprehension of the law regarding what *must* be shown to prove abuse for purposes of an entry in the Registry, we cannot know whether the ALJ *could* have inferred mental anguish or some other listed harm to D.L. if the ALJ had understood that such an inference was permitted. This legal error is particularly concerning here in light of the ALJ's findings that D.L. is non-verbal and thus it was difficult to determine whether his observed behavioral changes after the incident at issue were caused

by the incident and given that defendant-petitioner agreed that she had "more or less" threatened D.L. during the incident.

In turn, in its review, the superior court compounded this error by failing to recognize the import of *Allen* as precedent on this point. We therefore must reverse the superior court's order and remand the matter to the superior court for further remand to the ALJ to reconsider defendant-petitioner's petition under the proper legal authorities and precedent, and to make the appropriate findings of fact under the controlling law on which the court can then base conclusions of law.[3]

C. Burden of proof

While our resolution of plaintiff-respondent's first argument requires that we reverse the superior court's order and remand for legally correct proceedings by the ALJ, we briefly address plaintiff-respondent's contention that the superior court erred in its Conclusion of Law 14 when it rejected plaintiff-respondent's "argument that the ALJ improperly placed the burden of proof upon [plaintiff-respondent] to . . . provide evidence supporting this second prong of the definition of 'abuse' " in an effort to prevent the recurrence of this additional error on remand. *See State v. Womble*, 277 N.C. App. 164, 183, 858 S.E.2d 304, 318 (2021), *appeal dismissed and disc. review denied*, 380 N.C. 679, 868 S.E.2d 865 (2022).

Beginning at the initial source of this error of law, in her final decision, the ALJ made several conclusions of law concerning the abuse allegation, noting the two prongs of abuse as defined in 42 C.F.R. § 488.301: (1) a "willful infliction of injury, unreasonable confinement, intimidation, or punishment" that (2) results in "physical harm, pain, or mental anguish." While the ALJ agreed with plaintiff-respondent that the first prong was satisfied in that "[defendant-p]etitioner willfully inflicted intimidation and punishment on D.L. to get him to get off the floor when he did not wish to do so," as noted above in Conclusion of Law 11, the ALJ stated that the second prong was not satisfied because "there was no evidence presented at the hearing proving that [defendant-p]etitioner's kicking and/or scooting of D.L.'s body resulted in physical harm, pain, mental anguish, or emotional distress" and as a result, "[*plaintiff-r*]*espondent failed to prove that* [*defendant-p*]*etitioner 'abused' D.L. . . .*"

3. While fully equipped to consider and resolve arguments of errors of law upon appeal, this Court does not find facts. *See Pharr v. Atlanta & C. Air Line Ry. Co.*, 132 N.C. 418, 423, 44 S.E. 37, 38 (1903) (holding that appellate courts "cannot find facts").

While we generally assume that judges know and follow the law, *see State v. Bell*, 166 N.C. App. 261, 266, 602 S.E.2d 13, 16–17 (2004) (holding that an appellate court is "bound by the record before it," and where the record is void of anything indicating otherwise, we will assume the trial judge correctly applied the law and ruled appropriately) (quoting *State v. Williams*, 304 N.C. 394, 415, 284 S.E.2d 437, 451 (1981), *cert. denied*, 456 U.S. 932 (1982)), this explicit statement by the ALJ in her final decision that she placed the burden on *respondent* to prove abuse by petitioner against D.L. is directly counter to relevant provisions of the APA as set forth by the legislature.

The APA provides that in a contested case the *petitioner* must "state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency[, *inter alia*, e]xceeded its authority or jurisdiction." N.C. Gen. Stat. § 150B-23(a)(1) (2021). Further, "[e]xcept as otherwise provided by law or by this section, *the petitioner in a contested case has the burden of proving the facts alleged in the petition* by a preponderance of the evidence." N.C. Gen. Stat. § 150B-25.1(a) (2021) (emphasis added). *See also House of Raeford Farms, Inc. v. N.C. Dep't of Env't & Natural Res.*, 242 N.C. App. 294, 304, 774 S.E.2d 911, 918, *disc. review denied*, 368 N.C. 429, 778 S.E.2d 92 (2015) and *Overcash*, 179 N.C. App. at 704, 635 S.E.2d at 447.[4]

In its petition for judicial review by the superior court as provided in N.C. Gen. Stat. § 150B-43, plaintiff-respondent noted the ALJ's failure to comply with § 150B-25.1(a) in regard to the placement of the burden of proof in the contested case. The APA provides that on judicial review, an agency's final decision may be reversed or modified "if the reviewing court determines that the petitioner's substantial rights may have been prejudiced because the agency's . . . conclusions" fall into one of the six categories listed in N.C. Gen. Stat. § 150B-51(b) (2021), one of which is being "[i]n excess of the statutory authority or jurisdiction of the agency or administrative law judge." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658–59, 599 S.E.2d 888, 894 (2004) (quoting N.C. Gen. Stat. § 150B-51(b)(2)). Such considerations, including "[t]he proper allocation of the burden of proof," are questions of law to be considered de novo. *Overcash*, 179 N.C. App. at 703, 635 S.E.2d at 447; *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894.

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4. "The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence." N.C. Gen. Stat. § 150B-29(a) (2021).

In its order on judicial review, the superior court noted that plaintiff-respondent had raised the issue that "the ALJ improperly placed the burden of proof" on plaintiff-respondent and addressed this contention in Conclusion of Law 14. Conclusion of Law 14 reads, in its entirety:

> As to [plaintiff-respondent's] argument that the ALJ improperly placed the burden of proof upon [plaintiff-respondent] to show D.L. suffered physical harm, pain, mental anguish, or emotional distress, the [*c*]*ourt finds it illogical for* [*defendant-petitioner*] *to have to provide evidence supporting this second prong of the definition of "abuse." The* [*c*]*ourt also finds it illogical for the ALJ to require* [*defendant-petitioner*] *to have to prove a negative*, *i.e.*, that D.L. did *not* suffer physical harm, pain, mental anguish, or emotional distress. The [c]ourt finds and concludes [plaintiff-respondent]'s argument as to this burden of proof issue is meritless.

(First two emphases added.)

Regardless of the superior court's opinion on the matter, the legislature has specifically directed that "the petitioner in a contested case has the burden of proving the facts alleged in the petition by a preponderance of the evidence." N.C. Gen. Stat. § 150B-25.1(a). The ALJ failed to follow this explicit directive, therefore exceeding her statutory authority, and the superior court then compounded this error by substituting its own belief about the proper allocation of the burden of proof and rejecting plaintiff-respondent's appellate argument on that basis, thereby violating N.C. Gen. Stat. § 150B-51(b). On remand, the ALJ should take care to place the burden of proof in accord with the applicable authority.

III. Conclusion

The superior court's order upholding the ALJ's final decision is reversed, and the matter is remanded to the superior court for further remand to the ALJ for further proceedings not inconsistent with this decision.

REVERSED AND REMANDED.

Judge CARPENTER concurs.

Judge HAMPSON concurs in result only.

STATE v. BORLASE

[292 N.C. App. 54 (2024)]

STATE OF NORTH CAROLINA,
v.
TRISTAN NOAH BORLASE, DEFENDANT

No. COA22-985

Filed 2 January 2024

Sentencing—first-degree murder—juvenile defendant—life without parole—two consecutive sentences—propriety of sentences imposed

After defendant was convicted of two counts of first-degree murder for killing his parents one month before turning eighteen years old, the trial court did not err in imposing two consecutive sentences of life without parole (LWOP) after conducting a hearing, in which it considered evidence concerning defendant's youth and other mitigating factors. First, the court's sentencing procedure conformed with Eighth Amendment requirements and did not violate the federal prohibition against "cruel and unusual punishments." Second, the court complied with N.C.G.S. § 15A-1340.19B (requiring a hearing on whether to impose LWOP upon a juvenile convicted with first-degree murder) by considering each of the mitigating factors enumerated in the statute and by entering detailed written findings on each factor that were supported by the evidence. Third, given the court's finding that defendant had demonstrated "irreparable corruption and permanent incorrigibility without the possibility of rehabilitation," defendant's consecutive sentences of LWOP did not violate the prohibition against "cruel and unusual punishments" expressed in Article 1, Section 27 of the state constitution.

Judge ARROWOOD dissenting.

Appeal by defendant from judgment entered 3 March 2022 by Judge R. Gregory Horne in Watauga County Superior Court. Heard in the Court of Appeals 20 September 2023.

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

Law Office of Lisa Miles, by Lisa Miles, for defendant.

DILLON, Judge.

Defendant Tristan Noah Borlase was convicted of two counts of first-degree murder for killing his parents one month before turning eighteen years of age and was sentenced by the trial court to two life sentences without the possibility of parole, to run consecutively. He appeals his sentence. For the following reasons, we conclude Defendant received a fair trial, free from reversible error.

I. Background

On 10 April 2019, Defendant brutally killed his father and mother in separate attacks at their home near Boone. Evidence at trial showed as follows:

On the morning of 10 April 2019, Defendant attended his Civics and Economics class at school. The lesson that day focused on how juveniles are punished differently than adults in the criminal justice system. Specifically, the lesson instructed that juveniles could not receive the death penalty for murder.

In the afternoon, Defendant's father surprised Defendant by picking him up from high school after receiving a call from school personnel informing him that Defendant's grades had been slipping and that he was at risk of not graduating. Once home, Defendant's parents informed him that they were disciplining him by taking his car keys and cell phone and by prohibiting him from participating on the school's track team for the remainder of the season, including participating in the track meet that afternoon.

Later that evening, Defendant was inside the home with his mother while his father was outside engaged in yardwork. While alone with his mother, Defendant inflicted multiple stab wounds on her with a large knife. He also inflicted blunt force injuries on his mother and strangled her. He then went outside, approached his father from behind, and inflicted a stab wound. He chased and subdued his father, riding his father's back until he fell to the ground, and inflicted several more stab wounds in a violent fashion. When he finished the attack, he walked away with his father still alive. He looked back towards his father and saw him on his knees, struggling to get up. His father then collapsed to the ground, and Defendant continued to walk away. He did not render aid to either parent.

Defendant spent the next two hours attempting to conceal his actions, hiding the bodies of his deceased parents and attempting to clean the crime scene. He hosed down the front porch and the living room area. To dispose of his mother's body, he tied a rope around her

feet to drag her from the house. When this was unsuccessful, he resorted to carrying her, but he repeatedly dropped her. He hid his mother's body in the bed of a pickup truck, under a blanket and bags of mulch, in the woods on the family's property. He stole his father's wallet from his body but left the body in place and covered it with a hammock (which his sister would find later that night while searching for her parents).

Defendant then drove to his grandmother's home to pick up his youngest brother, rather than requiring his grandmother to bring his brother home. That brother described Defendant as "overly happy" and "kinda upbeat" when Defendant picked him up. The grandmother described Defendant as being "just in a really good mood" and said that he "smiled and laughed a bit."

After bringing his brother home, Defendant then left to smoke marijuana with friends, leaving his twelve-year-old brother alone and scared in a home covered with blood, worried about his missing parents. As he was returning home a few hours later, he saw his grandmother's car, whereupon he turned off his headlights and drove away. He stayed at a friend's house overnight and attempted to flee the state the next morning but was caught shortly after crossing the border into Tennessee.

At the time of the killings, Defendant was 17 years, 11 months old, a senior in high school, and had been accepted to attend a state university in South Carolina, with plans to join the school's track team as a pole vaulter.

While in jail, Defendant repeatedly showed a lack of remorse for his crimes. And a few weeks after the killings, Defendant even hosted a birthday gathering for himself, with his friends attending, at the jail.

Approximately three years later, on 2 March 2022, a jury found Defendant guilty of two counts of first-degree murder based on premeditation and deliberation.

The following day, on 3 March 2022, the trial court held a hearing to consider the appropriate sentence, as Defendant was a minor when he committed the two murders. At the conclusion of the hearing, the trial court entered a written sentencing order with its two judgments, sentencing Defendant to two life sentences without the possibility of parole, to run consecutively. Defendant appeals.

II. Analysis

Defendant's sole argument is that the trial court erred by sentencing him to two consecutive life sentences without parole. In making his argument, Defendant contends that the trial court did not comply

with Section 15A-1340.19B of our General Statutes, which provides the procedure for considering a sentence of life without the possibility of parole ("LWOP") for a juvenile offender. He further contends that he was sentenced in violation of the Eighth Amendment to the federal constitution and Article 1, Section 27 of our state constitution.

A. Federal Constitution – Eighth Amendment Jurisprudence

In the present case, the sentencing judge held a hearing in which he heard evidence concerning Defendant's youth and upbringing. The judge exercised discretion and determined two consecutive sentences of LWOP to be appropriate. For the reasoning below, we conclude the procedure employed in sentencing Defendant conformed with the Eighth Amendment of the federal constitution.

The Eighth Amendment to our federal constitution bars the imposition of "cruel and unusual punishments." U.S. Const. amend. VIII. The Eighth Amendment applies to states by virtue of the Fourteenth Amendment. *See Harmelin v. Michigan*, 501 U.S. 957, 962 (1991).

A LWOP sentence is "the second most severe [punishment] known to the law." *Id.* at 996. But as a LWOP sentence is markedly different than a death sentence, *Furman v. Georgia*, 408 U.S. 238, 306 (1972), a LWOP sentence is permissible under the Eighth Amendment for *adult* offenders, even for many non-violent crimes, such as simply possessing a large amount of cocaine, *Harmelin*, 501 U.S. at 996, and may be imposed on *adult* offenders even without ever considering mitigating factors or the "particularized circumstances of the crime and of the criminal." *Id.* at 962.

However, the United States Supreme Court has determined that the Eighth Amendment is more restrictive on the ability of a trial court to impose a LWOP sentence on a defendant who was a minor when he committed his crimes. For instance, in 2010, the Court held that the Eighth Amendment bars the imposition of a sentence of LWOP for a juvenile *nonhomicide* offender. *Graham v. Florida*, 560 U.S. 48, 75 (2010).

In 2012, the Court held that a sentencing scheme which *requires* a sentencing judge to impose a LWOP sentence on a juvenile homicide offender violates the Eighth Amendment. *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (holding that "the Eighth Amendment forbids a sentencing scheme that mandates [LWOP] for juvenile offenders."). In so holding, the Court reasoned that a sentencing scheme must afford a sentencing judge or jury "the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.*

at 489. The Court quoted earlier cases to reiterate the "great difficulty [for the sentencing judge] of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender *whose crime reflects* irreparable corruption.' " *Id.* at 479 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2004), and *Graham*, 560 U.S. at 68) (emphasis added).

Four years later, the Court explained that *Miller* "drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery v. Louisiana*, 577 U.S. 190, 209 (2016).

Courts across our country have grappled with the proper interpretation of these decisions, specifically whether or not the Eighth Amendment prohibits a judge from sentencing a juvenile homicide offender to LWOP without expressly finding that the offender was permanently incorrigible (or at least that his crime reflected incorrigibility). *See Jones v. Mississippi*, 141 S. Ct. 1307, 1313 (2021) (recognizing a "disagreement in state and federal courts about how to interpret *Miller*").

In 2021, in *Jones v. Mississippi*, the Court clarified that the Eighth Amendment does not require a sentencing judge to make any finding regarding the juvenile offender's permanent incorrigibility or otherwise to provide a "sentencing explanation with an implicit finding of permanent incorrigibility" before imposing a sentence of LWOP. *Id.* at 1318-19, 1321. Rather, the Eighth Amendment merely requires that the sentencing judge be afforded the "discretion to consider the mitigating qualities of youth and impose a lesser punishment." *Id.* at 1314.

In the present case, the sentencing judge held a hearing, considered evidence concerning Defendant's youth, and in his discretion determined two LWOP sentences to be appropriate. The procedure employed by the sentencing judge met the requirements of the Eighth Amendment as articulated by the United States Supreme Court in *Jones* and was at least as robust as the procedure employed by the Mississippi judge in *Jones*, which that Court held to be constitutionally sufficient.

Specifically, in *Jones*, the trial court held a hearing, allowed the defendant to introduce "any evidence relevant to the factors discussed in *Miller*[,]" including five factors touching on the defendant's youth, his upbringing, the circumstances of the offense, his competence, and the possibility of rehabilitation. *Jones v. State*, 285 So.3d 626, 632-33 (Miss. Ct. App. 2017), *aff'd*, *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). The judge made an oral ruling in which he "did not specifically discuss on the record each and every factor mentioned in the *Miller* opinion," but

in which he did state that he "considered each of the *Miller* factors." Id. at 634. In sum, he "recognized the correct legal standard ('the *Miller* factors'), his decision was not arbitrary, and his findings of fact [were] supported by substantial evidence." *Id.*

In the present case, the sentencing judge entered a written order in which he considered similar factors with much more articulation as to each factor than that provided by the sentencing judge in *Jones*. He exercised discretion to determine an appropriate punishment. His decision was not arbitrary. And for the reasoning in the next section, we conclude his findings are supported by substantial evidence. Accordingly, we conclude the sentence does not violate the Eighth Amendment.

B. North Carolina's Sentencing Scheme

In 2012, in response to *Miller*, our General Assembly enacted a statute which affords a judge discretion whether to sentence a juvenile homicide offender to LWOP. *See* N.C. Gen. Stat. § 15A-1340.19B (2022). The statute requires the sentencing judge to hold a hearing and allows the State and the defendant to present evidence "as to any matter that the court deems relevant to sentencing." *Id.* § 15A-1340.19B(b). The statute also allows a defendant to offer evidence of mitigating factors, including, but not limited to, eight specific factors which touch on the defendant's youth. *Id.* § 15A-1340.19B(c). Our Supreme Court has held that this sentencing scheme "facially conform[s] to the federal constitutional case law." *State v. Conner*, 381 N.C. 643, 666, 873 S.E.2d 339, 354 (2022).

It may be that our sentencing statute provides more limits than that required by *Miller* and *Jones*. However, as stated in *Jones*, states are free to impose "additional sentencing limits in cases involving defendants under 18 convicted of murder." *Jones*, 141 S. Ct. at 1323.

We now turn to Defendant's contentions in his brief on this issue.

1. Permanent Incorrigibility and Potential for Rehabilitation

Defendant challenges that the evidence did not support the trial court's finding that he was "permanently incorrigible" and "beyond rehabilitation." We note that there is nothing in our sentencing statute which requires the trial court to expressly find a juvenile homicide offender to be permanently incorrigible in order to sentence him to LWOP; however, the statute does require the sentencing judge to consider the "[l]ikelihood that the defendant would benefit from rehabilitation in confinement." N.C. Gen. Stat. § 15A-1340.19B(c)(8). In any event, here, the trial court determined that his "crimes and other [behavior] demonstrate a

condition of irreparable corruption and permanent incorrigibility without the possibility of rehabilitation." We conclude the trial court made several findings supporting its determination and that these findings are supported by the evidence.

Specifically, the trial court made extensive findings concerning Defendant's crimes, his intelligence, his devious calculations made during the crimes, his lack of sincere remorse for those crimes, his manipulative behaviors during and after his crimes and other behaviors, and other relevant factors to determine that there was insufficient evidence concerning the statutory mitigating factor of the likelihood of rehabilitation. While Defendant argues that "the record as a whole" suggests otherwise, our review is not a "whole record test" review. The trial court considered all the evidence, and there was substantial evidence to support the trial court's determination.

2. Defendant's Age

The statute requires the trial court to consider evidence concerning the offender's "[a]ge at the time of the offense" as a mitigating factor. N.C. Gen. Stat. § 15A-1340.19B(c)(1). Here, the trial court found Defendant was one month shy of his eighteenth birthday when he murdered his parents. Defendant takes issue with the failure by the trial court to indicate in its order whether it considered Defendant's age to be a mitigating factor. We disagree. Though the trial court did not expressly state that it did not consider Defendant's age to be a mitigating factor, it is apparent from the section in the order concerning Defendant's age and from the order as a whole that the trial court did not consider Defendant's age as a mitigating factor. For example, the court pointed out that Defendant "reached the age of adulthood only one month after committing these homicides." Accordingly, we conclude that the trial court did not err in its consideration of this factor.

3. Immaturity

The statute requires the trial court to consider evidence concerning Defendant's "[i]mmaturity" as a mitigating factor. N.C. Gen. Stat. § 15A-1340.19B(c)(2). Defendant takes issue with the trial court's handling of this factor. The trial court gave some weight to Defendant's immaturity as a mitigating factor but did not find the factor "to be a significant mitigating factor[.]" In so determining, the trial court recognized that juveniles in general are immature but that there was no evidence to suggest that Defendant was more immature than someone of his age. We conclude that the trial court did not err in considering this factor.

4. Ability to Appreciate Risks and Consequences

The statute requires the trial court to consider evidence concerning Defendant's "[a]bility to appreciate the risks and consequences of [his] conduct" as a mitigating factor. N.C. Gen. Stat. § 15A-1340.19B(c)(3). The trial court found no mitigating value as to this factor, noting Defendant's actions in planning the murders, his attempts to cover up his crimes, and his flight from the crime scene. Defendant merely notes in his brief concerning this factor that his attempt to clean up the crime scene was sloppy at best. Nonetheless, we conclude that the trial court did not err in its consideration of this factor.

5. Intellectual Capacity

The statute requires the trial court to consider evidence concerning Defendant's "[i]ntellectual capacity" as a mitigating factor. N.C. Gen. Stat. § 15A-1340.19B(c)(4). The trial court found Defendant's IQ to be 128 (placing him in the 97th percentile) and that he had no intellectual limitations and, accordingly, determined Defendant's intellectual capacity not to be a mitigating factor. Defendant argues that the trial court should have considered Defendant's high intellectual capacity as a mitigating factor. We conclude that the trial court did not err in its consideration of this mitigating factor.

6. Familial or Peer Pressure

The statute requires the trial court to consider evidence concerning "[f]amilial or peer pressure exerted upon [D]efendant" as a mitigating factor. N.C. Gen. Stat. § 15A-1340.19B(c)(7). Concerning this factor, the trial court found that Defendant had a positive home environment with loving parents and did not experience any significant peer pressure. There was evidence to support this finding. For instance, Defendant's forensic psychologist testified regarding his conversations with Defendant about his father. In those conversations, Defendant "talked about wanting to be like his father and that his father was a role model for him. Talked about how his father taught him how to play the guitar, and how proud his father was, how proud he was when he came to his track meets and would put his arms around his son." During his testimony at trial, Defendant characterized his mother as "a good mom" and "understanding[.]" One of Defendant's sisters testified that their mother had a "soft spot" for Defendant.

Defendant points to evidence suggesting that his relationship with his parents was strained, causing him emotional harm. The trial court did note that Defendant disagreed with some of the decisions his

parents made concerning discipline. There was other evidence to support the trial court's findings. We conclude the trial court did not err by determining that Defendant's evidence was not credible or otherwise had any impact on his decision to murder his parents.

Defendant takes issue with the trial court's "myopic focus on the" murders committed by Defendant. We note that the trial court did not focus *exclusively* on the murders but considered other evidence concerning Defendant when determining the appropriate sentence. In any event, we conclude that it was not error for the trial court to give significant consideration to the circumstances of the murders themselves. Indeed, a major focus of the analysis by the United States Supreme Court in the cases cited above in determining the appropriateness of a LWOP sentence is on whether the "crime" committed by the juvenile offender "reflects irreparable corruption." *Jones*, 141 S. Ct. at 1315 (citations omitted).

In sum, the sentencing judge considered the evidence presented concerning mitigating factors, including those enumerated in the sentencing statute. We conclude that the trial court complied with N.C. Gen. Stat. § 15A-1340.19B in sentencing Defendant.

B. North Carolina Constitution – Article I, Section 27

Defendant contends the trial court violated his rights under Article I, Section 27 of our state constitution, a provision which prohibits "cruel and unusual punishments," in sentencing him to two consecutive sentences of LWOP. N.C. Const. art. I, § 27.

Our Supreme Court recently held that this state constitutional provision "offers protections distinct from, and in [the context of sentencing juvenile offenders] broader than, those provided under the Eighth Amendment" of the federal constitution. *State v. Kelliher*, 381 N.C. 558, 579, 873 S.E.2d 366, 382 (2022). Further, the Court held that "sentencing a juvenile who can be rehabilitated to [LWOP] is cruel within the meaning of article 1, section 27." *Id.* at 585, 873 S.E.2d at 386. The Court reiterated this principle in another opinion decided the same day. *See Conner*, 381 N.C. 643, 669, 873 S.E.2d at 355-56 (2022) (holding that sentencing a juvenile offender whom the court finds not to be "incorrigible or irredeemable" to LWOP violates "the even more protective provisions of article 1, section 27" of our state constitution).

In both *Kelliher* and *Conner*, the sentencing judge found the juvenile offender *not* to be permanently incorrigible. Our Supreme Court held in each case that it was a violation of our state constitution to

sentence a juvenile offender to LWOP where the sentencing court found the offender not to be permanently incorrigible. However, here, the sentencing judge made no finding that Defendant was not permanently incorrigible. Rather, the trial court expressly found that "it did not believe that there is a likelihood of rehabilitation in confinement" and that Defendant's crimes "demonstrate a condition of irreparable corruption and permanent incorrigibility."

In what is arguably *dicta*, our Supreme Court further stated in *Kelliher* and *Conner* that even if the trial court does not find the juvenile offender not to be permanently incorrigible, the Court considered it a violation of our state constitution for a judge to sentence a juvenile offender to LWOP unless the judge affirmatively found the offender permanently incorrigible. *See*, *e.g.*, *Kelliher*, 381 N.C. at 587, 873 S.E.2d at 387 (noting that "unless the trial court expressly finds that a juvenile homicide offender is one of those 'exceedingly rare' juveniles who cannot be rehabilitated, he or she cannot be sentenced to [LWOP]" under our state constitution). That is, where the federal constitution does not require an express finding by a sentencing judge that the juvenile offender is or his crime reflects permanent incorrigibility, *see Jones v. Mississippi*, *supra*, our Supreme Court expressed the view that such a finding is required under our state constitution.

However, even if these statements in *Kelliher* and *Conner* are not *dicta*, we conclude the trial court complied with the holding when it expressly found that there was no likelihood that Defendant would be rehabilitated during confinement. Accordingly, we conclude the trial court did not violate Defendant's rights under our state constitution in sentencing him to two consecutive sentences of LWOP for the murder of his parents.

III. Conclusion

The trial court did not err in sentencing Defendant to two consecutive sentences of LWOP. We, therefore, conclude Defendant received a fair trial, free of reversible error.

NO ERROR.

Judge GORE concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the majority's holding that the trial court did not err in sentencing defendant to two consecutive sentences of life without the possibility of parole. The majority's opinion not only misreads the record, but it also ignores and calls into question our Supreme Court's precedent regarding a sentencing judge's "duty to find a statutory mitigating factor when the evidence in support of a factor is uncontradicted, substantial and manifestly credible." *State v. Spears*, 314 N.C. 319, 321 (1985) (citing *State v. Jones*, 309 N.C. 214, 219–20 (1983)). This duty of the trial court "is at the heart of the factfinding function[,]" and by allowing the trial court to ignore credible evidence, the majority renders meaningless the requirement that it consider the statutory factors under N.C.G.S. § 15A-1340.19B. *Jones*, 309 N.C. at 219–20.

Such blatant disregard for precedent demands justification, but the majority offers none. Instead, it wrongly concludes that the sentencing judge considered the evidence presented and complied with the statute. Moreover, rather than acknowledge defendant's evidence, the majority concentrates on excusing the trial court for its "significant consideration" of the crime when sentencing defendant—"despite the fact that the case law warns against such a focus[.]" *State v. Ames*, 268 N.C. App. 213, 225 (2019). In the process, the majority diminishes longstanding concerns surrounding the sentencing of juveniles and the importance of "considering an offender's youth and attendant characteristics before imposing a life-without-parole sentence." *Miller v. Alabama*, 567 U.S. 460, 483 (2012) (cleaned up).

I would vacate and remand for resentencing because the trial court violated N.C.G.S. § 15A-1340.19 as well as its duty under *Jones* in the face of credible evidence alone. However, by refusing to consider relevant mitigating evidence—despite such evidence being manifestly credible under North Carolina law—the trial court also violated defendant's constitutional rights under the Eighth Amendment and Article 1, Section 27 of the North Carolina Constitution.[1] *See Eddings v. Oklahoma*, 455 U.S. 104, 104 (1982).

The majority implies defendant murdered his parents because they took "his car keys and cell phone" and "prohibit[ed] him from

1. Because "our Supreme Court 'historically has analyzed [Eighth Amendment] claims by criminal defendants the same under both the federal and state Constitutions[,]' " my analysis applies to both. *See State v. Seam*, 263 N.C. App. 355, 365 (2018), *aff'd*, 373 N.C. 529 (2020) (quoting *State v. Green*, 348 N.C. 588, 603 (1998)).

participating on the school's track team[.]" The record before us, however, tells a much different story.

I. Background

Defendant's convictions arise from the killing of his parents in spring of 2019 at the family's home in Deep Gap, a remote area near Boone, North Carolina. At the time, defendant was seventeen years old and a senior in high school. Defendant's parents had eight children, four biological and four adopted. Defendant was the youngest of the biological children. The addition of the adopted children created many challenges for the family. Two of defendant's adoptive siblings had to leave the household due to family conflict. Specifically, one was sent to a psychiatric hospital before permanently ending up in foster care while another was sent to a home for troubled children in Missouri.

Defendant's parents were described as loving and committed to their children. They were also deeply religious, particularly defendant's mother. These religious views strained defendant's relationship with his mother and became a source of conflict. Defendant described discipline in the household as harsh. Defendant testified to being awakened in the middle of the night by his mother sometimes as many as "four out of five school nights[,]" so his mother could lecture him on religion, school, and girls for several hours. Defendant's adoptive siblings also described being awakened by their mother and taken to a place referred to as "the nest"—the place in the house where these late-night confrontations occurred. Some of these conflicts lasted several hours and escalated to screaming.

Before relocating to Deep Gap, the family lived in Mooresville, North Carolina. In 2017, the family physically separated when defendant's mother and two of the siblings moved to Deep Gap, leaving defendant, defendant's father, and another sibling in an apartment in Mooresville.

At the end of defendant's junior year, they joined his mother and siblings in Deep Gap, where the home was unfinished and not yet approved for occupancy. At one point, defendant testified that out of fear that building inspectors would discover them living in the structure, the family took down or moved everything in it that made it "look[ ] like people were living inside." Defendant testified that during this period, his sleeping arrangements varied from staying with his grandmother to sleeping in his car or a goat pen that was on the property.

Although athletically gifted and highly intelligent, defendant struggled academically. He was frequently absent or late to class and failed

to finish assignments. While in class, defendant would listen to music and not pay attention. During his senior year of high school, defendant testified to frequently using marijuana and nicotine and having sex with multiple partners. In 2018, defendant was suspended from school after being found with a knife during a search for vaping paraphernalia by school administrators. That same month, defendant participated in outpatient counseling "due to concerns regarding poor judgment and impulsive decision-making within the home and school environments[.]" Moreover, defendant suffered from depression and anxiety. Before his arrest, he engaged in self-harm by cutting his forearms. He also testified to contemplating suicide and attempting it in 2018.

On 10 April 2019, defendant's English teacher called defendant's mother because defendant "wasn't turning in a lot of assignments and . . . was having a hard time staying awake in class." In response to the call, defendant's parents pulled defendant out of class. The majority suggests that because it was discussed in his civics class that day that juveniles could not receive the death penalty for murder, the lecture somehow fueled defendant's actions. This suggestion has no support in the record and is mere speculation—in fact, the record reflects defendant's lack of attention and interest in the classroom, specifically on the day of the civics class lecture.

After his parents picked him up from school, defendant testified that they went home and discussed his shortcomings, such as being tardy "almost 30 . . . out of . . . 40-some days of school[,]" and his risk of not graduating high school. At some point, defendant's mother had him take a drug test. Defendant and his father then went to Lowe's Home Improvement to purchase mulch. After the three of them completed some household chores, surveillance cameras, which defendant had helped his father install around the home, showed defendant's father walking toward his truck in the driveway to start unloading pallets of mulch at 6:31 p.m. One minute later, defendant was seen walking out of the home toward the driveway before returning to the door and reentering the house.

According to defendant, his father had asked him to help him with the mulch, but his mother told him that he "needed to figure out some stuff for school." While defendant sent an email to a teacher regarding his class performance, which was dictated by his mother, defendant testified that they started arguing about religion. When he was at the table typing another email, defendant stated that the argument intensified to a point where he said, "Fuck you, that's not what Christianity is about." According to defendant, his mother stated that he "was about to

be talking to God or Jesus, whether [he] wanted to or not" before putting her arm around his neck and applying pressure.

Defendant testified that he responded by twisting around and elbowing her, after which, his mother retrieved a pair of scissors and approached him. Defendant stated that he then grabbed a kitchen knife and stabbed her to defend himself but that she kept coming toward him. Defendant testified that while they were pressed up against each other, he stabbed her again in a "reactive frenzy" while he was "trying to get outside[.]" According to the forensic pathologist, her death was caused by stab wounds to her torso. The autopsy results also found that defendant's mother "had been asphyxiated by some type of pressure to the neck prior to death."

At 6:35 p.m., the driveway surveillance camera showed defendant running toward his father in the driveway with a knife and stabbing him in the upper torso. Defendant's father is then seen running away from defendant. Another camera then showed defendant's father running down a hill adjacent to the house while defendant pursued him. While running, defendant's father appeared to trip and fall on the ground, at which point defendant started attacking his father with the knife.

According to defendant, after he went outside, he started yelling for his father "want[ing] to tell him what happened[.]"[2] Defendant recalled colliding with his father in the driveway but not stabbing him at that point. Defendant testified that when running after his father, he saw his father reach for something in his pocket, believing it could have been a pocketknife or phone. Defendant testified, "I was trying to talk to him. And either I was talking or my thoughts were screaming very loudly in my own head, but I thought I was audibly talking and trying to talk to him." Defendant further testified that when he caught up with his father, he started stabbing him. Then, according to defendant, the knife dropped to the ground and defendant's father picked it up after a brief scuffle. In response, defendant testified that he knocked the knife out of his father' hand with a rock before retrieving it and stabbing his father again. The forensic pathologist found that defendant's father died from stab wounds to his torso.

Dr. James Hilkey ("Dr. Hilkey"), defense counsel's expert witness and forensic psychologist, reported that "the encounter between [defendant] and his mother was a highly disturbing and emotionally arousing

2. The surveillance cameras did not record audio.

event; a culmination of years of conflict." The report found that defendant's actions "in killing his father after the assault on his mother was a continuous event and consistent with individuals experiencing a depersonalization/derealization disorder[,]" which involves "experiences of unreality or detachment with respect to surroundings[.]"

Defendant testified that, after killing his father, he went back to the house and vomited in the toilet before returning to his father where he got the knife and his father's phone and wallet. From 6:41 to 6:56 p.m., surveillance footage showed defendant retrieving the knife, hosing down the front porch, and dragging his mother into the driveway. Although there is no surveillance footage, defendant testified that he loaded his mother's body in the back of a truck, covered her with a blanket, and drove the truck toward the barn. According to defendant, he then took a shower, packed some clothes, and at some point, covered his father's body with a hammock and leaves.

Around 8:30 p.m., defendant picked up his younger brother from their grandmother's house and brought his brother back to the house. When defendant's brother asked him where his parents were and why there was blood in the house, defendant told him that their parents were in Wilkesboro and that the blood was from him cutting himself while doing dishes. After telling his brother to go upstairs and play video games, defendant drove to the high school to see friends and smoke marijuana. Defendant testified that after leaving the school, he went to pick up his other brother from work, but his brother had already left. Defendant then drove back to the house, but upon seeing several cars in the driveway, he left and ultimately ended up staying the night with a friend after telling her he had gotten into an argument with his family.

In the morning, defendant told his friend that he wanted to run away, so they left her apartment, got some breakfast at McDonalds, and purchased some toiletries and a pillow at Walmart. The friend told defendant that he could stay at her father's house who lived nearby in Tennessee and defendant agreed. As they crossed the border into Tennessee, police pulled the car over and arrested defendant.

Defendant was indicted with two counts of first-degree murder on 30 September 2019 to which defendant later entered pleas of not guilty. On 2 March 2022, a jury found defendant guilty on both counts of first-degree murder.

Pursuant to N.C.G.S. § 15A-1340.19, a sentencing hearing was held on 3 March 2023. During the hearing, the trial court first allowed the State and family members to be heard. In addition to family members

providing victim impact statements, the State introduced letters from other family members and two written statements that were previously read in court. The State concluded with the following statement:

> Your, honor, I will just say very briefly, I don't have the words to express what this family has been through. They have articulated it much better than I ever could. I will say, Your Honor, over the three years that this case has been pending, I and my staff have been truly honored and humbled to get to know them, to see the resilience and strength of this family. The way they have come together and supported one another in this loss has been truly inspiring for I and my staff, Your Honor, and I think that that along with the words that they've expressed here today truly shows the Court what kind of people that Jeff and Tanya were and what their family was all about.
>
> Your Honor, this community, this family has lost – has suffered an incomprehensible loss. On behalf of the State of North Carolina, Your Honor, given the gravity of this loss and all the other evidence that this Court has heard over the course of this trial, we would argue that the weight of the evidence, the weight of this loss would overcome any mitigating factors that the defense might present, and that the sentence for [defendant] should be life without the possibility of parole for the death of Tanya Maye Borlase and another sentence of life without the possibility of parole in the death of Jeffrey David Borlase, and that those two sentences should run consecutively, Your Honor. Thank you.

Defendant then introduced several sentencing exhibits, including (1) Dr. Hilkey's trial report; (2) Dr. Hilkey's report of psychological forensic evaluation addressing §15A-1340.19's mitigating factors; (3) a letter from Susan Schall ("Ms. Schall"), defendant's 11th grade Honors English teacher; (4) a letter from Cindy Wilkinson ("Ms. Wilkinson"), a mother who had spent a week as defendant's group leader during a church camp in 2017; and (5) a letter from Rachel Chrane regarding defendant's health issues. Defendant provided copies of the exhibits to the State.

Dr. Hilkey's trial report described a strict, chaotic household and a highly dysfunctional relationship between defendant and his mother. Specifically, the report included an interview with defendant's sibling,

who described being "summoned to 'the nest' " and lectured to "for hours at a time and at times until 3:00 in the morning." The sibling stated that "punishments delivered were often done in isolation and away from other siblings." Dr. Hilkey's report additionally explained that due to defendant's "emotionally reserved nature and his discomfort expressing strong emotions[,] he can come across to others as calloused and unfeeling."

The report also included an interview with defendant's ex-girlfriend who stated that she "often hear[d] defendant's mother screaming while she was on the phone with [defendant and had informed the investigator] that [defendant's] mother was very strict and did not feel [defendant] could 'do anything right.' " She further stated that "[t]oward the end, [defendant] quit trying to please and just wanted to make it through each day."

Additionally, the report described a "deeply religious" household where defendant reported that his mother "held to a literal translation of the Bible." According to defendant, it was "not uncommon for his mother to reference receiving instructions from God and removing African and West Indian objects of art from the home believing they were demonic, and at times, screaming at them."

Lastly, the report described significant conflicts between defendant's parents and adoptive siblings, including the removal of two of the siblings from the family. It was reported that before one was removed to a group home, the sibling had attacked his brother, grandmother, father, and mother.

In the letter from Ms. Schall, she described conversations she had with defendant about his "strict religious upbringing" and him "feeling confined by his family's choices and values." In 2018, Ms. Schall was asked to write a letter about defendant to the high school administration. In the letter, Ms. Schall states:

> Currently [defendant], his dad, and one adopted brother live in an apartment in Mooresville (his parents just sold their home this semester) while his mother and the rest of the children live in Boone. This arrangement is partly due to the Borlases building a house in Boone . . . and because [defendant's] brother is so violent that his mother cannot live with him until they work out some issues. This puts an undue burden on [defendant] to help parent his brother.[3]

3. The omitted portion consists of a note Ms. Schall added in a email excerpting the letter. The note is as follows: **{I now know they were renovating a home. [Defendant]**

Moreover, when interviewed by Dr. Hilkey, Ms. Schall reported that defendant "was frequently late for class and appeared physically fatigued." Defendant related to her "chaos in the home, separation of family members, and [moving] concerns[.]"

In Ms. Wilkinson's letter, she described a time during church camp in Myrtle Beach in 2017 where she was defendant's small group leader. According to Ms. Wilkinson, she learned that defendant was sent to the weeklong camp "with only a pair of shorts and a tee shirt" as punishment. In response, Ms. Wilkinson purchased some clothing and toiletries for defendant from Walmart. Ms. Wilkinson "sensed that he needed mothering and felt his emotional rawness and talked through some of the pain privately and in the group." Ms. Wilkinson further stated that defendant "was in despair and showed multiple signs of suicide risk: depression, sense of hopelessness, despair, withdrawal, isolation, worthlessness, saw no way out, fatigue, confusion, and talked about how broken he felt in group time."

Finally, Dr. Hilkey's report of psychological forensic evaluation, which addressed the §15A-1340.19's mitigating factors, stated that although defendant's parents "were law-abiding parents and attempted to provide a safe home consistent with their moral values[,]" defendant's "offense behavior was influenced by [his] conflicted relationship with his mother[.]"

After defense counsel and defendant made their closing statements regarding sentencing, the State declined to make any further argument. In the sentencing order, the trial court concluded that "[d]efendant's crimes and condition reflect a condition of irreparable corruption and permanent incorrigibility without the possibility of rehabilitation" and sentenced defendant to two terms of life without the possibility of parole. Defendant gave oral notice of appeal in open court following sentencing.

II. Discussion

On appeal, defendant argues that the trial court erred by sentencing him to two consecutive life without parole sentences. With regard to the trial court's findings on the mitigating factors enumerated in N.C.G.S. § 15A-1340.19B(c), defendant challenges six of them for either failing to establish whether the factor was mitigating or failing to find mitigating factors despite evidence that they existed. Defendant also argues that the trial court violated defendant's constitutional rights because it

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told me on more than one occasion that it was illegal for them to be living in the home due to the lack of upgrades, electrical and otherwise}.

"refuse[d] to consider" relevant mitigating evidence in violation of the Eighth Amendment. Before addressing each argument in turn, I first review federal and state law on the punishment of juvenile offenders.

A. Statutory and case law on the punishment of juvenile offenders

In *Miller v. Alabama*, the United States Supreme Court held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " 567 U.S. at 465. "Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 476. Thus, "the case for retribution is not as strong with a minor as with an adult" because their "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

The Supreme Court also stated in *Miller* that because of "children's diminished culpability and heightened capacity for change," sentencing juveniles to life without parole will be an uncommon occurrence. 567 U.S. at 479. This is especially the case "because of the great difficulty . . . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' " *Id.* at 479–80, 183 (citations omitted); *see also Graham v. Florida*, 560 U.S. 48, 72 (2010) (explaining that "[t]o justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is [permanently] incorrigible.").

Thus, in making such rare finding, "the trial court should be satisfied that in 25 years, in 35 years, in 55 years—when the defendant may be in his seventies or eighties—he will likely still remain incorrigible or corrupt, just as he was as a teenager, so that even then parole is not appropriate." *State v. Sims*, 260 N.C. App. 665, 683 (2018) (Stroud, J., concurring); *see also State v. James*, 371 N.C. 77, 96–97 (2018) ("*Miller* and its progeny indicate that life without parole sentences for juveniles should be exceedingly rare and reserved for specifically described individuals[.]").

Moreover, "almost all of the cases" subjecting juveniles to a sentence of life without parole "arose from heinous and shocking crimes[.]" *State v. May*, 255 N.C. App. 119, 130 (2017) (Stroud, J., concurring). However, *Miller* and its progeny "dwell[ ] on the danger in focusing the sentencing inquiry on the nature of the offense." *State v. Ames*, 268 N.C. App. 213, 221 (2019) (citing *Miller*, 567 U.S. at 472); *see also Roper*, 543 U.S. at 553

("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course[.]").

Nine years after *Miller*, in *Jones v. Mississippi*, the United States Supreme Court held "that a separate factual finding of permanent incorrigibility is not required before a sentencer imposes a life-without-parole sentence on a murderer under 18." 209 L. Ed. 2d 390 (2021). Although parts of *Jones* could be seen as in conflict with *Miller*, our Supreme Court clarified *Jones*'s meaning in *State v. Kelliher*. 381 N.C. 558 (2022).

Specifically, the *Kelliher* Court explained that although *Jones* does not require a separate finding of incorrigibility "under a discretionary sentencing scheme like North Carolina's[,]" the substantive Eighth Amendment rule announced in *Miller* and its progeny remains undisturbed: *Id.* at 576. *Miller* forbids sentencing courts "from sentencing redeemable juveniles to life without parole." *Id.*

In response to *Miller*, our General Assembly enacted what is now codified as N.C.G.S. § 15A-1340.19B, which requires trial courts to "conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole . . . or a lesser sentence of life imprisonment with parole" whenever a juvenile is convicted of first-degree murder. § 15A-1340.19B(a)(2). In determining whether the sentence will be life without parole or life with parole, § 15A-1340.19B requires the sentencing court to consider mitigating factors including (1) age at the time of offense, (2) immaturity, (3) ability to appreciate the risks and consequences of the conduct, (4) intellectual capacity, (5) prior record, (6) mental health, (7) familial or peer pressure exerted upon the defendant, (8) likelihood that the defendant would benefit from rehabilitation in confinement, and (9) any other mitigating factor or circumstance. § 15A-1340.19B(c).

B. Mitigating factors under § 15A-1340.19

Regarding the trial court's findings for the factors enumerated in § 15A-1340.19B(c), defendant argues that the trial court erred in that it (1) failed to establish whether defendant's age was mitigating or not and (2) failed to find mitigating factors for defendant's familial pressure and immaturity. I agree.

After the hearing required by § 15A-1340.19B, the trial court must enter a sentencing order that "include[s] findings on the absence or presence of any mitigating factors[.]" § 15A-1340.19C(a). The sentencing court must also "expressly state the evidence supporting or opposing

those mitigating factors[.]" *State v. Santillian*, 259 N.C. App. 394, 403 (2018) (citations omitted). "To show that the trial court erred in failing to find a mitigating factor, the evidence must show conclusively that this mitigating factor exists[.]" *State v. Canty*, 321 N.C. 520, 524 (1988) (citing *State v. Michael*, 311 N.C. 214 (1984)).

1. Failure to establish whether defendant's age was mitigating

In its sentencing order, the trial court found "that [d]efendant was 17 years and 11 months old on the offense date" and that "[h]e reached the age of adulthood only one month after committing these homicides[.]" Nothing further was stated. Defendant argues that "the court made no indication that it considered any mitigating value that [defendant's] age might have provided."

North Carolina statute requires that the trial court's sentencing order "include findings on the absence or presence of any mitigating factors[.]" § 15A-1340.19C(a). Here, the trial court violated the statute by neither expressly nor impliedly stating whether defendant's age was mitigating or not. The majority states "it is apparent" from the sentencing order "that the trial court did not consider Defendant's age as a mitigating factor" because it found "[d]efendant was a month shy of his 18th birthday" at the time of the offense. This is hardly the case. Although the trial court's statement that defendant reached the age of adulthood *only one* month after committing these homicides could indicate that it found no mitigating value as to age, it could also mean that it found mitigating value, just not a significant amount. *See Sims*, 260 N.C. App. at 675 (finding that defendant's age—seventeen years and six months at the time of the offense—was not a considerable mitigating factor, but still a mitigating one nonetheless). This ambiguity is insufficient to satisfy the requirements of § 15A-1340.19C(a).

Certainly, a defendant who is fourteen at the time of an offense may receive more mitigation value for the age factor as compared to if they were seventeen. However, United States Supreme Court precedent makes clear: the relevant distinction is between children and adults, not between defendants who are fourteen and seventeen. *See Miller*, 567 U.S. at 460 ("*Roper* and *Graham* establish that children are constitutionally different from adults for sentencing purposes."); *see also Matter of Monschke*, 197 Wash. 2d 305, 313, 482 P.3d 276, 280–81 (2021) (extending the age range in *Miller* to defendants who are eighteen to twenty years old). Because it is unclear whether the trial court found an "absence or presence of" mitigation with respect to defendant's age, it violated the statutory mandate. § 15A-1340.19C(a).

2. Failure to find credible evidence of familial pressure

With respect to the enumerated factor "familial or peer pressure exerted upon the defendant," the trial court's sentencing order states:

> In *Miller v. Alabama*, the majority placed emphasis on the negative family, home, environmental and peer influences a juvenile faced while growing up. The specific situations addressed in that and following cases included growing up exposed to a troubled childhood, lack of parental care and involvement, exposure to drugs and even violence. This would also include a situation in which the juvenile was not the "trigger-man" or his involvement in the killing was only tangential. None of the factors are present in this case. In fact, the very opposite is true. Defendant had the benefit of very loving, caring and nurturing parents. He benefited from being raised by parents who deeply loved him and all his siblings and who sacrificed beyond even reasonable measure to provide for their children's health, welfare, happiness, needs and even wishes. While the Defendant may have genuinely disagreed with the form of discipline (*taking of privileges and interactive discussions*), even he seemingly admits in his testimony that both his parents had his best interests and his very future at heart throughout. As to any tangential involvement in murders, that is clearly not the case here. Defendant killed both parents separately by his own hand. *There is no credible evidence before the Court to support any finding of mitigation as to this factor*[.] (emphasis added).

Defendant argues the trial court erred in finding "no credible evidence" to support this mitigating factor and in relying "on the fact that [defendant] was raised in a loving home[.]"

Our Supreme Court has established that the sentencing judge has a duty to find statutory mitigating factors when the evidence in support of such factors is "uncontradicted, substantial and manifestly credible." *Spears*, 314 N.C. at 321 (citation omitted). Thus, to give proper effect to § 15A-1340.19B, "we must find the sentencing judge in error if he fails to find a statutory factor when evidence of its existence is both uncontradicted and manifestly credible." *State v. Jones*, 309 N.C. 214, 220 (1983).

In *Jones*, our Supreme Court acknowledged that "[i]t is easier to determine from a record on appeal whether evidence of a particular fact is uncontradicted than it is to determine" the credibility of the evidence.

Id. However, the *Jones* Court discussed situations in which courts have considered "credibility to be manifest[.]" *Id.* Two of those situations occur (1) when "the controlling evidence is documentary and [the] non-movant does not deny the authenticity or correctness of the documents[,]" and (2) when "there are only latent doubts as to the credibility of oral testimony and the opposing party has failed to point to specific areas of impeachment and contradictions." *Id.* (citations and internal quotation marks omitted).

Here, defendant offered considerable evidence of familial pressure, conflict, and dysfunction that went well beyond the "taking of privileges and interactive discussions[,]" particularly with respect to religion. Such evidence included but was not limited to (1) defendant being summoned to "the nest" in the middle of the night multiple days out of the week; (2) defendant's mother screaming at art objects in the home in front of defendant because she believed they were demonic; (3) defendant needing to sleep in his car or in a goat pen because of the family's chaotic living arrangement; (4) reports of significant familial conflicts with his adoptive siblings, which involved violence at times and put an undue burden on defendant to help parent his siblings; (5) reports of defendant being sent to a weeklong church camp without a change of clothes or toiletries as a form of punishment; and (6) Dr. Hilkey's report that defendant's "offense behavior was influenced by [his] conflicted relationship with his mother[.]" Defendant's evidence also tends to support that defendant was regularly pressured by his mother in that he felt he could not "do anything right" and "just wanted to make it through each day."

Such evidence was not contradicted by the State. Specifically, nothing in the State's evidence spoke to these conflicts or pressures, and after defendant introduced such evidence for sentencing, the State declined to make any further argument. Moreover, under *Jones*, defendant's evidence is presumed credible. Specifically, the evidence was largely documentary, and the State did not deny the authenticity or correctness of the reports or letters.[4] Although the State's evidence supports the fact that defendant's parents loved and cared about him deeply—love and conflict are not mutually exclusive; rather, both can exist in a family simultaneously. Although the majority cites this evidence, such as defendant's idolization of his father, the majority again fails to highlight

4. Nor did the State "point to specific areas of impeachment and contradictions" with respect to defendant's oral testimony about being awakened in the middle of the night by his mother sometimes as many as "four out of five school nights" or needing to sleep in a car or goat pen as the result of the family's dysfunctional living arrangement. *Jones*, 309 N.C. at 220.

anything that refutes or contradicts the substantial evidence of familial conflict discussed in part I.

Further, nothing in *Miller* states that a defendant must lack parental care or be exposed to violence and drugs for the mitigating factor to have value, which the trial court's sentencing order wrongly suggests. Rather, *Miller* considers "the family and home environment that surrounds [the defendant]—and from which he cannot usually extricate himself—no matter how brutal or *dysfunctional*." *Miller*, 567 U.S. at 477 (emphasis added).

"When evidence in support of a particular mitigating . . . factor is uncontradicted, substantial, and there is no reason to doubt its credibility, to permit the sentencing judge simply to ignore it would eviscerate" the statute. *Jones*, 309 N.C. at 218–19. Accordingly, the trial court erred in ignoring the evidence of familial disfunction and the mother's irrational behavior while finding no credible evidence regarding the familial pressure exerted upon defendant.

3. Failure to find credible evidence of immaturity

With respect to the enumerated factor "immaturity," the sentencing order states:

> Dr. Hilkey's report cites various general studies tending to indicate that the juvenile brain tends to develop slowly and that the brain does not become fully developed until later in adulthood. While undoubtedly true, there is no credible, specific evidence before the Court that Defendant suffered from any specific immaturity that would act to mitigate his decisions and conduct in this case. Accordingly, the Court does not find this factor to be a significant mitigating factor in this case[.]

Defendant argues that the trial court erred in this finding because there was "credible, specific evidence before the Court that [d]efendant suffered from . . . specific immaturity that would" have mitigated his decisions.

Here, Dr. Hilkey's report stressed that because defendant was only "seventeen on the date of his offense . . . the frontal cortex of his brain was not yet fully developed." Additionally, Dr. Hilkey reported "evidence supporting [defendant's] clinical depression and a significant degree of physiological arousal . . . activating hormonal chemicals in [his] brain. When coupled with the adolescent brain phenomenon, these factors would have impacted his ability to make sound decisions and fully appreciate the impact of his behaviors when he killed his parents."

Defendant's previous participation in outpatient counseling "due to concerns regarding poor judgment and impulsive decision-making within the home and school environments" corroborate Dr. Hilkey's findings regarding immaturity. *See Miller*, 567 U.S. at 471 (explaining that children's "lack of maturity and underdeveloped sense of responsibility lead to recklessness, impulsivity, and heedless risk-taking." (cleaned up)). Defendant's "shirking class time on his phone, vaping and smoking weed, and [being] sexually active with more than one partner" acts to further underscore his immaturity.

In addition to being specific, defendant's evidence was credible. In fact, by acknowledging and agreeing with the science of juvenile brain development in its order, the trial court emphasized its credibility. Moreover, the evidence was "documentary[,]" and the State never "den[ied] the authenticity or correctness of [the findings]." *See Jones*, 309 N.C. at 220.

By stating there was "no credible, specific evidence" in its order, the trial court thus disregarded its duty. *See Spears*, 314 N.C. at 321 ("The sentencing judge has a duty to find a statutory mitigating factor when the evidence in support of a factor is uncontradicted, substantial and manifestly credible."). Accordingly, the trial court again erred in finding no credible evidence that defendant suffered from immaturity.

C. Violation of the State and Federal Constitutions

Defendant argues that the trial court violated defendant's constitutional rights under the Eighth Amendment in that it refused to consider "relevant mitigating evidence" involving his "family life as a source of pressure." I agree.

"Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 104 (1982). In *Eddings*, the trial court refused to consider the mitigating circumstances of the juvenile defendant's turbulent family history because it "found that *as a matter of law* he was unable even to consider the evidence." *Id.* at 113. Because the "sentence was imposed without 'the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases,' " the Supreme Court reversed and required on remand the trial court's consideration of the defendant's home life. *Id.* at 105 (quoting *Lockett v. Ohio*, 438 U.S. 586, 606 (1978)); *see also Jones v. Mississippi*, 209 L. Ed. 2d 390 (2021) (listing a series of its capital cases requiring "the sentencer to consider mitigating circumstances when deciding whether to impose the death penalty.").

Although these cases involved the death penalty, the Supreme Court expressly acknowledged in *Jones v. Mississippi* that these cases

> recognize a potential Eighth Amendment claim if the sentencer expressly refuses as a matter of law to consider relevant mitigating circumstances . . . . By analogy here, if a sentencer considering life without parole for a murderer who was under 18 expressly refuses as a matter of law to consider the defendant's youth (as opposed to, for example, deeming the defendant's youth to be outweighed by other factors or deeming the defendant's youth to be an insufficient reason to support a lesser sentence under the facts of the case), then the defendant might be able to raise an Eighth Amendment claim under the Court's precedents.

209 L. Ed. 2d 390 n.7 (2021). I find this analogy relevant because "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Graham*, 560 U.S. at 69, 176 L. Ed. 2d 825. Although no execution takes place, "the sentence alters the offender's life by a forfeiture that is irrevocable" and "deprives [them] of the most basic liberties without giving hope of restoration[.]" *Id.* at 69–70.

"Life without parole is an especially harsh punishment for a juvenile[,]" who "will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.* at 70, 176 (citations omitted). Even more, in the case *sub judice*, the trial court sentenced defendant to two consecutive life sentences. Because "[t]his reality cannot be ignored[,]" *id.* at 71, I agree with defendant that "logic dictates that th[e] Eighth Amendment condition [under *Eddings*] apply with equal force when considering the ultimate punishment for a juvenile."

Here, the trial court refused as a matter of law to consider relevant mitigating evidence when it determined there was "no credible evidence before the Court to support any finding of mitigation as to [the familial pressure] factor." The current edition of Black's Law Dictionary defines "matter of law" as "[a] matter involving a judiciary inquiry into the applicable law." Black's Law Dictionary (11th ed. 2019). As discussed in part II.B., determining whether mitigating evidence is credible involves a judicial inquiry into the law. *See Jones*, 309 N.C. at 220–21; *see also N. Carolina Nat. Bank v. Burnette*, 297 N.C. 524, 533 (1979) (explaining that credibility of the evidence was "manifest as a matter of law."). Specifically, if the "evidence is documentary and the non-movant does

not deny the authenticity or correctness of the documents," then courts should deem it manifestly credible. *Jones*, 309 N.C. at 220–21 (cleaned up). Likewise, oral testimony should be deemed manifestly credible if "there are only latent doubts as to [its] credibility . . . and the opposing party has to 'failed to point to specific areas of impeachment and contradictions.' " *Id.* (citations omitted).

Thus, like in *Eddings*, when the trial court here found "no credible specific evidence . . . that [d]efendant suffered from any specific immaturity" or familial pressure that would support mitigation, it expressly declined as a matter of law not to consider it. Yet, as discussed in part II.B., under *Jones*, considerable credible and relevant evidence was proffered by defendant at the sentencing hearing as to both factors.

Accordingly, I would hold that the trial court violated defendant's constitutional rights under the Eighth Amendment by "refus[ing] to consider, as a matter of law, [the] relevant mitigating evidence" regarding defendant's family life and immaturity. *Eddings*, 455 U.S. at 104. Because our Supreme Court " 'historically has analyzed [Eighth Amendment] claims by criminal defendants the same under both the federal and state Constitutions[,]' " I would also hold that the trial court violated defendant's constitutional rights under Article 1, Section 27 of the North Carolina Constitution. *See State v. Seam*, 263 N.C. App. 355, 365 (2018), *aff'd*, 373 N.C. 529 (2020) (quoting *State v. Green*, 348 N.C. 588, 603 (1998)).

III. Conclusion

For the foregoing reasons, I dissent from the majority opinion and would remand for a new sentencing hearing with respect to defendant's first-degree murder convictions.

STATE OF NORTH CAROLINA
v.
DINO LAMONT THOMPSON

No. COA22-1036

Filed 2 January 2024

1. Appeal and Error—appellate jurisdiction—criminal case—Rule 4—judgment "rendered"

The Court of Appeals had jurisdiction to hear defendant's appeal from his convictions for first-degree forcible rape and other related offenses where, although the trial court's written judgments were neither file-stamped nor certified by the clerk of court, the judgments were signed by the judge, defendant's notice of appeal was file stamped the next day, and the parties did not dispute that the judgments had in fact been entered for purposes of Appellate Rule 4 (allowing an appeal from a judgment that is "rendered" in a criminal case).

2. Criminal Law—motion for mistrial—rape prosecution—victim as witness—alcohol consumption before testifying

In a prosecution for first-degree forcible rape and other related offenses, where the State informed the trial court on the fourth day of trial that the victim (who was testifying for the State) was seen in possession of alcohol and had possibly consumed alcohol that morning, the trial court did not abuse its discretion by denying defendant's motion for a mistrial after noting—on the record and outside of the jury's presence—that the victim had taken a portable breathalyzer test that day with "a 0.0 outcome." Further, although the victim later admitted to consuming alcohol that morning and the day before, the court did not err in declining to declare a mistrial sua sponte, since the court took immediate measures to address the victim's behavior, including ordering her to refrain from consuming any impairing substances, requiring her to remain in the courtroom until she needed to testify again, and advising her that a member of the district attorney's office would stay with her while she was not testifying to ensure her compliance.

Appeal by Defendant from Judgment rendered 21 March 2022 by Judge Alyson A. Grine in Chatham County Superior Court. Heard in the Court of Appeals 9 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Jodi L. Regina, for the State.

Christopher J. Heaney for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Dino Lamont Thompson (Defendant) appeals from Judgment rendered 21 March 2022 upon jury verdicts finding him guilty of First-Degree Forcible Rape, First-Degree Kidnapping, Sexual Battery, and Assault of a Female. The Record before us tends to reflect the following:

On 28 October 2019, Defendant was indicted for First-Degree Forcible Rape, First-Degree Kidnapping, and Assault on a Female. On 12 July 2021, the grand jury issued a superseding indictment for First-Degree Kidnapping, Assault on a Female, and a new count of Sexual Battery. Defendant pleaded not guilty to all charges.

The matter came on for trial on 14 March 2022. The State called Victim to testify. Victim testified to the following:

On 3 April 2019 at approximately 2:00 p.m., Defendant came to Victim's house and offered her crack cocaine. Victim and Defendant both smoked crack cocaine. Defendant then left Victim's home but returned around 8:00 p.m. with more crack cocaine, an unidentified powdered substance, and orange-colored alcohol. Victim tried the unidentified powder, which made her feel "weird" and unlike herself. Victim told Defendant she needed to go take a shower, and attempted to go up the stairs to the second floor of her home when Defendant grabbed her. Victim and Defendant went into Victim's bedroom, where Victim grabbed a screwdriver from the dresser beside her bed for protection. Defendant forced Victim to have vaginal intercourse with him against her will. Defendant repeatedly punched Victim while she was on the bed. Victim attempted to fight back and kick Defendant off of her; eventually, she was able to run into her bathroom and locked the door. Victim found her cellphone in the bathroom and called 911.

During Victim's testimony, defense counsel requested to be heard outside the presence of the jury. Defense counsel took issue with Victim's testimony, describing it as "a streamed sort of consciousness." The State was also heard on the issue and requested to be allowed to ask more leading questions on direct examination. The State conducted voir dire regarding Victim's mental health issues to allow the trial court

to determine whether it would be appropriate for the State to ask more leading questions. These issues were ultimately disclosed to the jury: Victim had been diagnosed with either Bipolar or Borderline Personality Disorder; Victim had been diagnosed with Post-Traumatic Stress Disorder and a substance use or abuse disorder; and Victim had recently relapsed and gotten out of rehab the week before trial. Victim also disclosed that she takes Gabapentin for fibromyalgia, chronic pain, anxiety, agitation, and as a sleep aid and Seroquel for Borderline Personality Disorder.

On the fourth day of trial, the State informed the trial court Victim was observed in possession of alcohol, and the bailiffs believed she had consumed some alcohol earlier that morning. Defense counsel moved for a mistrial. The trial court noted, on the record, outside the presence of the jury, Victim took a portable breathalyzer test with "a 0.0 outcome." The trial court denied Defendant's Motion for a Mistrial. When asked whether Victim had taken any impairing substances that day, Victim disclosed she had "a sip of vodka" because her "nerves are bad." Victim also informed the trial court that she took a breathalyzer test twice, and both results were "0." The trial court reminded Victim she is under subpoena and ordered Victim to remain in the courtroom until the time that she is needed as a witness again. The trial court also ordered Victim "not to consume any substances that are impairing, no alcohol, no controlled substances." The trial court advised Victim a member of the District Attorney's Office would stay with her while she was not testifying to ensure her compliance. Before Victim was called to testify again, the trial court stated on the record:

> when [Victim] came in this morning, she appeared coherent to the Court. She was responding rationally to the questions posed to her; seemed to be in control of her faculties. And I believe the parties agree that the best use of time is to go ahead and proceed with cross-examination of [Victim].

On recross-examination, defense counsel asked Victim if she had consumed alcohol that morning, to which she replied, "I sure did." Victim disclosed to the jury that she took a shot of alcohol that was in her purse upon arriving to the courthouse. When asked if she consumed alcohol the previous day, Victim initially replied that she did not. The State later informed the trial court that soon after Victim was released from testifying, Victim reported to the State that she consumed "a beer at lunch" the day before. Defense counsel stated, "I think the jury needs to understand and hear that." Victim was called to testify again and corrected her testimony about not consuming alcohol the day before, disclosing to the jury she had a beer at lunch.

On 21 March 2022, the jury returned verdicts finding Defendant guilty of First-Degree Forcible Rape, First-Degree Kidnapping, Sexual Battery, and Assault on a Female. The trial court sentenced Defendant to 110-144 months of imprisonment for First-Degree Kidnapping and Assault on a Female and to 292-411 months of imprisonment for First-Degree Forcible Rape. The trial court arrested judgment on the Sexual Battery charge. Defendant timely filed written Notice of Appeal on 22 March 2022.

Appellate Jurisdiction

[1] The trial court rendered Judgment and sentenced Defendant on 21 March 2022. The Record also reflects written Judgments signed by the trial court on 21 March 2022, but these Judgments are neither file-stamped nor certified by the Clerk.[1] Rule 4 of the North Carolina Rules of Appellate Procedure provides that appeal from a judgment *rendered* in a criminal case must be given either orally at trial or by filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment. N.C. R. App. P. 4. Here, the Record reflects the written Judgments were signed by Judge Alyson A. Grine on 21 March 2022, and Defendant's written Notice of Appeal was file-stamped the next day, 22 March 2022. There is no dispute between the parties that Judgments were in fact entered and Defendant's written Notice of Appeal was timely. Therefore, this Court has appellate jurisdiction over this appeal.

Issue

[2] The dispositive issue on appeal is whether the trial court abused its discretion by not declaring a mistrial.

Analysis

Defendant contends the trial court erred in denying Defendant's Motion for a Mistrial. We disagree.

"[A] judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2021). However, "[i]t is within the trial court's discretion to determine whether to grant a mistrial, and the trial court's decision is to be given great deference because the trial court is in the best position

1. Indeed, as a whole, the Record fails to include any file-stamped documents. We admonish both parties to pay greater attention in compiling the Record on Appeal.

to determine whether the degree of influence on the jury was irreparable." *State v. Hill*, 347 N.C. 275, 297, 493 S.E.2d 264, 276 (1997) (citation omitted). As such, "[o]ur standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion." *State v. Dye*, 207 N.C. App. 473, 482, 700 S.E.2d 135, 140 (2010) (citation and quotation marks omitted). "An abuse of discretion occurs 'only upon a showing that the judge's ruling was so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Salentine*, 237 N.C. App. 76, 81, 763 S.E.2d 800, 804 (2014) (quoting *State v. Dial*, 122 N.C. App. 298, 308, 470 S.E.2d 84, 91, *disc. review denied*, 343 N.C. 754, 473 S.E.2d 620 (1996)).

In the case *sub judice*, the State informed the trial court—outside the presence of the jury—Victim was observed in possession of alcohol, and the bailiffs believed she had consumed some alcohol earlier that morning. Defense counsel moved for a mistrial. The trial court noted, on the record, outside the presence of the jury, Victim took a portable breathalyzer test and had a "0.0 outcome." The trial court denied Defendant's Motion for a Mistrial and inquired further into the matter as discussed below. Thus, given the trial court's knowledge and consideration of the result of the breathalyzer test, we cannot conclude the trial court abused its discretion in denying Defendant's Motion for a Mistrial.

Defendant also contends the trial court erred in failing to declare a mistrial *sua sponte*. We, again, disagree.

"[U]pon his own motion, a judge may declare a mistrial if . . . [i]t is impossible for the trial to proceed in conformity with law[.]" N.C. Gen. Stat. § 15A-1063(1) (2021). "This statute allows a judge . . . to grant a mistrial where he could reasonably conclude that the trial will not be fair and impartial." *State v. Ramirez*, 156 N.C. App. 249, 253, 576 S.E.2d 714, 718 (2003) (alteration in original) (citation and quotation marks omitted). "It is appropriate for a trial court to declare a mistrial only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Bowman*, 349 N.C. 459, 472, 509 S.E.2d 428, 436 (1998) (citation and quotation marks omitted).

The Record demonstrates the trial court took immediate measures to address Victim's behavior, ordering her to refrain from consuming any impairing substances and to remain in the courtroom until she is needed to testify again. With regard to Victim's behavior Defendant characterizes as "so emotionally sympathetic" and prejudicial, the trial court was in the best position "to investigate any allegations of misconduct, question witnesses and observe their demeanor[,] and make appropriate

findings." *State v. Washington*, 141 N.C. App. 354, 376, 540 S.E.2d 388, 403 (2000) (citation and quotation marks omitted). In light of the immediate and reasonable steps taken by the trial court to address Victim's behavior, the trial court's decision to: (1) deny Defendant's Motion for a Mistrial; and (2) not declare a mistrial sua sponte was the result of a reasoned decision.[2]

Thus, the trial court did not abuse its discretion in not declaring a mistrial. Therefore, Defendant received a fair trial free from error. Consequently, we affirm the trial court's ruling.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error at trial.

NO ERROR.

Judges MURPHY and WOOD concur.

TOWN OF FOREST CITY, Plaintiff
v.
FLORENCE REDEVELOPMENT PARTNERS, LLC, Defendant

No. COA23-401

Filed 2 January 2024

1. Cities and Towns—contract to sell property—lack of pre-audit certificate—no expense incurred in first year

In a contract dispute between a town and a prospective buyer (defendant) of a historic town property, the trial court erred by granting summary judgment to the town (and denying defendant's motion for summary judgment) on the town's claim that the contract was void as a matter of law for lack of a pre-audit certificate as required by N.C.G.S. § 159-28(a). Where the parties entered into the contract five days prior to the end of the fiscal year and the town was not obligated to satisfy a financial obligation during that short window, a pre-audit certificate was not required. Although the

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2. Defendant also contends defense counsel was ineffective in failing to renew the Motion for a Mistrial. Given our decision the trial court did not abuse its discretion, we need not reach Defendant's ineffective assistance of counsel claim.

property closing technically could have occurred within those five days, no matter how improbable, no expense was actually incurred.

2. Contracts—contract to purchase town property—terms of contract—automatic termination—waiver by continued performance

In a contract dispute between a town and a prospective buyer (defendant) of a historic property, the trial court erred by granting summary judgment to the town (and denying defendant's motion for summary judgment) on the town's claim that the contract automatically terminated pursuant to its own terms when defendant failed to timely deliver a "Notice of Suitability." Although the contract had "time is of the essence" and "no waiver" provisions, the town's acceptance of defendant's notice of suitability twenty-eight days after the deadline specified in the contract and continued interactions with defendant about the property for more than a year after that point constituted a waiver of the contract's notice deadline.

3. Immunity—governmental—contract to purchase town property—waiver

In a contract dispute between a town and a prospective buyer (defendant) of a historic town property, in which the town asserted governmental immunity as a bar to defendant's counterclaims (for breach of contract, breach of the covenant of good faith and unfair dealing, unjust enrichment, and declaratory judgment), the trial court erred by granting summary judgment to the town on those counterclaims, where the town waived immunity when it entered into the contract and where the appellate court had determined that there was no merit to the town's argument that the contract was void.

4. Unjust Enrichment—contract to purchase town property—validity of contract—claim inapplicable

In a contract dispute between a town and a prospective buyer (defendant) of a historic town property, the town properly granted summary judgment in favor of the town on defendant's counterclaim for unjust enrichment because, where the appellate court had determined that a valid contract existed between the parties, the doctrine of unjust enrichment was inapplicable.

5. Appeal and Error—abandonment of issues—failure to cite legal authority

In a contract dispute between a town and a prospective buyer (defendant) of a historic town property, defendant's argument on

appeal that the trial court erred by granting summary judgment in favor of the town on one of the town's claims and on three of defendant's counterclaims was deemed abandoned because defendant failed to support its argument with any legal citations as required by Rule of Appellate Procedure 28(b)(6).

Appeal by Defendant from order entered 12 September 2022 by Judge Bradley B. Letts, and orders entered 16 May and 29 July 2022 by Judge Peter Knight, in Rutherford County Superior Court. Heard in the Court of Appeals 18 October 2023.

Parker Poe Adams & Bernstein LLP, by Daniel E. Peterson, Anthony A. Fox, and Jasmine N. Little, for Plaintiff-Appellee.

Rosenwood, Rose & Litwak, PLLC, by Nancy S. Litwak, for Defendant-Appellant.

COLLINS, Judge.

Florence Redevelopment Partners, LLC, ("Florence") appeals from an order granting the Town of Forest City ("Town") summary judgment and denying Florence summary judgment on claims arising from a contract dispute. Florence also appeals orders denying its motions to amend and revise its complaint. We affirm in part and reverse in part the summary judgment order and remand for further proceedings. We need not address Florence's arguments regarding the remaining orders.

I. Background

In 2018, the Town solicited proposals from developers to rehabilitate the Florence Mill building ("Mill"), a historic property in the Town. After a series of open session meetings, the Town entered into a contract ("Contract") with Florence to purchase the Mill. The Contract established a timeline for an inspection period as follows:

> 10. **Inspection Period.**
>
> a. Duration. The period of time beginning with the Effective Date, and ending at 11:59 p.m. on that date which is ninety (90) days after the effective date of this Contract, is hereinafter referred to as "the Inspection Period."
>
> . . . .
>
> c. Notice of Suitability. The results of all inspections, tests, examinations and studies of the Property performed during

> the Inspection Period must be suitable to [Florence], in its sole discretion. Prior to the expiration of the Inspection Period, [Florence] may notify [the Town] that such results are suitable to [Florence] by delivering to [the Town] a written Notice of Suitability. If [Florence] does not deliver to [the Town] a valid Notice of Suitability on or before the date of expiration of the Inspection Period, then this Contract shall automatically terminate on that date. . . .

The Contract also provided that "Closing shall be held on or before thirty (30) days after [Florence] provides the Notice of Suitability . . . ." In addition, the Contract provided that "[t]he following conditions must be satisfied prior to Closing, and this Agreement and the performance of [the Town] and [Florence] hereunder is expressly contingent upon satisfaction of the following:"

> a. The Parties' (sic) agree to work in good faith to identify adequate parking within a reasonable distance of the Property to accommodate the anticipated uses by [Florence] prior to the end of the Inspection Period. . . .
>
> . . . .
>
> d. [The Town's] and [Florence's] obligation's (sic) hereunder are contingent upon [the Town] and [Florence] successfully negotiating and entering into a Development Agreement providing for the redevelopment of the Property in accordance with the Master Plan provided by [Florence] to [the Town] . . . .
>
> e. [The Town's] obligation to sell the property is specifically contingent upon [the Town] and [Florence] agreeing on the provisions of a Master Declaration of Easements, Encroachments and Conditions . . . . The Master Declaration of Easements, Encroachments and Conditions shall include the necessary restrictions, covenants, conditions and easements being placed upon the Property . . . . Any such restrictions, covenants, conditions and easements required by [the Town] for the Property shall be agreed upon prior to the expiration of the Inspection Period.

The Contract also contained "Standard Provisions" stating:

> b. TIME IS OF THE VERY ESSENCE in the occurrence of all events, the satisfaction of all conditions and the performance of all obligations hereunder.

> . . . .
>
> i. Any failure or delay of [Florence] or [the Town] to enforce any term of this Contract shall not constitute a waiver of such term, it being explicitly agreed that such a waiver must be specifically stated in a writing delivered to the other party in compliance with Section 16 above. Any such waiver by [Florence] or [the Town] shall not be deemed to be a waiver of any other breach or of a subsequent breach of the same or any other term.

The "effective date" of the Contract was 25 June 2019, the date on which the Contract was duly signed. Thus, the 90-day Inspection Period ran from 25 June 2019 through 23 September 2019. Florence failed to deliver the Notice of Suitability within the inspection period, and instead delivered it on 21 October 2019.

Despite the untimely delivery of the Notice of Suitability, the parties continued their dealings for over a year. Between 21 October 2019 and 4 November 2020, the Town and Florence maintained consistent communication with each other. During this time, the Town provided draft term sheets for the Development Agreement and, through a series of emails and phone calls between July and October 2020, the parties negotiated the remaining sale terms to be included in the term sheets. Also during this period, the parties agreed on matters related to electrical, sewer, and water infrastructure for the Mill. However, the parties did not enter into a Development Agreement or agree on a Master Development of Easements, Encroachments and Conditions.

During a meeting on 22 October 2020, Florence informed the Town that it was unable to secure financing from the United States Department of Housing and Urban Development as it had originally intended, and that it would take some time to obtain alternative financing. The Town sent Florence a letter on 4 November 2020 ("Notice of Termination") terminating the Contract:

> On behalf of the Town, please let this letter serve as notice of the Town's termination of the Purchase Contract for failure of the conditions precedent to close on the purchase and sale of the property subject to the Purchase Contract. The Town appreciates the efforts made by [Florence] to explore the redevelopment of the [Mill].
>
> By signing this letter on behalf of [Florence] and the Town, respectively, each party acknowledges and agrees the Purchase Contract is terminated and neither party has any

> claims whatsoever against the other . . . of any right, title, interest, loss, or damage arising out of or related directly or indirectly to the Purchase Contract.

Florence refused to acknowledge the Notice of Termination or agree to the Town's decision to terminate the Contract.

On 13 April 2021, the Town filed a complaint for declaratory judgment on the following issues: (1) Florence breached the Contract by failing to close on the Mill; (2) the Contract had automatically terminated because Florence failed to deliver the Notice of Suitability on or before 23 September 2019; and (3) the Contract was void because it lacked a pre-audit certificate required by State law. The Town prayed for a declaration that the Contract is null and void, distribution of the escrow funds to the Town, and an award of costs and attorney's fees.

Florence filed an answer and asserted counterclaims for: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) unjust enrichment, and (4) declaratory judgment in their favor "as to the claims asserted by the Town" – essentially that the Town breached the Contract and Florence did not. Florence prayed for judgment in its favor, declaratory judgment in its favor, damages or specific performance, and an award of costs and attorney's fees.

The Town answered Florence's counterclaims, denying the substantive allegations and asserting various affirmative defenses, including governmental immunity. Florence filed a motion for leave to amend to assert additional counterclaims, which the trial court denied. Shortly thereafter, Florence filed a "Motion for Revision and/or Reconsideration of Order" arguing that the trial court should reconsider its order denying Florence's motion for leave to amend. The trial court also denied this motion.

Florence moved for summary judgment on the Town's three claims and on its own first, second, and fourth counterclaims. The Town moved for summary judgment on all of its claims and all of Florence's counterclaims. After a hearing, the trial court entered an order on 12 September 2022, deciding as follows:

- granting the Town, and denying Florence, summary judgment on the Town's second claim (Contract termination for untimely Notice of Suitability) and third claim (Contract void for lack of pre-audit certificate);
- granting the Town, and denying Florence, summary judgment on Florence's four counterclaims;

- denying Florence summary judgment on the Town's first claim (Florence breached the Contract); and
- determining the Town's motion for summary judgment on its first claim to be moot.

Florence timely appealed.

II. Standard of Review

Florence argues that the trial court erred by granting the Town, and denying Florence, summary judgment.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2022). The standard of review of a trial court's order granting or denying summary judgment is de novo. *Butterfield v. Gray*, 279 N.C. App. 549, 553, 866 S.E.2d 296, 300 (2021). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Carolina Mulching Co. v. Raleigh-Wilmington Invs. II, LLC*, 272 N.C. App. 240, 245, 846 S.E.2d 540, 544 (2020) (quotation marks and citation omitted).

III. Discussion

A. Pre-audit Certificate (the Town's third claim)

[1] Florence first argues that the trial court erred by granting the Town, and denying Florence, summary judgment on the Town's request for a declaration that the Contract was void because it lacked a pre-audit certificate. Florence specifically argues that a pre-audit certificate was not required because the Town had no financial obligation due under the Contract within the fiscal year that the Contract was formed.

Pursuant to N.C. Gen. Stat. § 159-28 governing town budgetary accounting for appropriations,

> [n]o obligation may be incurred in a program, function, or activity accounted for in a fund included in the budget ordinance unless the budget ordinance includes an appropriation authorizing the obligation and an unencumbered balance remains in the appropriation sufficient to pay in the current fiscal year the sums obligated by the transaction for the current fiscal year.

N.C. Gen. Stat. § 159-28(a) (2022). "If an obligation is reduced to a written contract . . . requiring the payment of money, . . . the written contract . . . shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with subsection (a) of this section." *Id.* § 159-28(a1) (2022). "An obligation incurred in violation of subsection (a) or (a1) of this section is invalid and may not be enforced." *Id.* § 159-28(a2) (2022).

"The purpose of the pre-audit certificate is to ensure that a town has enough funds in its budget to pay its financial obligations." *Myers v. Town of Plymouth*, 135 N.C. App. 707, 713, 522 S.E.2d 122, 126 (1999). "The language of the statute makes the pre-audit certificate a requirement when a town will have to satisfy an obligation in the fiscal year in which a contract is formed." *Id.* (emphasis omitted). Such "a contract for payment that has not been preaudited is invalid and unenforceable." *Id.* (citations omitted); *see also Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 103, 545 S.E.2d 243, 247 (2001). However, "a contract that is signed in one year but results in a financial obligation in a later year will not violate § 159-28(a)." *Myers*, 135 N.C. App. at 714, 522 S.E.2d at 126.

In *Myers*, the plaintiff entered into an employment contract with the town of Plymouth two months before the end of its fiscal year. *Id.* at 709, 522 S.E.2d at 123. The contract provided for a severance package by which Plymouth would pay the plaintiff certain compensation upon his termination. *Id.* The plaintiff was fired a day before he completed his first year of employment, and Plymouth refused to pay the severance compensation. *Id.* at 709, 522 S.E.2d at 123-24. The plaintiff sued Plymouth for breach of contract. *Id.* at 709, 522 S.E.2d at 124.

On appeal, Plymouth claimed that the employment contract was invalid because it did not include a pre-audit certificate. *Id.* at 713, 522 S.E.2d at 126. Plymouth argued that a pre-audit certificate was required because, if the plaintiff had been fired during the first two months of his employment, the contract would have imposed a financial obligation on Plymouth within its current fiscal year. *Id.* at 714, 522 S.E.2d at 126. This Court rejected Plymouth's argument and held that the employment contract was valid:

> Presumably, neither [the plaintiff] nor [] Plymouth thought that [the plaintiff] would be fired within a mere two months after the contract was signed, and indeed he was not fired within that time. We recognize that the improbability of termination did not mean that termination was *impossible*

> during that two-month period. However, we will not invalidate the contract due to its lack of a pre-audit certificate when the mere *possibility* of an expense in the first year never in fact resulted in an obligation.

Id.

Here, the Town entered into the Contract with Florence on 25 June 2019, five days before the Town's fiscal year ended on 30 June 2019. The Contract did not require the Town to satisfy a financial obligation during this timeframe. Furthermore, the Town does not argue, and the record does not show, that the Town incurred any expense under the Contract before the end of the 2019 fiscal year.

The Town argues that, had the parties closed on the Contract in the five days before the end of the fiscal year, the Town could have had to pay for deed preparation, closing costs, attorney's fees, liens, and taxes. We recognize that the improbability of closing during that five-day period did not mean that closing was *impossible* during that period. *See id.* However, as in *Myers*, "we will not invalidate the [C]ontract due to its lack of a pre-audit certificate when the mere *possibility* of an expense in the first year never in fact resulted in an obligation." *Id.*

The Town also argues that because the Contract gave the Town the option to repurchase the Mill if Florence did not secure a construction loan, a pre-audit certificate was required. However, the Town's option to repurchase the Mill was not triggered until "after a period of twenty-four (24) months from the Closing" and could not have resulted in an expense in the fiscal year in which the Contract was executed.

Because a pre-audit certificate was not required, the Contract was not void as a matter of law for a lack of pre-audit certificate. Accordingly, the trial court erred by granting the Town summary judgment and by denying Florence summary judgment on this claim.[1]

B. Automatic Termination (the Town's second claim)

[2] Florence next argues that the trial court erred by granting the Town, and denying Florence, summary judgment on the Town's request for a declaration that the Contract had automatically terminated because Florence failed to deliver the Notice of Suitability on or before 23 September 2019. Florence specifically argues that the Town waived the Contract's Notice of Suitability deadline, the "time is of the essence"

1. In light of this conclusion, we need not address Florence's arguments that the trial court erred by denying its motion to amend and motion to revise.

provision, and the "no waiver" provision by continuing to perform under the Contract.

It has long been the law in North Carolina that "[t]he provisions of a written contract may be modified *or waived* . . . by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived." *42 East, LLC v. D.R. Horton, Inc.*, 218 N.C. App. 503, 511, 722 S.E.2d 1, 6-7 (2012) (quoting *Whitehurst v. FCX Fruit & Vegetable Serv., Inc.*, 224 N.C. 628, 636, 32 S.E.2d 34, 39 (1944)). Our Supreme Court has held that "a party may waive the breach of a contractual provision or condition without consideration or estoppel . . . by continuing to perform or accept the partial performance of the breaching party." *Wheeler v. Wheeler*, 299 N.C. 633, 639, 263 S.E.2d 763, 767 (1980).

This holding applies equally to a contract's "no waiver" provision "based on the view that the nonwaiver clause itself, like any other term of the contract is subject to waiver by agreement or conduct during performance." *42 East*, 218 N.C. App. at 511, 722 S.E.2d at 7 (quotation marks and citation omitted). Likewise, "[o]ur Supreme Court has specifically applied this reasoning with respect to a contract providing both that 'time is of the essence' and that substantial modifications of the contract must be in writing." *Id.* (citing *Childress v. C. W. Myers Trading Post, Inc.*, 247 N.C. 150, 156, 100 S.E.2d 391, 395 (1957)). "Waiver is a matter of law to be determined by the court where the facts are not disputed." *Johnson v. Dunlap*, 53 N.C. App. 312, 316, 280 S.E.2d 759, 762 (1981) (citation omitted).

Here, the undisputed facts show the following: The Town accepted Florence's Notice of Suitability approximately 28 days after the deadline specified in the Contract. After accepting the late Notice, the Town continued to perform and accept Florence's performance *for more than a year after the deadline*. After the 23 September 2019 deadline passed, the Town and Florence maintained consistent communication with one another. The parties exchanged emails and phone calls and negotiated matters related to electrical, sewer, and water infrastructure for the Mill, and the Town provided draft term sheets for the Development Agreement.

It was not until 4 November 2020, over one year after the Town accepted the untimely Notice of Suitability, that the Town sent Florence a Notice of Termination. The Notice of Termination does not allege that the Contract terminated because of the untimely Notice of Suitability, but instead alleges the "failure of the conditions precedent to close on the purchase and sale of the property" as the reason for termination.

The undisputed facts establish conduct that naturally would lead Florence to believe that the Town had dispensed with its right to insist that the Notice of Suitability be delivered by 23 September 2019. Accordingly, the trial court erred by granting the Town summary judgment and denying Florence summary judgment on this claim.

C. Governmental Immunity (Florence's first, second, and fourth counterclaims)

[3] Florence argues that the trial court erred by granting the Town summary judgment on Florence's first, second, and fourth counterclaims because governmental immunity does not apply. The Town argues that governmental immunity bars these claims.[2]

> It is a fundamental rule that sovereign immunity renders this state, including counties and municipal corporations herein, immune from suit absent express consent to be sued or waiver of the right of sovereign immunity. Furthermore, counties and municipal corporations within this state enjoy governmental immunity from suit for activities that are governmental, and not proprietary, in nature. Nonetheless, a governmental entity may waive its governmental immunity, for instance, where the entity purchases liability insurance. Additionally, where the entity enters into a valid contract, the entity "implicitly consents to be sued for damages on the contract in the event it breaches the contract.

Data Gen. Corp., 143 N.C. App. at 100, 545 S.E.2d at 246 (citations omitted).

The Town argues that no valid contract was formed because a pre-audit certificate was required. However, as analyzed above, no pre-audit certificate was required. As the Contract was not invalid for lack of a pre-audit certificate, and the Town makes no argument that the Contract was otherwise invalid, the Town waived governmental immunity by entering into a valid contract.[3]

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2. Although the trial court gave no rationale for granting summary judgment in the Town's favor on these claims, the parties' only argument for and against summary judgment at both the hearing and on appeal relates to governmental immunity.

3. In light of this conclusion, we need not address whether the Town was acting in a governmental or a proprietary capacity with regard to the redevelopment project.

The trial court thus erred by granting the Town summary judgment on Florence's first, second, and fourth counterclaims based on governmental immunity.

D. Unjust Enrichment (Florence's third counterclaim)

[4] Florence argues that the trial court erred by granting the Town summary judgment on Florence's third counterclaim for unjust enrichment. Florence makes this argument in the event we conclude that the lack of a pre-audit certificate rendered the Contract invalid.

It is true that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555-56 (1988) (brackets and citation omitted). However, "[t]he doctrine of unjust enrichment is based on 'quasi-contract' or contract 'implied in law' and thus will not apply here where a contract exists between two parties." *Atlantic & E. Carolina Ry. Co. v. Wheatly Oil Co.*, 163 N.C. App. 748, 753, 594 S.E.2d 425, 429 (2004) (citation omitted). Because no pre-audit certificate was required, there was a valid contract between the parties and Florence cannot maintain an action for unjust enrichment.

The trial court did not err by granting the Town, and denying Florence, summary judgment on this counterclaim.

E. Contract Claims (the Town's first claim and Florence's first, second, and fourth counterclaims)

[5] Florence argues that the trial court erred by denying Florence summary judgment on the Town's first claim and Florence's first, second, and fourth counterclaims. This argument is deemed abandoned.

Under our Rules of Appellate Procedure, an appellant's brief must include "[a]n argument, to contain the contentions of the appellant with respect to each issue presented." N.C. R. App. P. 28(b)(6). "The body of the argument . . . shall contain citations of the authorities upon which the appellant relies." *Id.* "Issues . . . in support of which no reason or argument is stated, will be taken as abandoned." *Id.*

This Court has routinely held an issue to be abandoned where an appellant presented argument without citations to the authorities upon which the appellant relied. *See, e.g.*, *K2HN Constr. N.C., LLC v. Five D Contractors, Inc.*, 267 N.C. App. 207, 213-14, 832 S.E.2d 559, 564 (2019) ("Each argument in Plaintiff's brief violates Rule 28(b)(6). For example, Plaintiff's arguments that genuine issues of material fact exist concerning its breach of contract, unjust enrichment, fraud, and unfair and

deceptive trade practices claims cite no authority establishing: (1) what the elements of those claims are; or (2) how the evidence demonstrates the existence of any genuine issue of material fact pertinent to those elements or any of Defendants' defenses pled and argued below. Plaintiff has, as a result, abandoned these arguments."); *see also Fairfield v. WakeMed*, 261 N.C. App. 569, 575, 821 S.E.2d 277, 281 (2018) ("Plaintiffs do not cite any legal authority in support of this argument as required by the North Carolina Rules of Appellate Procedure. Therefore, we deem this issue to be abandoned." (citation omitted)).

Florence fails to cite a single legal authority in its argument, or anywhere else in its brief, to establish, at a minimum, the elements of the claims or how the evidence demonstrates the existence of any genuine issue of material fact pertinent to those elements. This argument is deemed abandoned, N.C. R. App. 28(b)(6), and the portion of the trial court's order denying Florence summary judgment on the Town's first claim and Florence's first, second, and fourth counterclaims is affirmed.

IV. Conclusion

For the foregoing reasons, we conclude as follows:

The trial court erred by granting the Town summary judgment, and denying Florence summary judgment, on the Town's third claim–declaratory judgment that the Contract was void because it lacked a pre-audit certificate. This portion of the judgment is reversed and remanded to the trial court for entry of summary judgment in Florence's favor. In light of this conclusion, we need not address Florence's arguments that the trial court erred by denying its motion to amend and motion to revise.

The trial court erred by granting the Town summary judgment, and denying Florence summary judgment, on the Town's second claim–declaratory judgment that the Contract had automatically terminated based on Florence's failure to timely deliver the Notice of Suitability. This portion of the judgment is reversed and remanded to the trial court for entry of summary judgment in Florence's favor.

The trial court erred by granting the Town summary judgment on Florence's first, second, and fourth counterclaims based on governmental immunity. This portion of the order is reversed.

The trial court did not err by granting the Town summary judgment, and denying Florence summary judgment, on Florence's third counterclaim–unjust enrichment. This portion of the order is affirmed.

The portion of the trial court's order denying Florence summary judgment on the Town's first claim–declaratory judgment that Florence

breached the Contract by failing to close on the Mill–and Florence's first, second, and fourth counterclaims is affirmed.

This matter is remanded to the trial court for further proceedings on the Town's first claim and Florence's first, second, and fourth counterclaims.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges GORE and FLOOD concur.

TOWN OF LA GRANGE, NORTH CAROLINA, PETITIONER
v.
COUNTY OF LENOIR, NORTH CAROLINA, AND
COPART OF CONNECTICUT, INC., RESPONDENTS

No. COA23-495

Filed 2 January 2024

1. Zoning—land use classification—planning board's decision—standard of review by superior court

In reviewing a town's challenge to the county planning board's decision to classify a business owner's intended property usage as "Auction Sales" rather than "Junk/Salvage Yard," the trial court correctly applied the whole record test in evaluating the town's assertion that the planning board's decision was unsupported by evidence and the de novo standard of review to the legal question of whether the town's junkyard ordinance was applicable to the intended land use. Based on these standards, the court's conclusion that "Auction Sales" was the correct classification was supported by the evidence, including that the business took possession but not ownership of the vehicles, the vehicles were only stored temporarily on the property, the vehicles were sold on behalf of various entities via online action, the sales included both damaged and undamaged vehicles, and no vehicles were dismantled or demolished on the property.

2. Zoning—land use classification—ordinance definitions—record evidence

In reviewing a town's challenge to the county planning board's decision to classify a business owner's intended property usage as "Auction Sales" rather than "Junk/Salvage Yard," the trial court

did not err by concluding that the planning board reached the correct decision, where, although the zoning ordinance did not define "Auction Sales," the evidence of the intended property use aligned more closely with the plain and ordinary meaning of "auction" than with the zoning ordinance's definition of "Junk/Salvage Yard." Evidence demonstrated that the business sold vehicles through an online auction system, temporarily stored the vehicles on the property prior to auction, sold both damaged and undamaged vehicles, did not dismantle or demolish vehicles on the property, and did not store or accumulate abandoned vehicles, scrap metals, vehicle parts, or other waste materials.

Appeal by petitioner from order entered on 28 December 2022 by Judge Imelda J. Pate in Lenoir County Superior Court. Heard in the Court of Appeals 28 November 2023.

Cauley Pridgen, P.A., by Gabriel Du Sablon, James P. Cauley, III, and Emily C. Cauley-Schulken, for petitioner-appellant.

Morningstar Law Group, by Keith P. Anthony and William J. Brian, Jr., for respondent-appellee-Copart of Connecticut, Inc.

Sumrell Sugg, P.A., by David B. Baxter, Jr. and James H. Ferguson, III, for respondent-appellee-County of Lenoir, North Carolina.

FLOOD, Judge.

The Town of La Grange (the "Town") appeals from the trial court's affirmation of the Lenoir County Planning Board's (the "Planning Board") determination that Copart of Connecticut Inc.'s ("Copart") land was correctly classified as "Auction Sales" under Lenoir County's (the "County") Zoning Ordinance. For the reasons discussed below, we affirm.

I. Facts and Procedural Background

The pertinent facts of the case before us arise from a land use dispute between the Town, Copart, and the County. The Town is situated within the County, and Copart owns a 151-acre tract of land (the "Property") that abuts the Town's highest-producing public water supply wellhead. The Property is not located within the Town's municipal limits. An existing junkyard is located across the street.

Copart is in the business of selling damaged and undamaged vehicles on behalf of insurance companies, licensed dealers, financial

institutions, charities, and municipalities. Copart receives these vehicles from all over the country, and upon delivery at Copart's facility, each vehicle is inspected, photographed, and catalogued in preparation for sale. The vehicles are then sold by auction through an online website. The vehicles are "never stacked and remain in short-term storage for an average of only [fifty] to [sixty] days." While Copart charges a fee to the organization on behalf of which it is selling the vehicle, Copart itself never holds the title to any vehicle on its lot.

On 29 December 2020, a zoning official for the County issued a certificate of zoning compliance to Copart, concluding Copart's intended use of its land aligned most closely with "Auction Sales," which is a permitted use of right within the County's Commercial District. Upon learning of the zoning official's determination that Copart's land use most closely conformed with "Auction Sales," the Town appealed the determination to the Planning Board.

In its appeal to the Planning Board, the Town argued Copart's intended use of the Property is more akin to a "Junk/Salvage Yard" as defined by the Zoning Ordinance, and that such a use is not permitted within the County's Commercial District. The Town further argued that Copart's proposed use violated the County's separate "Ordinance Regulating Junkyards and Automobile Graveyards" (the "Junkyard Ordinance").

On 19 July 2022, following a lengthy evidentiary hearing, the Planning Board unanimously affirmed the determination by the zoning official that the Property was appropriately classified as "Auction Sales" and that the "Junkyard Ordinance [was] inapplicable to the intended use" of the Property.

On 17 August 2022, the Town filed a petition for writ of certiorari to the Lenoir County Superior Court, contending the Planning Board made errors of law, made findings of fact that were unsupported by substantial evidence in the whole record, and had acted in an arbitrary and capricious manner.

On 28 December 2022, the trial court entered an order affirming the Planning Board's classification of the Property as "Auction Sales." In its order, the trial court made, in pertinent part, the following conclusions:

> 20. [The Town's] first claim raised . . . is whether the Planning Board[']s decision to affirm Copart's intended use as permitted under the Zoning Ordinance was supported by competent evidence in the record.
>
> . . . .

22. In particular, the Planning Board's findings in the written [o]rder based upon the evidence presented and testimony found that Copart's intended use of the Property was correctly classified as "Auction Sales" under the Zoning Ordinance. The Planning Board made findings, supported by the record evidence that:

- Copart's automobiles are only temporarily stored on the Property prior to auction. (R. Ex.1, p.2 ¶ 9)
- Copart's automobiles temporarily stored on the Property are sold to the highest bidder. (R. Ex. 1, p. 2 ¶ 10).
- Copart's use does not involve dismantling, demolition, or abandonment of automobiles on the Property. (R. Ex. 1, p. 2 ¶ 11).
- Copart does not intend to place or store scrap metals, waste paper, rags, or other scrap materials or used building materials on the Property. (R. Ex. 1, p.2 ¶ 12).
- Copart's automobiles will be parked in an organized fashion and [are] not stacked or placed in piles. (R.Ex.1, p.2 ¶13).
- Copart's automobiles vary in condition with some automobiles having no damage or minor damage while others hav[e] more damage. (R. Ex. 1, p.3 ¶19).
- The majority of Copart's automobiles will be sold to end-users and will be restored to operation. (R. Ex.1, p.3 ¶ 20).
- Copart's intended use did not pose the same environmental and safety concerns as a junkyard poses to the community. (R.Ex.1, p.3 ¶¶ 22-23).

23. [The Town's] second claim . . . is whether the Planning Board properly interpreted the County's relevant ordinances when it found Copart's intended use was more similar to auction sales or automobile sales than a "junkyard."

. . . .

25. The Zoning Ordinance defines a "Junk/Salvage Yard" as "[t]he use of more than [] (600) square feet of any lot for storage, keeping or accumulation of material, including scrap [sic] metals, waste paper, rags, or other scrap [sic]

> materials, or used building materials, or for the dismantling, demolition or abandonment of automobiles or other vehicles or machinery or parts thereof.
>
> 26. The term "auction" is given its ordinary meaning, a sale of property to the highest bidder.
>
> . . . .
>
> 29. Considering the entirety of the record evidence, the [c]ourt concludes that the Planning Board's Findings of Fact in the written [o]rder were supported by competent, material and substantial evidence and the Board's findings supported the Board's Conclusions of Law in the written [o]rder wherein the [Planning] Board concluded Copart's intended use of the Property as "Auction Sales" and that the "Junkyard" Ordinance is inapplicable to the intended use by Copart.
>
> 30. [The Town's] third claim . . . is that the Board's decision was arbitrary and capricious because the decision was not based [o]n "fair and careful consideration." The [trial c]ourt applies the whole record test to this claim, examining all record evidence.

Ultimately, the trial court concluded that the Planning Board's decision was "supported by competent, material, and substantial evidence[,]" and that the Town could not establish that the Planning Board's decision was arbitrary and capricious. The Town timely appealed.

II. Jurisdiction

This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) as the trial court's order affirming the Planning Board's decision was a final judgment on the merits. *See* N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Analysis

On appeal, the Town argues the trial court (A) applied incorrect standards of review and (B) erred by upholding the decision of the Planning Board. On both points, we disagree.

A. Trial Court's Standard of Review as to Planning Board's Decision

[1] The Town argues the trial court applied the incorrect standard of review to the issues on appeal from the Planning Board's decision.

1. Standard of Review

As to appellate review of a superior court order regarding an agency decision, "[t]he process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Amanini v. N.C. Dep't of Hum. Res.*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118–19 (1994) (citations omitted). Ultimately, upon review, it is this Court's duty to conclude whether the trial court applied the correct standard of review, and if so, whether the appropriate conclusion under the standard was reached. *See Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118.

2. Superior Court's Standard of Review of Planning Board's Decision

"When the Superior Court grants certiorari to review a decision of the Board, it functions as an appellate court rather than a trier of fact." *Hopkins v. Nash Cnty.*, 149 N.C. App. 446, 447, 560 S.E.2d 592, 593–94 (2002) (citation omitted).

When a petitioner "questions (1) whether [a board's] decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test." *ACT-UP Triangle v. Comm'n for Health Servs. of the State of N.C.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *In re Appeal by McCrary*, 112 N.C. App 161, 165, 435 S.E.2d 359, 363 (1993)). "When utilizing the whole record test . . . the reviewing court must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (internal quotation marks omitted). "The 'whole record' test does not allow the reviewing court to replace the [b]oard's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo." *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

If, however, "a petitioner contends the [b]oard's decision was based on an error of law, de novo review is proper." *Mann Media, Inc.*, 356 N.C. at 13, 565 S.E.2d at 17 (citation and internal quotation marks omitted). "Under de novo review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board['s] [] conclusions of law." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011).

i. The Whole Record Test

In its appeal to this Court, the Town states that the trial court's "glossing over most of [the Town's] contentions[ ] is evidence that the [t]rial [c]ourt nevertheless applied the improper scope of review to its meager analysis." To support its argument, the Town points to the language used in the trial court's conclusions. The Town states that the trial court's use of the phrases, "considering the entirety of the record evidence," and "were supported by competent, material, and substantial evidence" in Conclusion of Law 29 evinces the trial court's failure to apply a *de novo* standard of review.

The correct standard of review, however, is the "whole record test," given the allegations made by the Town in its petition for writ of certiorari stated that the Planning Board's decision was "unsupported by [] competent, material, and substantial evidence in view of the entire record." *See ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392 (stating that the "whole record test" is applied when the issue at bar is whether an agency's decision was supported by substantial evidence).

Here, under a "whole record test" review, the trial court had to show that it examined "all competent evidence (the whole record) in order to determine whether the agency decision [was] supported by substantial evidence." *Mann Media, Inc.*, 356 N.C. at 14, 565 S.E.2d at 17 (internal quotation marks omitted). Evidence that the trial court reviewed the whole record before determining the Planning Board's decision was supported by substantial evidence can be found throughout its order, but particularly in its conclusions of law. Conclusion of Law 22 lists pieces of evidence and testimony that support the Property's classification as "Auction Sales," indicating the trial court considered the "whole record" when determining the Planning Board's decision was supported by substantial evidence.

In Conclusion of Law 22, the trial court highlighted evidence found throughout the record that shows: Copart's vehicles are sold *via* online auction; the vehicles are only stored temporarily on the Property and are never dismantled, demolished, or abandoned; some vehicles have no damage or minor damage; and the vehicles are never stacked or placed in piles.

For those reasons, our review of the trial court's order concludes the trial court applied the whole record test and reached the correct conclusion that the Planning Board's decision was supported by substantial evidence. *See ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392.

ii. *De Novo* Review

The Town further argues the trial court failed to apply a *de novo* standard of review to the question of whether the "Junkyard Ordinance" was applicable to Copart's intended land use. To support this contention, the Town suggests the language used in Conclusion of Law 29, in which the trial court references "record evidence" being "competent, material and substantial," evidences use of the "whole record test" rather than a *de novo* review. When read in context with the surrounding conclusions of law, however, it is clear the trial court intended to convey that it had reviewed all of the evidence in the Record and that the evidence supported the legal conclusions.

As stated above, Conclusion of Law 22 recites several findings regarding Copart's use of the Property. Further, Conclusion of Law 25 restates the Zoning Ordinance's definition of "Junk/Salvage Yard" as being a lot for "the dismantling, demolition, or abandonment of automobiles or other vehicles or machinery or parts[,]" while Conclusion of Law 26 states that "[t]he term 'auction' is given its ordinary meaning, a sale of property to the highest bidder."

For those reasons, we conclude the trial court applied the correct *de novo* standard of review to the questions of law raised by the Town and ultimately reached the correct conclusion. *See Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118.

B. Trial Court's Determination as to Planning Board's Decision

[2] The second argument the Town makes on appeal is that the trial court erred by upholding the decision of the Planning Board because (1) it incorrectly concluded Copart's land use was appropriately classified as "Auction Sales" and (2) taken *in pari materia*, under both the Zoning Ordinance and Junkyard Ordinance, Copart's use more closely conformed with a "Junk/Salvage Yard," or "Automobile Graveyard." With respect to the Town's first argument, we disagree; accordingly, we need not address the Town's second argument.

1. Standard of Review

This Court reviews questions of law presented in challenges to zoning decisions *de novo*. *See Myers Park Homeowners Ass'n v. City of Charlotte*, 229 N.C. App. 204, 208, 747 S.E.2d 338, 342 (2013). When interpreting a local ordinance, the basic rule is to "ascertain and effectuate the intention of the municipal legislative body." *Darbo v. Old Keller Farm Prop. Owners' Ass'n*, 174 N.C. App 591, 594, 621 S.E.2d 281, 284 (2005) (citation omitted). Undefined terms are given their ordinary

meaning and significance. *See Morris Commc'n Corp.*, 365 N.C. at 157, 712 S.E.2d at 872. When the question of law involves interpretation of an ordinance, this Court applies basic principles of statutory construction, so that "words and phrases of a statute may not be interpreted out of context, but . . . as a composite whole so as to harmonize with [the] other statutory provisions and effectuate legislative intent." *Duke Power Co. v. City of High Point*, 69 N.C. App. 378, 387, 317 S.E.2d 701, 706 (1984). Additionally, when issues of statutory construction arise, "the construction adopted by those who execute[d] and administer[ed] the law in question" should be given great consideration. *Darbo*, 174 N.C. App at 594, 621 S.E.2d at 283.

Finally, "the law favors uninhibited free use of private property over governmental restrictions." *Byrd v. Franklin City*, 237 N.C. App. 192, 201, 765 S.E.2d 805, 811 (2015) (Hunter, J., concurring in part). The general rule is that a zoning ordinance, being in derogation of common law property rights, should be construed in favor of the free use of property. *See Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966); *see City of Sanford v. Dandy Signs, Inc.*, 62 N.C. App. 568, 569, 303 S.E.2d 228, 230 (1983).

2. Superior Court's Conclusion that Copart's Business is Auction Sales

On appeal, the Town does not challenge any findings of fact, but rather argues that by concluding Copart's business and land use is more closely aligned with "Auction Sales," rather than a "Junk/Salvage Yard," the trial court "has elevated form over substance, ignoring the manner in which the land itself was to be used." The Town claims that because the term "Auction Sales" is not defined within the Zoning Ordinance, it should be given its ordinary and plain meaning, which here, should be taken to mean a place "where goods are sold to the public who are assembled in one place for the auction." In essence, the Town argues that Copart's land use cannot be accurately described as "Auction Sales" because the buyers of Copart's vehicles do not physically assemble in one place to bid. This argument cherry-picks one understanding of the term "auction" while excluding the even further simplified definition—"a sale of property to the highest bidder." *Auction*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2022).

Under our *de novo* review, while applying the basic principles of statutory construction, this Court seeks to ascertain the intention of the legislative municipal body, while also favoring the uninhibited free use of property. *See Darbo*, 174 N.C. App at 594, 621 S.E.2d at 283; *see Byrd*, 237 N.C. App. at 201, 765 S.E.2d at 811. Here, the Town does not challenge

the sufficiency of the trial court's findings of fact regarding Copart's land use; rather, the Town challenges the conclusion that Copart's proposed use was classified as "Auction Sales," rather than a "Junk/Salvage Yard."

While the term "Auction Sales" is undefined in the Zoning Ordinance, the term "Junk/Salvage Yard" is defined as,

> [t]he use of more than [] (600) square feet of any lot for the storage, keeping or accumulation of material, including scrap metals, waste paper, rags, or other scrap materials, or used building materials, or for the dismantling, demolition or abandonment of automobiles or other vehicles or machinery or parts thereof. **ALL Junk/Salvage Yards must also comply with Lenoir County's Junkyard and Automobile Graveyard Ordinance**.

The Junkyard Ordinance defines a "junkyard" as "an establishment or place of business, which is maintained[,] operated[,] or used for storing[,] keeping[,] buying[,] or selling junk[,] or for the maintenance of an automobile graveyard." Further, an "automobile graveyard" is defined as,

> [a]ny establishment or place of business which is maintained[,] used[,] or operated for storing[,] keeping[,] buying[,] or selling wrecked[,] scrapped[,] ruined[,] dismantled[,] or inoperable motor vehicles and which are not being restored to operation regardless of the length of time which individual motor vehicles are stored or kept at said establishment or place of business.

The facts in the Record tend to show Copart: sells vehicles through an online auction system; temporarily stores the vehicles on the Property prior to auction; sells vehicles that are both damaged and undamaged; and does not dismantle, demolish, or abandon any vehicles on the Property. Conspicuously absent from the Record are any facts to indicate Copart intends to use the Property to keep or accumulate scrap metals, waste papers, rags or building materials. Further, no facts in the Record tend to show that Copart intends to use the Property to store abandoned vehicles or parts of vehicles.

Our *de novo* review of the Record reveals a mismatch between the Zoning Ordinance's definition of "Junk/Salvage Yard" and how Copart intends to use the Property. Given the facts in the Record, we conclude that Copart's business model—selling vehicles with varying degrees of damage via online auction and their removal within sixty days—aligns more closely with the common definition of "auction" than the Zoning Ordinance's definition of a "Junk/Salvage Yard." Further, even if

we considered the Zoning Ordinance and Junkyard Ordinance *in pari materia*, we still reach the same conclusion, because the facts in the Record do not demonstrate Copart used the Property to accumulate abandoned vehicles that are not being restored to operation.

We therefore hold that both the Planning Board and the trial court correctly upheld the zoning official's classification of Copart's intended use of the Property as "Auction Sales." Having concluded the Planning Board and trial court were correct in upholding the zoning official's determination that Copart's land use was appropriately classified as "Auction Sales," we need not address the Town's second argument.

IV. Conclusion

For the aforementioned reasons, we hold the trial court applied the correct standards of review, made the correct conclusion under the standards of review, and did not err when upholding the Planning Board's determination. The trial court's order is affirmed.

AFFIRMED.

Judges TYSON and ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 JANUARY 2024)

DAVIS v. HAYES HOFLER, P.A. No. 22-1028	Durham (21CVS1592)	Reversed and Remanded
IN RE B.O.R. No. 23-434	Wilkes (20JA126)	Vacated and Remanded in Part; Affirmed in Part.
IN RE C.H. No. 22-476-2	Durham (21SPC2564)	Affirmed
IN RE C.L.S. No. 23-507	Haywood (21JA35)	Affirmed in Part; Dismissed in Part.
IN RE E.O.N. No. 23-352	Forsyth (21J85) (21J86)	Affirmed in Part, Vacated in Part, and Remanded
IN RE E.T.P. No. 23-394	Henderson (21JT16-17)	Affirmed
IN RE G.J.W.L. No. 23-458	Surry (22JB136)	Reversed and Remanded
IN RE J.U. No. 20-812-2	Cumberland (19JB477)	Affirmed
IN RE N.R.W. No. 23-440	Buncombe (19JT229) (19JT252)	Affirmed
IN RE R.B. No. 23-426	Union (20JA178)	Affirmed
IN RE S.C.M. No. 23-678	New Hanover (22JT66)	Affirmed
IN RE S.W. No. 23-160	Johnston (21JA122)	Affirmed
JOHNSON v. BUTLER No. 23-692	Wake (20CVS14359)	Affirmed
JOHNSON v. BUTLER No. 23-693	Wake (20CVS14392)	Affirmed
JOHNSON v. BUTLER No. 23-694	Wake (20CVS14098)	Affirmed

LOWE v. LOWE No. 23-80	Clay (20CVD81)	Affirmed
POIMBOEUF v. MERRITT No. 23-229	Orange (20CVS1358)	No Error
SHAY v. SHAY No. 23-330	Cabarrus (22CVD1605)	Affirmed
SPENCER v. GOODYEAR TIRE & RUBBER CO. No. 23-430	N.C. Industrial Commission (18-017149)	Affirmed
STATE v. FORD No. 23-374	Buncombe (21CRS84572) (21CRS87417-19)	No Error
STATE v. FORREST No. 22-1005	Wake (20CRS209043) (20CRS209180)	No Error
STATE v. PARSONS No. 23-200	Watauga (21CRS50660-61)	No prejudicial error
STATE v. REVELS No. 23-148	Robeson (16CRS55641)	No Error.
STATE v. WILLIAMS No. 23-408	Wilkes (20CRS50468) (21CRS50107) (21CRS50114)	Affirmed
TANGER PROPS. LTD. P'SHIP v. LEGACY LIBATIONS CORP. No. 23-415	Watauga (22CVD464)	Affirmed

ENNIS v. HASWELL

[292 N.C. App. 112 (2024)]

PAUL ENNIS, AS GUARDIAN AD LITEM OF T.F.G., II, A MINOR, PLAINTIFF
v.
ALEXANDER HASWELL, RONALD HASWELL, JR., AND BETTY HASWELL, DEFENDANTS
v.
NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., INTERVENOR

No. COA23-534

Filed 16 January 2024

Subrogation—insurer's right—reimbursement of underinsured motorist coverage—statutory requirements—failure to advance amount of offer

In a case arising from an automobile accident involving a serious injury, where plaintiff's insurer ("Intervenor") paid plaintiff the full amount of underinsured motorist (UIM) coverage under its policy ($100,000) and then received notice that plaintiff and defendants' liability insurer reached a settlement agreement for that insurer to pay plaintiff over $300,000, Intervenor was required, based on the clear and unambiguous language of N.C.G.S. § 20-279.21(b)(4), to advance to plaintiff the amount of the settlement within thirty days in order to protect its subrogation rights. Despite Intervenor's argument, the plain meaning of the statute did not differentiate between pre-exhaustion payments—where a UIM insurer pays a claim prior to the insured exhausting the tortfeasor's liability insurance coverage—and post-exhaustion payments. Thus, Intervenor was not entitled to exercise any right of subrogation to recoup its UIM payment from defendants' insurer.

Appeal by intervenor from order entered 12 December 2022 by Judge James M. Webb in Chatham County Superior Court. Heard in the Court of Appeals 31 October 2023.

White & Stradley, PLLC, by J. David Stradley, and Brian D. Westrom for plaintiff-appellee.

No brief filed for defendants-appellees.

Young, Moore, and Henderson, P.A., by Walter E. Brock, Jr., and Matthew C. Burke, for intervenor-appellant.

ZACHARY, Judge.

Intervenor North Carolina Farm Bureau Mutual Insurance Company, Inc., ("Farm Bureau") appeals from the trial court's order denying its motion to enforce its right of subrogation, in which Farm Bureau sought reimbursement of its $100,000 underinsured motorist ("UIM") coverage payment to Plaintiff from the proceeds of Plaintiff's settlement with Defendants. After careful review, we affirm.

I. Background

On 19 February 2016, T.F.G., II, ("T.F.G.") was severely injured while riding as a passenger in a vehicle operated by Defendant Alexander Haswell and owned by Alexander's parents, Defendants Ronald Haswell, Jr., and Betty Haswell. There is no dispute regarding the relevant insurance policies' coverage at the time of the incident. As the trial court found in its order:

> 5. At the time of the Accident, Defendants were insured by an auto liability insurance policy issued by Nationwide General Insurance Company ("Nationwide") with limits of $300,000 per person and $300,000 per accident. This policy also provided [UIM] coverage in the amount of $300,000 per person and $300,000 per accident. The Nationwide policy provided UIM coverage for [T.F.G.], as a passenger in an insured vehicle, in the amount of $300,000 per person and $300,000 per accident.
>
> 6. At the time of the Accident, [T.F.G.] was an insured under a motor vehicle liability insurance policy issued by [Farm Bureau]. The Farm Bureau policy provided UIM coverage for [T.F.G.] with a limit of $100,000 per person.

On 16 March 2018, Plaintiff's counsel[1] sent a letter to Nationwide, demanding that Nationwide tender its policy limit within 30 days. Nationwide did not respond to this demand. Consequently, on 26 April 2018, Plaintiff, acting on T.F.G.'s behalf as his guardian ad litem, filed suit against Defendants in Chatham County Superior Court. In the complaint, Plaintiff alleged negligence by Defendant Alexander Haswell, and the vicarious liability of Defendants Ronald and Betty Haswell pursuant to the family purpose vehicle doctrine.

On 2 May 2018, Plaintiff's counsel notified Farm Bureau that (1) Nationwide had not responded to the time-limited demand, (2) Plaintiff

1. On 26 April 2018, the trial court granted Plaintiff Paul Ennis's motion to be appointed T.F.G.'s guardian ad litem, as T.F.G. was a minor child without general or testamentary guardian.

had filed suit against Defendants, and (3) Farm Bureau had the right to participate in the litigation as an unnamed party.

On 9 May 2018, Plaintiff's counsel stated to defense counsel that Plaintiff "would not accept $300,000 from Nationwide at this point in time in settlement on behalf of . . . Defendants." On 24 May and 8 June 2018, Nationwide served Plaintiff with offers of judgment in the amount of $300,000 on Defendants' behalf. Plaintiff's counsel sent a copy of the 8 June offer of judgment to Farm Bureau on 14 June 2018, but Farm Bureau did not advance the amount of Nationwide's tender. Plaintiff did not accept the offer of judgment, and the litigation continued.

A month later, on 20 July 2018, Farm Bureau offered to pay Plaintiff $100,000 pursuant to its UIM coverage. Plaintiff accepted this offer, and by consent order entered on 28 January 2019, the trial court approved the parties' settlement of the Farm Bureau UIM claim. Farm Bureau "reserv[ed] any and all rights, if any, it may have to recover its payments from the tortfeasor, and acknowledg[ed] that [Defendants] contend that these rights have been waived."

On 23 September 2022, Plaintiff and Defendants participated in court-ordered mediation, which culminated in an agreement to settle for an amount in excess of $300,000. That same day, Plaintiff's counsel notified Farm Bureau via email of the settlement agreement and suggested that Farm Bureau could "choose to advance to secure its subrogation rights." On 12 October 2022, Farm Bureau declined to advance the amount of the settlement agreement.

On 26 October 2022, Farm Bureau filed (1) a motion to intervene in the action and (2) a motion to enforce its subrogation right, pursuant to N.C. Gen. Stat. § 20-279.21(b)(4) (2021). The matter came on for hearing on 31 October 2022.

After entering a sealed order approving the confidential settlement, the trial court heard Farm Bureau's motions. The trial court granted Farm Bureau's motion to intervene without objection from the other parties. On 12 December 2022, the trial court entered an order denying Farm Bureau's motion to enforce its subrogation right. Farm Bureau timely filed notice of appeal.

II. Discussion

This case involves the interpretation of N.C. Gen. Stat. § 20-279.21(b)(4): in sum, the question presented is whether Farm Bureau was required to advance to Plaintiff the amount of the liability settlement offer in order to preserve its subrogation claim against the proceeds of any recovery from the tortfeasor.

Farm Bureau argues that, because it paid its UIM policy limit before the liability insurer exhausted its policy limits, pursuant to § 20-279.21(b)(4), "Farm Bureau became subrogated to the extent of that payment and therefore earned the right to reimbursement of its $100,000 payment from any money that Plaintiff recovered from the owner or operator of the underinsured vehicle or their liability insurer." Plaintiff, on the other hand, contends that the plain text of § 20-279.21(b)(4) is clear—if a UIM insurer "wishes to preserve its subrogation rights against the tortfeasor, it must advance a payment to the insured in the amount of the tentative settlement with a liability insurer within 30 days of the date it receives notice of the offer. If it does not, it loses all subrogation rights." For the reasons that follow, we agree with Plaintiff.

A. Standard of Review

The question presented is purely a matter of law. "Answering this question primarily involves interpretation of the Motor Vehicle Safety and Financial Responsibility Act of 1953 (commonly referred to as the 'FRA'), and examination of the terms of Farm Bureau's motor vehicle insurance policy, each a question of law." *Lunsford v. Mills*, 367 N.C. 618, 622–23, 766 S.E.2d 297, 301 (2014) (citation omitted). "This Court reviews questions of law de novo, meaning that we consider the matter anew and freely substitute our judgment for the judgment of the lower court." *Id.* at 623, 766 S.E.2d at 301.

B. Analysis

"According to well-established North Carolina law, the intent of the Legislature controls the interpretation of a statute." *C Invs. 2, LLC v. Auger*, 383 N.C. 1, 8, 881 S.E.2d 270, 276 (2022) (citation omitted). "The avowed purpose of the [FRA], of which [N.C. Gen. Stat.] § 20-279.21(b)(4) is a part, is to compensate the innocent victims of financially irresponsible motorists. It is a remedial statute to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (citations omitted), *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989).

One portion of N.C. Gen. Stat. § 20-279.21(b)(4) addresses a UIM insurer's right to subrogation:

> *An underinsured motorist insurer may at its option*, upon a claim pursuant to underinsured motorist coverage, *pay moneys without there having first been an exhaustion of the liability insurance policy* covering the ownership, use, and maintenance of the underinsured highway vehicle. *In the event of payment, the underinsured motorist insurer*

> *shall be either*: (a) entitled to receive by assignment from the claimant any right or (b) *subrogated to the claimant's right* regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, provided that the amount of the insurer's right by subrogation or assignment shall not exceed payments made to the claimant by the insurer. *No insurer shall exercise any right of subrogation* or any right to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a policy providing coverage against an underinsured motorist *where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days* following receipt of that notice.

N.C. Gen. Stat. § 20-279.21(b)(4) (emphases added).

Farm Bureau contends that this section of the statute creates two kinds of subrogation rights, differentiated by whether the UIM insurer pays a claim before the insured exhausts the tortfeasor's liability insurance coverage or after the exhaustion of coverage. According to Farm Bureau, if a UIM insurer elects to make a pre-exhaustion payment, as it did in the instant case, the insurer "become[s] subrogated to the claimant's rights against the tortfeasor, to the extent of [the insurer's] payment." Notably, Farm Bureau only cites the first two sentences of the above-quoted portion of § 20-279.21(b)(4) to support this "type of subrogation"; Farm Bureau's citation ends before the sentence limiting "*any* right of subrogation . . . where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days[.]" *Id.* (emphasis added).

In Farm Bureau's view, the omitted, limiting language of § 20-279.21(b)(4) solely applies to the other "type of subrogation" that Farm Bureau identifies: a post-exhaustion payment. In the event of a post-exhaustion payment, Farm Bureau asserts that the UIM insurer may either appear and defend the action or "advance" the amount of settlement. Thus, according to Farm Bureau, by applying the statutory limits from this "separate portion" of § 20-279.21(b)(4), the trial court erroneously "engrafted an inapplicable requirement on Farm Bureau's

subrogation right and effectively ruled that Farm Bureau had no subrogation right whatsoever."

Farm Bureau's argument is unpersuasive for several reasons. To begin, there is no ambiguity in the plain language of § 20-279.21(b)(4). "Where the language of a statute is clear and unambiguous, there is no 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." *C Invs. 2*, 383 N.C. at 8, 881 S.E.2d at 276 (cleaned up). Section 20-279.21(b)(4) plainly states:

> *No insurer* shall exercise *any right of subrogation* . . . where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice.

N.C. Gen. Stat. § 20-279.21(b)(4) (emphases added).

The language used by our General Assembly in this subsection is "clear and unambiguous" and thus, we "are without power to interpolate, or superimpose, provisions and limitations not contained" within its text. *C Invs. 2*, 383 N.C. at 8, 881 S.E.2d at 276 (citation omitted); *see also Haarhuis v. Cheek*, 261 N.C. App. 358, 366, 820 S.E.2d 844, 851 (2018) ("This language is clear and unambiguous, and we are not at liberty to divine a different meaning through other methods of judicial construction." (cleaned up)), *disc. review denied*, 372 N.C. 298, 826 S.E.2d 698 (2019). Consequently, it matters not whether there are "two different types of statutory subrogation rights[,]" as Farm Bureau contemplates. In that Farm Bureau "fail[ed] to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice[,]" Farm Bureau is not entitled to "exercise *any* right of subrogation"—regardless of whether that right of subrogation arises from a pre-exhaustion payment. N.C. Gen. Stat. § 20-279.21(b)(4) (emphasis added).

Moreover, Farm Bureau misplaces its reliance on *Farm Bureau Insurance Co. of North Carolina v. Blong*, 159 N.C. App. 365, 583 S.E.2d 307, *disc. review denied*, 357 N.C. 578, 589 S.E.2d 125 (2003), and *Tutterow v. Hall*, 283 N.C. App. 314, 872 S.E.2d 171 (2022), *petition for disc. review dismissed and cert. denied*, 384 N.C. 33, 883 S.E.2d 475 (2023).

Farm Bureau cites *Blong* for the proposition that Farm Bureau "was not required to advance [payment] in order to preserve its subrogation

right." However, *Blong* stands for no such proposition. After quoting the section of the Farm Bureau UIM policy at issue in *Blong*—with its provision that subrogation rights do not apply "if we have been given written notice in advance of a settlement and fail to advance payment in an amount equal to the tentative settlement within 30 days following receipt of such notice"—this Court noted that "[t]he contingency in the latter provision has not been alleged, therefore no impediment from the policy exists." 159 N.C. App. at 372, 583 S.E.2d at 311. *Blong* is simply inapplicable to the dispositive issue in the present case.

Similarly inapplicable is *Tutterow*, in which we held that "[t]he trial court properly determined that [N.C. Gen. Stat. § 20-279.21(b)(4)] is inapplicable" in that "the UIM carriers had no duty to advance any payments because they owed nothing under their policies"; the amounts of the liability policies' coverage and the UIM coverage were equal, and therefore, there was no UIM obligation. 283 N.C. App. at 320, 872 S.E.2d at 176.

In light of our conclusion that no distinction exists between pre-exhaustion and post-exhaustion payments under § 20-279.21(b)(4), we need not address Farm Bureau's argument that "there had been no exhaustion of [Defendants'] liability insurance policy" at the time that Farm Bureau paid its $100,000. Farm Bureau's position is based on the premise that Plaintiff "had expressly rejected the tender of policy limits and stated [an] intent to continue to reject settlement offers for the liability insurer's policy limits." This argument has been repeatedly rejected by this Court:

> Both the statute and case law require a UIM insurer be notified when a settlement *offer* is made, and when the primary liability insurance carrier has *offered* the limits of its policy in settlement, as was done in this case, the insurer must advance that amount to the insured within 30 days to protect its subrogation rights. Neither the statute nor case law require that the settlement be completed or that the UIM carrier must have notice of its insured's acceptance of the offer.

Daughtry v. Castleberry, 123 N.C. App. 671, 675, 474 S.E.2d 137, 140 (1996), *aff'd*, 346 N.C. 272, 485 S.E.2d 45 (1997). Accordingly, under *Daughtry*, the only requirement to trigger the 30-day deadline is an *offer*, and the insured's response—whether known or unknown to the UIM insurer—is immaterial.

We acknowledge the public policy concerns advanced by Farm Bureau. However, this Court is "an error-correcting body, not a

policy-making or law-making one." *Shearin v. Brown*, 276 N.C. App. 8, 14, 854 S.E.2d 443, 448 (2021) (citation omitted). Our role "is not to speculate about the consequences of the language the legislature chose; we interpret that language according to its plain meaning and if the result is unintended, the legislature will clarify the statute." *Wake Radiology Diagnostic Imaging LLC v. N.C. Dep't of Health & Hum. Servs.*, 279 N.C. App. 673, 681, 866 S.E.2d 489, 495 (2021) (cleaned up). Accordingly, although we decline to address Farm Bureau's policy arguments, the arguments are preserved should Farm Bureau seek further review.

III. Conclusion

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

AFFIRMED.

Judges STADING and THOMPSON concur.

JEAN HILL AND JAMES HILL, PETITIONERS
v.
THE DIVISION OF SOCIAL SERVICES AND THE DIVISION OF HEALTH BENEFITS OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENTS

No. COA23-197

Filed 16 January 2024

Public Assistance—Medicaid plan—full benefits denied—definition of "caretaker relative"—great-aunt and great-uncle excluded

The trial court properly upheld decisions of the N.C. Department of Health and Human Services determining that a great-aunt and great-uncle were not entitled to full Medicaid benefits for medical expenses that they incurred while taking care of their great-niece—and were only entitled to Family Planning Medicaid benefits—because those family members did not meet the definition of "caretaker relative" under applicable administrative rules. Although a North Carolina administrative rule previously allowed extended family members to collect benefits, after a new federal law took effect that revised Medicaid eligibility groups, North Carolina adopted a State Plan Amendment (SPA) in which the State declined to adopt an expanded definition of "caretaker relative" as allowed by the new federal law. Since the previously-enacted and still-existing

rule and the SPA were in direct conflict with each other, the SPA controlled as the most recent expression of the State's intent regarding this issue.

Appeal by petitioners from order entered 7 October 2022 by Judge J. Thomas Davis in Rutherford County Superior Court. Heard in the Court of Appeals 3 October 2023.

Ott Cone & Redpath, P.A., by Stephen J. White, for petitioners-appellants.

Attorney General Joshua H. Stein, by Assistant Attorney General Chris D. Agosto Carreiro and Assistant Attorney General Adrian W. Dellinger, for the State.

ZACHARY, Judge.

This case concerns a single issue of law: whether great-aunts and great-uncles were included within the definition of "caretaker relatives" under the North Carolina State Medicaid Plan prior to 1 May 2022. Petitioners Jean and James Hill ("the Hills") appeal from the superior court's order affirming the ruling by Respondent North Carolina Department of Health and Human Services ("DHHS"), which approved the Hills for Family Planning Medicaid benefits rather than retroactive and ongoing full Medicaid benefits covering the medical expenses that they incurred during their period of caring for their great-niece. After careful review, we affirm.

I. Background

At the outset, the Hills acknowledge that "[t]his appeal does not raise any substantive disputes concerning the material facts." We therefore need only recite the legal and procedural facts pertinent to our analysis.

A. Medicaid

"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. Div. 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).

"The federal and state governments share the cost of Medicaid, but each state government administers its own Medicaid plan. State Medicaid plans must, however, comply with applicable federal law and regulations." *N.C. Dep't of Health & Hum. Servs. v. Parker Home Care, LLC*, 246 N.C. App. 551, 556, 784 S.E.2d 552, 556, *disc. review denied*, 369 N.C. 183, 793 S.E.2d 690 (2016) (citation omitted); *see also* 42 U.S.C. § 1396c. "Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures." 42 C.F.R. § 430.0 (2022). A "State plan" is "a comprehensive written commitment by a Medicaid agency, submitted under [42 U.S.C. § 1396a], to administer or supervise the administration of a Medicaid program in accordance with Federal requirements." *Id.* § 400.203.

"North Carolina's Medicaid plan describes the nature and scope of its Medicaid program and gives assurance that it will be administered in conformity with specific federal statutory requirements and other applicable official issuances of the federal Department of Health and Human Services." *Martin v. N.C. Dep't of Health & Hum. Servs.*, 194 N.C. App. 716, 720, 670 S.E.2d 629, 633 (2009). State Medicaid Plans and State Plan Amendments approved by the Centers for Medicare and Medicaid Services ("CMS") "have the force and effect of rules adopted pursuant to Article 2A of Chapter 150B of the General Statutes." N.C. Gen. Stat. § 108A-54.1B(d) (2021).

B. "Caretaker Relative" Status

CMS has promulgated a regulation defining "caretaker relative," a category of individuals who may be eligible for full Medicaid benefits, which includes an optional expansion of the category that a state may choose:

> *Caretaker relative* means a relative of a dependent child by blood, adoption, or marriage with whom the child is living, who assumes primary responsibility for the child's care (as may, but is not required to, be indicated by claiming the child as a tax dependent for Federal income tax purposes), and who is one of the following—
>
> (1) The child's father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece.

> (2) The spouse of such parent or relative, even after the marriage is terminated by death or divorce.
>
> (3) *At State option, another relative of the child based on blood* (including those of half-blood), adoption, or marriage; the domestic partner of the parent or other caretaker relative; or an adult with whom the child is living and who assumes primary responsibility for the dependent child's care.

42 C.F.R. § 435.4 (second emphasis added).

Prior to the enactment of the Patient Protection and Affordable Care Act ("the Affordable Care Act"),[1] North Carolina recognized a more expanded definition of "caretaker relative." The North Carolina Administrative Code contained a regulation ("the Rule")[2] that reflected this expanded definition:

> "Caretaker Relative" means a parent or a person in one of the following groups with whom a child lives:
>
> (a) any blood relative, including those of half-blood, and including first cousins, nephews, or nieces, *and persons of preceding generations as denoted by prefixes of grand, great, or great-great*;
>
> (b) stepfather, stepmother, stepbrother, and stepsister;
>
> (c) persons who legally adopt a child, their parents as well as the natural and other legally adopted children of such persons, and other relatives of the adoptive parents in accordance with state law;
>
> (d) spouses of any persons named in the groups in Sub-item (19)(a)–(c) of this Rule even after the marriage is terminated by death or divorce.

10A N.C. Admin. Code 23A.0102(19) (2020) (emphasis added).

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1. The Affordable Care Act is the comprehensive federal health care reform legislation enacted in 2010 with the primary goals of "increas[ing] the number of Americans covered by health insurance and decreas[ing] the cost of health care." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538, 183 L. Ed. 2d 450, 467 (2012).

2. DHHS repealed the Rule with an effective date of 1 May 2022. 36 N.C. Reg. 1869–72 (June 1, 2022). It is undisputed, however, that at all times relevant to this appeal, this explicit repeal had not yet taken effect.

In response to the enactment of the Affordable Care Act, which included revisions to the Medicaid eligibility groups, North Carolina submitted State Plan amendments to CMS on 26 September 2013. On 10 December 2013, CMS approved the North Carolina State Plan Amendment NC-13-00014-MM1 ("the SPA") with an effective date of 1 January 2014. The SPA includes several pages to be incorporated into North Carolina's State Plan. On page S25-1 of the SPA, the State "attests that it operates [the 'caretaker relatives'] group[,]" which includes "parents or other caretaker relatives (defined at 42 CFR 433.4), including pregnant women, of dependent children (defined at 42 CFR 435.4) under age 18. Spouses of parents and other caretaker relatives are also included." Page S25-1 also contains a series of checkboxes related to the various options in defining the category that the State may elect. The box labeled "Options relating to the definition of a caretaker relative (select any that apply)"—which must be checked in order to select an expanded definition of "caretaker relative"—is unchecked. Meanwhile, on page S51-1 of the SPA, the State attests that it declines "to cover individuals qualifying as parents or other caretaker relatives who are not mandatorily eligible and who have income at or below a standard established by the State and in accordance with provisions described at 42 CFR 435.220."

C. Procedural History

The Hills live with and care for their great-niece, a minor child. On 24 June 2021, the Hills submitted an application for retroactive and ongoing Medicaid Assistance for Families & Children; however, they were only approved for Family Planning Medicaid benefits, rather than full Medicaid benefits. On 22 July 2021, the Rutherford County Department of Social Services ("DSS") notified the Hills via mail that their application was approved "only for limited services related to Family Planning and COVID 19 testing." The Hills appealed DSS's decision.

On 25 August 2021, after a local appeal hearing, the Hearing Officer affirmed DSS's decision. The Hearing Officer agreed with DSS that the Hills "did not qualify for full coverage" because the "minor in the home [wa]s a 'great' niece, making the applicants ineligible for caretaker benefits." The Hearing Officer stated that "[t]he regulation[ ] on which this decision [wa]s based is found in" Section 3235 of the North Carolina Family and Children's Medicaid Manual ("the MAF Manual").

The Hills requested a state appeal, which was heard on 13 October 2021. On 15 October 2021, the State Hearing Officer issued a pair of decisions affirming DSS's prior rulings. The State Hearing Officer relied, in significant part, on the federal definition of "caretaker relative" found

in 42 C.F.R. § 435.4, the SPA, and Section 3235 of the MAF Manual. The Hills appealed again, and on 17 December 2021, the Assistant Chief Hearing Officer issued a pair of Final Decisions, once again affirming the earlier rulings.

On 13 January 2022, the Hills filed a petition for judicial review with the Rutherford County Superior Court pursuant to N.C. Gen. Stat. § 108A-79(k). The matter came on for hearing on 30 June 2022. On 7 October 2022, the superior court entered an order affirming the Final Decisions. The superior court concluded:

> [N.C. Gen. Stat. § 108A-54.1B(d)] provides that the [SPA] shall have the force and effect of the Rules. As a result, [the SPA] and the supporting [MAF] Manual are in direct conflict with [the Rule]. The later adopted [SPA] and the [MAF M]anual, however, have the force and effect of a repeal of [the Rule] since they cannot coexist together. Therefore, great[-]aunts and great[-]uncles are not included within the definition of relative caretaker and the rulings by [DHHS] should be affirmed.

The Hills timely filed notice of appeal.

II. Discussion

Before the superior court, the parties conceded that the sole issue to be determined was whether great-aunts and great-uncles "are included within the definition of 'caretaker relatives.' " On appeal to this Court, the Hills argue that the superior court erred in affirming the previous rulings because the Hills satisfied the Rule's definition of "caretaker relative," which they maintain "is a valid and enforceable rule congruent with federal Medicaid requirements[.]" The Hills further argue that there is "no 'direct conflict' with the Rule" and the SPA; "that DHHS may not ignore its own Rule"; and that the superior court "failed to articulate the standard of review it applied in upholding the denial of Medicaid benefits[.]"

For the following reasons, we conclude that there is a direct, irreconcilable conflict between the SPA and the Rule, and that the SPA controls. Accordingly, we affirm the superior court's order.

A. Standard of Review

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). A party aggrieved by a final decision of an administrative law judge in a

contested case has a right to judicial review by the superior court. N.C. Gen. Stat. § 150B-43.

Under the APA, the superior court's scope of review is limited:

> 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.

Id. § 150B-51(b).

The APA also provides two different standards of review, depending on the type of error asserted:

> 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.

Id. § 150B-51(c).

"A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in [N.C. Gen. Stat. §] 7A-27." *Id.* § 150B-52. "This Court's review

of the superior court's order on appeal from an administrative agency decision generally involves (1) determining whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Luna v. Div. of Soc. Servs.*, 162 N.C. App. 1, 3, 589 S.E.2d 917, 919 (2004) (cleaned up). "[O]ur review of a [superior] court's order under [N.C. Gen. Stat.] § 150B-52 is the same as in any other civil case—consideration of whether the court committed any error of law." *Id.* (citation omitted). "[W]e review de novo the legal issues, including whether the findings of fact are adequate to support the conclusions of law." *Id.* at 7, 589 S.E.2d at 921.

B. Analysis

The crux of this case is the effect that the 2013 adoption of the SPA had on the Rule. The parties agreed before the superior court that this issue determined the outcome of this matter. Thus, "the appropriate scope of review" was this single question of law, *id.* at 3, 589 S.E.2d at 919 (citation omitted), and the parties agree that de novo review was the applicable standard of review for the superior court, N.C. Gen. Stat. § 150B-51(b)(4), (c). Our careful review of the order on appeal shows that the superior court appropriately conducted de novo review of the Assistant Chief Hearing Officer's ruling. We therefore turn to "whether the court committed any error of law" when conducting its de novo review. *Luna*, 162 N.C. App. at 3, 589 S.E.2d at 919 (citation omitted).

The Hills argue that because the definition of "caretaker relative" found in the Rule applies, the superior court erred in concluding, as a matter of law, that "great[-]aunts and great[-]uncles are not included within the definition of relative caretaker[.]" According to the Hills, "the Rule exists as a valid legislative rule binding on not only the regulated public but also DHHS from promulgation until 1 May 2022." By contrast, DHHS contends that "a plain reading of the two definitions indicates that they are clearly at odds with one another" and that the SPA definition controls because, *inter alia*, "it was the most recently adopted definition at the time of [the Hills'] application." We agree with DHHS.

The SPA has "the force and effect of rules adopted pursuant to Article 2A of Chapter 150B of the General Statutes." N.C. Gen. Stat. § 108A-54.1B. We are thus tasked with interpreting the Rule and the SPA as a pair of administrative regulations. When interpreting administrative regulations, our appellate courts apply the same rules of construction that we apply when interpreting statutes. *Cole v. N.C. Dep't of Pub. Safety*, 253 N.C. App. 270, 278, 800 S.E.2d 708, 714, *disc. review denied*, 370 N.C. 71, 803 S.E.2d 156 (2017).

Accordingly, a reviewing court "looks first to the plain meaning of the words of the [regulation] itself. Interpretations that would create a conflict between two or more [regulations] are to be avoided, and [regulations] should be reconciled with each other whenever possible." *Aetna Better Health of N.C., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 279 N.C. App. 261, 266, 866 S.E.2d 265, 269 (2021) (cleaned up). Further, when determining whether a conflict between regulations exists, "repeals by implication are not favored and the presumption is always against implied repeal. Instead, repeal by implication results only when the [regulations] are inconsistent, necessarily repugnant, utterly irreconcilable, or wholly and irreconcilably repugnant." *State ex rel. Utils. Comm'n v. Town of Kill Devil Hills*, 194 N.C. App. 561, 567, 670 S.E.2d 341, 345 (emphasis omitted) (cleaned up), *aff'd per curiam*, 363 N.C. 739, 686 S.E.2d 151 (2009).

In the instant case, the SPA and the Rule are in irreconcilable conflict with one another. Page S25-1 of the SPA provides that the State declined to adopt the expanded definition of "caretaker relative" found in 42 C.F.R. § 435.4—that is, the State declined to include great-aunts and great-uncles in the definition of "caretaker relative" when it adopted the SPA. This directly and irreconcilably conflicts with the Rule, which included great-aunts and great-uncles in its definition of "caretaker relative."

The Hills do not attempt to harmonize these two regulations; instead, they question whether "a mere blank checkbox" on Page S25-1 of the SPA truly expresses the State's intent to impliedly repeal the Rule via the SPA. The Hills' arguments are unpersuasive. Moreover, the Hills cannot resolve the irreconcilable conflict between the SPA and the Rule: either great-aunts and great-uncles are "caretaker relatives" per the Rule or they are not per the SPA. There is no reconciling these contradictory definitions.

"When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control." *In re Winstead*, 189 N.C. App. 145, 147, 657 S.E.2d 411, 413 (2008). Again, the same rules of construction apply to administrative regulations. *Cole*, 253 N.C. App. at 278, 800 S.E.2d at 714.

In this instance, neither regulation is more "special and particular" or more "general in nature" than the other, *Winstead*, 189 N.C. App. at 147, 657 S.E.2d at 413; both the SPA and the Rule define "caretaker relative" for the purposes of North Carolina's administration of Medicaid.

However, the SPA controls as the most recent expression of the State's intent with respect to this issue. *See In re Guess*, 324 N.C. 105, 107, 376 S.E.2d 8, 10 (1989) ("It is a generally accepted rule that where there is an irreconcilable conflict between two statutes, the later statute controls as the last expression of legislative intent."). Thus, the trial court properly held that the SPA definition of "caretaker relative" applies in its exercise of de novo review.

Lastly, the Hills contend that the superior court incorrectly compared the Rule to Page S51-1 of the SPA, and "should have evaluated the Rule as compared to SPA Page S25-1." It is true that in its order, the superior court specifically referred to Page S51-1 of the SPA, which refers to the incorrect CMS regulation—42 C.F.R. § 435.220—and concerns income eligibility rather than the definition of "caretaker relative." As Page S25-1 explicitly references the appropriate CMS regulation—42 C.F.R. § 435.4—and offers the opportunity for the State to select "[o]ptions relating to the definition of caretaker relative[,]" the superior court's order reflects that it did not consider the appropriate page of the SPA in making its ruling.

However, this error does not rise to the level of error requiring reversal or remand. "We need not remand for reconsideration if we can reasonably determine from the record whether the petitioner's asserted grounds for challenging the agency's final decision warrant reversal or modification of that decision under the applicable provisions of [N.C. Gen. Stat.] § 150B-51(b)." *Early v. Cty. of Durham DSS*, 172 N.C. App. 344, 360, 616 S.E.2d 553, 564 (2005) (cleaned up), *disc. review improvidently allowed*, 361 N.C. 113, 637 S.E.2d 539 (2006).

Our careful review of the SPA and the Rule demonstrates that the superior court arrived at the correct outcome on the dispositive issue here. Accordingly, the superior court's order is properly affirmed despite the authorities upon which it relies.

III. Conclusion

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

AFFIRMED.

Judges STROUD and MURPHY concur.

LINDSAY OLDHAM MANESS, PLAINTIFF
v.
CIERA KORNEGAY AND EDEN MCNAIR, DEFENDANTS

No. COA23-301

Filed 16 January 2024

1. Appeal and Error—interlocutory order—temporary custody—no clear and specific reconvening time—substantial right

Although the trial court's order granting temporary custody of a child to his grandmother—after concluding that the child's father had acted inconsistent with his constitutionally protected right as a parent—and decreeing that "[p]ermanent custody will be set for trial" was interlocutory, the order was nevertheless properly on review before the appellate court because the trial court did not state a clear and specific reconvening time. Further, the order affected a substantial right because it eliminated the father's fundamental parental rights.

2. Child Custody and Support—temporary custody—awarded to non-relative—constitutionally protected status of parent—sufficiency of findings

In respondent-father's appeal from an order granting temporary custody of his son to a non-relative caretaker (with whom the child's mother left the son without telling respondent), the trial court's findings of fact were insufficient to support the court's conclusion that respondent had acted inconsistent with his constitutionally protected status as a parent. Although the trial court found that respondent failed to provide financial support for a period of time and made insufficient efforts to contact the child's mother or the caretaker, evidence showed that the trial court had previously awarded custody to the father on a regular and increasing basis for nearly a year, that respondent had regularly visited with his son for a period of time when the child and the child's mother moved in with the caretaker, that respondent had been told by the child's mother that the child was living with her in another state when in fact the child was still living with the caretaker, and that when respondent learned of his son's whereabouts he followed advice from the department of social services to take the necessary steps to obtain custody.

Judge ARROWOOD dissenting.

Appeal by defendant Eden McNair from order entered 4 November 2022 by Judge Hathaway S. Pendergrass in Chatham County District Court. Heard in the Court of Appeals 14 November 2023.

Kathryn Hutchinson for plaintiff-appellee (no brief filed).

Ciera Kornegay, pro se, for defendant-appellee Kornegay (no brief filed).

Dobson Law Firm, PLLC, by Shawna D. Vasilko, for defendant-appellant McNair.

THOMPSON, Judge.

In this child custody case, appellant-father appeals from an order entered concluding that he acted inconsistent with his constitutionally protected parental rights and ordering custody proceedings to be decided based on the best interests of the child. We agree and reverse the trial court's temporary custody order entered 7 November 2022.

I. Factual Background and Procedural History

This matter arises from a dispute over the custody of a minor child, Jacob,[1] who was born to mother Ciera Kornegay and father Eden McNair in November 2018. At the time of Jacob's birth, neither Kornegay nor appellant-father was certain that McNair was Jacob's biological father, but once DNA testing confirmed Jacob's parentage, appellant-father began a relationship with his son, including having primary custody of the child for a period of several months when Jacob was an infant and Kornegay lacked a residence. In January 2020, Kornegay and Jacob moved in with plaintiff Lindsay Maness. Kornegay had dated Maness's son for several months before Kornegay became pregnant with Jacob, and after that relationship ended, Maness continued her connection with Kornegay such that she was "like a daughter to" Maness. Once Maness learned that Kornegay was pregnant, she began buying items for Kornegay and preparing for the baby's arrival, causing Maness to feel that she "kind of cemented [her] spot in [Jacob's] life." While Maness expressed clear concerns about Kornegay having custody of Jacob, she testified that she didn't know appellant-father and did "not have enough interaction or communication or dealings with him to be able to form an opinion on" any concerns about appellant-father having custody.

1. A pseudonym is used to protect the privacy of the minor child.

For a number of months after Kornegay and Jacob moved in with Maness, appellant-father continued to exercise regular visits with Jacob, approximately every other weekend. These visits were facilitated by appellant-father's mother, who would pick Jacob up from Maness's home and drive him to appellant-father's location. Appellant-father testified that he thought Maness was simply acting as a babysitter for Jacob.

Unbeknownst to appellant-father, at some point in August 2020, Kornegay left Jacob with Maness, moved out of Maness's residence, and ceased any contact with appellant-father. Appellant-father repeatedly attempted to contact Kornegay "through various means of communication but was unsuccessful." It does not appear that Maness attempted to contact appellant-father, either directly or through appellant-father's mother to tell appellant-father that Kornegay had moved out or that Jacob—appellant-father's child—had been left in Maness's care, despite her lack of any legal custody or other rights to the child. Maness also failed to file a complaint seeking legal custody of Jacob at that time.

In September 2020, Kornegay and Maness executed a "temporary guardianship agreement" which purported to extend custody and other rights over Jacob to Maness but which, in actuality, was of no legal import. Appellant-father was not a party to this agreement and did not consent to it. In January 2021, appellant-father was finally able to contact Kornegay, who claimed that she had moved to South Carolina with Jacob and shared with appellant-father photos of Jacob to support this false claim. Appellant-father told Kornegay that he planned to visit her and Jacob in South Carolina as soon as his car was repaired, but before this proposed trip could take place, appellant-father received a call from the Chatham County Department of Social Services (DSS) informing him that Jacob was in the physical custody of Maness in that locale, not with Kornegay in South Carolina. DSS suggested that appellant-father "go to the city [where Maness resided], grab the police, then go to [Maness's] house and get [your] son," and the following day, he followed that recommendation and called law enforcement to Maness's home for their assistance in regaining physical custody of Jacob—appellant-father's son—from the care of Maness—who had no familial relationship or legal rights to the child. When law enforcement officers arrived, Maness showed them the "temporary guardianship agreement" and the officers, after consulting with DSS, informed Maness that the document was "likely insufficient" and suggested that she seek a court order. Jacob was, however, left in the care of Maness.

Following this incident, Maness blocked appellant-father's mother from picking up Jacob for any visits with appellant-father as had been the arrangement previously and also acknowledged that she rejected at

least one attempt by appellant-father to arrange for visitation by contacting Maness's attorney. At that point, in May 2021, appellant-father filed a report with DSS. Maness responded by filing a "Complaint for Custody for Non-Parent(s)" on 24 May 2021 against Kornegay and appellant-father, and litigation in this case ensued. The record in this matter further reveals the following: Appellant-father initially responded pro se with a handwritten letter to the court on 9 June 2021 expressing that he was "trying to claim custody" of Jacob. On 2 July 2021, appellant-father filed a calendar call request for 26 July 2021. A "Notice for Custody Mediation Orientation" document was filed by Maness on 29 July 2021. By August 2021, appellant-father had obtained counsel, and on 30 August 2021, appellant-father filed an amended answer and motion to dismiss, raising, *inter alia*, appellant-father's constitutionally protected status as a parent and requesting sole physical and legal custody of his son.

The case was not set for hearing until November 2021 and the first order regarding custody in the matter was filed on 13 December 2021, providing "custody" to appellant-father on 24 December 2021 and 1 January 2022, but otherwise apparently leaving Jacob in the physical custody of Maness, despite her non-parent status and lack of any legal rights to the child. The case was continued on 24 February 2022, and on 4 March 2022, the trial court ordered temporary custody of Jacob for appellant-father from Friday evening to Sunday evening every other weekend. The matter was continued again on 2 May 2022 and 3 June 2022. In July 2022, the trial court entered another order, continuing every-other-weekend custody with appellant-father and custody otherwise with Maness, still without any acknowledgment of appellant-father's constitutionally protected parental status or Maness's lack of any familial or legal connection to Jacob. On 12 August 2022, the trial court entered another temporary custody order, extending appellant-father's custody of Jacob to Thursday evening through Monday morning every other weekend. The court also awarded joint legal custody to Maness and appellant-father and directed appellant-father and Maness to custody mediation.

The next order included in the record on appeal was entered on 7 November 2022. In that order, from which this appeal is taken, the trial court made a number of findings of fact, concluded that appellant-father had "acted inconsistent with his constitutionally protected parental rights[,]" and decreed that "[p]ermanent custody will be set for trial" and "[t]he issue of permanent custody will be decided based on the best interests of the minor child."[2] Appellant-father timely appealed.

2. The trial court also concluded that Kornegay was unfit and acted inconsistent with her constitutionally protected status as a parent. Kornegay has not challenged the trial court's order and is not a party to this appeal.

II. Analysis

Appellant-father argues that the trial court erred by concluding that he acted inconsistent with his constitutionally protected parental rights, and as a result, decreeing that it would employ a "best interest of the child" standard at any future permanent custody proceeding as between himself and Maness, a non-parent party. We agree.

A. Appellate posture

[1] As an initial point, we note that this appeal arises from a *temporary* custody order, and thus is interlocutory. This Court has addressed the immediate appealability of orders in such circumstances in several prior cases.

> An interlocutory order is one that does not determine the issues, but directs some further proceeding preliminary to a final decree. Normally, a temporary child custody order is interlocutory and does not affect any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition on the merits. Temporary custody orders resolve the issue of a party's right to custody pending the resolution of a claim for permanent custody. The trial court's mere designation of an order as temporary is not sufficient to make the order interlocutory and nonappealable. *Rather, an appeal from a temporary custody order is premature only if the trial court: (1) stated a clear and specific reconvening time in the order; and (2) the time interval between the two hearings was reasonably brief.*

Brewer v. Brewer, 139 N.C. App. 222, 227–28, 533 S.E.2d 541, 546 (2000) (citations, quotation marks, brackets, and ellipses omitted) (emphasis added). *See also Graham v. Jones*, 270 N.C. App. 674, 678, 842 S.E.2d 153, 158 (2020) ("Generally, a child custody order is temporary if (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings is reasonably brief, or (3) the order does not determine all the issues. If the order does not meet any of these criteria, it is permanent." (citations, quotation marks, brackets, and ellipsis omitted)). The order from which appellant-father appeals decreed that "[p]ermanent custody will be set for trial," but did not provide any timeframe for such a trial, much less "a clear and specific reconvening time." *Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546.

More importantly, this Court has repeatedly held that a trial court's order which "eliminates the fundamental right of . . . a parent, to make decisions concerning the care, custody, and control of [his] children, . . . affects a substantial right and [an] appeal from [such an] order is properly before this Court pursuant to N.C. Gen. Stat. § 1-277(a)." *In re Adoption of Shuler*, 162 N.C. App. 328, 330, 590 S.E.2d 458, 460 (2004) (citations and internal quotation marks omitted); *see also Graham*, 270 N.C. App. at 682, 842 S.E.2d at 160. In his brief, appellant-father has appropriately cited N.C. Gen. Stat. § 1-277(a) as the basis for our appellate review, and furthermore this "appeal from a temporary custody order is [not] premature" under *Brewer*. 139 N.C. App. at 228, 533 S.E.2d at 546. Accordingly, we turn to the merits of appellant-father's arguments.

B. Standard of review

> 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. The clear and convincing standard requires evidence that should fully convince. This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters.
>
> The trial court's legal conclusion that a parent acted inconsistent[ ] with his constitutionally protected status as a parent is reviewed de novo to determine whether the findings of fact cumulatively support the conclusion and whether the conclusion is supported by clear and convincing evidence. The trial court's findings of fact are conclusive on appeal if unchallenged, or if supported by competent evidence in the record.

In re I.K., 377 N.C. 417, 421–22, 858 S.E.2d 607, 611 (2021) (citations, quotation marks, and brackets omitted).

C. Sufficiency of factual findings

[2] "The liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by" the United States Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). "[T]he Due Process Clause does not permit a state to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 72–73. Likewise, "North Carolina's recognition of the paramount right of parents to custody, care, and nurture of their children" is

longstanding and deeply rooted. *Petersen v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994). "[P]arents normally love their children and desire not only what is best for them, but also a deep and meaningful relationship with them. Therefore, the decision to remove a child from the custody of a natural parent must not be lightly undertaken." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001). Accordingly, precedent provides that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally[ ]protected paramount right of parents to custody, care, and control of their children must prevail." *Petersen*, 337 N.C. at 403–04, 445 S.E.2d at 905.

The primary import of the "*Petersen* presumption" lies in its impact on the burden of proof to be applied in a custody dispute between a parent and a non-parent party: "So long as a parent has this paramount interest in the custody of his or her children, a custody dispute with a non[-]parent regarding those children may not be determined by the application of the 'best interest of the child' standard." *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 503 (2010) (citing *Price v. Howard*, 346 N.C. 68, 73, 484 S.E.2d 528, 531 (1997)). If the *Petersen* presumption—the presumption that a fit parent will act in the best interest of his or her child—is overcome, however, the provisions of N.C. Gen. Stat. § 50-13.2(a) will apply: "an order for custody of a minor child . . . shall award the custody of such child to such person, agency, organization, or institution as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a) (2021); *Price*, 346 N.C. at 79, 484 S.E.2d at 534.

While "there is no bright line beyond which a parent's conduct [overcomes the *Petersen* presumption,] . . . . conduct rising to the 'statutory level warranting termination of parental rights' is unnecessary." *Boseman*, 364 N.C. at 549, 704 S.E.2d at 503 (citing and then quoting *Price*, 346 N.C. at 79, 484 S.E.2d at 534-35). "Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. . . . [and o]ther types of conduct, which must be viewed on a case-by-case basis, can also rise to this level[.]" *Price*, 346 N.C. at 79, 484 S.E.2d at 534–35. "A determination that a parent has forfeited this status must be based on clear and convincing evidence." *In re N.Z.B.*, 278 N.C. App. 445, 450, 863 S.E.2d 232, 236 (2021) (citations omitted).

The trial court did not find that appellant-father is an unfit parent for Jacob, or that he neglected or abandoned his son.[3] To the contrary,

3. A trial court's conclusion that one parent is unfit does not have any impact on the constitutionally protected parental rights of the other parent, who is still entitled to the benefit of the *Petersen* presumption. *See*, *e.g.*, *Brewer*, 139 N.C. App. at 231–32, 533 S.E.2d at 548.

the trial court plainly had no concerns about appellant-father as a parent as the court initially awarded periods of custody of Jacob to appellant-father beginning on 24 December 2021, increased appellant-father's custody beginning in March 2022, continuing that custody at least once, and then once again increased appellant-father's custody on 12 August 2022. Thus, we turn to a case-specific consideration of the potentially pertinent findings of fact in the trial court's 7 November 2022 order, which include: that appellant-father "provided no financial support to the minor child since January of 2020"; that Kornegay and Jacob moved in with Maness in January 2020 at which point Kornegay allowed Maness to act as a parental figure to Jacob; that "unbeknownst to" appellant-father, Kornegay left Jacob with Maness in August 2020; that appellant-father had visitation with Jacob every other weekend from January to August 2020; that after learning in August 2020 of the existence of the purported temporary guardianship agreement between Kornegay and Maness, which appellant-father was told was intended to facilitate medical appointments for the child, appellant-father never contacted Maness about the agreement; that from August 2020 to January 2021, appellant-father was unable to contact Kornegay, did not attempt to contact Maness about Jacob's or Kornegay's whereabouts, and did not see Jacob; that Kornegay contacted appellant-father in January 2021 and informed him that she and Jacob were residing in South Carolina; and that appellant-father did not seek custody of Jacob until May 2021. Based on these findings of fact, the trial court concluded that appellant-father "withheld [his] care, love, and attention from the minor child through [his] actions while the child resided with" Maness; "failed to act as a reasonable parent when he had no communication from [Kornegay;] did not attempt communication with [Maness] as the last known location of the minor child, [when appellant-father's] mother was in communication with [Maness] until at least September [ ] 2020"; and thus "acted inconsistent with his constitutionally protected parental rights." The trial court did not note that it had placed Jacob in appellant-father's custody on a regular and increasing basis for almost a year prior to the entry of its order or explain how those rulings could be harmonized with its conclusion that appellant-father had acted inconsistent with his constitutionally protected parental rights less than three months following the court's increase of custody with appellant-father.

Upon our de novo review, we hold that the trial court's factual findings are insufficient to support its conclusion that appellant-father acted inconsistent with his constitutionally protected parental rights. These findings of fact boil down to appellant-father's failure to provide financial support for Jacob during a certain period of time and his failure, in

the trial court's view, "to act as a reasonable parent" when, upon being unable to reach Kornegay between September and December 2020, appellant-father did not attempt to contact Maness.

Given appellant-father's testimony that Kornegay had changed residences regularly since Jacob's birth in November 2018—including living with her grandparents, being apparently homeless, living with at least one boyfriend, living "in Sanford," spending several nights sleeping on appellant-father's couch, and moving in with Maness—in conjunction with his belief that Maness was simply acting as a babysitter for Jacob and had sought temporary guardianship to facilitate the child's medical care, we cannot conclude that it was not "reasonable" for appellant-father to act as he did in continuing to try to contact Kornegay over several months, rather than assuming that Kornegay had left Jacob in the care of Maness, a non-relative with no legal rights to the child who did not attempt to alert appellant-father or appellant-father's mother that the child was in her care.

Despite Kornegay's past housing instability, she had never before abandoned Jacob with a non-relative, having only left the child with appellant-father, and in this context, we disagree that a reasonable parent in appellant-father's position would assume that Kornegay had left her child behind and moved away or that Maness would maintain physical custody of appellant-father's child without contacting appellant-father, his family, or DSS. Once Kornegay responded to appellant-father's outreach in January 2021, appellant-father believed Jacob to be in her care out of state and formed a plan to visit his son. When DSS alerted appellant-father of the actual state of affairs—that Maness had been keeping Jacob despite having no legal right to do so—appellant-father immediately followed the recommendation of DSS that he contact law enforcement in an attempt to retrieve his child and filed a report with DSS in an effort to regain custody of Jacob.

These circumstances are easily distinguishable from those present in cases where a natural parent who has never voluntarily relinquished custody of his child to a non-parent have been held to have risen to the level of being inconsistent with the constitutionally protected status of a parent:

- A father had numerous criminal convictions, a history of violating court orders, and only seven brief visits with his son during the two years of the child's life prior to the custody hearing in *Adams*, 354 N.C. at 58–59, 65, 550 S.E.2d at 500–01, 504.

- A mother lived a lifestyle that caused her to neglect her child and evidence suggested that she was involved in the murder of the child's father in *Speagle v. Seitz*, 354 N.C. 525, 528–29, 557 S.E.2d 83, 85 (2001), *cert. denied*, 536 U.S. 923 (2002).

Moreover, as noted above, the trial court had found appellant-father appropriate to have regular custody of his son for nearly a year, increasing those periods of custody less than three months before entering the order from which appellant-father appeals. None of the findings of fact made by the trial court pertain to any concern or change which arose or occurred during that time period. Nor did the trial court ever acknowledge that Maness kept Jacob in her physical custody for eight to nine months after his mother left Maness's residence—in the absence of any legal custody order—without contacting DSS, filing a custody complaint, or notifying appellant-father or his mother, filing her custody complaint only after appellant-father learned that his child was not with Kornegay and took DSS-suggested action to regain custody of Jacob. Given the acts and omissions by Kornegay and Maness regarding where and with whom Jacob was residing between August or September 2020 and May 2021, we hold that the findings of fact in the trial court's order were insufficient to support a conclusion that appellant-father acted in a manner inconsistent with his constitutionally protected status as Jacob's natural parent. For this reason, application of "the best interest of the child" standard is inappropriate in this custody action.

III. Conclusion

Accordingly, the trial court's 7 November 2022 order is reversed, and the case is remanded for further proceedings not inconsistent with this decision.

REVERSED AND REMANDED.

Judge WOOD concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the majority's holding that this interlocutory appeal can be decided on the merits. "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 (1950) (citation omitted). "As a general rule, interlocutory orders are not immediately appealable." *Williams v. Devere Constr. Co., Inc.*, 215 N.C. App. 135, 137 (2011) (citation omitted).

"The purpose of this rule is 'to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard.' " *Sharpe v. Worland*, 351 N.C. 159, 161 (1999) (quoting *Bailey v. Gooding*, 301 N.C. 205, 209 (1980)). This Court has noted that "[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Veazey*, 231 N.C. at 363.

The majority is correct that orders awarding temporary custody are interlocutory and not appealable if "(1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings is reasonably brief, or (3) the order does not determine all the issues. . . . If the order does not meet any of these criteria, it is permanent." *See Graham v. Jones*, 270 N.C. App. 674, 678 (2020) (cleaned up). Here, the trial court issued an order on 4 November 2022 determining, in relevant part, that appellant-father "acted inconsistent with his constitutionally protected parental rights[,]" "[p]ermanent custody will be set for trial[,]" and "[t]he issue of permanent custody will be decided based on the best interests of the minor child." Thus, the order directed a further proceeding be scheduled and decided using the best interests of the child standard. Further, it did not make any final custody determination. Additionally, there is a hearing on permanent custody referenced which suggests that the trial court directed another hearing to be scheduled and that the time between the hearings would have been reasonably brief but for this appeal. This is unlike the cases where the trial court enters multiple "temporary" custody orders which appear to be an attempt to avoid review. Thus, this order is interlocutory, and we must dismiss this appeal.

The majority notes that appellant-father cited N.C.G.S. § 1-277(a) as the basis for his right to appeal. However, he does not acknowledge the appeal as interlocutory, and he has not articulated how this appeal affects a substantial right. *See* N.C. R. App. P. 28(b)(4) ("When an appeal is interlocutory, the statement [of the grounds for appellate review] *must contain sufficient facts and argument* to support appellate review on the

ground that the challenged order affects a substantial right." (emphasis added)). There are numerous cases that stand for the proposition that if a case is interlocutory and a person is relying on the fact that it affects a substantial right, their brief must articulate the basis for this contention—this Court is not to articulate those grounds for them. *See*, *e.g.*, *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380 (1994); *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78 (2009). The majority here appears to be trying to circumvent this line of cases. That effort in my opinion is violative of our Supreme Court's holding in *In Re Civil Penalty*. 324 N.C. 373, 384 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citation omitted)).

In the case *sub judice*, the trial court did not terminate appellant-father's parental rights, nor did it make a permanent custody or guardianship determination in this order; the court explicitly ordered permanent custody to be determined at a later date. Because the order did not dispose of the case, the appeal is interlocutory. Appellant-father's statement of his grounds for appeal is thus insufficient as "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order[.]" *Jeffreys*, 115 N.C. App. at 380 (citation omitted); *see also Hoke Cnty. Bd. of Educ.*, 198 N.C. App. at 277–78 ("[A]ppellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." (emphasis in original) (citation omitted)). While appellant makes a bare bones assertion that his substantial rights are implicated, he makes no argument to support this statement. Appellant-father's failure to do so subjects his appeal to dismissal for lack of jurisdiction.

As discussed above, this appeal is interlocutory, and this Court should dismiss the appeal. Deciding this case on the merits, though appellant-father merely cited a statute as the basis for this appeal, defies the purpose of the rule against interlocutory appeals, "procrastinate[s] the administration of justice[,]" and binds the other parties in this matter despite their patience to wait for a full adjudication below.

SMITH DEBNAM NARRON DRAKE SAINTSING & MYERS, LLP, PLAINTIFF
v.
PAUL MUNTJAN, DEFENDANT

No. COA23-324

Filed 16 January 2024

1. Statute of Frauds—agreement by father to pay son's legal bills—enforceability—sufficiency of email correspondence

In an action by plaintiff law firm to collect monies owed for legal services it provided to its client, in which plaintiff sued the client's father (defendant) on the basis that it had formed a contract with defendant to pay his son's legal bills, the trial court erred by entering judgment against defendant. Assuming without deciding that the parties had formed a valid contract, the appellate court determined that such a contract was unenforceable because it violated the statute of frauds (N.C.G.S. § 22-1). First, the trial court erred by concluding that defendant made an original promise—which is not a guaranty—and that the promise did not need to be in writing, since defendant's promise to pay in addition to his son was a collateral promise that constituted a guaranty. Second, there was no evidence that the main purpose of the guaranty was to benefit defendant, and thus the promise needed to be written to be enforceable. Finally, defendant's email correspondence with plaintiff, which, despite having some references to plaintiff's invoices, lacked essential contract elements and an explicit promise to pay and was therefore insufficiently definite to constitute a signed "memorandum or note thereof" for purposes of the statute.

2. Quantum Meruit—agreement by father to pay son's legal bills—no benefit passed from law firm to father—father not liable

In an action by plaintiff law firm to collect monies owed for legal services it provided to its client, where the appellate court determined that any purported contract plaintiff had with the client's father (defendant) for defendant to pay his son's legal bills was unenforceable as violating the statute of frauds, plaintiff could not recover under the equitable principle of quantum meruit, because no benefit passed from plaintiff to defendant.

Judge ARROWOOD dissenting.

Appeal by Defendant from judgment entered 3 November 2022 by Judge Ned W. Mangum in Wake County District Court. Heard in the Court of Appeals 1 November 2023.

Smith Debnam Narron Drake Saintsing & Myers, LLP, by Byron L. Saintsing & Joseph Alan Davies, for Plaintiff-Appellee.

Law Office of Mark L. Hayes, by Mark L. Hayes, for Defendant-Appellant.

CARPENTER, Judge.

Paul Muntjan ("Defendant") appeals from the trial court's judgment, awarding money damages from Defendant to Smith Debnam Narron Drake Saintsing & Myers, LLP ("Plaintiff"). Defendant argues the judgment is unsupported by a legal theory. Specifically, Defendant argues the judgment is unsupported by breach of contract or quantum meruit. After careful review, we agree with Defendant and reverse the trial court's judgment.

I. Factual & Procedural Background

This case concerns a contract dispute involving three parties: a construction-business owner, the business owner's father, and a law firm. Nick Muntjan is the business owner, Defendant is Nick's father, and Plaintiff is the law firm. In sum, Plaintiff performed legal services for Nick, and Plaintiff eventually sued Defendant to collect fees for its services.

On 16 August 2019, Nick initially met with Brian Saintsing, a partner at Plaintiff. Defendant accompanied Nick to the meeting. At the meeting, the parties did not discuss the cost of Plaintiff's services. Saintsing, however, testified that Defendant promised to pay for Plaintiff's services. Specifically, Saintsing testified as follows: "Paul, the father, volunteered that he would be responsible for the fees in addition to his son because his son was experiencing financial difficulty and did not have the wherewithal to pay for a defense of any litigation that might be brought."

Defendant denied saying this. More specifically, Defendant denied "promis[ing] at that meeting with Mr. Saintsing that [he] would pay [his] son's legal bills." Despite the disputed substance of the discussion, the purpose of the meeting was clear: Nick needed legal representation, and he sought Plaintiff's help.

On 17 September 2019, Plaintiff mailed and emailed Nick an engagement letter, which stated that "[u]pon receipt of the signature page and

the retainer, we will begin work in this matter." The engagement letter listed Plaintiff's hourly rate and how Nick would be billed. Nick and Defendant both testified, however, that they never received the letter.

Some of Nick's former clients eventually sued him on 9 December 2019, and Defendant forwarded the complaint to Plaintiff on 18 December 2019. Despite not receiving a signed engagement letter, Plaintiff began working for and billing Nick. And Plaintiff received payments toward Nick's balance, but those payments were made through Defendant's credit card. Defendant and Nick testified that Defendant did not make the payments; he merely allowed Nick to use his credit card as a loan. These payments are reflected in Plaintiff's invoices, which also detail Plaintiff's hourly rate, time worked, and total charges.

On 12 May 2020, Plaintiff emailed Nick, stating that portions of his bill were past due. On 4 June 2020, Plaintiff again emailed Nick about his overdue bill. On 6 June 2020, Nick responded and asked Plaintiff to "CC" Defendant on future correspondence. Correspondence between Plaintiff and Defendant included the following, all via email. Defendant: stated that it "was important to us to always pay our valued partners quickly for their services"; sent Plaintiff the complaint filed against Nick and asked how "we can best work together in this regard"; questioned whether a payment was missing from an invoice; and asked if discovery could be limited in order to keep costs down. Defendant ended each of these emails with either "Paul" or "Paul Muntjan."

On 31 March 2021, Plaintiff attempted to collect its past-due bills by suing Defendant, rather than Nick. On 3 November 2022, after a bench trial, the trial court entered a $13,528.06 judgment against Defendant. The trial court concluded that Defendant breached an "original promise" to Plaintiff. In other words, the trial court concluded that Defendant breached a contract with Plaintiff, and the contract need not be written to be enforceable. Defendant timely filed notice of appeal on 23 November 2022.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Issue

The issue on appeal is whether the trial court erred in holding Defendant liable to Plaintiff for services provided for Defendant's son. The two underlying issues concerning the propriety of the trial court's judgment are whether Plaintiff has a valid claim for (1) breach of contract or (2) quantum meruit.

IV. Standard of Review

We review a trial court's conclusions of law de novo. *Luna ex rel. Johnson v. Div. of Soc. Servs.*, 162 N.C. App. 1, 4, 589 S.E.2d 917, 919 (2004). 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. Breach of Contract & the Statute of Frauds

[1] Defendant argues the trial court erred because he and Plaintiff never formed a valid contract, and even if they did, the contract was unenforceable under the statute of frauds. Rather than analyzing contract formation, we will begin with Plaintiff's second argument. We will assume, without deciding, that the parties formed a valid contract, and we will discern whether the contract satisfies the statute of frauds. After careful review, we conclude that even if the parties formed a valid contract, it is unenforceable because it fails the statute of frauds.

A "statute of frauds" requires certain contracts be written and signed to be enforceable. *See Durham Consol. Land & Improv. Co. v. Guthrie*, 116 N.C. 381, 384, 21 S.E. 952, 953 (1895) (explaining that the statute of frauds requires "that the contract shall be in writing and signed by 'the party to be charged therewith' "). North Carolina's statute of frauds is codified in Chapter 22 of our General Statutes. *See* N.C. Gen. Stat. §§ 22-1 to -5 (2021). Section 22-1 states:

> No action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

Id. § 22-1.

In other words, an enforceable contract to pay another's debt must be in writing and be signed by the party charged. *Id.* A contract to pay another's debt is a "guaranty," and the "guarantor" is the party who promises to pay. *See Foote & Davies, Inc. v. Arnold Craven, Inc.*, 72 N.C. App. 591, 593–94, 324 S.E.2d 889, 891–92 (1985).

1. Collateral Promise or Original Promise: Whether Defendant's Promise Was a Guaranty

A "collateral promise" is a guaranty, but an "original promise" is not. *See Burlington Indus., Inc. v. Foil*, 284 N.C. 740, 754, 202 S.E.2d 591, 601 (1974). Our courts have distinguished the two categories this way: If "credit was extended directly and exclusively to the promisor, then the promise is considered original and not within the statute of frauds." *Id.* at 754, 202 S.E.2d at 601. But if any credit was extended to a party other than the promisor, the promise is collateral and within the statute of frauds. *Id.* at 754, 202 S.E.2d at 601. Put another way, if only the promisor is liable for the promise, the promise is original; but if another party is also liable for the promise, the promise is collateral. *See id.* at 754, 202 S.E.2d at 601.

Here, Saintsing stated that Defendant "volunteered that he would be responsible for the fees in addition to his son because his son was experiencing financial difficulty and did not have the wherewithal to pay for a defense of any litigation that might be brought." Defendant did not simply promise to pay; he promised to pay in addition to Nick. So a party other than Defendant—Nick—was also liable under the contract. *See id.* at 754, 202 S.E.2d at 601. Therefore, the contract was a guaranty, and the trial court erred when it concluded that Defendant made an "original promise." *See id.* at 754, 202 S.E.2d at 601.

2. The Main Purpose Rule

A guaranty, however, may still avoid the statute of frauds if the main-purpose rule applies. *Id.* at 748, 202 S.E.2d at 597. The main-purpose rule applies to a guaranty if its main purpose is to benefit the guarantor. *Id.* at 748, 202 S.E.2d at 597. But a parent–child relationship, without more, does not trigger the main-purpose rule. *See Ebb Corp. v. Glidden*, 322 N.C. 110, 110, 366 S.E.2d 440, 441 (1988) (adopting the dissenting opinion from this Court as its own); *Ebb Corp. v. Glidden*, 87 N.C. App. 366, 373, 360 S.E.2d 808, 811 (1987) (Becton, J., dissenting) ("[T]he parent-child relationship is not sufficient in and of itself to take an oral promise by a parent to pay a child's debts outside the Statute of Frauds by applying the main purpose doctrine.").

Here, Defendant promised to pay Nick's debt, and Nick is Defendant's son. No other evidence suggests that the main purpose of the guaranty was to benefit Defendant, so the main-purpose rule does not apply, and the statute of frauds does. Therefore, the trial court erred when it concluded Defendant's promise need not be written to be enforceable. *See Ebb Corp.*, 322 N.C. at 110, 366 S.E.2d at 441.

3. Signed "Memorandum or Note Thereof"

Having concluded that the statute of frauds applies to the contract, we must now discern whether any correspondence between Plaintiff and Defendant is a signed "memorandum" of the contract. *See* N.C. Gen. Stat. § 22-1.

"In order to constitute an enforceable contract within the statute of frauds, the written memorandum, though it may be informal, must be sufficiently definite to show the essential elements of a valid contract." *Smith v. Joyce*, 214 N.C. 602, 604, 200 S.E. 431, 433 (1939). Price, parties, and the goods or services to be exchanged are essential elements of a contract. *Connor v. Harless*, 176 N.C. App. 402, 405, 626 S.E.2d 755, 757 (2006).

A written correspondence may satisfy the statute of frauds if it "sufficiently refer[s] to some writing in which the terms are set out and which itself contains all the requisites of a valid contract or memorandum under the statute." *Winders v. Hill*, 144 N.C. 614, 618–19, 57 S.E. 456, 457 (1907).[1] When looking for sufficient written memoranda, "separate writings may be considered together to satisfy the statute of frauds requirement." *Crocker v. Delta Grp., Inc.*, 125 N.C. App. 583, 586, 481 S.E.2d 694, 696 (1997). And concerning the requisite signature, email signatures generally suffice. *See Powell v. City of Newton*, 200 N.C. App. 342, 348, 684 S.E.2d 55, 60 (2009) (citing N.C. Gen. Stat. §§ 66-312(9), -315(b)).

Here, all emails sent by Defendant end with his name, which satisfies the signature requirement. *See id.* at 348, 684 S.E.2d at 60. The question is whether the substance of Defendant's emails contains "the essential elements of a valid contract." *See Smith*, 214 N.C. at 604, 200 S.E. at 433. The text of Defendant's emails lacks the price of Plaintiff's services, so the text of Defendant's emails lacks an essential element. *See Connor*, 176 N.C. App. at 405, 626 S.E.2d at 757.

But Defendant's emails may still satisfy the statute of frauds if they refer to a memorandum that includes the essential contract elements. *See Winders*, 144 N.C. at 618–19, 57 S.E. at 457. Here, several of Defendant's emails explicitly refer to Plaintiff's invoices. The invoices provide the price and provided-service terms of the contract because

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1. The Dissent notes that *Winders* is a 116-year-old case, implying that its age dilutes its precedential value. To the contrary, unless overruled, we think a case's precedential value increases with the passage of time. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).

they include the services provided by Plaintiff and the price of the services. *See Connor*, 176 N.C. App. at 405, 626 S.E.2d at 757.

Because this dispute involves a guaranty, however, the invoices must show that Defendant promised to pay. Here, the invoices only refer to "Nick" as the customer, not Defendant. Nor do the invoices state any promise by Defendant to pay Nick's invoices. Therefore, the invoices lack an essential term of the guaranty—the alleged paying party, Defendant. *See id.* at 405, 626 S.E.2d at 757.

One of Defendant's emails, though, bears repeating in full. Defendant sent the following email to Plaintiff and signed it as "Paul Muntjan":

> Received your email as addressed to son Nick regarding the case and request for prompt payment. It is important to us to always pay our valued partners quickly for their services rendered[,] so rest assured your invoice will be turned around immediately and a check sent upon receipt. Please note as of this date no invoice has been received. As a reminder, please [e]nsure any and all invoices are sent to my email due to my travel schedule.

The question is whether this email, coupled with other emails and invoices, is enough to "show the essential elements of" the guaranty. *See Smith*, 214 N.C. at 604, 200 S.E. at 433. Defendant spoke in passive, vague terms. Defendant said Plaintiff's invoice "will be turned around immediately," but he did not promise that he, personally, would pay. Defendant said that "no invoice has been received," but he did not say that he, personally, was expecting the invoice.

Taken as a whole, Defendant's emails imply that he agreed to pay for Nick's legal bills, and indeed the trial court found that Defendant verbally promised to do so. But while spoken words and implications can form a contract, *see Snyder v. Freeman*, 300 N.C. 204, 217, 266 S.E.2d 593, 602 (1980), they cannot satisfy the statute of frauds, *see Winders*, 144 N.C. at 618–19, 57 S.E. at 457.[2] Defendant's emails are not "sufficiently definite to show the essential elements of a valid contract" because they do not express a clear, written promise by Defendant that *he* would pay Plaintiff. *See Smith*, 214 N.C. at 604, 200 S.E. at 433.

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2. Contrary to the Dissent's position, we are not "attempt[ing] to engender a new rule." In our view, the statute of frauds indeed stands athwart to spoken words and implications. *See* N.C. Gen. Stat. §§ 22-1 to -5. We concede that this is a close case, but the statute of frauds is not a high bar. All Plaintiff needed from Defendant was a signed writing saying, for example, "I promise to pay Nick's debt." Defendant's writings certainly imply that he would pay Nick's debt, but his writings do not say so.

Therefore, Defendant's guaranty is not enforceable, and the trial court erred by concluding otherwise.

In sum, we conclude that because the guaranty between Plaintiff and Defendant is not memorialized and signed by Defendant, it is not enforceable against Defendant. *See* N.C. Gen. Stat. § 22-1.

B. Quantum Meruit

[2] Lastly, we must discern whether the trial court's judgment was supported by quantum meruit, "an equitable principle" that allows recovery without an enforceable contract. *See Paxton v. O.P.F., Inc.*, 64 N.C. App. 130, 132, 306 S.E.2d 527, 529 (1983). We conclude it was not.

Quantum meruit is Latin for "as much as he has deserved." *Quantum Meruit*, Black's Law Dictionary (11th ed. 2019). Quantum meruit requires "plaintiff [to] show: (1) services were rendered to defendants; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously." *Envtl. Landscape Design Specialists v. Shields*, 75 N.C. App. 304, 306, 330 S.E.2d 627, 628 (1985).

In order to recover under quantum meruit, however, a benefit must pass from the plaintiff to the defendant. *Fagen's of N.C., Inc. v. Rocky River Real Est. Co.*, 117 N.C. App. 529, 533, 451 S.E.2d 872, 874–75 (1995). In *Fagen's*, the defendant served as a guarantor concerning the plaintiff's loan to a third-party borrower, an entity which the defendant did not own or operate. *Fagen's*, 117 N.C. App. at 532, 451 S.E.2d at 874. The plaintiff asserted the defendant was liable under quantum meruit, but this Court held that quantum meruit was "without support, because that theory would also require some benefit passing to [the defendant] upon the extension of credit to [the third-party borrower]." *Id.* at 533, 451 S.E.2d at 874–75.

So too here. The benefit of Plaintiff's legal services passed from Plaintiff to Nick, not to Defendant. Although Plaintiff mistakenly believed he was, Defendant is not an owner of Nick's company, and Plaintiff's services were rendered to Nick and his company—not Defendant. Therefore, Plaintiff cannot recover from Defendant under quantum meruit. *See id.* at 533, 451 S.E.2d at 874–75.

VI. Conclusion

We conclude the trial court erred by entering judgment against Defendant. The judgment is not supported by contract theory or quantum meruit; therefore, we reverse.

REVERSED.

Judge FLOOD concurs.

Judge ARROWOOD dissents in a separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the majority's holding that the trial court erred by entering judgment against defendant because, in my opinion, defendant's emails satisfied the statute of frauds.

Section 22-1 of the North Carolina General Statutes codifies the statute of frauds requirement that a contract to pay a third-party's debt "be in writing, and signed by the party charged[.]" N.C.G.S. § 22-1 (2023). Such requirement "was designed to guard against fraudulent claims supported by perjured testimony; it was not meant to be used by defendants to evade an obligation[.]" *House v. Stokes*, 66 N.C. App. 636, 641, *cert. denied*, 311 N.C. 755 (1984).

" 'In order to constitute an enforceable contract within the statute of frauds, the written memorandum, though it may be informal, must be sufficiently definite to show the essential elements of a valid contract.' " *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 243 (1967) (quoting *Smith v. Joyce*, 214 N.C. 602 (1939)). Essential elements of a valid contract include the parties, price, and subject-matter of the contract. *Hurdle v. White*, 34 N.C. App. 644, 648 (1977).

Further, "[a] memorandum, by its very nature, is an informal instrument, and the statute of frauds does not require that it be in any particular form." *Hurdle v. White*, 34 N.C. App. 644, 648 (1977). Even "separate writings may be considered together to satisfy the statute of frauds requirement." *Crocker v. Delta Grp., Inc.*, 125 N.C. App. 583, 586 (1997).

The majority contends that defendant's emails do not satisfy the statute of frauds because "they do not express a clear, written promise by [d]efendant that he would pay [p]laintiff." Yet, to satisfy the requirement, the emails only need to be "sufficiently definite to show the essential elements of a valid contract." *Carr*, 269 N.C. at 243. And when "considered together[,]" defendant's emails undoubtedly do that. *See Crocker*, 125 N.C. App. at 586.

As the majority states, the essential elements of the parties, price, and signature were met, leaving only the element of defendant's promise to pay in question. Here, defendant's September 2019 email states that

"it is important to *us* to always pay *our* valued partners quickly for their services rendered so rest assured your invoice will be turned around immediately and a check sent upon receipt." (emphasis added). The same email also accounts for payment of "any and all [future] invoices" by asking that such invoices be sent directly to defendant's personal email address. I think this sufficiently shows in writing defendant's promise to pay.

Defendant further memorializes his agreement to pay plaintiff for legal services in five emails sent by defendant between December 2019 and July 2020. Specifically, defendant's 19 December 2019 email specifically refers to subject-matter of the contract by attaching the filed complaint against defendant's son and requesting plaintiff's legal review of it. The four subsequent emails—sent directly from defendant in June and July 2020—refer to various invoices and questions about payments for legal services, including defendant's clear acknowledgement that he would need to "deal with" a $3,000.00 payment for plaintiff's work "answering the discovery served upon" defendant's son. Thus, when considered together, defendant's emails constitute a signed memorialization of the guaranty between plaintiff and defendant and satisfy the requirements of § 22-1 and our precedents.

To support the contention that these emails somehow miss the mark of satisfying the statute of frauds, the majority cites *Winders v. Hill*, 144 N.C. 614, a 116-year-old case that—until this filing—has not been mentioned for sixty-nine years. *See Clapp v. Clapp*, 241 N.C. 281, 283–84 (1954) (citing *Winders* to support the rule that "it is settled law that a party may rely on the statute of frauds under a general denial."); *see also Weant v. McCanless*, 235 N.C. 384, 386 (1952) ("[T]he contract, as alleged, may be denied and the statute pleaded, and in such case if it 'develops on the trial that the contract is in parol, it must be declared invalid'.").

In *Winders*, our Supreme Court explained that the writings did not satisfy the statute of frauds because they were insufficient to constitute an admission of the contract in that they did not "contain internal evidence of the contract or refer to some that writing that does." 144 N.C. at 618 (citations omitted). Our Supreme Court reaffirmed the rule set forth in *Winders* that in a breach of contract case, the plaintiff "must establish the contract by legal evidence, and if it is required by the statute to be in writing, then by the writing itself, for that is the only admissible proof" *Jamerson v. Logan*, 228 N.C. 540, 543 (1948) (citing *Winders*, 144 N.C. at 617).

Yet, even in light of *Winders*, the majority's argument fails. In the case *sub judice*, unlike in *Winders*, we have multiple emails from

defendant that not only "contain internal evidence of the [guaranty]" but as discussed above, are sufficiently definite to show the contract's essential elements. *See Winders*, 144 N.C. at 618. The emails may also be considered "legal evidence" and taken together constitute "the writing itself" and accordingly are "admissible proof" of the contract. *Jamerson*, 228 N.C. at 543.

The majority also attempts to engender a new rule from *Winders* that written "implications" cannot support satisfying the statute of frauds. I cannot agree with such proposition, however, as neither *Winders* nor N.C.G.S. §§ 22-1 through 22-5 states this. In fact, § 22-1 simply requires that "*some memorandum or note thereof*, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized." (emphasis added). More importantly, I believe that defendant's emails, which the majority states "imply that he agreed to pay for Nick's legal bills," go further than mere implication, and instead "contain internal evidence of the contract" and satisfy the statute of frauds. As the majority acknowledges, the statute of frauds "is not a high bar," and in my view the evidence here easily clears.

For the foregoing reasons, I would affirm the trial court's judgment. Therefore, I dissent.

STATE OF NORTH CAROLINA
v.
JOSEPH BALL

No. COA22-1029

Filed 16 January 2024

1. Kidnapping—rape case—"restraint" element of kidnapping—separate from restraint inherent in rape

In a prosecution arising from the rape of a sixty-five-year-old woman, the trial court properly denied defendant's motion to dismiss a charge of second-degree kidnapping, where the State presented sufficient evidence of restraint that was separate and distinct from that which was required to commit the rape. Specifically, the evidence showed that defendant forced his way into the woman's home, intercepted her as she tried to flee from him, trapped her inside her own bedroom, and held her down onto her bed while the two engaged in an extended physical struggle leading up to the rape.

2. Constitutional Law—Confrontation Clause—sexual assault nurse examination report—prepared by nontestifying nurse —different nurse's expert testimony regarding report

In a prosecution arising from the rape of a sixty-five-year-old woman, the trial court did not commit plain error by admitting a sexual assault nurse examination report into evidence or by allowing a different nurse from the one who prepared the report to testify about it as an expert in sexual assault nurse examinations. Although the report constituted testimonial evidence, testimonial statements will not be barred under the Confrontation Clause under certain circumstances, such as where they are admitted for nonhearsay purposes. Further, because the nurse testified only as to her independent opinion of the exam results detailed in the report, she was the witness that defendant had the right to confront, not the nurse who prepared the report; therefore, because defendant was able to cross-examine the testifying nurse at trial, his confrontation rights were not violated.

3. Criminal Law—prosecutor's closing argument—differences in defendant's pretrial statements and trial testimony—credibility argument

In a prosecution arising from the rape of a sixty-five-year-old woman, the trial court did not abuse its discretion by failing to intervene ex mero motu during the prosecutor's closing argument, during which the prosecutor highlighted the differences between defendant's recorded statement to law enforcement days after the rape and his trial testimony, describing the differences as "the evolution of a defense." Rather than improperly suggesting—as defendant contended on appeal—that defendant testified falsely at trial pursuant to his lawyers' advice, it could be reasonably inferred from the record that the prosecutor was merely pointing out defendant's differing statements in order to call defendant's credibility into question.

Appeal by Defendant from judgment entered 17 December 2021 by Judge William H. Coward in Macon County Superior Court. Heard in the Court of Appeals 20 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Ryan C. Zellar, for the State.

Joseph P. Lattimore, for the Defendant-Appellant.

WOOD, Judge.

Joseph Ball ("Defendant") appeals from judgments entered by the trial court after a jury verdict finding him guilty of second-degree forcible rape, first-degree burglary, interfering with an emergency communication, second-degree kidnapping, and assault on a female. For the reasons stated below, we hold Defendant received a fair trial, free from error.

I. Factual and Procedural Background

On the evening of 11 May 2019, Defendant appeared at the residence of K.V.[1] K.V.'s residence is situated on a seventeen-acre farm and contains her primary residence, a storage building, and a guest house. Defendant and K.V. knew each other previously as they had worked together at a Christmas tree lot in Atlanta, Georgia and Defendant had completed carpentry work at her property years earlier.

When K.V. answered the door, Defendant informed K.V. his car was stuck in a nearby ditch, and he could not drive it. K.V. offered Defendant her guest house for the night, walked him to the structure, and returned to her residence. K.V. texted two friends notifying them that a person was staying in her guest house and asked them to check in with her in the morning because she felt uncomfortable.

At trial, the parties offered different accounts of what followed. K.V. testified that after she returned to her home, Defendant came to her front door again and asked for a cigarette lighter. After she handed a lighter to Defendant, he barged through the front door into the home. K.V. ran to retrieve her phone to call for help, but before she could reach her phone, Defendant "intercepted [her] and threw [her] on the bed." K.V. landed on her bed face down.

Defendant jumped on the bed, placed his knee in K.V.'s back, grabbed her wrists, and attempted to roll her over. K.V. began to scream, kick, and repeatedly ordered Defendant to leave her home. When Defendant ignored her, K.V. began to beg Defendant not to hurt her and told him she would not call the police if he left her home without hurting her. According to K.V., Defendant responded "I've made it this far, I'm going to finish it." K.V. testified she warned Defendant that "if he did finish it, there would be consequences that he might not like" to which Defendant responded, "I don't care what the consequences are." Defendant moved K.V. onto her back, at which point she kicked Defendant in the face, causing his glasses to fly off his face. At some point during the struggle, K.V. noticed Defendant's cell phone on the

1. The prosecuting witness is referred to by her initials to protect her identity.

bed, picked it up, and attempted to dial 911. However, before she could complete the call, Defendant grabbed the phone out of K.V.'s hands and threw it against the wall.

K.V. testified that during this struggle, she feared for her life as she, a sixty-five-year-old woman, measuring 5'1", and weighing 140 pounds, was resisting a man likely around forty years old, measuring around 6'1", and weighing around 250 to 300 pounds. Recounting the struggle, K.V. testified:

> [I]t became pretty clear to me that my choice was to submit or die. I think every woman at some point in their life has imagined what they would do if they were put in this circumstance. And I simply knew I needed to submit so that I could live, so I let him roll me over.

Once K.V. was rolled onto her back, Defendant attempted to vaginally penetrate her but was unable to do so. Defendant then grabbed K.V.'s hair, pushed her face into his crotch, and demanded oral sex. K.V. refused. Defendant eventually penetrated K.V.'s vagina with his penis.

After Defendant ejaculated, he rolled off her, and she quickly leapt off the bed, attempting to escape. As she was running from her bedroom, Defendant, while still lying on the bed, grabbed and ripped off K.V.'s nightgown. K.V. escaped out of her front door nude, grabbed a blanket from the guest house to cover herself, and ran to her neighbor's home to ask for help. After failing to obtain help from her neighbors, K.V. approached a nearby sheriff's vehicle for assistance and reported that she had been raped by a man who was still in her home. The officers accompanied K.V. back to her home and found Defendant asleep on the bed. Defendant did not respond to the officers. The officers rolled him onto his side to handcuff him and removed him from K.V.'s home. K.V. underwent a sexual assault nurse examination ("SANE exam") the following morning on 12 May 2019.

In Defendant's recount of the night in question, he testified he was on his way to Atlanta but realized he was too intoxicated from alcohol to drive and needed to rest before continuing his travels. Defendant testified he had several drinks over the course of the day and by the evening began to "fade in and out of consciousness" after consuming six "Long Island iced teas" at a restaurant. Remembering K.V. lived near the travel route he was planning to take, Defendant decided to try to stay with her until he became sober. According to Defendant, after K.V. agreed to let him stay in her guest house, the two later went into K.V.'s bedroom, where he caressed and kissed K.V.'s breasts while they were lying

together on the bed. Defendant testified he initially could not perform sexually, so he had to "manually stimulate" himself. He testified that he and K.V. eventually engaged in consensual sexual intercourse.

On 15 July 2019, Defendant was charged with second-degree forcible rape, first-degree burglary, and interfering with an emergency communication. On 22 January 2020, Defendant was charged with second-degree kidnapping, sexual battery, and assault on a female in a superseding indictment. Defendant's trial was held during the 13 December 2021 criminal session of the Macon County Superior Court.

In addition to the testimony presented by K.V., the State presented the testimony of Corporal Lynch of the Macon County Sheriff's Department, who accompanied K.V. back to her home. Corporal Lynch testified that when he entered K.V.'s home, he found "a large naked man in the bed." Corporal Lynch noted, "he's way over 6 foot tall, I would estimate; and he was in excess of 200 pounds, probably 250 pounds. He was much larger than I was and much larger than [K.V]." Corporal Lynch placed Defendant under arrest, handcuffed him and rolled him onto his side because he was vomiting. Corporal Lynch testified there was a strong odor of alcohol and opined that Defendant was "appreciably intoxicated."

The State also called Detective Wright of the Macon County Sheriff's Office Special Victim's Unit who testified to taking pictures and collecting evidence at K.V.'s home as part of her normal investigation practice. Some of the pictures and evidence collected were accepted into evidence at trial and included a photograph of Defendant lying on K.V.'s bed, men's clothing, boots and boxer shorts, a broken cell phone with a cell phone battery, a cigarette butt, a photograph of metal framed eyeglasses on the floor, and a photograph of a torn nightgown on K.V.'s bed.

The State called as a witness Mr. Wendell Ivory of the North Carolina State Crime Lab who reviewed Defendant's DNA samples as well as DNA samples obtained through vaginal swabs of K.V. Mr. Ivory testified "[t]he major DNA profile matches the DNA profile from [Defendant]," while "the minor profile is no different from that of [K.V.]."

The State called Nurse Maillet, a forensic nursing supervisor at Mission Hospital, who was tendered at trial, without objection, as an expert in sexual assault nurse examinations. Nurse Maillet provided expert testimony regarding the SANE exam report, which was performed by Nurse Sullivan, a registered nurse at Mission Hospital, on 12 May 2019.

Nurse Maillet testified she personally reviewed K.V.'s SANE exam report and concluded the examination was conducted in accordance with the proper protocols governing all sexual assault examinations. Nurse Maillet further explained that part of the general protocol governing all sexual assault examinations is for the examining nurse to take photographs of nearly every part of the patient's body. Nurse Maillet personally reviewed the photographs taken during K.V.'s examination, and she observed bruising, abrasions and redness in the photographs that were "consistent with blunt trauma, which is what happens during a sexual assault." In connection with Nurse Maillet's testimony, the SANE exam report was admitted into evidence at trial, without objection.

Additionally, the State admitted into evidence, without objection, a recorded interview between Defendant and members of the Macon County Sheriff's Office conducted two days after the incident. During the recorded interview, which was played for the jury at trial, Defendant stated several times "I was too drunk[,] I don't remember anything" concerning the night in question. In the interview, when asked by officers "why did you do it," Defendant responded by stating, "I don't know."

On 17 December 2021, the jury found Defendant guilty of second-degree forcible rape, first-degree burglary, interfering with an emergency communication, second-degree kidnapping, and assault on a female. Following the jury's guilty verdicts, the trial court imposed the following active sentences, which were ordered to run consecutively: 96 to 176 months in prison for the conviction for second-degree forcible rape; 84 to 113 months for first-degree burglary; 75 days for interfering with an emergency communication; 33 to 52 months for second-degree kidnapping; and 75 days for assault on a female. Defendant gave oral notice of appeal in open court on this same day.

II. Analysis

Defendant brings three issues on appeal. We address each in turn.

A. Motion to Dismiss the Kidnapping Charge.

[1] Defendant first argues the trial court erred in denying his motion to dismiss the charge of second-degree kidnapping. Specifically, Defendant challenges the State's failure to "introduce sufficient evidence of confinement separate from that which was inherent in the commission of the alleged sexual assault" on K.V. We disagree.

Upon a defendant's motion to dismiss, the question for the trial 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." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The trial court views the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000). "Contradictions and discrepancies [in the evidence] do not warrant dismissal of the case but are for the jury to resolve." *Id.* at 379, 526 S.E.2d at 455. "[I]n borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *State v. Woods*, 275 N.C. App. 364, 368, 853 S.E.2d 177, 180 (2020), *aff'd*, 381 N.C. 160, 871 S.E.2d 495 (2022) (citation omitted).

This Court reviews a trial court's denial of a motion to dismiss *de novo*. *State v. Moore*, 240 N.C. App. 465, 470, 770 S.E.2d 131, 136 (2015) (citation omitted). Under a *de novo* standard of review, the court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted).

Kidnapping is defined pursuant to N.C. Gen. Stat. § 14-39:

> Any person who shall unlawfully confine, restrain or remove from one place to another . . . without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint, or removal is for the purpose of: (1) Holding such other person for ransom or as a hostage or using such other person as a shield or (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony or (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

N.C. Gen. Stat. § 14-39(a) (2023). Our case law provides kidnapping has no durational requirements, and instead, lasts until the victim regains her free will. *State v. White*, 127 N.C. App. 565, 571, 492 S.E.2d 48, 51 (1997). Similarly, confinement and restraint need not last for a significant amount of time, nor does removal require asportation of the victim across a substantial distance. *See State v. Fulcher*, 294 N.C. 503, 522, 243 S.E.2d 338, 351 (1978).

"[A] kidnapping charge cannot be sustained if based upon restraint [or confinement] which is an inherent feature of another felony." *State v. Williams*, 308 N.C. 339, 346, 302 S.E.2d 441, 447 (1983). Thus, the

restraint for kidnapping "must be an act independent of the intended felony." *State v. Ackerman*, 144 N.C. App. 452, 457, 551 S.E.2d 139, 142 (2001).

The test of the independent act "does not look at the restraint necessary to commit an offense, rather the restraint that is inherent in the actual commission of the offense." *Williams*, 308 N.C. at 347, 302 S.E.2d at 447. "It has been held, quite properly, that where movement is merely incidental to an assault the prosecution must be for that offense and not for kidnapping." *State v. Ripley*, 360 N.C. 333, 338, 626 S.E.2d 289, 293 (2006) (quoting Rollin M. Perkins, *Criminal Law*, ch. 2, § 7(A)(1), at 178 (2d ed. 1969)). A court may also consider whether the restraint subjected the victim to the type of danger the kidnapping statute was designed to prevent, and whether defendant's acts "increase[d] the victim's helplessness and vulnerability." *State v. Key*, 180 N.C. App. 286, 290, 636 S.E.2d 816, 820 (2006) (citation omitted).

In rape cases, this Court has previously determined a separate charge of second-degree kidnapping requires a defendant's restraint or confinement of the victim to be separate from that necessary to accomplish the rape. *State v. Harris*, 140 N.C. App. 208, 213, 535 S.E.2d 614, 618 (2000). Additionally, we have held acts of confinement or restraint prior to the commission of a rape are separate and distinct from the force used during the rape itself. *See State v. Robertson*, 149 N.C. App. 563, 569, 562 S.E.2d 551, 556 (2002).

In the present case, the State introduced evidence tending to show restraint, which was separate and distinct from that required to accomplish the charge of second-degree forcible rape. Evidence was presented tending to show Defendant and K.V. were engaged in an ongoing struggle. K.V. testified Defendant forced himself into her front door, "intercepted" her as she tried to flee from him, threw her onto her bed, climbed on top of her and placed his knee in the small of her back while holding both of her wrists behind her back. K.V. began kicking and screaming at Defendant "a dozen or more times" to get out of her house. After her requests were ignored by Defendant, K.V. testified she mentally "moved to the next phase which was to beg him not to hurt [her]." Defendant instead responded, "I've made it this far, I'm going to finish it."

During the physical struggle, K.V. reached for Defendant's cell phone on the bed and attempted to dial 911, but Defendant allegedly grabbed the phone out of K.V.'s hands and threw it against the wall. Defendant continued to restrain K.V. as he forced her to roll over onto her back, and K.V. attempted to resist by kicking Defendant in the face, causing his glasses to fly off his face. The evidence shows K.V. was trapped and restrained in her own bedroom during this physical struggle

before Defendant sexually assaulted her. Moreover, after attempting to resist Defendant, K.V. testified she felt helpless, feared for her life, and believed she had the choice to either submit to Defendant's assaults or die. As K.V. attempted to flee after the assaults and rape, Defendant grabbed and ripped off her nightgown, causing her to flee from her own home outside into the night naked.

When viewed in the light most favorable to the State, we hold Defendant's restraints of K.V. were separate and apart from that inherent in the commission of the rape. Therefore, Defendant's motion to dismiss the charge of second-degree kidnapping was properly denied. Defendant's argument is overruled.

B. The SANE Exam Report and Expert Witness Testimony.

[2] Next, Defendant contends the trial court plainly erred in admitting the SANE exam report prepared by Nurse Sullivan and in allowing Nurse Maillet to provide "surrogate testimony for Sullivan, in violation of the Confrontation Clause." We disagree.

On appeal, Defendant concedes he failed to object to the admission of Nurse Sullivan's SANE exam report containing her observations of injuries to K.V.'s genital area. Likewise, Defendant acknowledges he failed to object to Nurse Maillet's testimony regarding the report.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). However, in criminal cases,

> an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4).

Generally, "plain error review is available in criminal appeals for challenges to jury instructions and evidentiary issues." *State v. Miller*, 371 N.C. 266, 268, 814 S.E.2d 81, 83 (2018) (citation omitted). To find plain error, an appellate court must determine that an error occurred at trial. *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Additionally, the defendant must demonstrate that the error was

"fundamental"—meaning 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." *Miller*, 371 N.C. at 269, 814 S.E.2d at 83 (cleaned up).

> Thus, plain error should only be found where 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.

State v. Lane, 271 N.C. App. 307, 312, 844 S.E.2d 32, 38 (2020) (cleaned up). Courts reverse for plain error only in the "most exceptional cases." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) (citation omitted).

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees 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 Confrontation Clause "bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citations omitted).

The Supreme Court of the United States noted in *Melendez-Diaz v. Massachusetts* that forensic analyses qualify as testimonial statements subject to the Confrontation Clause. 557 U.S. 305, 310, 129 S. Ct. 2527, 2532, 174 L. Ed. 2d 314, 321 (2009) (holding that reports stating the substance at issue was cocaine was testimonial). Thus, in the present case, the SANE exam report constitutes a testimonial statement. However, as the State notes, the Confrontation Clause is subject to several exceptions that limit its applicability, including that testimonial statements will not be barred when they are admitted for "purposes other than establishing the truth of the matter asserted." *Crawford v. Washington*, 541 U.S. 36, 60 n.9, 124 S. Ct. 1354, 1369, 158 L. Ed. 2d 177, 198 (2004) (citation omitted).

Rule 702 of the North Carolina Rules of Evidence states: "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 . . . may testify thereto in the form of an opinion[.]" N.C. Gen. Stat. § 8C-1, R. 702(a). North Carolina courts have consistently held

> when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible.

State v. Ortiz-Zape, 367 N.C. 1, 9, 743 S.E.2d 156, 161 (2013) (cleaned up).

An expert witness "may testify as to the testing or analysis conducted by another expert if: (i) that information is reasonably relied on by experts in the field in forming their opinions; and (ii) the testifying expert witness independently reviewed the information and reached his or her own conclusion in [the] case." *State v. Crumitie*, 266 N.C. App. 373, 379, 831 S.E.2d 592, 596 (2019) (citations omitted). Importantly, "the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements." *Ortiz-Zape*, 367 N.C. at 9, 743 S.E.2d at 162 (citation omitted). In short, an expert witness may properly base her independent opinion "on tests performed by another person, if the tests are of the type reasonably relied upon by experts in the field," without violating the Confrontation Clause. *State v. Fair*, 354 N.C. 131, 162, 557 S.E.2d 500, 522 (2001).

In the present case, Nurse Maillet identified herself as a forensic nursing supervisor at the hospital, and who has the responsibility to "go through the other nurse's charting and documentation and photographs and make sure that everything is up to standard." Nurse Maillet testified she has twenty-five years of experience both performing and overseeing sexual assault examinations. The State tendered Nurse Maillet as an expert in sexual assault nurse examinations, and the trial court accepted her as an expert without objection from Defendant. Nurse Maillet testified the protocol for a sexual assault examination includes speaking with the patient and gathering medical history, explaining to the patient what treatments and procedures are offered, gaining the patient's consent as to what procedures and examinations she would like to undergo, and then conducting a general physical examination as well as the physical collection for the sexual assault kit, including taking photographs of areas on the body that have suffered injury or abnormality.

Nurse Maillet testified that she had an opportunity to review K.V.'s sexual assault examination conducted by Nurse Sullivan. Nurse Maillet affirmed that Nurse Sullivan conducted the SANE exam in accordance

with proper procedures and protocols. The SANE exam report conducted on K.V. was admitted into evidence without objection.

Nurse Maillet then provided her own independent opinion of the images taken during K.V.'s examination showing injury to K.V.'s body, which were included in the SANE exam report. Nurse Maillet testified in her review of the photographs indicating bruising, she "found three instances of what [she] consider[s] an incident worth reporting" and the injury she observed "is consistent with blunt trauma, which is what happens during a sexual assault." Nurse Maillet's testimony was based upon her personal knowledge and her professional judgement in her independent review of the information from the SANE exam report. Hence, Nurse Maillet's opinion was her "own independently reasoned opinion" and did not serve as "surrogate testimony parroting the testing analyst's opinion." *Ortiz-Zape*, 367 N.C. at 12, 743 S.E.2d at 163 (citation omitted). Because Nurse Maillet provided her independently reasoned opinion, she is the witness whom Defendant had the right to confront, and which he did confront during cross-examination. *Id.* at 8, 743 S.E.2d at 161. Because there was no violation of Defendant's rights to confrontation, the trial court did not err, much less plainly err, in admitting the SANE exam report and in allowing Nurse Maillet's testimony.

C. The Prosecutor's Closing Argument.

[3] In his final argument, Defendant contends that the trial court erred by failing to intervene *ex mero motu* in response to statements made by the Prosecutor during his closing argument. We disagree.

During closing arguments, a lawyer is "to provide the jury with a summation of the evidence, which in turn serves to sharpen and clarify the issues for resolution by the trier of fact, and should be limited to relevant legal issues." *State v. Jones*, 355 N.C. 117, 127, 558 S.E.2d 97, 103 (2002) (cleaned up). In a criminal jury trial, N.C. Gen. Stat. § 15A-123(a) provides specific guidelines for closing arguments:

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

N.C. Gen. Stat. § 15A-1230(a) (2023). Additionally, our Supreme Court has determined that "argument of counsel must be left largely to the control and discretion of the presiding judge and that counsel must be allowed wide latitude in the argument of hotly contested cases." *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975). Nonetheless, this wide latitude has limitations as a closing argument must: "(1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *Jones*, 355 N.C. at 135, 558 S.E.2d at 108.

We note Defendant's attorney failed to object to the Prosecutor's closing argument, so Defendant "must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*. To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Tart*, 372 N.C. 73, 80-81, 824 S.E.2d 837, 842 (2019) (cleaned up).

Even when an appellate court determines that a trial court erred in failing to intervene *ex mero motu*, a new trial will be granted only if "the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* at 82, 824 S.E.2d at 843 (citation omitted).

In the present case, Defendant argues the Prosecutor attempted to undermine Defendant's testimony by pointing out the differences "in his testimony about the sexual encounter with [K.V.] and his previous recorded statement to law enforcement" in describing it as "the evolution of a defense." Specifically, Defendant challenges the following portion of the closing argument:

> So why is this important? Why the change? The rape, voluntary intoxication is not a defense. On May 13th of 2019 [Defendant] was in custody. You've heard testimony that he didn't have a lawyer. "I was too drunk. I don't remember anything." It sounded pretty good, but it's not a defense. What's the only thing left for [Defendant] to avoid facing consequences? It's a red herring all day long. That's why the testimony was what it was. That's why they're excruciating minute details about all of these interactions with [K.V.] that she didn't testify about that he didn't tell Detective Burrows or Detective Wright about. Consent is

> the last card that could be played. The burglary, kidnapping, interfere with emergency communications, voluntary intoxication is a defense. Go back one. Why is that important? [Defendant's] recall and memory and testimony from the stand only involved consent. He doesn't remember anything else to do with these crimes where voluntary intoxication is a defense, nothing. He's like a light bulb except only when it's convenient for him and his case.

Defendant contends "[t]here was absolutely no support in the evidence for this comment, which suggested that [he] testified falsely in accordance with the advice he received from his lawyers."

When making closing arguments, prosecutors may argue based on the law, the facts in evidence, and "all reasonable inferences drawn therefrom." *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995) (citation omitted). Additionally, attorneys may properly refer to evidence of prior misconduct by the defendant to make arguments regarding the defendant's credibility. *State v. Bondurant*, 309 N.C. 674, 688, 309 S.E.2d 170, 179 (1983).

Here, the Prosecutor's closing statements were consistent with the record, as his arguments highlighted the differences between Defendant's statements to the police two days after the incident, which were properly admitted at trial, and Defendant's own testimony during his trial. When viewing this argument in light of the overall factual circumstances to which it refers, it is clear the Prosecutor was making a credibility argument against Defendant. This questioning of Defendant's credibility was reasonably inferred from the record and did not violate the requirements of N.C. Gen. Stat. § 15A-1230. Thus, the Prosecutor's remarks were not grossly improper or so extreme and of such a magnitude that their inclusion in the State's argument prejudiced Defendant by rendering the proceedings fundamentally unfair.

III. Conclusion

For the reasons stated above, we conclude Defendant received a fair trial, free from error.

NO ERROR.

Judges TYSON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
CORY MICAH FORNEY

No. COA23-338

Filed 16 January 2024

Motor Vehicles—driving while impaired—breath chemical analysis—chewing gum in mouth—shortened observation period—no prejudicial error

There was no prejudicial error in defendant's trial for impaired driving by the admission of breath chemical analysis results, which were collected from defendant after three standardized field sobriety tests indicated a high likelihood that defendant was appreciably impaired. Where defendant gave an initial breath sample while he had chewing gum in his mouth, and a second sample was collected two minutes after he was made to spit out the gum, the admission of the results was error because the officer did not start a new fifteen-minute observation period prior to collecting the second sample as required by administrative rules. However, the error was not prejudicial where there was not a reasonable possibility that, absent the error, a different result would have been reached at trial, based on the arresting officer's direct observations of defendant's demeanor at the scene and the results of the field sobriety tests.

Judge ARROWOOD concurring in the result only.

Judge WOOD concurring by separate opinion.

Appeal by defendant from judgments entered 8 July 2022 by Judge R. Gregory Horne in Buncombe County Superior Court. Heard in the Court of Appeals 14 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General J.D. Prather, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

THOMPSON, Judge.

In this appeal from defendant's conviction on a charge of impaired driving, among other offenses, he argues that the trial court erred in admitting the results of a chemical analysis of defendant's breath. While we agree that the evidence in question should not have been admitted at trial, we conclude that the error was not prejudicial to defendant. Accordingly, defendant's conviction on a charge of impaired driving must be upheld.

I. Factual Background and Procedural History

The evidence introduced at defendant's trial tended to show the following: On 9 March 2021, Officer Samuel DeGrave, of the Asheville Police Department, was on traffic enforcement duty observing a stop sign located in East Asheville. Just after 10:00 p.m., a red Dodge minivan being operated by defendant[1] failed to stop at the stop sign, and DeGrave initiated a traffic stop. At the beginning of their interaction, DeGrave explained the reason for the traffic stop and defendant informed DeGrave that defendant had no driver's license. DeGrave detected an odor of alcohol emanating from the vehicle and noticed that the odor was stronger when defendant spoke. DeGrave further observed that defendant's speech was slow and slurred and his eyes were red and glassy; DeGrave's suspicion that defendant had consumed alcohol was also raised when he saw defendant put a piece of mint gum into his mouth while DeGrave was verifying defendant's identity and that of the female passenger in the vehicle.

After completing that process, DeGrave returned to the minivan and informed defendant that DeGrave was going to conduct three standardized field sobriety tests, which the officer was certified to perform. He thereafter performed three such tests on defendant. On the horizontal gaze nystagmus (HGN) test—about which DeGrave was allowed to testify as an expert—DeGrave noted six of six possible indications of impairment. DeGrave noted two of eight possible indications of impairment on the walk-and-turn test and three of four indications of impairment on the one-leg-stand test. DeGrave testified that a research study of these results created a 91% likelihood that defendant was appreciably impaired. Based upon his observations and the test results, DeGrave formed the opinion that defendant had consumed a sufficient quantity of alcohol to appreciably impair his faculties and arrested him.

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1. The vehicle's occupants also included a female passenger in the passenger seat and a child in the back seat.

At the Buncombe County Jail, Officer Kenneth Merritt of the Biltmore Forest Police Department, a certified chemical analyst, was called in to perform a breath analysis of defendant using an "EC/IR II Intoximeter." After advising defendant of his implied consent rights, Merritt began a fifteen-minute "observation period" designed to ensure that the individual does not eat food, consume alcohol, regurgitate, or smoke prior to testing, primarily to ensure the presence of no "mouth alcohol" that might affect the accuracy of the blood alcohol reading. Merritt administered a breath test at 12:05 a.m. which resulted in a 0.11 blood alcohol concentration (BAC) reading. When Merritt then noticed that defendant had chewing gum in his mouth, he had defendant spit out the gum and then administered a second breath test at 12:07 a.m., which again resulted in a 0.11 BAC reading.

Defendant was later charged with driving while impaired, driving while impaired with three prior convictions of driving while impaired within 10 years of the date of the offense, driving while license revoked, and failure to stop for a stop sign. The case came on for hearing before Judge Gregory Horne at the 5 July 2022 session of Superior Court, Buncombe County. Defendant filed several pretrial motions, including a motion in limine which sought to exclude the results of the EC/IR II breath testing on the basis that Merritt failed to follow the required observation protocol before administering the second breath test. That motion was denied following an evidentiary hearing. Defendant then pled guilty to the offenses of driving while impaired with three prior convictions of driving while impaired within 10 years of the date of the offense and driving while license revoked, not guilty to driving while impaired, and not responsible for the stop sign violation.

The other matters proceeded to trial before a jury, and when Merritt was asked to describe the step of the Intoximeter procedure known as the "observation period," he testified that "the observation period is a 15-minute period that I'm looking for regurgitation, or as bad as it sounds, throw up, eating food, consuming alcohol, or smoking cigarettes. *It is mainly to detect for mouth alcohol*." (Emphasis added.) Merritt also stated that he did not see defendant "put anything in his mouth or . . . see any signs of him regurgitating or drinking or anything like that." Nevertheless, Merritt testified that after he then collected a first breath sample from defendant, Merritt "was notified that [defendant] had gum in his mouth." Merritt had defendant spit out the gum and collected the second breath sample required under the pertinent procedures two minutes later. Defendant renewed his objection to the admission of the Intoximeter results, and the trial court overruled those objections and allowed the results to be published to the jury.

On cross examination, defendant's trial counsel discussed the waiting period with Merritt:

> Q. And the reason that we need an observation period is to make sure that there's nothing going on internally for the subject of the test that could skew the results of the test, correct?
>
> A. For the most part, yes, sir. My understanding is to allow for deterioration of mouth alcohol.

Merritt acknowledged that "the reason for the rules and regulations, again, is to assure us of the accuracy and reliability of the results that the [Intoximeter] provides" and also agreed that "for best practices" he should have restarted the observation period after having defendant spit out the gum. However, Merritt repeatedly stated that he did not believe the rules had been violated because they only explicitly ask the analyst "to look for consuming alcohol, smoking, eating, and regurgitating" and do not address chewing gum.

The State then called Daniel Cutler, an employee of the North Carolina Forensic Tests for Alcohol Branch of the Division of Public Health within DHHS, who was then acting as a Drug and Alcohol Impaired Driving Regional Coordinator supervising the affairs of the Forensic Tests for Alcohol Branch within the western 18 counties of the State, and Cutler was admitted as an expert in the EC/IR II breath testing instrument and its procedures without objection. Cutler testified that "[g]um in the mouth will not, and by all indications, looking at the test record, did not affect the results of the breath sample," citing two published studies. Cutler explained that one of those studies indicated that chewing "sugar-free gum, which is a salivary flow promoter" for five minutes led to lower BAC results as compared to the control situation in which no gum was chewed. The first study was conducted using "an Intoxilyzer 5000C," the testing instrument used in North Carolina prior to our State's adoption of the Intoximeter Model EC/IR II. The second study cited involved testing with "75 different brands of chewing gum" and indicated that one brand of gum, "Trident Splash Strawberry with Kiwi" caused elevated BAC results, but the remaining varieties of gum did not. The testing instruments used in that study were "the Alco-Sensor IV DWF, and Alcotest 7410 GLC."

Dr. Andy Ewans, a forensic toxicologist, testified for the defense as an expert in toxicology and agreed that "in general" gum in a test subject's mouth would not affect chemical analysis results. He further noted, however, Cutler's own reference to a study indicating an impact

on BAC results from at least some types of gum and also emphasized that regardless, "the protocol established by statute was not followed by Sergeant Merritt."

On 8 July 2022, the jury found defendant guilty of the impaired driving charge and responsible for the stop sign violation. Defendant gave notice of appeal in open court.

II. Analysis

Defendant's sole contention on appeal is that the trial court committed error in denying his motion to exclude the results of the Intoximeter's chemical analysis and in overruling defendant's objections to the admission of that evidence when it was introduced at trial. Specifically, defendant argues that after having defendant remove the gum from his mouth, Merritt's failure to conduct a new observation period rendered the Intoximeter results inadmissible under the relevant provision of the North Carolina General Statutes and related Department of Health and Human Services rules. We agree. However, because defendant has failed to show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial," N.C. Gen. Stat. § 15A-1443(a) (2021), we hold that he has not demonstrated prejudice.

A. Error in admission of chemical analysis results

The primary issue before us in this appeal, which appears to be a matter of first impression, is one of statutory and regulatory interpretation. Such questions are reviewed de novo. *Sound Rivers Inc. v. N.C. Dep't of Envtl. Quality*, 271 N.C. App. 674, 727, 845 S.E.2d 802, 834 (2020), *affirmed in part and disc. review allowed in part*, 385 N.C. 1, 891 S.E.2d 83 (2023).

> An appeal de novo is one in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings. Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court.

In re K.S., 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022) (citations, quotation marks, and brackets omitted).

The provisions at the heart of this appeal concern the admissibility of breath test results obtained by means of chemical analysis. "A chemical analysis of the breath . . . is admissible in any court . . . if it . . . is

performed in accordance with the rules of the Department of Health and Human Services." N.C. Gen. Stat. § 20-139.1(b)(1) (2021).[2] *See also State v. Davis*, 208 N.C. App. 26, 34, 702 S.E.2d 507, 513 (2010). The pertinent Department of Health and Human Services (DHHS) rules are found in Chapter 10A, Subchapter 41B of the North Carolina Administrative Code, titled "Injury Control." The testing procedure for the type of Intoximeter employed for the chemical analysis of defendant's breath—the EC/IR II—is found in 10A NCAC 41B.0322 and provides that "when administering a test using the Intoximeters," a chemical analyst must, *inter alia*, "[e]nsure [that] observation period requirements have been met" before collecting two breath samples for analysis. 10A NCAC 41B.0322(2), (6), (7); *see also* N.C. Gen. Stat. § 20-139.1(b)(1), (b3). The "observation period," in turn, is defined as

> a period during which a chemical analyst observes the person or persons to be tested to determine *that the person* or persons *has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen.* The chemical analyst may observe while conducting the operational procedures in using a breath testing instrument. *Dental devices or oral jewelry need not be removed.*

10A NCAC 41B.0101(6) (emphases added). As the proponent of breath test evidence in an impaired driving case, "the State bears the burden of proving compliance with the 'observation period' requirement set out in N.C. Gen. Stat. § 20-139.1." *State v. Roberts*, 237 N.C. App. 551, 560, 767 S.E.2d 543, 550 (2014), *disc. review denied*, 368 N.C. 258, 771 S.E.2d 324 (2015).

The basis of defendant's motion in limine to exclude the chemical analysis results was that, while Merritt conducted an observation period before obtaining the first breath sample from defendant, after determining that defendant had gum in his mouth and having defendant spit out the gum, Merritt did not conduct an additional observation period and then began the testing process again. At the hearing on the motion, the State contended that Merritt did not violate the statutory mandate or the DHHS rules "because chewing gum is not eating," further emphasizing that "it would be different if [defendant] had actually taken the

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2. This statute also requires that "[t]he person performing the analysis ha[ve] . . . a current permit . . . to perform a test of the breath using the type of instrument employed." N.C. Gen. Stat. § 20-139.1(b)(1). Merritt's certification to perform the chemical analysis here is not disputed.

gum and put it in his mouth during the observation period, but there's nothing in this observation period definition that required the officer to actually check the person's mouth." Rather, the State argued that an analyst need only "make sure [test subjects] don't eat, drink, regurgitate, anything like that." Defendant, in contrast, argued that the determination of whether a violation occurred centered on whether "[t]here's a foreign substance in his mouth . . . . We did not have a second observation period after the foreign substance was found. Therefore, we do not have the proper procedure."

In explaining the decision to deny defendant's motion to exclude, the trial court appears to have adopted the State's, rather than defendant's, framing of the question and therefore focused on whether "chewing gum" was an activity covered by the plain language of 10A NCAC 41B.0101(6). In so doing, the trial court found "that there is no evidence that [defendant] ingested alcohol or other fluids, that he regurgitated, vomited or smoked during the 15 minutes. Therefore, the issue is . . . *whether or not chewing gum equates to eating or having eaten* within the 15-minute period." (Emphasis added.) After noting that "eaten" is not defined in the pertinent portion of the Administrative Code, the trial court consulted an online dictionary and found that a definition for "eat" is "to take in through the mouth as food, ingest, chew and swallow in turn."[3] The trial court then held that because "chewing gum does not equal having eaten something[,]" Merritt's failure to conduct a second observation period after having defendant spit out his gum was in "technical compliance with the rules and regulations." While it may be the case that "chewing gum does not equal having eaten something[,]" upon our de novo consideration, we agree with defendant's appellate assertions that "the trial court was wrong in following the State's suggestion that the issue boiled down to "whether or not chewing gum constitutes eating" and that instead, the DHHS rules here must be "interpreted to contain an implicit requirement that foreign objects must generally be removed from the test subject's mouth during the observation period."

As our Supreme Court has recently emphasized:

> "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." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134 (1990).

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3. Consulting a dictionary to determine the plain meaning of a word not defined in a statute is entirely appropriate. *Wing v. Goldman Sachs Trust Co., N.A.*, 382 N.C. 288, 298, 876 S.E.2d 390, 398 (2022).

> Although the first step in determining legislative intent involves an examination of the "plain words of the statute," *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291 (1991), "[l]egislative intent can be *ascertained not only from the phraseology of the statute but also from* the nature and purpose of the act and *the consequences which would follow its construction one way or the other*," *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759 (1989) (citations omitted).

State v. Alexander, 380 N.C. 572, 587, 869 S.E.2d 215, 227 (2022) (emphases added). Thus, in attempting to ascertain the legislative intent behind a statute or rule, "strict literalism [should] not be applied to the point of producing 'absurd results.' " *Proposed Assessments of Additional Sales & Use Tax v. Jefferson-Pilot Ins. Co.*, 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003) (quoting *Taylor v. Crisp*, 286 N.C. 488, 496, 212 S.E.2d 381, 386 (1975)). *See also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 470, (1989) (Kennedy, J., concurring) ("Where the plain language of the statute would lead to patently absurd consequences that [the legislature] could not *possibly* have intended, [courts] need not apply the language in such a fashion.") (citations and internal quotation marks omitted) and *Commissioner of Ins. v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978) (holding that a reviewing court must avoid reading the plain language of a statute or rule in a manner that leads to absurd or bizarre consequences).

Here, the plain language of the rule defining the observation period—the individual words themselves—may appear to be clear and unambiguous, providing a specific list of actions that an analyst must determine the person to be tested has not engaged in for the fifteen minutes prior to the sample being taken: "ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked," with "chewed" or "chewed gum" not appearing in the list. 10A NCAC 41B.0106(6). In addition, DHHS elected not to end the list in this rule with a catch-all term such as "or had other substances or foreign objects in the mouth." Nevertheless, the intent of subsection N.C. Gen. Stat. § 20-139.1(b)(1), titled "Approval of Valid Test Methods; Licensing Chemical Analysts," is also plain and unambiguous: to ensure that chemical analysis results are sufficiently valid that they may be admitted "in any court or administrative hearing or proceeding" as evidence of impairment. *See* N.C. Gen. Stat. § 20-139.1(b)(1). In an effort to achieve that end, the legislature has delegated to DHHS—an agency undoubtedly more expert than the General Assembly regarding BAC measurement, chemical analysis, and the procedures appropriate

to maximize scientific reliability and validity—the task of rulemaking regarding breath testing via Intoximeters. In turn, DHHS has set forth various relevant definitions in 10A NCAC 41B.0106(6) and a specific procedure for the Intoximeter employed here in 10A NCAC 41B.0322.

In sum, we believe the intent of both the legislature and DHHS in the provisions pertinent here is clear: to ensure that the chemical analysis of a subject's breath is accurate in measuring BAC and not tainted by the presence of substances in the mouth during testing. And in our view, to adopt the State's position that the observation period requirement is not violated when a subject "chews" something during the period would lead to absurd results and have bizarre consequences because it would mean, for example, that a subject could engage in the following activities not listed in 10A NCAC 41B.0106(6) moments before the taking of breath samples: *chewing* gum—presumably including nicotine gum—or tobacco or food that is spit out before swallowing, *dipping* snuff, *sucking* on a medicated throat lozenge or a hard candy, *using* an inhaler, and *swallowing* a pill. Surely if "ingest[ing] . . . other fluids," which would include ordinary tap water, is considered a potential problem in ensuring an admissible chemical analysis of a breath sample, the examples just stated would likewise be problematic. This assumption aligns with the testimony from Merritt, a certified chemical analyst, that the purpose of the observation period "is to allow for deterioration of *mouth* alcohol" before taking breath samples.

We acknowledge the testimony at trial from the State's expert witness Cutler but note that one of the studies he cited used only sugar-free gum and the other did find an increased BAC reading after one type of gum was tested. Here, there was no evidence presented about the specific type or brand of gum in defendant's mouth during the observation period and testing and DeGrave's observation of defendant putting a piece of "mint gum" in his mouth occurred some two hours before the chemical analysis. Further, while defendant's chemical analysis was conducted using the Intox EC/IR II, the two studies Cutler cited regarding the effect of chewing gum were conducted using other testing instruments, one of which was previously used in North Carolina, but which has since been replaced by the Intoximeter EC/ER II. In any event, the procedures promulgated by DHHS in 10A NCAC 41B.0322 are specified to "be followed when administering a test using the Intoximeters, Model Intox EC/IR II and Model Intox EC/IR II (Enhanced with serial number 10,000 or higher)" and Cutler himself testified that "over the years there have been many different technologies for breath testing," presumably with different procedures for their use.

We also reject the State's contention that chewing gum would actually make the chemical analysis "more accurate," citing Cutler's testimony that chewing gum might reduce the "mouth alcohol effect" by 85%. We disagree that the reduction of the "mouth alcohol effect" would make the test more *accurate*, even if chewing gum could have some effect, potentially beneficial to a test subject, on the chemical analysis results. More importantly, as Cutler testified, the Intoximeter estimates alcohol in the blood (BAC) based on a measurement of alcohol in the breath—a ratio which in reality varies amongst different people—by using a single specific ratio to standardize the testing of all test subjects. Test results for breath samples taken from persons chewing gum, even under Cutler's testimony, would likely *differ* from those where a test subject did not have foreign substances in his or her mouth during the observation period (and while giving a breath sample). This circumstance undercuts the efforts indicated by the DHHS rules to standardize chemical analysis by Intoximeter and frustrates the intent of the General Assembly to automatically permit the admission of such evidence in any court.

In this appeal, we need only address an asserted violation of the requirements for automatic admissibility of chemical analysis of the breath on the facts before us: that defendant had gum of an unknown sort[4] in his mouth during the observation period and during the taking of the first breath sample. For the reasons discussed above, we hold that the DHHS observation provisions were violated in defendant's case and that Merritt should have conducted a new fifteen-minute observation period after having defendant spit out his gum and before taking breath samples.

B. Prejudicial impact of error

Having concluded that the trial court erred in allowing the chemical analysis results to be admitted in this case, we must now determine whether this error prejudiced defendant.

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4. At trial, DeGrave testified that he saw defendant "putting mint gum in his mouth" as DeGrave was walking back to defendant's vehicle after returning to his patrol car where he had attempted to check defendant's identification materials and that of the passenger in the car. DeGrave did not testify about whether he was able to assess whether the gum was ordinary chewing gum, nicotine gum, or some other type of gum. In addition, the traffic stop was several hours prior to the chemical analysis, and nothing in the record establishes whether the gum in defendant's mouth during the observation period and the taking of the first breath sample was the same gum which DeGrave witnessed defendant putting into his mouth.

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when 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. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2021).

In accordance with N.C. Gen. Stat. § 20-138.1(a)(1) and (2), the jury in this trial was instructed that the State could establish the impairment element of driving while impaired either by establishing that defendant (1) drove while his mental and physical faculties were substantially impaired by the consumption of alcohol, or (2) drove after he had consumed sufficient alcohol that he "had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath." Regarding the latter option of proving impairment, the jury was further instructed that "[t]he results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration." In light of our holding above, the question is whether "there is a reasonable possibility that" the erroneous admission of evidence of defendant's BAC impacted the jury's verdict.

The arresting officer in this matter testified that running a stop sign is not, standing alone, evidence of impairment, and that he did not witness any other illegal or unsafe driving by defendant. Defendant was at all times during the traffic stop, arrest, and detention able to: respond almost immediately when DeGrave turned on the blue lights in his vehicle; pull off onto a less-traveled side street, which DeGrave "appreciate[d]"; appear not disheveled; have already removed the keys from his vehicle's ignition and placed them on the dashboard, which DeGrave again "appreciated"; be "polite and cooperative"; understand and follow directions; engage in conversation; inform DeGrave that he had "blades" on his person and arrange with the officer to place them on the roof of the vehicle; place the blades on the roof without difficulty or fumbling; and maintain his balance.

However, when DeGrave conducted standardized field sobriety tests on defendant, he observed six out of six possible clues of impairment on the horizontal nystagmus gaze test, two out of eight clues of impairment on the walk-and-turn test, and two out of four clues of impairment on the one-leg-stand test. DeGrave testified that these results taken together suggested "a 91 percent case that" defendant was appreciably impaired. In light of this evidence and DeGrave's testimony about defendant's red glassy eyes, slurred speech, and strong odor of alcohol, we

conclude that there is not a reasonable possibility that the jury would have returned a verdict of not guilty in the absence of the erroneously admitted chemical analysis evidence.

III. Conclusion

The trial court in this matter should have excluded the State's chemical analysis evidence due to the analyst's failure to conduct a proper observation period after defendant removed gum from his mouth. Nevertheless, because defendant has failed to establish that he was prejudiced by the trial court's error, his conviction must be upheld. *See* N.C. Gen. Stat. § 15A-1443(a).

NO PREJUDICIAL ERROR.

Judge ARROWOOD concurs in result only.

Judge WOOD concurs by separate opinion.

WOOD, Judge, concurring in the result only.

Although I agree with the result reached by the majority, I would hold the trial court's admission of the breath chemical analysis results was not error. The majority holds the admission of the breath chemical analysis results was error but not prejudicial error.

As the majority recognizes, "[t]he 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." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990) (citation omitted). Thus, "[t]he best indicia of that intent are the [plain] language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted). However, "if the statutory language is clear and unambiguous, then the statutory analysis ends, and the court gives the words in the statute their plain and definite meaning." *State v. Lemus*, 273 N.C. App. 155, 159, 848 S.E.2d 239, 242 (2020) (cleaned up).

As discussed by the majority, the statutory and regulatory provisions in this case address the admissibility of breath tests results obtained by means of chemical analysis. N.C. Gen. Stat. § 20-139.1(b) provides in pertinent part:

> A chemical analysis of the breath . . . is admissible in any court . . . if it meets both of the following requirements:
>
> (1) It is performed in accordance with the rules of the Department of Health and Human Services.
>
> (2) The person performing the analysis had . . . a current permit . . . to perform a test of the breath using the type of instrument employed."

N.C. Gen. Stat. § 20-139.1(b) (2021).

The pertinent DHHS regulations are found at 10A NCAC 41B.0322 and 10A NCAC 41B.0101(6) of the North Carolina Administrative Code. 10A NCAC 41B.0322 provides that when administering a test using the Intoximeter, such as the one used in the present case, a chemical analyst must "[e]nsure [that] observation period requirements have been met" before collecting two breath samples for analysis. In turn, 10A NCAC 41B.0101(6) defines "observation period" as:

> a period during which a chemical analyst observes the person or persons to be tested to determine that the person or persons has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen. The chemical analyst may observe while conducting the operational procedures in using a breath testing instrument. Dental devices or oral jewelry need not be removed[.]

10A NCAC 41B.0101(6).

Here, the DHHS regulations do not explicitly list chewing gum or having gum in one's mouth under 10A NCAC 41B.0101(6)'s definition of "observation period." After hearing the evidence presented during Defendant's motion *in limine*, the trial court determined the issue regarding adherence to the regulatory procedures during the observation period concerned whether the act of chewing gum constitutes eating. As the trial court noted, there is nothing in the Administrative Code which offers a definition of "eaten" as the term is used in 10A NCAC 41B.0101(6). Therefore, this word "must be given [its] common and ordinary meaning." *Lemus*, 273 N.C. App. at 159, 848 S.E.2d at 242 (citation omitted).

Consequently, the trial court consulted a Merriam-Webster dictionary to determine that the definition of "eat" is "to take in through the mouth as food, ingest, chew and swallow in turn." Based upon the

ordinary understanding of the word "eaten" in the context of the DHHS regulations, the trial court held that the officer complied with the regulatory requirements for the observation period. Applying the plain and unambiguous language of the statutory and regulatory provisions, the trial court determined no evidence was presented that anything had been eaten by Defendant during the fifteen minutes of Officer Merritt's observations.

Although "best practice" operating procedures might have prompted Officer Merritt to restart the observation period after having Defendant spit out the gum, this "best practice" is not controlling. Instead, the statutory and regulatory provisions control.

While the majority suggests we should depart from the plain language of the DHHS regulations to avoid "absurd results" in the future, it is this Court's role to "interpret statutes as they are written; we do not rewrite statutes to ensure they achieve what we believe is the legislative intent." *C Invs. 2, LLC v. Auger*, 277 N.C. App. 420, 422, 860 S.E.2d 295, 298 (2021), *aff'd*, 383 N.C. 1, 881 S.E.2d 270 (2022). Thus, if "our interpretation of the plain language of a statute yields unintended results, the General Assembly can amend the statute to ensure it achieves the intent of the legislative branch of our government." *Id.* Because the trial court made its determination based on the plain reading of the statute and DHHS regulations, I would find no error. Therefore, I respectfully concur in the result only.

STATE OF NORTH CAROLINA
v.
ROBERT TODD GUFFEY, DEFENDANT

No. COA22-1043

Filed 16 January 2024

1. Indictment and Information—fatal defect—continuing criminal enterprise—essential element—allegation of each underlying act required

In a criminal case arising from a drug trafficking scheme, defendant's conviction for aiding and abetting a continuing criminal enterprise was vacated because the indictment—by failing to specify the individual criminal acts composing the enterprise—failed to allege an essential element of the charged crime and was therefore fatally defective.

2. Jury—verdict—unanimity—conspiracy to traffic methamphetamine—by possession "or" transportation

In a drug trafficking case, defendant's conviction on a conspiracy charge was upheld where the verdict sheets indicated that defendant was found guilty of conspiring to traffic in methamphetamine "by possession or transportation." When the court instructed the jury disjunctively on trafficking by possession and trafficking by transportation, it was not listing two different conspiracies (characterized by two different underlying acts), either of which defendant could be found guilty of; rather, the court was identifying two alternative acts by which the jury could find defendant guilty of the singular conspiracy alleged. Thus, where the verdict sheet also listed the two types of trafficking in the disjunctive, the jury's verdict was not fatally ambiguous because it reflected a unanimous verdict convicting defendant of one particular offense.

Judge STROUD concurring in part and dissenting in part.

Appeal by Defendant from judgments entered 18 February 2022 by Judge Forrest D. Bridges in McDowell County Superior Court. Heard in the Court of Appeals 19 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Asher P. Spiller, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

MURPHY, Judge.

When a defendant is charged with a continuing criminal enterprise, each act alleged to have constituted the enterprise is an essential element of the offense. As an indictment must allege all the essential elements of an offense, an indictment charging a defendant with a continuing criminal enterprise is invalid unless it specifies the acts alleged to have constituted the enterprise itself. Here, where the indictment charging Defendant with aiding and abetting a continuing criminal enterprise did not specify the acts alleged to have constituted the enterprise, the indictment was fatally defective.

However, the jury's verdict with respect to Defendant's separate charge of conspiracy to traffic in methamphetamine was not fatally ambiguous under our longstanding precedent pertaining to disjunctive conspiracy instructions, and no error occurred with respect to that charge.

BACKGROUND

Defendant is an admitted participant in a drug trafficking enterprise appealing his 17 February 2022 convictions of conspiracy to traffic in methamphetamine and aiding and abetting a continuing criminal enterprise ("CCE"). The enterprise in question distributed meth, crack cocaine, opiate pills, and marijuana and moved quantities whose total dollar value was in the hundreds of thousands. However, by the State's own characterization, Defendant was neither an organizer nor employee of the principal operation, instead being a routine purchaser of drugs for resale with whom some more immediate members of the operation were familiar.

Defendant was indicted on 21 August 2017, and the indictments with which Defendant was charged provided as follows:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above [] [D]efendant named above unlawfully, willfully and feloniously did conspire with Jamie Leonard Tate to commit the felony of trafficking by possession and transportation of 28 grams or more but less than 200 grams of methamphetamine.
>
> . . . .

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above [] [D]efendant named above unlawfully, willfully, and feloniously did aid and abet Jamie Leonard Tate and Dwayne Bullock in unlawfully, willfully, and feloniously engaging in a continuing criminal enterprise by violating [N.C.G.S. §] 90-95(h)(3b) by trafficking in methamphetamine. The violation was part of a continuing series of violations of Article 5 of Chapter 90 of the General Statutes, which Jamie Leonard Tate and Dwayne Bullock undertook in concert with more than five other persons, including Jackie Pearson, Marqueseo Pearson, Gregory Rutherford, Randy Scott, Aretha Fullwood, Aretha Giles, and Karita Bullock, with respect to whom Jamie Leonard Tate and Dwayne Bullock occupied a position of organizer, a supervisory position, and a management position, and from which Jamie Leonard Tate and Dwayne Bullock obtained substantial income and resources.

Defendant was tried beginning on 14 February 2022. During trial, Defendant made "[a] general motion to dismiss for insufficiency of the evidence[,]" arguing, in particular, that the evidence did not establish sufficient involvement in the criminal enterprise for purposes of the CCE charge and that the evidence also did not establish Defendant trafficked the amount of methamphetamine specified in the charge. The trial court denied the motion. When the jury returned its verdict, the verdict sheets indicated Defendant was "guilty of conspiracy to traffic[] in methamphetamine by possession or transportation of 28 grams or more, but less than 200 grams[,]" as well as "guilty of aiding and abetting a continuing criminal enterprise[.]"

ANALYSIS

On appeal, Defendant argues both that the trial court lacked subject matter jurisdiction over the charge of aiding and abetting a CCE because the indictment was fatally defective and that it erred in denying his motion to dismiss the charge of aiding and abetting a CCE because a defendant may not be guilty of that offense under a theory of aiding and abetting. He also argues both verdicts were fatally ambiguous because the jury was instructed disjunctively on two separate theories of trafficking to support both charges.

As we agree that the trial court lacked subject matter jurisdiction over the charge of aiding and abetting a CCE, we vacate that charge; therefore, we need not address whether, as a general matter, a defendant

may be guilty of aiding and abetting a CCE or whether that verdict was fatally ambiguous. However, we hold that the jury's verdict with respect to conspiracy to traffic in methamphetamine was not fatally ambiguous and find no error with respect to that charge.

A. Subject Matter Jurisdiction

[1] We first address Defendant's argument that the charge of aiding and abetting a CCE in the indictment was fatally defective. Specifically, Defendant argues the trial court lacked subject matter jurisdiction over the offense because the indictment did not specify each of the offenses comprising the CCE. "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *State v. Herman*, 221 N.C. App. 204, 209 (2012) (citation omitted).

North Carolina defines the offense of continuing criminal enterprise in N.C.G.S. § 90-95.1:

> (a) Any person who engages in a continuing criminal enterprise shall be punished as a Class C felon and in addition shall be subject to the forfeiture prescribed in subsection (b) of this section.
>
> (b) Any person who is convicted under subsection (a) of engaging in a continuing criminal enterprise shall forfeit to the State of North Carolina:
>
> (1) The profits obtained by him in such enterprise, and
>
> (2) Any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.
>
> (c) For purposes of this section, a person is engaged in a continuing criminal enterprise if:
>
> (1) He violates any provision of this Article, the punishment of which is a felony; and
>
> (2) Such violation is a part of a continuing series of violations of this Article;
>
> a. Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management; and
>
> b. From which such person obtains substantial income or resources.

N.C.G.S. § 90-95.1 (2022).

In interpreting a federal statute with nearly identical wording, *see* 21 U.S.C. § 848, the United States Supreme Court held in *Richardson v. United States* that each individual offense comprising a CCE constitutes an essential element of the offense:

> When interpreting a statute, we look first to the language. *United States v. Wells*, 519 U.S. 482, 490 (1997). In this case, that language may seem to permit either interpretation, that of the Government or of the petitioner, for the statute does not explicitly tell us whether the individual violation is an element or a means. But the language is not totally neutral. The words "violates" and "violations" are words that have a legal ring. A "violation" is not simply an act or conduct; it is an act or conduct that is contrary to law. Black's Law Dictionary 1570 (6th ed.1990). That circumstance is significant because the criminal law ordinarily entrusts a jury with determining whether alleged conduct "violates" the law, see *infra*, at 822, and, as noted above, a federal criminal jury must act unanimously when doing so. Indeed, even though the words "violates" and "violations" appear more than 1,000 times in the United States Code, the Government has not pointed us to, nor have we found, any legal source reading any instance of either word as the Government would have us read them in this case. To hold that each "violation" here amounts to a separate element is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law. To hold the contrary is not.
>
> The CCE statute's breadth also argues against treating each individual violation as a means, for that breadth aggravates the dangers of unfairness that doing so would risk. Cf. *Schad v. Arizona*, [501 U.S. 624, 645 (1991)] (plurality opinion). The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. The two chapters of the Federal Criminal Code setting forth drug crimes contain approximately 90 numbered sections, many of which proscribe various acts that may be alleged as "violations" for purposes of the series requirement in the statute. Compare, *e.g.*, 21 U.S.C. §§ 842(a)(4) and (c) (1994 ed. and Supp. III) (providing civil penalties for removing drug labels) and 21 U.S.C.

> § 844(a) (Supp.III) (simple possession of a controlled substance) with 21 U.S.C. § 858 (endangering human life while manufacturing a controlled substance in violation of the drug laws) and § 841(b)(1)(A) (possession with intent to distribute large quantities of drugs). At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, or did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.
>
> Finally, this Court has indicated that the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition. *Schad v. Arizona*, 501 U.S., at 632-633 (plurality opinion); *id.*[] at 651 (SCALIA, J., concurring) ("We would not permit . . . an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday . . ."). We have no reason to believe that Congress intended to come close to, or to test, those constitutional limits when it wrote this statute. See *Garrett v. United States*, 471 U.S. 773, 783-784[] . . . (1985) (citing H.R. Rep. No. 91-1444, pt. 1, pp. 83-84, (1970)) (in making CCE a separate crime, rather than a sentencing provision, Congress sought increased procedural protections for defendants); cf. *Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question"); *Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

Richardson v. United States, 526 U.S. 813, 818-20 (1999).

The United States Supreme Court's expression of constitutional concern with respect to CCE in *Richardson*, while avoided for prudential reasons in the opinion proper, was well-founded. *Id.* at 820; *cf. Matter of Arthur*, 291 N.C. 640, 642 (1977) ("If a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, it is well settled that the courts should construe the statute so as to avoid the constitutional question."). While the State has some latitude to "define different courses of conduct, or states of mind, as [] alternative means of committing a single offense," its ability to do so is not boundless under the Fourteenth Amendment's Due Process Clause. *Schad v. Arizona*, 501 U.S. at 632. "The axiomatic requirement of due process that a statute may not forbid conduct in terms so vague that people of common intelligence would be relegated to differing guesses about its meaning carries the practical consequence that a defendant charged under a valid statute will be in a position to understand with some specificity the legal basis of the charge against him." *Id.* at 632-33 (citations omitted) (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). For this reason, "no person may be punished criminally save upon proof of some *specific* illegal conduct." *Id.* at 633 (emphasis added).

Here, the specificity concerns raised by the United States Supreme Court in *Richardson* are fully present in the indictment. The indictment does not allege that the enterprise engaged in any specific conduct, only defining the CCE as "a continuing series of violations of Article 5 of Chapter 90 of the General Statutes" and generally naming the participants and their positions in the trafficking scheme's hierarchy. A juror would have no way of knowing how many criminal acts were committed within the organization or how Defendant's acts advanced them; while the indictment specifies that Defendant aided and abetted the CCE "by trafficking in methamphetamine[,]" it says nothing of why the enterprise with which Defendant dealt constituted a CCE. Moreover, if such an indictment were sufficient as to the establishment of a CCE, a future indictment could permissibly invite little to no agreement from individual jurors as to in which acts a defendant actually participated.

While *Richardson* is not a directly binding authority as to the interpretation of North Carolina's statute, the command of the Due Process Clause is; and we, like the United States Supreme Court, will not construe a statute so as to jeopardize that statute's constitutionality. *Richardson*, 526 U.S. at 820; *Matter of Arthur*, 291 N.C. at 642. We therefore hold that each underlying act alleged under N.C.G.S. § 90-95.1 constitutes an essential element of the offense. Moreover, as "an indictment . . . must allege all the essential elements of the offense[,]" *State v. Rankin*, 371

N.C. 885, 887 (2018) (marks and citations omitted), we further hold that a valid indictment under N.C.G.S. § 90-95.1 requires the state to specifically enumerate the acts alleged.

Defendant's charge of aiding and abetting a CCE was therefore fatally defective, and we vacate the judgment on that charge. Having so held, Defendant's other arguments with respect to that charge are moot. *Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99 (1996) (marks and citations omitted) ("A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

B. Motion to Dismiss

[2] We turn next to whether Defendant's conspiracy to traffic methamphetamine verdict was fatally ambiguous. Specifically, Defendant argues the verdict was "fatally ambiguous because it is not possible to determine from the indictments, evidence, jury instructions, and verdict sheets whether the jury unanimously found trafficking by *possession* versus trafficking by *transportation* . . . ."

"A verdict should be certain and import a definite meaning free from ambiguity, with an uncertain or ambiguous verdict being insufficient to support the entry of a judgment." *Chisum v. Campagna*, 376 N.C. 680, 710 (marks and citations omitted), *reh'g denied*, 377 N.C. 217 (2021). Jury verdicts are "fatally ambiguous in the event that the verdict sheet or the underlying instructions were vague, making it unclear precisely what the jury intended by its verdict." *Id.* As ambiguity in a jury verdict creates an issue of jury unanimity, we review this argument de novo. *See State v. Surrett*, 217 N.C. App. 89, 93 (2011) ("We review the existence of a unanimous jury verdict *de novo* on appeal . . . .").

Here, as Defendant's argument depends on the failure to distinguish between trafficking by possession and trafficking by transportation, a determinative question is whether these offenses, if presented to the jury in the disjunctive, would actually render the jury's verdict fatally ambiguous. Under our binding conspiracy precedent, the answer is no. "[O]ur case law has long embraced a distinction between unconstitutionally vague instructions that render unclear the offense for which the defendant is being convicted and instructions which instead permissibly state that more than one specific act can establish an element of a criminal offense." *State v. Walters*, 368 N.C. 749, 753 (2016). On the one hand, "a disjunctive instruction[] [that] allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to

determine whether the jury unanimously found that the defendant committed one particular offense. In such cases, the focus is on the conduct of the defendant." *Id.* (marks omitted) (emphasis in original). On the other hand, "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied. In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct." *Id.* (marks omitted) (emphasis in original).

Where a conspiracy charge disjunctively lists multiple offenses, we have held that each underlying offense does not create a separate conspiracy, but is instead an alternative act by which a Defendant may be found guilty of the singular conspiracy alleged. In *State v. Overton*, the defendant's verdict sheet charged a conspiracy to "manufacture, possess with intent to sell and deliver *or* sell and deliver[] . . . heroin[,]" and the jury's verdict mirrored that use of the disjunctive. *State v. Overton*, 60 N.C. App. 1, 34 (1982), *disc. rev. denied*, 307 N.C. 581 (1983). Although we "acknowledge[d] that the verdict sheet was not artfully drawn," we nonetheless held that "[t]he parameters of the conspiracy could include either a conspiracy to manufacture *or* to possess with intent to sell or deliver *or* to sell and deliver heroin." *Id.* We reasoned that the defendant "could not have been prejudiced by the inexact nature of this verdict form because the punishments for conspiracy to do any one of these three offenses are the same, and the trial court's judgment contained a sentence well within the statutory limits. *Id.* Moreover, in *State v. Davis*, we applied a similar principle to hold that a defendant "charged only with conspiracy to traffic in cocaine" was not subject to the risk of a non-unanimous verdict because "fact that the different methods of trafficking constitute separate offenses is immaterial." *State v. Davis*, 188 N.C. App. 735, 741 (2008) (citing *State v. McLamb*, 313 N.C. 572, 578-79 (1985)).

We are bound by this precedent and therefore hold the jury's verdict was not fatally ambiguous.

CONCLUSION

Defendant's verdict with respect to conspiracy to traffic methamphetamine was not fatally ambiguous. However, as Defendant's judgment for aiding and abetting a CCE did not enumerate the acts alleged to have constituted the CCE as necessary elements of the offense, we vacate that judgment.

VACATED IN PART; NO ERROR IN PART.

Judge FLOOD concurs.

Judge STROUD concurs in part and dissents in part by separate opinion.

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

While I concur with the majority's decision regarding the issue of a fatal ambiguity in the verdict, I write separately to dissent as to the indictment issue. Because the indictment was not fatally defective, the trial court had subject matter jurisdiction, and I would find no error as to the indictment of continuing criminal enterprise ("CCE").

I. Indictment

It is well-established that

> [t]o be sufficient, an indictment must include, inter alia, a plain and concise factual statement asserting facts supporting every element of a criminal offense and the defendant's commission thereof. If the indictment fails to state an essential element of the offense, any resulting conviction must be vacated. The law disfavors application of rigid and technical rules to indictments; so long as an indictment adequately expresses the charge against the defendant, it will not be quashed.

State v. Rankin, 371 N.C. 885, 886-87, 821 S.E.2d 787, 790-91 (2018) (citations, quotation marks, and brackets omitted). Our Supreme Court has clearly stated "the purpose of an indictment is to put the defendant on notice of the crime being charged and to protect the defendant from double jeopardy." *State v. Newborn*, 384 N.C. 656, 659, 887 S.E.2d 868, 871 (2023) (citation omitted). "[T]he traditional test is whether the indictment alleges facts supporting the essential elements of the offense to be charged." *Id.*

North Carolina General Statute Section 90-95.1 establishes the criminal charge of CCE, stating:

> (a) Any person who engages in a . . . [CCE] shall be punished as a Class C felon and in addition shall be subject to the forfeiture prescribed in subsection (b) of this section.
>
> (b) Any person who is convicted under subsection (a) of engaging in a . . . [CCE] shall forfeit to the State of North Carolina:

(1) The profits obtained by him in such enterprise; and

(2) Any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(c) For purposes of this section, a person is engaged in a .. . . [CCE] if:

(1) He violates any provision of this Article, the punishment of which is a felony; and

(2) Such violation is a part of a continuing series of violations of this Article;

a. Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management; and

b. From which such person obtains substantial income or resources.

N.C. Gen. Stat. § 90-95.1 (2021).

The indictment charging Defendant with CCE stated:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above [Defendant] named above unlawfully, willfully, and feloniously did aid and abet Jamie Leonard Tate and Dwayne Bullock in unlawfully, willfully, and feloniously engaging in a . . . [CCE] by violating G.S. 90-95(h)(3b) by trafficking in methamphetamine. The violation was part of a continuing series of violations of Article 5 of Chapter 90 of the General Statutes, which Jamie Leonard Tate and Dwayne Bullock undertook in concert with more than five other persons, including Jackie Pearson, Marqueseo Pearson, Gregory Rutherford, Randy Scott, Aretha Fullwood, Aretha Giles, and Karita Bullock, with respect to whom Jamie Leonard Tate and Dwayne Bullock occupied a position of organizer, a supervisory position, and a management position, and from which Jamie Leonard

> Tate and Dwayne Bullock obtained substantial income and resources.

The majority relies on a United States Supreme Court case, *Richardson v. United States*, 526 U.S. 813, 143 L. Ed. 2d 985 (1999), to determine "each underlying act alleged under N.C.G.S. § 90-95.1 constitutes an essential element of the offense." However, as the majority noted, this decision is not binding on this Court as to North Carolina's CCE statute since *Richardson* was interpreting a federal statute, not North Carolina's statute. *See generally id.* I believe, under current North Carolina case law, North Carolina's law is more in line with the dissenting opinion in *Richardson* than the majority opinion. The dissenting justices would have held that an indictment alleging CCE need not allege each underlying act that is the basis for this type of charge. As the dissent in *Richardson* notes, requiring the government to specifically allege the underlying acts that constitute a CCE charge "is a substantial departure from what Congress intended." *Richardson*, 526 U.S. at 826, 143 L. Ed. 2d at 998 (Kennedy, J., dissenting).

Here, the indictment specifically alleged Defendant aided and abetted Jamie Leonard Tate and Dwayne Bullock by "engaging in a . . . [CCE] by violating G.S. 90-95(h)(3b) by trafficking in methamphetamine[,]" which is a felony offense under North Carolina law. *See* N.C. Gen. Stat. § 90-95(h)(3b) (2021). The indictment specifically alleged this felony offense was part of a "continuing series of violations of Article 5 of Chapter 90 of the General Statutes" and states Defendant undertook the violations "in concert with more than five other persons[,]" naming each person, and alleging Jamie Leonard Tate and Dwayne Bullock "occupied a position of organizer, a supervisory position, and a management position, and from which Jamie Leonard Tate and Dwayne Bullock obtained substantial income and resources."

The indictment tracks the statutory language of North Carolina General Statute Section 90-95.1 by naming the underlying felony offense as required by subsection 90-95.1(c)(1); expressly stating the person was part of a "continuing series of violations" as required by subsection 90-95.1(c)(2); the violations were in concert with five other people and the person occupied a "position of organizer, a supervisory position, and a management position" as required by subsection 90-95.1(c)(2)(a); and the person "obtained substantial income and resources" as required by subsection 90-95.1(c)(2)(b). *See* N.C. Gen. Stat. § 90-95.1.

Since, as the dissent in *Richardson* also notes, the underlying violations that constitute the CCE charge could involve "hundreds or thousands of sales[,]" and the indictment is sufficient under North Carolina

law to put Defendant on notice and tracks the statutory language, I would hold there was no error with respect to the indictment of the CCE charge. *Richardson*, 526 U.S. at 826, 143 L. Ed. 2d at 998 (Kennedy, J., dissenting); *see Newborn*, 384 N.C. at 659, 887 S.E.2d at 871 ("[T]he purpose of an indictment is to put the defendant on notice of the crime being charged and to protect the defendant from double jeopardy." (citation omitted)); *see also State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953) ("The general rule in this state and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words." (citation omitted)).

II. Motion to Dismiss

Defendant also argues "[t]he trial court erred by denying [Defendant's] motion to dismiss the CCE charge where a defendant cannot be guilty of that offense based on a theory of aiding and abetting[.]" While the majority did not discuss this argument since it concludes the indictment was fatally defective, I will briefly discuss the issue since I would conclude there was no error as to the indictment.

The State's evidence tended to show that Jamie Tate and Dwayne Bullock were leaders of a criminal enterprise specifically related to drug trafficking. As the majority notes, the criminal enterprise trafficked various drugs and collected hundreds of thousands of dollars from the trafficking enterprise. Defendant's role in this enterprise was limited to purchasing drugs from Jamie Tate and Dwayne Bullock, or their associates, and re-selling the drugs. There is no indication that Defendant was under the direction or control of Jamie Tate or Dwayne Bullock, or was otherwise involved in the enterprise aside from purchasing drugs to re-sell.

At the close of the State's evidence, Defendant made a motion to dismiss for insufficiency of the evidence, which the court did not rule on. Defendant did not testify on his own behalf or present any evidence, and renewed his motion to dismiss at the close of all evidence. The trial court ultimately denied the motions to dismiss.

Defendant's argument is essentially that he could not be convicted of aiding and abetting a criminal enterprise since he was not involved in any leadership role, and his purchase of drugs from the enterprise was a small part of the enterprise's overall operation. Defendant discusses federal caselaw regarding the federal equivalent to North Carolina's CCE statute, stating:

> The Second Circuit has held that a defendant cannot be guilty of the offense based on this theory of vicarious liability, while the Seventh Circuit, sitting *en banc*, concluded that a defendant can be liable as an aider and abettor under some circumstances. Both circuits concluded, however, that such aiding-and-abetting liability should not exist where, as here, the defendant is an employee or agent of the CCE.

Defendant cites to *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir. 1989) (*en banc*) and *United States v. Amen*, 831 F.2d 373 (2nd Cir. 1987).

While I would not conclude a defendant can *never* be charged as an aider and abettor to a CCE, I would conclude, under these facts, the trial court erred by not dismissing the CCE charge. The State correctly notes that "aider and abettor liability in North Carolina is a principle of common law." *See State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (laying out the common law elements of aider and abettor liability). The plain language of North Carolina General Statute Section 90-95.1 abrogates aider and abettor liability for those who are not in a management or leadership position in a criminal enterprise. *See* N.C. Gen. Stat. § 90-95.1; *see also State v. James*, 371 N.C. 77, 87, 813 S.E.2d 195, 203 (2018) ("The intent of the General Assembly *may be found first from the plain language* of the statute[.] If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so." (emphasis added) (citation omitted)).

North Carolina General Statute Section 90-95.1(c) states:

> (c) For purposes of this section, a person is engaged in a . . . [CCE] if:
>
> (1) He violates any provision of this Article, the punishment of which is a felony; and
>
> (2) Such violation is a part of a continuing series of violations of this Article;
>
> a. Which are undertaken by such person in concert with five or more other persons *with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management*; and

b. From which such person obtains substantial income or resources.

Id. (emphasis added).

Subsection (c)(2)(a) states a person who "occupies a position of organizer, a supervisory position, or any other position of management" can be liable for a CCE charge. N.C. Gen. Stat. § 90-95.1(c)(2)(a). Thus, the plain meaning of the words "organizer," "supervisor," and "management" will control the meaning of the statute. *See James*, 371 N.C. at 87, 813 S.E.2d at 203. "Organizer" means "one that organizes[,]" which means "to cause to develop an organic structure[,] to form into a coherent unity or functioning whole[,] to set up an administrative structure for[,] to persuade to associate in an organization[,] to arrange by systematic planning and united effort[.]" Merriam-Webster's Collegiate Dictionary 874 (11th ed. 2003). "Supervisor" means "one that supervises; an administrative officer in charge of business, government, or school unit or operation[.]" Merriam-Webster's Collegiate Dictionary 1255 (11th ed. 2003). "Management" means "the act or art of managing: the conducting or supervising of something[,] judicious use of means to accomplish an end[,] the collective body of those who manage or direct an enterprise[.]" Merriam-Webster's Collegiate Dictionary 754 (11th ed. 2003).

Taken together, the clear legislative intent of North Carolina General Statute Section 90-95.1 is that it should apply to those who are drug kingpins, not those who are not involved in the overall enterprise leadership structure. *See* N.C. Gen. Stat. § 90-95.1. Holding to the contrary would impose criminal liability under a theory of CCE for any person who purchases drugs from a criminal enterprise, which the General Assembly did not intend. *See id.* Here, it is undisputed Defendant was involved in the purchase and distribution of large quantities of illegal drugs, and he was charged and convicted of those crimes. Those convictions are not affected by this appeal. But the evidence was clear that Defendant's role in this enterprise was limited to purchasing drugs from Jamie Tate and Dwayne Bullock, or their associates, and re-selling the drugs. The State even conceded at trial that Defendant "wasn't a kingpin. So you can treat him differently than you would the kingpin." In the State's brief to this Court, it again conceded that "Tate and Bullock soon formed [a] close-knit organization of 'seven or eight' associates and family members who ran the drug-trafficking enterprise[,]" listing "[t]he individuals under Tate and Bullock's supervision[,]" without listing Defendant. The State does not characterize Defendant as an employee of the organization, while it specifically referred to the seven listed individuals as employees of the organization.

While it is clear and undisputed that Defendant sold drugs obtained by the criminal enterprise, it is also clear Defendant was not one of the organizers, supervisors, or managers listed in North Carolina General Statute Section 90-95.1. *See* N.C. Gen. Stat. § 90-95.1(c)(2)(a). Since North Carolina General Statute Section 90-95.1 demonstrates a clear legislative intent to punish those acting as drug kingpins, I would conclude the trial court erred in not dismissing the CCE charge at the close of all evidence.

For the reasons outlined above, I concur in part and dissent in part.

STATE OF NORTH CAROLINA
v.
MICHAEL JUSTIN HAGAMAN, DEFENDANT

No. COA22-434

Filed 16 January 2024

1. Search and Seizure—motion to suppress—denied—findings of fact—search of defendant's notebooks—cursory inspection

After a criminal defendant pled guilty to one count of indecent liberties with a child in a prosecution for various sexual offenses against children, an order denying defendant's motion to suppress evidence seized from his home was affirmed where, of the findings of fact in the order that defendant challenged on appeal, the ones that were actually conclusions of law were treated as such on appellate review, and the findings containing facts upon which the trial court relied in making its conclusions were supported by competent evidence. Notably, competent evidence supported the trial court's findings that, where law enforcement—while searching defendant's home pursuant to a warrant—inspected defendant's personal notebooks for evidence of child pornography and came across a description of defendant committing a hands-on sexual offense involving a minor, law enforcement's examination of the notebooks amounted to a cursory reading falling within the search warrant's scope.

2. Search and Seizure—warrant to search home—scope—evidence of child pornography—search of defendant's personal notebooks—evidence of other crime found—cursory inspection

After a criminal defendant pled guilty to one count of indecent liberties with a child in a prosecution for various sexual offenses

against children, an order denying defendant's motion to suppress evidence seized from his home was affirmed where, while executing a warrant to search the home for evidence of defendant's involvement in producing or purchasing child pornography, law enforcement inspected defendant's "substance abuse recovery journals" and came across a description of defendant committing a hands-on sexual offense involving a minor. The officer's cursory review of the journals neither exceeded the search warrant's scope nor constituted an improper invasion of defendant's privacy where: the warrant permitted the search of any documents or records inside defendant's home containing passwords for accessing online child pornography; the officer merely flipped through the journals' pages looking for such passwords rather than reading the journals word for word; and, upon discovering the description of the other crime, the officer stopped reading and sought another search warrant for the journals.

Appeal by defendant from order and judgment entered 10 November 2021 by Judge Gary M. Gavenus in Superior Court, Watauga County. Heard in the Court of Appeals 21 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary K. Dunn, for the State.

Patterson Harkavy LLP, by Christopher A. Brook, for defendant-appellant.

STROUD, Judge.

Defendant-appellant appeals from an order and judgment entered pursuant to a guilty plea for one count of indecent liberties with a child. In the plea agreement, Defendant-appellant reserved his right to appeal from the trial court's ruling on his motion to suppress. Defendant-appellant argues on appeal the trial court erred in denying his motion to suppress. For the following reasons, we affirm.

I. Background

The State's evidence at the motion to suppress hearing tended to show that on or about 25 May and 30 May 2018, Detective J.B. Reid of the Boone Police Department was "conducting an undercover operation involving the distribution of child pornography on certain file sharing networks." Detective Reid found ten files containing explicit videos of child pornography uploaded to a file sharing network on the internet

known as BitTorrent. Based upon the Internet Protocol ("IP") address that uploaded the videos, Detective Reid determined the files came from Defendant's residence. On or about 6 June 2018, Detective Reid applied for, received, and executed two search warrants permitting a search of (1) Defendant and his vehicle or vehicle(s) in his control, and (2) Defendant's residence. The warrants authorized law enforcement to, in part, search for:

> 6. Text files containing information pertaining to the interest in child pornography or sexual activity with children and/or pertaining to the production, trafficking in, or possession of child pornography.
>
> 7. Correspondence…. Pertaining to the trafficking in, production of, or possession of visual depictions of minors engaged in sexually explicit conduct.
>
> 8. Correspondence…. Soliciting minors to engage in sexually explicit conduct for the purposes of committing an unlawful sex act and/or producing child pornography.
>
> 10. Names and addresses of minors visually depicted while engaged in sexually explicit conduct.
>
> 12. Any book, . . ., or any other material that contains an image of child pornography.
>
> 13. Any and all documents and records pertaining to the purchase of any child pornography.
>
> 14. Notations of any password that may control access to a computer operating system or individual computer files. Evidence of payment for child pornography[.][1]

We first note we need not discuss the vehicle search. As Defendant states in his brief and confirmed by the record, "[h]e only filed a motion to suppress in file number 18-CRS-50936, in which he ultimately pled guilty to one count of indecent liberties. . . . Accordingly, [Defendant's] appeal and appellate brief focuses exclusively on file number 18-CRS-50936." The indecent liberties with a child charge stems from the search conducted in Defendant's residence. Accordingly, we direct our focus to that search.

In the search of Defendant's residence, State Bureau of Investigation Special Agent Chris Chambliss assisted in the execution of the search

1. The order skipped numbers 9 and 11.

warrant and found four notebooks. Special Agent Chambliss was "[p]rimarily looking for passcodes, or keywords, or something that would potentially show something along those lines, something that would further the investigation" during his initial review of the notebooks. One of the notebooks included a reference to Defendant's commission of a hands-on sexual offense involving a minor. Thereafter, Detective Reid applied for two additional search warrants and identified the victim of the hands-on offense. Ultimately, Defendant was indicted for (1) ten counts of second-degree sexual exploitation of a minor and (2) two counts of first-degree sexual offense.

On or about 28 June 2019, Defendant filed a (1) motion to suppress "evidence seized in excess of the scope" of the initial search warrants and (2) motion to quash the third and fourth warrants and suppress "any evidence seized thereby[.]" On or about 4 March 2020, the trial court entered an order denying Defendant's motion to suppress and motion to quash. On or about 10 November 2021, Defendant entered a guilty plea on ten counts of second-degree sexual exploitation of a minor and one count of indecent liberties with a child reserving his right to appeal the order denying his motion to suppress and motion to quash.

II. Motion to Suppress

Defendant contends (1) "[m]any of the trial court's findings of fact are not actually factual findings or are not supported by competent evidence" and (2) "search of [his notebooks] went beyond the scope of the search warrants[,]" so the trial court should have granted his motion to suppress.

A. Standard of Review

As our Supreme Court has explained:

> In evaluating the denial of a motion to suppress, the reviewing court must determine whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. The trial court's findings of fact on a motion to suppress are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.

State v. Williams, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) (citations and quotation marks omitted). When "the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

Appellate courts "accord[] great deference to the trial court" when reviewing findings of fact because the trial court "is entrusted with the duty to hear testimony, weigh [the evidence,] and resolve any conflicts in the evidence[.]" *Williams*, 366 N.C. at 114, 726 S.E.2d at 165 (citation and quotation marks omitted). Our deference to the trial court reflects that the trial court "sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth. The appellate court is much less favored because it sees only a cold, written record." *State v. Cooke*, 306 N.C. 132, 134-35, 291 S.E.2d 618, 620 (1982) (citation and quotation marks omitted). In contrast, "[c]onclusions of law are reviewed *de novo* and are subject to full review." *Biber*, 365 N.C. at 168, 712 S.E.2d at 878. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citations and quotation marks omitted).

B. Challenged Findings of Fact

[1] Defendant challenges many findings of fact and grouped his arguments into four categories based upon the nature of the challenge: (1) finding 17 "is not supported by competent evidence[;]" (2) findings 24-26 "are, in whole or in part, conclusions of law and/or are not supported by competent evidence[;]" (3) findings 20, 21, and 27 are not findings of fact but conclusions of law; and (4) findings 19 and 23 are "not factual findings" but are instead the trial court's interpretations of Defendant's argument or of caselaw. (Capitalization altered.) We review each category in turn.

1. Finding 17

Finding 17 states:

> The court finds from the credible testimony that paper writings including notebooks often carry information regarding child pornography including passcodes or keywords, correspondence, communication with individuals involved in child pornography, documentation of episodes of child pornography and other information that will further the investigation into child pornography.

Defendant asserts finding 17 is "not supported by competent evidence" because it

> overstates the evidence in two ways. First, Agents Chambliss and Anderson did not testify that law enforcement "often" found information regarding child

> pornography in notebooks. . . Second, neither testified that he had ever discovered handwritten records that included correspondence or communications with individuals involved in child pornography or documentation of episodes of child pornography.

We disagree.

Defendant engages in a hyper-technical, word-for-word interpretation of the testimonies. First, Defendant mentions only Special Agent Chambliss and Special Agent Nathan Anderson, but the trial court did not name these two specific agents in finding 17. Another witness, Detective Reid, testified paper writings in this type of investigation "commonly" include relevant items such as passcodes or passwords. "Commonly" is the adverbial version of the word "common" meaning "occurring or appearing frequently[.]" Merriam-Webster's Collegiate Dictionary 250 (11th ed. 2003). Similarly, the word "often" means "many times" or "frequently[.]" *Id.* at 862 (capitalization altered). Thus, the word "commonly[,]" at least as used in this testimony, is a functional equivalent of the word "often" as used in finding 17.

Defendant also argues that "neither [Special Agents Chambliss nor Anderson] testified that [they] had ever discovered handwritten records that included correspondence or communications with individuals involved in child pornography or documentation of episodes of child pornography[;]" finding of fact 17 does not state those two specific agents so testified. Finding of fact 17 simply finds "*from the credible testimony* that paper writings . . . often carry information regarding child pornography. . . [,]" not which specific law enforcement officers testified about this information. Finding No. 17 is supported by the evidence.

2. Findings 24-26

Findings 24-26 state:

> 24. A cursory reading of the notebook found in the Xterra, Exhibit D-1, although not revealing any passcodes, did reveal incriminating statements made by [D]efendant as to his possession of child pornography which was the crime providing for the search and was subject to seizure.
>
> 25. During a cursory reading of one of the notebooks found in the residence, Exhibit D-2, although not revealing any passcodes, it did reveal incriminating statements made by [D]efendant relative to a new crime, the crime of indecent liberties, was subject to seizure, and was subsequently

> searched in detail pursuant to the June 11, 2018 search warrant. "Courts have never held that a search is overbroad merely because it results in additional charges." *United States v. Phillips*, 588 F.3d 218 (4th Cir. 2009).
>
> 26. The seizure of the notebooks both from the Xterra and the residence was within the scope of the June 6, 2018 search warrants and the scope of the search authorized by the warrants included the authority to cursorily view each notebook.

Here, Defendant contends that (1) portions of findings 24-26 contain conclusions of law, and (2) portions of findings 24-26 are not supported by competent evidence.

As to the label applied to "findings" 24-26, it is well-established that the labels assigned by a trial court do not dictate the standard of review for this Court. *State v. Johnson*, 246 N.C. App. 677, 683, 783 S.E.2d 753, 758-59 (2016) ("[W]e do not base our review of findings of fact and conclusions of law on the label in the order, but rather, on the substance of the finding or conclusion. *See State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) ("Although labeled findings of fact, these quoted findings mingle findings of fact and conclusions of law. While we give appropriate deference to the portions of Findings No. 37 and 39 that are findings of fact, we review *de novo* the portions of those findings that are conclusions of law.") (ellipses omitted)). Thus, no matter how the trial court classified findings 24-26, we will "give appropriate deference to the portions . . . that are findings of fact, [and] we review *de novo* the portions of those findings that are conclusions of law." *Id.*

As to whether there was competent evidence to support the factual portions of these findings, Defendant makes a two-sentence argument:

> To the extent this Court views the trial court characterization of law enforcement's actions as a "cursory reading" or "cursorily view[ing]" of the notebooks as factual findings, they are not supported by competent evidence. As noted above, Agents Colvard and Chambliss read beyond the 30th pages of the two journals in question despite the fact that they were plainly substance abuse recovery journals. . . . This speaks to an in depth reading of the journals, not a skimming of their contents.

Again, Defendant only challenges the hands-on sexual offense; Defendant does not challenge the child pornography charges which were related to the initial warrants. While Defendant does challenge

the above findings in his brief and these findings include references to the search of Defendant's car, his motion to suppress and appeal is limited to the hands-on offense, and Defendant concedes "[h]e filed a motion to suppress in file number 18-CRS-50936, in which he ultimately pled guilty to one count of indecent liberties, however. Accordingly, [Defendant]'s appeal and appellate brief focuses exclusively on file number 18-CRS-50936."

The evidence supporting the indecent liberties charge was based upon one of the notebooks found in Defendant's home; thus, we only review Special Agent Chambliss's actions since he was the person who located and reviewed the notebook which contained the reference to the hands-on offense. The notebook found in the car referenced Defendant's activities regarding child pornography, but the notebook from Defendant's car did not contain evidence regarding the hands-on offense. As Defendant only challenged the hands-on offense at his motion to suppress hearing and on appeal, we need not discuss the notebook from Defendant's car.

Special Agent Chambliss testified that in looking through the notebooks for "passcodes" he discovered the passage regarding a hands-on offense, but he did not read the notebooks "word for word[.]" Special Agent Chambliss's testimony does not say he "read beyond the 30th pages" as he was not reading "word for word" but was looking through the journal for passcodes "when [he] noticed . . . [the notebook] had language that was consistent with somebody talking about committing hands-on offenses." Thereafter, rather than going through the rest of the notebook continuing to look for passcodes, as he could have done under the warrant, Special Agent Chambliss informed other officers and they immediately applied for an additional warrant specifically applicable to the notebook. Defendant fails to direct us to any testimony which supports "an in depth reading of the [notebooks]" during the execution of the initial search warrant.

We further note that Defendant's argument the notebooks were "plainly substance abuse recovery journals" does not change our analysis. The search warrant authorized the officers to look for:

> 6. Text files containing information pertaining to the interest in child pornography or sexual activity with children and/or pertaining to the production, trafficking in, or possession of child pornography.
>
> 7. Correspondence…. Pertaining to the trafficking in, production of, or possession of visual depictions of minors engaged in sexually explicit conduct.

> 8. Correspondence…. Soliciting minors to engage in sexually explicit conduct for the purposes of committing an unlawful sex act and/or producing child pornography.
>
> 10. Names and addresses of minors visually depicted while engaged in sexually explicit conduct.
>
> 12. Any book, …, or any other material that contains an image of child pornography.
>
> 13. Any and all documents and records pertaining to the purchase of any child pornography.
>
> 14. Notations of any password that may control access to a computer operating system or individual computer files. Evidence of payment for child pornography[.]

This sort of information could easily be kept in a notebook such as the ones the officers found in Defendant's home. As the Second Circuit persuasively recognized in *Riley*,

> [i]t is true that a warrant authorizing seizure of records of criminal activity permits officers to examine many papers in a suspect's possession to determine if they are within the described category. But allowing some latitude in this regard simply recognizes the reality that few people keep documents of their criminal transactions in a folder marked "drug records."

U.S. v. Riley, 906 F.2d 841, 845 (1990).

Even if the notebook was "plainly a substance abuse [notebook]," the apparent topic of the notebook does not shield it from a cursory review in accord with the search warrant. Just as "few people keep documents of their criminal transactions in a folder marked 'drug records[,]' " few people keep passwords or other information regarding their child pornography in a notebook marked "child pornography records." *Id.* Someone who records potentially incriminating information would logically seek to keep it in a place where it is not obvious or easy to find.

In opening the notebook and looking for "passcodes[,]" Special Agent Chambliss discovered the hands-on offense. There is no dispute that the search warrant allowed Special Agent Chambliss to seize and inspect the notebook to look for passcodes, potential correspondence involving child pornography, names and addresses of potential victims, and other potentially written information as listed above. It is entirely reasonable

to assume a written spiral-bound notebook with hand-written notations might include information on a myriad of topics, including child pornography. Defendant cites to no law, nor have we found any, requiring law enforcement officers to limit their search for information or documents as authorized by a valid search warrant in a manner dictated by a defendant's own labels or characterization of a document. A passcode such as Special Agent Chambliss was looking for could be written in any sort of document or book, and a defendant would most likely not want to make this sort of information easy for others to find and identify. Accordingly, these findings are supported by competent evidence.

3. Findings 20, 21, and 27

Defendant next contends findings 20, 21, and 27 are not findings of fact but are actually conclusions of law and "therefore, are reviewed de novo." Defendant makes no other challenge to these findings. The State agrees with Defendant's argument. Findings 20, 21, and 27 state:

> 20. A "commonsense and realistic" approach to the interpretation of the search warrants clearly indicates that the seizure of the notebooks was well within the purview of and authorized by the June 6, 2018 search warrants.
>
> 21. Even assuming *arguendo* that paragraphs 6, 7, 8, 10 and 12 did not authorize the seizure and cursory search of the notebooks, paragraphs 13 and 14 clearly did.
>
> . . . .
>
> 27. That the June 6, 2018, June 11, 2018 and June 26, 2018 search warrants were each based upon probable cause and were not issued or executed in violation of the Constitutional rights of the defendant and all items seized and searched thereby were seized and searched legally.

We again note, we will review "findings" under the appropriate standard depending on their actual classification, not the label given by the trial court. *State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009). We agree these are conclusions of law, and we review them below accordingly.

4. Findings 19 and 23

Findings 19 and 23 state:

> 19. [D]efendant argues that the June 6, 2018 search warrants should be interpreted in a "hypertechnical" manner.

> That is, since the focus of the search warrants dealt with computer, digital, photographic and video evidence that it cannot be expanded to include written materials such as the notebooks seized.
>
> . . . .
>
> 23. Each of the officers could conduct "some cursory reading" of the notebooks discovered during the course of the searches to determine their relevance to the crime providing for the search. *United States v. Crouch*, 648 F.2d 932, 933-34 (4th Cir.), cert. denied, 454 U.S. 952, 70 L. Ed. 2d 259, 102 S. Ct. 491 (1981).

Finally, as to the findings of fact, Defendant asserts findings 19 and 23 are "not factual findings" nor "conclusions of law" because they represent the trial court's "characterization" of Defendant's argument or of caselaw. The State, and we, agree. Nonetheless, these "findings" do not affect this analysis since neither "finding" is required to support the trial court's conclusions of law because neither "finding" actually finds facts upon which the trial court relied in making its conclusions. Thus, we will not review them further.

C. Scope of Search Warrants

[2] Beyond Defendant's challenges to the findings of fact, he argues law enforcement's search of his notebooks "went beyond the scope of the search warrants." The crux of Defendant's argument is

> [W]hen conducting searches of a person's papers, officers "must take care to assure that they are conducted in a manner that minimizes unwarranted [intrusions] upon privacy." *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976). This reflects not only an aversion to "general warrant[s] to rummage and seize at will[,]" *Crabtree*, 126 N.C. App. at 735, 487 S.E.2d at 578, but also due consideration of the particular privacy interests at issue, *see* 6 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.6(a) (2020) [hereinafter "LaFave"]. Consistent with the textual constitutional commitment to their protection, U.S. Const. amend. IV, searching a person's papers in executing a warrant raises "grave dangers[,]" *Andresen*, 427 U.S. at 482 n.11. Given the wariness of general warrants and the corresponding commitment to protecting privacy rights, especially relating to sensitive materials, *id.*, law enforcement may only search papers for "as long and as intensely

> as is reasonable to find the things described in the warrant[.]" LaFave § 4.6(a).
>
> Law enforcement is accordingly limited in its examination of papers in executing a warrant. They are, of course, permitted to search and seize evidence specified by the warrant. *Crabtree*, 126 N.C. App. at 735, 487 S.E.2d at 578. Law enforcement may also seize evidence in plain view, *Coolidge*, 403 U.S. at 465, including materials that are "clearly and immediately incriminating[,]" *Crouch*, 648 F.2d at 933. And courts recognize "that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among the papers to be seized." *Andresen*, 427 U.S. at 482 n.11. But a cursory examination is a surface-level glance at materials, *Cursory*, WEBSTER'S DICTIONARY (2nd ed. 1975) (defining cursory as "hasty; slight; superficial; careless; without close attention"); *see also Arizona v. Hicks*, 480 U.S. 321, 328 (1987) (defining cursory inspections in a similarly narrow fashion); this makes sense given the weighty privacy interests an individual has in his or her papers. Anything more intensive touching upon materials beyond the warrant authorization constitutes an impermissible search. *See Hicks*, 480 U.S. at 324-25, 328-29.

Defendant contends the journals were not "clearly and immediately incriminating[,]" but they could be immediately identified as "sensitive" since they were substance abuse recovery journals and thus presented " 'grave dangers' of unwarranted invasion of privacy[.]" Defendant argues that "Agents Colvard and Chambliss read, page by page, more than 30 journal pages" despite the sensitive nature of the journals and this examination was unconstitutional.

According to Defendant, the agents were allowed to cursorily look in the notebook but immediately upon discovering it was a substance abuse journal, they should have looked no further, not even for passwords or passcodes. Again, Defendant is essentially arguing, with no legal support, that law enforcement officers must trust and rely upon a defendant's label on documents, particularly since the notebooks were "substance abuse recovery journals." But the evidence and findings in this case do not support Defendant's assertions.

The initial search warrant allowed for the search of Defendant's residence including, "[a]ny and all documents and records pertaining to the purchase of any child pornography" and "notations of any password

that may control access" to a computer. Special Agent Chambliss testified he was in Defendant's residence looking at a document for notations of a password when he found the portion of the journal suggesting a hands-on sexual offense, and he then sought and obtained another search warrant. The State presented extensive testimony regarding how passcodes to access online child pornography are often written on paper. Special Agent Chambliss testified that while he was specifically searching for "passcodes" page by page, he was not reading every word on the pages, but instead flipping through looking for information relevant to his search, and in that search he happened to see evidence of a hands-on crime. Special Agent Chambliss immediately stopped looking at the notebook, which he had not been reading "word for word," spoke with a supervisor, and another warrant was obtained. Defendant's entire argument is premised upon the manner in which Special Agent Chambliss looked at the notebook. But the evidence does not support Defendant's claim that Special Agent Chambliss carefully read every word for the first 30 pages of the notebook and thus would have known the notebook was a substance abuse journal as Defendant contends.

In summary, the search was conducted in accordance with a properly issued search warrant to search Defendant's home for "[a]ny and all documents and records pertaining to the purchase of any child pornography" and "notations of any password that may control access" to a computer. During execution of the warrant an officer looking for a "passcode" happened to find evidence of another crime, and then sought another search warrant. The trial court did not err in denying Defendant's motion to suppress or quash. This argument is overruled.

III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges HAMPSON and GORE concur.

STATE v. SPRINGS

[292 N.C. App. 207 (2024)]

STATE OF NORTH CAROLINA
v.
ANTONIO DEMONT SPRINGS

No. COA23-9

Filed 16 January 2024

1. Appeal and Error—criminal appeal—by State—Appellate Rules violations—jurisdictional defects—substantial non-jurisdictional violations—certiorari allowed—sanctions imposed

In a prosecution for multiple drug-related offenses, the State's appeal from an interlocutory, orally rendered order granting defendant's motion to suppress was subject to dismissal where the State: violated Appellate Rule 4(b) by mistakenly stating on its notice of appeal that it was appealing an order granting defendant's "motion to dismiss," even though the State subsequently filed a certification of its appeal under N.C.G.S. § 15A-979(c) (required for appeals from orders granting motions to suppress); and violated Appellate Rule 28(b)(4) by failing to include a statement of grounds for appellate review in its principal brief. The State's violations of the Appellate Rules constituted, at most, jurisdictional defects in the appeal, or, at minimum, substantial non-jurisdictional violations justifying the appeal's dismissal. Ultimately, although the State did not petition for certiorari review, the appellate court exercised its discretion to issue a writ of certiorari to hear the appeal. However, the costs of the appeal were taxed to the State as a sanction pursuant to Appellate Rule 34(b)(2)(a).

2. Search and Seizure—probable cause—warrantless search—vehicle and its contents—odor of marijuana—additional circumstances

In a prosecution for multiple drug-related offenses, where an officer had searched defendant's car during a traffic stop after detecting an odor of marijuana, the trial court erred in granting defendant's motion to suppress evidence seized during the warrantless search, including drug paraphernalia found inside a bag that defendant kept on his person during the search. The appellate court did not have to determine on appeal whether the scent of marijuana alone would be sufficient to grant an officer probable cause to search a vehicle because, here, additional circumstances beyond the marijuana odor—including that defendant was driving without a valid license and that the car had a fictitious tag—gave

the officer probable cause to search defendant's vehicle and its contents, including the bag of paraphernalia.

Judge MURPHY concurring in part and dissenting in part.

Appeal by State from Order rendered 23 August 2022 by Judge Jesse B. Caldwell, IV in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden W. Hayes, for the State.

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

HAMPSON, Judge.

Factual and Procedural Background

The State appeals from an orally rendered Order granting a Motion to Suppress filed by Antonio Demont Springs (Defendant) and suppressing evidence seized during a traffic stop. The Record before us tends to reflect the following:

On 17 May 2021, an Officer with the Charlotte-Mecklenburg Police Department initiated a stop of Defendant's vehicle on suspicion of a fictitious tag. When the Officer pulled over Defendant and approached the car, he observed Defendant "fumbling through to get some paperwork" with his hands "shaking," and noted Defendant appeared "very nervous." Defendant was the only person in the car. Defendant gave the Officer his identification card and the car's paperwork. The Officer determined the car was not stolen, but Defendant was driving on a revoked license. The Officer returned to Defendant's vehicle and asked him "about the odor of marijuana in the vehicle." Defendant denied smoking marijuana in the car, prompting the following exchange:

> Officer: You didn't have a blunt earlier or anything?
>
> Defendant: No. I just got the car from my homeboy. That's probably why.
>
> Officer: Is that why it smells like weed in here?
>
> Defendant: Yeah—

> Officer: —because he might have smoked a blunt or something earlier?
>
> Defendant: Yeah.

The Officer then asked Defendant to get out of the car. Defendant did so and took some belongings with him, including a cellphone, cigarettes, and a Crown Royal bag. The Officer took Defendant's items and put them in the driver's seat of the car to pat down Defendant for weapons. After the search and finding no weapons, the Officer returned Defendant's cellphone and cigarettes, but opened and searched the Crown Royal bag. In the bag, the Officer found a digital scale, a green leafy substance, two baggies of white powder, and "numerous baggies of colorful pills[.]"

On 24 May 2021, Defendant was subsequently indicted for Possession of Drug Paraphernalia, Trafficking in Drugs, and Possession with Intent to Sell or Deliver a Controlled Substance based on this evidence. On 17 August 2022, Defendant filed a Motion to Suppress the evidence from the Crown Royal bag, arguing the Officer lacked probable cause to search the car, and consequently, lacked probable cause to search the bag.

Specifically, at the hearing on Defendant's Motion to Suppress on 23 August 2022, Defendant contended that because hemp, which Defendant argued is indistinguishable from marijuana in odor and appearance, is legal in North Carolina, the odor of marijuana alone was no longer sufficient to establish probable cause for the ensuing searches. The State argued that binding precedent in this state holds that marijuana odor alone per se supports a finding of probable cause to support a search. Further, the State asserted even presuming odor alone was insufficient, the Officer had additional evidence supporting probable cause, including Defendant's "fidgety" behavior, the fact Defendant was driving with a fictitious tag and without a valid license, and Defendant's agreement marijuana may have been smoked in the car earlier, which the trial court characterized as "an acknowledgment, if not an admission" marijuana had been smoked in the car.

At the conclusion of the hearing, the trial court orally granted Defendant's Motion. In rendering its ruling, the trial court stated: "So I think that the standards set forth in *Parker*[1] which is abbreviated odor plus is certainly the appropriate standard to use here." The trial court acknowledged "the odor of something that could be marijuana but might be CBD or hemp or a legal hemp-related product is certainly an issue or

1. *State v. Parker*, 277 N.C. App. 531, 860 S.E.2d 21, *appeal dismissed, review denied*, 860 S.E.2d 917 (2021).

a consideration for law enforcement to make note of when evaluating or trying to reach probable cause." The trial court further acknowledged, "[a]nd in this circumstance arguably there were additional factors to consider" including the traffic violations and the acknowledgment "that weed, bud, the colloquial for marijuana, was smoked in the vehicle previously." The trial court, however, concluded: "I just think in the totality here and given the new world that we live in, that odor plus is the standard and we didn't get the plus here. There was no probable cause."

The State filed written Notice of Appeal on 29 August 2022. The Notice of Appeal, however, stated the appeal was from an order "grant[ing] the defendant's motion to dismiss[.]" Two days later, on 31 August 2022, the State filed a Certification, certifying that the appeal was not taken for the purpose of delay and that the evidence suppressed is essential to the case.

Appellate Jurisdiction

[1] The parties do not address appellate jurisdiction in their briefing to this Court. However, the State's Notice of Appeal, the later Certification of its interlocutory appeal, failure to include a Statement of Grounds for Appellate Review in its brief, failure to address our authority to review an orally rendered order granting a Motion to Suppress, and overall failure to provide this Court with any jurisdictional basis to review this matter requires this Court examine the basis for our appellate jurisdiction. *See State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008) ("It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even . . . by a court sua sponte.").

First, "when a [party] has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005). Rule 4 of the North Carolina Rules of Appellate Procedure sets out the requirements for a notice of appeal in criminal cases. *See* N.C. R. App. P. 4 (2023). Relevant to this case, Rule 4(b) provides the requisite contents of a written notice of appeal:

> The notice of appeal required to be filed and served . . . shall specify the party or parties taking the appeal; *shall designate the judgment or order from which appeal is taken* and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

N.C. R. App. P. 4(b) (emphasis added). "Our Supreme Court has said that a jurisdictional default, such as a failure to comply with Rule 4, 'precludes the appellate court from acting in any manner other than to dismiss the appeal.' " *State v. Hammonds*, 218 N.C. App. 158, 162, 720 S.E.2d 820, 823 (2012) (quoting *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008)).

Here, the State's Notice of Appeal indicates it is from an order granting "the defendant's motion to dismiss[.]" No such order appears in the Record. Rather, the State's arguments focus entirely on the grant of Defendant's Motion to Suppress. We acknowledge, however, " 'a mistake in designating the judgment . . . should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appeal is not misled by the mistake[.]' " *Stephenson v. Bartlett*, 177 N.C. App. 239, 241, 628 S.E.2d 442, 443 (2006) (quoting *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156-57, 392 S.E.2d 422, 424 (1990)).

Our Court has observed that granting a motion to suppress—even of evidence which is essential to the State's case—is not synonymous with dismissal of the case. *See State v. Romano*, 268 N.C. App. 440, 447, 836 S.E.2d 760, 768 (2019) (affirming denial of a motion to dismiss at trial because "[e]ven though this Court and our Supreme Court agreed the trial court properly suppressed the evidence, that did not impede the State from proceeding to trial without the suppressed evidence since our appellate courts' decisions on the motion to suppress were made prior to trial."); *see also State v. Fowler*, 197 N.C. App. 1, 28-29, 676 S.E.2d 523, 545 (2009) ("A trial court's decision to grant a pretrial motion to suppress evidence 'does not mandate a pretrial dismissal of the underlying indictments' because '[t]he district attorney may elect to dismiss or proceed to trial without the suppressed evidence and attempt to establish a prima facie case.' " (quoting *State v. Edwards*, 185 N.C. App. 701, 706, 649 S.E.2d 646, 650 (2007))).

Indeed, this highlights a second jurisdictional issue: the State's appeal is from an interlocutory order. *See Romano*, 268 N.C. App. at 445, 836 S.E.2d at 767 (an order granting a motion to suppress is an interlocutory—not final—decision). N.C. Gen. Stat. § 15A-979(c) provides the State a statutory right of appeal from an Order granting a motion to suppress prior to trial "upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case." N.C. Gen. Stat. § 15A-979(c) (2021). This Court has recognized Section 15A-979(c) "not only requires the State to raise its right to appeal according to the

statutory mandate, but also places the burden on the State to demonstrate that it had done so." *State v. Dobson*, 51 N.C. App. 445, 447, 276 S.E.2d 480, 482 (1981). Similarly, Rule 28(b)(4) of the Rules of Appellate Procedure requires: "An appellant's brief shall contain . . . [a] statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review." N.C. R. App. P. 28(b)(4) (2023).

Crucially, "when an appeal is interlocutory, Rule 28(b)(4) is not a 'nonjurisdictional' rule. Rather, the *only way* an appellant may establish appellate jurisdiction in an interlocutory case . . . is by showing grounds for appellate review[.]" *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 77-78, 772 S.E.2d 93, 96 (2015) (emphasis in original); *see also Coates v. Durham Cnty.*, 266 N.C. App. 271, 273-74, 831 S.E.2d 392, 394 (2019) ("Our Court has noted that in the context of interlocutory appeals, a violation of Rule 28(b)(4) is jurisdictional and requires dismissal."). This burden rests solely with the appellant. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

Here, in violation of N.C. R. App. P. 28(b)(4), the State wholly failed to include any statement of grounds for appellate review. The State's brief offers no discussion of its defective Notice of Appeal or the timeliness of its subsequently filed Certification of the appeal. Nowhere in briefing does the State cite to N.C. Gen. Stat. § 15A-979 as statutory support for its interlocutory appeal. Moreover, the State's appeal is from an orally rendered Order granting a Motion to Suppress without written findings of fact or conclusions of law. The State, however, offers no basis or rationale for our ability to review the orally rendered Order in this circumstance. The State's failure to comply with Rule 4 of the Rules of Appellate Procedure combined with its failure to comply with Rule 28(b)(4) of the Rules of Appellate Procedure constitutes a jurisdictional defect in the appeal depriving this Court of appellate jurisdiction requiring dismissal of the appeal.

Nevertheless, even assuming the shortcomings in the State's appeal and briefing do not rise to the level of jurisdictional defects, they still constitute substantial violations of the Rules of Appellate Procedure impairing and frustrating this Court's ability to review the merits. *See Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367. Here, the defects in the appeal—at a minimum—raise substantial jurisdictional questions, which the State, as the appellant, fails to address before this Court. This not only hampers our ability to judicially review this matter efficiently and effectively but also frustrates the appellate adversarial process by not squarely raising these issues to be briefed or addressed by Defendant.

The State has also not taken steps to recognize or remedy these defects, such as petitioning for certiorari.

Mindful of the admonishment "it is not the role of this Court to create an appeal for an appellant or to supplement an appellant's brief with legal authority or arguments not contained therein[,]" *Thompson v. Bass*, 261 N.C. App. 285, 292, 819 S.E.2d 621, 627 (2018), we conclude the State's violations of the appellate rules are substantial enough to potentially warrant dismissal of its interlocutory appeal.

Thus, the State's violations of the Rules of Appellate Procedure constitute either jurisdictional defects in the appeal mandating dismissal or substantial non-jurisdictional violations of the appellate rules justifying dismissal of the appeal on the basis that the State has failed to demonstrate appellate jurisdiction in this Court. Therefore, the State—as the appellant—has failed to meet its burden of establishing appellate jurisdiction over this interlocutory appeal.

Nevertheless, under N.C. Gen. Stat. § 7A-32(c), "[t]he Court of Appeals has jurisdiction . . . to issue the prerogative writs, including . . . certiorari . . . in aid of its own jurisdiction[.]" N.C. Gen. Stat. § 7A-32(c) (2021). The decision to issue a writ is governed by statute and by common law. *See State v. Killette*, 381 N.C. 686, 691, 873 S.E.2d 317, 320 (2022). "Our precedent establishes a two-factor test to assess whether certiorari review by an appellate court is appropriate. First, a writ of certiorari should issue only if the petitioner can show 'merit or that error was probably committed below.' " *Cryan v. Nat'l Council of YMCA of the United States*, 384 N.C. 569, 572, 887 S.E.2d 848, 851 (2023). Second, a writ of certiorari should only issue if there are extraordinary circumstances to justify it. *Moore v. Moody*, 304 N.C. 719, 720, 285 S.E.2d 811, 812 (1982). "There is no fixed list of 'extraordinary circumstances' that warrant certiorari review, but this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty at stake.' " *Cryan*, 384 N.C. at 573, 887 S.E.2d at 851 (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 23, 848 S.E.2d 1, 11 (2020)).

Here, despite its defects, we conclude the State's appeal raises sufficient merit to consider issuance of the writ of certiorari. Moreover, given the posture of the case, judicial economy and efficient use of judicial resources weighs in favor of exercising our discretion to issue the writ of certiorari pursuant to N.C. Gen. Stat. § 7A-32(c). However, given the substantial and gross violations of the Rules of Appellate Procedure, we tax the costs of this appeal to the State as a sanction pursuant to N.C. R. App. P. 34(b)(2)(a).

Issue

[2] The sole issue on appeal is whether the trial court erred in granting Defendant's Motion to Suppress on the basis the Officer did not have probable cause to conduct a warrantless search under the totality of the circumstances, notwithstanding the Officer detecting the odor of marijuana.

Analysis

In reviewing a trial court's determination on a motion to suppress, the trial court's findings of fact "are conclusive on appeal if supported by competent evidence[.]" *State v. O'Connor*, 222 N.C. App. 235, 238, 730 S.E.2d 248, 251 (2012) (citation and quotation marks omitted). "A trial court's conclusions of law on a motion to suppress are reviewed *de novo* and are subject to a full review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. Ashworth*, 248 N.C. App. 649, 658, 790 S.E.2d 173, 179-80 (2016).

Generally, a warrant is required for every search and seizure. *State v. Trull*, 153 N.C. App. 630, 638, 571 S.E.2d 592, 598 (2002) (citation omitted). However, "[i]t is a well-established rule that a search warrant is not required before a lawful search based on probable cause of a motor vehicle . . . in a public vehicular area may take place." *State v. Downing*, 169 N.C. App. 790, 795, 613 S.E.2d 35, 39 (2005) (citations omitted). Thus, "[a]n officer may search an automobile without a warrant if he has probable cause to believe the vehicle contains contraband." *State v. Poczontek*, 90 N.C. App. 455, 457, 368 S.E.2d 659, 660-61 (1988) (citation omitted). "A court determines whether probable cause exists under the Fourth Amendment of the U.S. Constitution and Article I, Section 20, of the Constitution of North Carolina with a totality-of-the-circumstances test." *State v. Caddell*, 267 N.C. App. 426, 433, 833 S.E.2d 400, 406 (2019).

"If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *State v. Mitchell*, 224 N.C. App. 171, 175, 735 S.E.2d 438, 441 (2012) (citation and quotation marks omitted). "An officer has probable cause to believe that contraband is concealed within a vehicle when given all the circumstances known to him, he believes there is a 'fair probability that contraband or evidence of a crime will be found' therein." *State v. Ford*, 70 N.C. App. 244, 247, 318 S.E.2d 914, 916 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332 (1983)).

This Court and our state Supreme Court have repeatedly held that the odor of marijuana alone provides probable cause to search the object or area that is the source of that odor. *See, e.g.*, *State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981); *State v. Smith*, 192 N.C. App. 690, 694, 666 S.E.2d 191, 194 (2008); *State v. Armstrong*, 236 N.C. App. 130, 133, 762 S.E.2d 641, 644 (2014).

Here, however, the trial court relied on our Court's decision in *State v. Parker* to apply what it described as an "odor plus" standard in which while—as the trial court articulated—the odor of marijuana was a factor to consider, additional circumstances were required to establish probable cause. In *Parker*, this Court noted: "The legal issues raised by the recent legalization of hemp have yet to be analyzed by the appellate courts of this state." *Parker*, 277 N.C. App. at 541, 860 S.E.2d at 29. This Court went on, however, to determine "in the case before us today we need not determine whether the scent or visual identification of marijuana alone remains sufficient to grant an officer probable cause to search a vehicle." *Id.* This was so because we determined there were additional circumstances that supported probable cause for a warrantless search in that case beyond the odor of marijuana. *Id.*

As in *Parker*, Defendant here also relied on a memorandum published by the State Bureau of Investigation (SBI). The SBI memo explains that industrial hemp is a variety of the same species of plant as marijuana, but it contains lower levels of tetrahydrocannabinol (THC), which is the psychoactive chemical in marijuana. According to the SBI memo, the legalization of hemp poses significant issues for law enforcement because "[t]here is no easy way for law enforcement to distinguish between industrial hemp and marijuana" and there is no way for law enforcement to quickly test and determine whether a substance is hemp or marijuana. Thus, Defendant contended—and the trial court agreed—the odor of marijuana in this case detected by the Officer did not itself give rise to probable cause to conduct the warrantless search—in particular—of the Crown Royal bag on Defendant's person.

In this case, however, as in *Parker*, the Officer had several reasons in addition to the odor of marijuana to support probable cause to search the vehicle and, consequently, the Crown Royal bag. As such, again, "we need not determine whether the scent or visual identification of marijuana alone remains sufficient to grant an officer probable cause to search a vehicle." *Id.*

First, as the trial court found, Defendant made "an acknowledgment, if not an admission" that marijuana had been smoked in the car

earlier. Defendant made no assertion at the time the odor derived from legalized hemp. *See id.* at 541-42, 860 S.E.2d at 29 (finding probable cause where a police officer smelled marijuana, the defendant admitted to smoking marijuana earlier, and the defendant produced a partially smoked marijuana cigarette from his person). Further, Defendant was driving a car with a fictitious tag, which the Officer had observed, and which prompted this stop. *Cf. State v. Murray*, 192 N.C. App. 684, 688-89, 666 S.E.2d 205, 208 (2008) (finding a police officer lacked reasonable suspicion to support a traffic stop where the vehicle was obeying all traffic laws, and a check of the license plate showed no irregularities). Additionally, Defendant was driving with an invalid license, which the Officer confirmed prior to the search. *See State v. Duncan*, 287 N.C. App. 467, 473-76, 883 S.E.2d 210, 214-16 (2023) (finding probable cause for a warrantless arrest where law enforcement learned from a license plate check that defendant's driver's license was medically cancelled).[2]

Additionally, the Officer had probable cause to search both the vehicle itself and the Crown Royal bag. "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle *and its contents* that may conceal the object of the search." *Mitchell*, 224 N.C. App. at 175, 735 S.E.2d at 441 (emphasis added); *see also Arizona v. Gant*, 556 U.S. 332, 347, 129 S. Ct. 1710, 1721 (2009) (holding probable cause to believe a vehicle contains evidence of criminal activity "authorizes a search of any area of the vehicle in which the evidence might be found." (citation omitted)). This Court in *Armstrong* upheld the search of a vehicle's glove compartment even after defendants were handcuffed and secured in a police patrol vehicle, which resulted in the discovery of cocaine. 236 N.C. App. at 133, 762 S.E.2d at 644. There, this Court found that the officers involved had probable cause to search the vehicle based on the odor of marijuana emanating from it. *Id.* at 132-33, 762 S.E.2d at 643-44. The present case is analogous.

As discussed *supra*, the Officer had probable cause to search the vehicle based on the odor of marijuana and additional suspicious circumstances. On that basis, the Officer had probable cause to search the vehicle "and its contents" for evidence. *Mitchell*, 224 N.C. App. at 175,

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2. There was also testimony—although disputed—Defendant appeared nervous to the Officer because his hands were "shaking" and he was "fumbling through some paperwork" when the Officer approached the vehicle. *See State v. Corpening*, 109 N.C. App. 586, 589-90, 427 S.E.2d 892, 895 (1993) (noting that a defendant's nervous behavior supported probable cause to search his vehicle). In rendering its Order, the trial court did not address this evidence. This underscores the utility of a written order in these circumstances including specific findings of fact and conclusions of law when allowing a motion to suppress.

735 S.E.2d at 441. The Crown Royal bag, as one of the contents of the vehicle, was thus subject to the Officer's search. The fact that Defendant attempted to remove the Crown Royal bag is immaterial because the bag was in the car at the time of the stop. *See State v. Massenburg*, 66 N.C. App. 127, 130, 310 S.E.2d 619, 622 (1984) ("The scope of the search is not defined by the nature of the container in which the contraband is secreted but is defined by the object of the search and the places in which there is probable cause to believe it may be found."). Here, the object of the Officer's search was evidence of marijuana, which it was reasonable to believe could have been in the Crown Royal bag. Therefore, because the Officer had probable cause to search the vehicle, he also had probable cause to search the Crown Royal bag.

Thus, the Officer was aware of several suspicious circumstances—including the odor of marijuana—at the time of the search. Therefore, under the totality of the circumstances, the Officer had probable cause to search the Crown Royal bag. Consequently, the trial court erred in granting Defendant's Motion to Suppress the evidence that resulted from the search.

Conclusion

Accordingly, for the foregoing reasons, the trial court's grant of Defendant's Motion to Suppress is reversed, and this case is remanded for additional proceedings. Additionally, due to the substantial violations of the Rules of Appellate Procedure, the costs of this appeal are taxed to the State.

REVERSED AND REMANDED.

Judge GRIFFIN concurs.

Judge MURPHY concurs in part and dissents in part by separate opinion.

MURPHY, Judge, dissenting in part.

While I agree with the Majority's analysis that we lack jurisdiction over this appeal, I dissent from its decision to nevertheless exercise jurisdiction in this case. Although Judge Carpenter's reasoning below was provided by our Court in a recent unpublished opinion, I believe that this case, in which the State has not even sought the issuance of a writ of certiorari, fits squarely within his analysis:

> "We require extraordinary circumstances because a writ of certiorari 'is not intended as a substitute for a notice of appeal.' " [*Cryan v. Nat'l Council of YMCAs of the U.S.*, 384 N.C. 569, 573 (2023) (quoting *State v. Ricks*, 378 N.C. 737, 741 (2021))]. "If courts issued writs of certiorari solely on the showing of some error below, it would 'render meaningless the rules governing the time and manner of noticing appeals.' " *Id.* at 573 (quoting *Ricks*, 378 N.C. at 741). An extraordinary circumstance "generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty at stake.' " *Id.* at 573 (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 23 (2020)).
>
> Here, Defendant argues the trial court erred, but Defendant fails to explain why this case involves an extraordinary circumstance sufficient to excuse his failure to preserve his right to appeal. Notably, Defendant fails to mention the word "extraordinary" in his PWC. Defendant merely concludes that the "interests of justice thus require" us to grant a writ of certiorari. Defendant's argument falls far short of our extraordinary-circumstance standard, and further, our review of the record reveals no extraordinary circumstances. *See id.* at 573. Therefore, we deny Defendant's PWC and dismiss his appeal for lack of jurisdiction. *See* [*State v. Reynolds*, 298 N.C. 380, 397 (1979)].

State v. Duncan, No. COA22-906, 2023 WL 8742997, at *1–2 (N.C. Ct. App. Dec. 19, 2023) (unpublished) (parallel citations omitted). The State has not argued, and the record does not reveal, anything extraordinary regarding the State's negligence in invoking our jurisdiction. I decline this opportunity to do to the State's job for it and would dismiss its appeal.[1]

1. I would further note that, unlike in *Lakins v. W. N.C. Conf. of United Methodist Church*, the Majority's result does not provide this Court with an opportunity to reach the ultimate undecided issue regarding probable cause and the odor of marijuana. *See Lakins v. W. N.C. Conf. of United Methodist Church*, 283 N.C. App. 385, 390-91 (2022).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 JANUARY 2024)

HORSEY v. GOODYEAR TIRE & RUBBER CO. No. 23-107	N.C. Industrial Commission (14-009286)	Affirmed
IN RE EST. OF BLUE No. 23-505	Moore (21E160)	Affirmed
IN RE P.C. No. 23-253	Randolph (21JA118) (21JA119) (21JA120) (21JA121) (21JA122)	Affirmed
IN RE Z.M. No. 23-45	Alleghany (22JA11) (22JA12) (22JA13)	Affirmed
JONNA v. YARAMADA No. 22-954	Wake (15CVD16510)	Vacated and Remanded for Additional Findings of Fact.
MAXISIQ, LLC v. HOWARD No. 23-478	Mecklenburg (22CVS2113)	Affirmed
MILFORD v. MILFORD No. 23-379	Mecklenburg (19CVD23744)	Affirmed
MUNN v. N.C. DEP'T OF PUB. SAFETY No. 23-299	N.C. Industrial Commission (TA-28363)	Affirmed
NLEND v. NLEND No. 23-516	Mecklenburg (22CVD6955)	Dismissed In Part; Affirmed In Part.
PEELE v. PEELE No. 23-614	Beaufort (22CVD123)	Dismissed
PEREZ v. PEREZ No. 23-371	Forsyth (22CVD948)	Affirmed.
STATE v. GILL No. 23-381	Craven (17CRS50459) (17CRS50507) (17CRS51161)	No Error in part; Vacated and Remanded in part.

STATE v. GLENN No. 23-201	Rowan (19CRS52075)	Dismissed
STATE v. HALL No. 23-320	Wake (20CRS201267)	No Error.
STATE v. HOLLIS No. 22-817	Martin (18CRS50600) (18CRS50691)	No Error
STATE v. STEELE No. 23-425	Iredell (20CRS1501) (20CRS52949-51) (20CRS52968)	No Error.
STATE v. WILLOUGHBY No. 23-3	Pender (20CRS50730)	No Error.

HANSON v. CHARLOTTE-MECKLENBURG BD. OF EDUC.

[292 N.C. App. 221 (2024)]

RICHARD C. HANSON, FRED ALLEN, RICHARD BURGESS, VERNON L. CATHCART, ANGIE CATHCART, CHRISTOPHER L. DAVIS, JAMES J. FLOWERS, KENNETH C. LYNCH, LARRY F. MATKINS, THOMAS RODDEY, DARYL STURDIVANT, ALVESTER W. TUCKER AND CARLOS VALENTIN, PLAINTIFFS
v.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, DEFENDANT

No. COA22-1044

Filed 6 February 2024

1. Public Officers and Employees—campus police officers—Supplemental Retirement Income Plan—eligibility—county board of education—definition of "employer"

In a declaratory judgment action to determine whether plaintiffs—all current or former law enforcement officers employed by a county board of education (defendant) as campus police officers—were eligible for certain retirement contributions and benefits under the Supplemental Retirement Income Plan (Plan) for Local Government Law-Enforcement Officers, the portion of the trial court's order declaring that defendant was not required to pay plaintiffs the 5% contribution to the Plan was reversed. Contrary to the trial court's conclusions, since defendant is a political subdivision of the State, it met the definition of "employer" provided in N.C.G.S. § 143-166.50(a)(2). Further, the plain language of N.C.G.S. § 143-166.50(e) did not restrict eligibility for the supplemental benefits to only members of the Local Government Employees' Retirement System. Therefore, plaintiffs met the statutory criteria of being law enforcement officers employed by a local government employer and were thus participating members in the Plan.

2. Public Officers and Employees—campus police officer—Special Separation Allowance—eligibility—membership of participating retirement plan required

In a declaratory judgment action to determine whether plaintiff, a law enforcement officer hired by a county board of education (defendant) as a campus police officer, was eligible to receive a Special Separation Allowance upon retiring from his position, the trial court properly concluded that plaintiff was not entitled to the allowance, which by statute was expressly premised on membership in, and retirement from, the Local Government Employees' Retirement System. The record reflected that plaintiff retired under the Teachers' and State Employees' Retirement System instead.

Appeal by Plaintiffs from Order entered 30 June 2022 by Judge Casey Viser in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 August 2023.

Tin Fulton Walker & Owen, P.L.L.C., by John W. Gresham, for Plaintiffs-Appellants.

Wallace Law Firm PLLC, by Terry L. Wallace, for Defendant-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Richard C. Hanson, Fred Allen, Richard Burgess, Vernon L. Cathcart (Cathcart), Angi Cathcart, Christopher L. Davis, James J. Flowers, Kenneth C. Lynch, Larry F. Matkins, Thomas Roddey, Alvester W. Tucker, and Carlos Valentin (collectively, Plaintiffs) appeal from an Order on Complaint for Declaratory Judgment (Declaratory Judgment).[1] The Declaratory Judgment declared: (1) Plaintiffs ineligible for contributions by Charlotte-Mecklenburg Board of Education (Defendant) under the Supplemental Retirement Income Plan for Local Government Law-Enforcement Officers pursuant to N.C. Gen. Stat. § 143-166.50; and (2) Cathcart ineligible for the Special Separation Allowance for law-enforcement officers employed by local government employers under N.C. Gen. Stat. § 143-166.42. The Record before us—including facts stipulated to by the parties—reflects the following:

On 10 June 2009, the North Carolina General Assembly enacted a Local Act entitled "AN ACT TO ALLOW THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION TO MAINTAIN A CAMPUS POLICE AGENCY." 2009 N.C. Sess. Law 73. This Local Act, applicable only to Defendant, amended Chapter 115C by adding section 147.1. 2009 N.C. Sess. Law 73, § 2. This Act—applicable only to Defendant—provides:

> A local board of education may establish a campus law enforcement agency and employ campus police officers. These officers shall meet the requirements of Chapter 17C of the General Statutes, shall take the oath of office prescribed by Article VI, Section 7 of the Constitution,

1. Plaintiff Daryl Sturdivant filed a Voluntary Dismissal without Prejudice on 2 June 2021.

> and shall have all the powers of law enforcement officers generally.

Id.[2]

Under the authorization provided by Section 115C-147.1, Defendant established a campus law-enforcement agency staffed by campus police officers. Plaintiffs all are or were sworn law-enforcement officers who are or were employed by Defendant as campus police officers. In particular, Cathcart retired from employment with Defendant on 30 September 2016.

On 21 May 2019, Plaintiffs filed a Complaint in Mecklenburg County Superior Court. The Complaint alleged that Plaintiffs, as sworn law-enforcement officers employed or retired from employment by Defendant, were entitled to certain retirement contributions and benefits for law-enforcement officers employed by local government employers. Specifically, the Complaint alleged Defendant was required to contribute amounts equal to 5% of the Plaintiffs' monthly compensation to the Supplemental Retirement Income Plan provided for by N.C. Gen. Stat. § 143-166.50(e) and, separately, that Cathcart—a retired officer—was entitled to a Special Separation Allowance provided for by N.C. Gen. Stat. § 143-166.42. The Complaint sought declaratory relief that Plaintiffs were entitled to these benefits and Defendant was required to pay the amounts due. The Complaint further sought a declaration Defendant was required to pay these benefits going forward.

Defendant filed an Answer to the Complaint on 15 November 2019. The Answer alleged Plaintiffs do not meet the statutory criteria to receive the additional benefits. The Answer also included an affirmative defense Plaintiffs' claims were otherwise barred by any applicable statute of limitations.

The trial court heard the matter on 11 June 2021. The parties submitted three questions for determination by the trial court based on a series of stipulated facts:

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2. Frustratingly, the text of this Local Act appears nowhere in the Record and neither party includes the text of this Act in their briefing or as an Appendix to the parties' briefing. While we acknowledge the Local Act is not the statute requiring interpretation in this case, it quite obviously provides crucial context. We take this opportunity to urge compliance with N.C. R. App. P. 28(d)(1)(c) requiring an appellant to reproduce as an appendix to its brief: "relevant portions of statutes, rules, or regulations, the study of which is required to determine issues presented in the brief[.]" N.C. R. App. P. 28(d)(1)(c). Indeed, it would have been helpful for the parties to append *any* of the relevant statutes to their briefing in this case.

> 1) Whether the Defendant is Required to Pay Plaintiff Vernon Cathcart a Special Separation Allowance Under N.C. Gen. Stat. § 143-166.42?
>
> 2) Whether Defendant is Required to Pay Plaintiffs a 5% contribution into the Supplemental Retirement Income Plan as Set Forth in N.C. Gen. Stat. § 143-166.50(e)?
>
> 3) Does the Statute of Limitations Apply to bar or limit Plaintiffs' claims?

The trial court entered its Order on Complaint for Declaratory Judgment on 30 June 2022. The trial court concluded, in relevant part, Defendant is not a "county, nor is it a city, or town or 'other political subdivision of the State.' " Based on this conclusion, the trial court reasoned Defendant was not an Employer as that term is defined in N.C. Gen. Stat. § 143-166.50. The trial court further concluded Plaintiffs were not members of the Local Government Employees' Retirement System (LGERS). The trial court also concluded its review of legislative history indicated "it was the intent of the legislature to specifically exclude law enforcement officers employed by a county board of education" from LGERS benefits.

Based on its conclusions, the trial court declared Defendant is not required to pay Cathcart the Special Separation Allowance or pay Plaintiffs the 5% contribution to the Supplemental Retirement Income Plan. Because of these rulings, the trial court determined Defendant's statute of limitations argument was moot. On 28 July 2022, Plaintiffs timely filed Notice of Appeal.

Issues

The dispositive issues on appeal are whether the trial court erred in declaring: (I) Plaintiffs are not eligible for the Supplemental Retirement Income Plan; and (II) Cathcart is not eligible for the Special Separation Allowance.

Analysis

" 'The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal.' " *Nelson v. Bennett*, 204 N.C. App. 467, 470, 694 S.E.2d 771, 774 (2010) (quoting *Cross v. Capital Transaction Grp., Inc.*, 191 N.C. App. 115, 117, 661 S.E.2d 778, 780 (2008)). " 'However, the trial court's conclusions of law are reviewable *de novo*.' " *Id.* Here,

because there are no factual disputes between the parties, the ultimate issues relate solely to the trial court's conclusions of law construing the applicable statutes. *See id.*

I. Supplemental Retirement Income Plan

[1] Plaintiffs contend the trial court erred in declaring they are not entitled to the Supplemental Retirement Income Plan under N.C. Gen. Stat. § 143-166.50(e). Defendant contends Plaintiffs are not entitled to this benefit because, consistent with the trial court's conclusions, it is not an employer as contemplated by the statute as Plaintiffs should not be deemed law-enforcement employees of "a county, city, town or other political subdivision of the State." Defendant further asserts Plaintiffs are not members of LGERS and, thus, are not eligible for the benefits thereunder.

"In resolving issues of statutory interpretation, we look first to the language of the statute itself." *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 685, 562 S.E.2d 82, 92 (2002). N.C. Gen. Stat. § 143-166.50(e) provides, in relevant part:

> (e) Supplemental Retirement Income Plan for Local Governmental Law-Enforcement Officers. – As of January 1, 1986, *all law-enforcement officers employed by a local government employer, are participating members of the Supplemental Retirement Income Plan as provided by Article 5 of Chapter 135 of the General Statutes.* In addition to the contributions transferred from the Law-Enforcement Officers' Retirement System, participants may make voluntary contributions to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participants. From July 1, 1987, until July 1, 1988, local government employers of law enforcement officers shall contribute an amount equal to at least two percent (2%) of participating local officers' monthly compensation to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participating local officers; and *on and after July 1, 1988, local government employers of law enforcement officers shall contribute an amount equal to five percent (5%) of participating local officers' monthly compensation to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participating local officers.*

N.C. Gen. Stat. § 143-166.50(e) (2021) (emphasis added). The definitional sub-section of Section 143-166.50 defines employer: " 'Employer' means a county, city, town or other political subdivision of the State." N.C. Gen. Stat. § 143-166.50(a)(2) (2021). Relevant to this case, " 'Law-enforcement officer' means a full-time paid employee of an employer, who possesses the power of arrest, who has taken the law enforcement oath administered under the authority of the State as prescribed by G.S. 11-11, and who is certified as a law enforcement officer under the provisions of Article 1 of Chapter 17C of the General Statutes or certified as a deputy sheriff under the provisions of Chapter 17E of the General Statutes." N.C. Gen. Stat. § 143-166.50(a)(3).[3]

A. Political Subdivision

Under the North Carolina Constitution, the General Assembly is required to provide for a general and uniform system of public schools. N.C. Const. art. IX, § 2. The General Assembly has sought to meet this constitutional obligation to provide a general and uniform system of schools through enactment of Chapter 115C of the General Statutes. *See* N.C. Gen. Stat. § 115C-1 (2021) (General and Uniform System of Schools). As part of this system, the General Assembly has constituted elected county boards of education. N.C. Gen. Stat. § 115C-35. County boards of education are bodies corporate and "subject to any paramount powers vested by law in the State Board of Education or any other authorized agency shall have general control and supervision of all matters pertaining to the public schools in their respective local school administrative units; they shall execute the school laws in their units . . . ." N.C. Gen. Stat. § 115C-40. Under Section 115C-5, a local school administrative unit is defined as "a subdivision of the public school system which is governed by a local board of education." N.C. Gen. Stat. § 115C-5(6) (2021). By way of illustration, Black's Law Dictionary defines "Political Subdivision" as "[a] division of a state that exists primarily to discharge some function of local government." *Black's Law Dictionary* (11th ed. 2019).

Indeed, our Courts have historically recognized local Boards of Education to be political subdivisions of the State. In 1948, our Supreme Court observed: "The Board of Trustees of the Kinston Graded Schools is a body politic and corporate charged with the public duty of providing

3. Defendant does not contest that Plaintiffs are or were sworn law-enforcement officers. The argument centers solely on whether Defendant itself should be deemed a local government employer for purposes of application of the retirement benefit statutes at issue.

an adequate public school system for children residing in the Kinston Graded School District, *a political subdivision of the State*." *Boney v. Bd. of Trs. of Kinston Graded Schs.*, 229 N.C. 136, 137, 48 S.E.2d 56, 57 (1948) (emphasis added).[4] Later, in 1979, the Supreme Court observed a plaintiff employed by the Surry County Board of Education "was employed by a political subdivision of the state[.]" *Presnell v. Pell*, 298 N.C. 715, 724, 260 S.E.2d 611, 616 (1979). In *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, this Court determined the Rowan County Board of Education was a political subdivision of the State engaged in "a governmental function exercised in pursuit of a sovereign purpose for the public good on behalf of the State." 87 N.C. App. 106, 115, 359 S.E.2d 814, 819 (1987) (citations omitted). More recently, this Court has expressly held: "the [local boards of education], like the counties themselves, are mere subdivisions of the State." *Silver v. Halifax Cnty. Bd. of Comm'rs*, 255 N.C. App. 559, 584, 805 S.E.2d 320, 337 (2017), *aff'd*, 371 N.C. 855, 821 S.E.2d 755 (2018); *see also Moore v. Bd. of Educ. of Iredell Cnty.*, 212 N.C. 499, 502, 193 S.E. 732, 733-34 (1937) ("It is in the exercise of such power that the Legislature alone can create, directly or indirectly, counties, townships, *school districts*, road districts, and *the like subdivisions*, and invest them, and agencies in them, with powers corporate or otherwise in their nature, to effectuate the purposes of the government, whether these be local or general, or both." (emphasis added)); *Branch v. Bd. of Educ. of Robeson Cnty.*, 233 N.C. 623, 626, 65 S.E.2d 124, 126 (1951) (Plaintiffs could not bring a suit on behalf of school administrative units as taxpayers on behalf of a public agency or political subdivision); *Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ.*, 236 N.C. App. 207, 215, 763 S.E.2d 288, 295 (2014) ("Local school boards and local school administrative units are local governmental units, and, as such, are not 'agencies' for the purpose of the [Administrative Procedure Act].").

Thus, Defendant—a county board of education—is a political subdivision of the State. Therefore, Defendant falls under the definition of employer provided in N.C. Gen. Stat. § 143-166.50(a)(2). Consequently, the trial court erred in concluding Plaintiffs were not law-enforcement officers employed by a local government employer under N.C. Gen. Stat. § 143-166.50(e).

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4. Obviously, this case was decided prior to the adoption of the 1969 State Constitution or the enactment of Chapter 115C of the General Statutes.

B. Membership in LGERS

Defendant further contends, however, that Plaintiffs are nevertheless not eligible for the Supplemental Retirement Income Plan because they are members of the Teachers' and State Employees' Retirement Plan (TSERS) and not LGERS. Specifically, Defendant points to N.C. Gen. Stat. § 143-166.50(b) which provides:

> (b) Basic Retirement System. – On or after January 1, 1986, law-enforcement officers employed by an employer shall be members of the Local Government Employees' Retirement System, and beneficiaries who were last employed as officers by an employer, or who are surviving beneficiaries of officers last employed by an employer, are beneficiaries of the Local Governmental Employees' Retirement System and paid in benefit amounts then in effect. All members of the Law-Enforcement Officers' Retirement System last employed and paid by an employer are members of the Local Retirement System.

N.C. Gen. Stat. § 143-166.50(b) (2021). Defendant argues this provision means only law-enforcement members of LGERS are eligible for the supplemental benefits provided under subsection (e). Plaintiffs, however, make no argument that they are entitled to the basic benefits provided by LGERS under subsection (b). That broader question of whether Plaintiffs are properly enrolled in TSERS rather than LGERS is simply not before us in this case.

Further, the plain language of subsection (e) contains no language limiting the supplemental benefits to only LGERS members. To the contrary, its plain language unequivocally provides: "As of January 1, 1986, all law-enforcement officers employed by a local government employer, are participating members of the Supplemental Retirement Income Plan as provided by Article 5 of Chapter 135 of the General Statutes." N.C. Gen. Stat. § 143-166.50(e). As such, Plaintiffs—law-enforcement officers—employed by Defendant—a local government employer—are participating members in the Supplemental Retirement Income Plan provided for by Article 5 of Chapter 135 of the General Statutes.

Thus, the trial court erred in concluding Plaintiffs are not employees of an employer under Section 143-166.50(e) or eligible for supplemental benefits as non-members of LGERS. Therefore, Plaintiffs are eligible for the Supplemental Retirement Income Plan provided for under Section 143-166.50(e), and Defendant is required to pay the 5% contribution under the statute. Consequently, we reverse the portion of the trial

court's Order declaring Defendant is not required to pay Plaintiffs the 5% contribution to the Supplemental Retirement Income Plan.

II. Special Separation Allowance

[2] Plaintiffs further contend the trial court erred by declaring Cathcart ineligible to receive the Special Separation Allowance provided for under N.C. Gen. Stat. § 143-166.42. Section 143-166.42 provides in relevant part:

> (a) On and after January 1, 1987, every sworn law enforcement officer as defined by G.S. 128-21(11d) or G.S. 143-166.50(a)(3) employed by a local government employer who qualifies under this section shall receive, beginning in the month in which the officer retires on a basic service retirement under the provisions of G.S. 128-27(a), an annual separation allowance equal to eighty-five hundredths percent (0.85%) of the annual equivalent of the base rate of compensation most recently applicable to the officer for each year of creditable service.

N.C. Gen. Stat. § 143-166.42(a) (2021).

Defendant again contends Cathcart was not employed by a local government employer. Section 143-166.42(a) provides two separate definitions of law-enforcement officer through N.C. Gen. Stat. § 128-21(11d) or N.C. Gen. Stat. § 143-166.50(a)(3). *Id.* As discussed above Plaintiffs—including Cathcart—meet the definition of a law-enforcement officer under Section 143-166.50(a)(3). Therefore, Defendant's argument on this point fails.

However, Section 143-166.42 contains an additional requirement that the Special Separation Allowance is payable "beginning in the month in which the officer retires on a basic service retirement under the provisions of G.S. 128-27(a)[.]" *Id.* Section 128-27(a) governs the service retirement benefits under LGERS.[5] *See* N.C. Gen. Stat. § 128-27(a) (2021). Here, unlike the Supplemental Retirement Income Plan, the Special Separation Allowance is expressly premised on membership in—and upon retirement from—LGERS.

Here, there is nothing in the Record to indicate Cathcart retired under the provisions of Section 128-27(a). The parties stipulated to the fact Cathcart, instead, retired under TSERS. *See* N.C. Gen. Stat. § 135-1,

5. Article 3 of Chapter 128 is entitled: "Retirement System for Counties, Cities, and Towns."

et seq. In briefing to this Court, Plaintiffs fail to even address this additional requirement under Section 143-166.42.

Thus, on the Record before us, Cathcart did not retire under the provisions of LGERS. Therefore, we are compelled to agree with the trial court Cathcart is not entitled to the Special Separation Allowance provided for under Section 143-166.42. Consequently, we affirm the portion of the trial court's Order declaring Defendant is not required to pay Cathcart the Special Separation Allowance. In so concluding, we do note the definition of employer under LGERS provides a mechanism for its scope to be expanded to other political subdivisions of the State beyond those enumerated in the statute. Section 128-21(11) defines employer as meaning:

> any county, incorporated city or town, the board of alcoholic control of any county or incorporated city or town, the North Carolina League of Municipalities, and the State Association of County Commissioners. *"Employer" shall also mean any separate, juristic political subdivision of the State as may be approved by the Board of Trustees upon the advice of the Attorney General.*

N.C. Gen. Stat. § 128-21(11) (2021) (emphasis added).

Conclusion

Accordingly, for the foregoing reasons, we reverse that portion of the trial court's Order which declared Plaintiffs ineligible for the Supplemental Retirement Income Plan contribution. We affirm the portion of the trial court's Order declaring Cathcart is not entitled to the Special Separation Allowance. We remand this case to the trial court for implementation of our decision and to address any remaining issues raised by the pleadings—including whether Plaintiffs' claims are barred in whole or in part by any applicable statute of limitations.[6]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges MURPHY and WOOD concur.

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6. Based on our resolution of this matter on statutory grounds, we do not reach the remaining issue raised on appeal by Plaintiffs related to the exclusion of a letter from the Assistant General Counsel to the Retirement Systems Division. On remand, if relevant or necessary, the trial court may in its discretion revisit its ruling on that matter.

IN RE K.C.

[292 N.C. App. 231 (2024)]

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

No. COA23-612

Filed 6 February 2024

1. Appeal and Error—petition for writ of certiorari—review of void orders—meritorious argument—extraordinary circumstances

In a child neglect matter, the appellate court granted respondent parents' petition for writ of certiorari to review the trial court's orders of adjudication and disposition, which the trial court entered after it granted the department of social services' motion under Civil Procedure Rules 59 and 60 to reconsider the trial court's order dismissing the juvenile petition for lack of proof. Since the orders appealed from were void, respondents' notice of appeal was ineffective; however, certiorari was appropriate because respondents raised a meritorious claim on appeal and made a showing of extraordinary circumstances based on the substantial harm that would result from separating the children from their parents.

2. Child Abuse, Dependency, and Neglect—juvenile petitions dismissed—Rule 59 and 60 motion improperly granted—lack of subject matter jurisdiction

In a child neglect matter, once the trial court dismissed the juvenile petition filed by the department of social services (DSS) for failure to prove the allegations by clear, cogent, and convincing evidence, the trial court was thereafter divested of subject matter jurisdiction to enter any further orders in the matter, including on DSS's motion pursuant to Civil Procedure Rules 59 and 60 seeking to have the trial court reconsider the dismissal. Pursuant to N.C.G.S. §§ 7B-201 and 7B-807, the trial court's jurisdiction was terminated when it dismissed the petition; therefore, DSS's motion to reconsider was an improper method to seek review of the trial court's dismissal order, and granting that motion did not revive the trial court's jurisdiction.

Appeal by Respondents from orders entered 21 December 2022, 30 January 2023, and 4 April 2023 by Judges Hal G. Harrison and Matthew Rupp in Watauga County District Court. Heard in the Court of Appeals 9 January 2024.

Fox Rothschild LLP, by Brian C. Bernhardt, for Guardian ad Litem; and Di Santi Capua & Garrett PLLC, by Chelsea B.

Garrett, for Watauga County Department of Social Services, Petitioner-appellee.

Jeffrey L. Miller, for Respondent-Father-appellant.

Assistant Parent Defender Jacky L. Brammer and Parent Defender Wendy C. Sotolongo, for Respondent-Mother-appellant.

WOOD, Judge.

I. Factual and Procedural History

Father and Mother (together, "Respondents") were unmarried partners living together as a family unit along with their children, Kylie and Martin.[1] Father is the biological father of Martin and stepparent of Kylie. On 24 August 2022, Watauga County Department of Social Services ("DSS") filed juvenile petitions alleging that Kylie and Martin[2] were neglected juveniles within the meaning of N.C. Gen. Stat. § 7B-101(15)(e). The petitions were based on a report from a third party of possible domestic violence, improper discipline, and substance use in the home. Kylie was seven years old, and Martin was two years old at the time juvenile petitions were filed. Upon the filing of the petitions, the trial court entered orders for nonsecure custody as to both children, and DSS removed the children from their home and placed them in foster care.

On 31 August 2022, Selena Moretz ("Moretz"), the director of the Children's Advocacy Center of the Blue Ridge, conducted a forensic interview with Kylie, which was videotaped. During the interview, Kylie and Moretz had the following exchanges:

> [KYLIE]: [S]ometimes [Father] hits my mom. . . . And then she has a black eye. . . . [T]he reason I know—I know how my mommy gets hit by him is because I wake up and I hear her screaming. . . . I heard a, no, like a loud no. And then it just went quiet. . . . And then I heard my mommy come into the bathroom. But then I started to close my eyes so she thought I was sleeping, she went into the bathroom and shut the doors hard. . . . And the morning I saw a black eye

1. Pseudonyms are used to protect the identity of the juveniles pursuant to N.C. R. App. P. 42(b).

2. The original juvenile petition named Martin as an "Unknown male child," but amended juvenile petitions were filed on 29 August 2022 and 28 September 2022 adding Martin's name and identifying Father as his biological father.

on her. . . . So she just said I fell and landed on something. . . . [B]ut then we knowed it wasn't that. . . . [I]t's been more than once.

. . .

I have seen it with my eyes. . . . [S]o when I was younger when I was at Valle Crucis School . . . she woke me up and she had a bruise under her eye and the top of her eye.

. . .

MORETZ: Uh-huh. But whenever you say that you see him hit your mom; tell me about where you're at when you see that.

[KYLIE]: So I am usually on the couch. . . . But, like, I can hear her. . . . I can hear her scream no. . . . But when I said I seen him hit her is . . . I was watching TV and then my mommy looked on his phone and he had—he had another girlfriend that my mommy knowed about it and he dumped her. But then he was texting her and said, I love you, good night. . . . So then she flipped out and then [Father] got mad. And then—and then he hit her. And then they went into the—she wanted me to go into the bathroom some place where he wouldn't hurt us. So we—so she took me and [Martin] in the bathroom and there was blood.

. . .

MORETZ: Tell me about where the blood was at.

[KYLIE]: It was on the curtains and on the ground, it was on the bathtub a little bit. It was on the sink, like she was crying. . . . We stayed there for a couple of more minutes until it was quiet. Then we went out. . . . [Mother] told us to just go to bed. And then nothing—and it's going to be okay.

. . .

MORETZ: Has there ever been a time that you've been scared or worried about what [Father] is doing or saying?

[KYLIE]: Yeah. I am scared that one day [Father] is going to hit me.

Kylie further told Moretz that Father is "very mean to [Martin.] If he cries when he's going to sleep, he will spank him. . . . [H]e won't say what do you want. He would just spank him sometimes." Finally, Kylie stated

there was a time when Mother made breakfast and left for work, planning to bring dinner home that night, and Father did not allow Kylie or Martin to eat the whole day, except for one snack.

The adjudication hearing was held 25 October 2022. DSS presented two witnesses: Ashley Hartley ("Hartley"), the social worker who filed the juvenile petitions and initially brought law enforcement with her to Respondents' home, and Moretz. As its final evidence, DSS entered the videotape of the forensic interview into evidence and played it for the court. The entire interview is approximately one hour. Father testified in opposition to DSS's case; Mother did not testify. Father testified he "heard Kylie's remarks in the video." Father was asked about Kylie's remarks that Mother "was hit and was screaming," and he testified that he did not know what Kylie was talking about. Father was asked if he ever observed Mother with a black eye, and he testified that there was one time Mother had a black eye after she fell down the stairs and another time when she had a pimple near her eye that became swollen, turned black, and had to be lanced. Father testified that he was not responsible for giving Mother a black eye. Father was also asked about Kylie's allegation of domestic violence at the time she attended Valle Crucis School, to which he testified, "that was at the beginning of our relationship where we was barely living together," and that it must have occurred before he entered into the current living arrangement he had with Mother. Regarding Kylie's allegations of seeing blood after an incident between Father and Mother and hearing Mother cry, Father testified he could not remember any incidents involving blood although he has seen Mother cry on numerous occasions. In response to Kylie's allegation of the day Father did not let her or Martin eat during the day except for one snack, Father testified that the children had been snacking too much and not eating their regular food. That morning, Mother made a big breakfast before she left for work and was going to return at approximately 5:00 p.m. to make dinner. Father testified that he was firm that day that the children would only be allowed one snack between breakfast and dinner.

At the close of all evidence, counsel made closing arguments. Counsel for Mother argued:

> We've had nothing but this video of the seven-year-old and her interpretation of what she may or may not have seen. . . . [W]ithout any other evidence and no substantiation of any DV other than what was perceived by a seven-year-old, again, we would just have to leave that in the Court's discretion.

Counsel for Father argued, "I believe[ ] that all we really have in this situation is an interview where a child has made accusations about things, but we're no further along in proving that than when we started here today. None of this has been substantiated." Counsel for DSS argued:

> We've heard that there has been yelling. There was blood in the kitchen. . . . And so neither parent has offered an explanation for that incident. And with all due respect, it comes down simply to credibility. . . . [W]e have a stepfather that said that [Mother] fell down the stairs and got a black eye, which is one of the most clichéd things ever heard about a reason for someone to get a black eye; and then another black eye was because of a stye.

Following all of the evidence and arguments of counsel, the trial court found DSS had failed to produce clear, cogent, and convincing evidence that the children were neglected. The trial court stated:

> The case of the Department is based solely upon the video. The court finds that [Kylie] . . . is a delightful young lady, very articulate; and I believe—probably believed what she was saying, but I also believe that the Department could have, at a minimum, obtained the medical records relative to the mom's black eye. I never saw that.
>
> I believe that the Department at a minimum could have got a criminal history for [Father]. While I have no reason to question his character, but he may—that may be his criminal record and it may not. There may have been other things that would have shown more light on this circumstance.
>
> Maybe if the burden of proof was by the greater weight you might have it. I cannot find and nor can I adjudicate in this matter without clear, cogent, and convincing evidence. And I don't believe that I've been furnished that and this petition is dismissed.

The trial court ordered the children to be reunited with Father and Mother. On 23 November 2022, the trial court filed its written order dismissing the juvenile petitions.

On 1 December 2022, DSS filed a motion pursuant to N.C. R. Civ. P. 59–60 (the "Rule 59/60 motion"). In the motion, DSS stated, in relevant part:

> 1. Pursuant to Rule 59, N.C.R.P., a new trial may be granted or this Court may amend its judgment based upon: insufficiency of the evidence to justify the verdict or that the verdict is contrary to law, or any other reason recognized as grounds therefor.
>
> 2. Alternatively, pursuant to Rule 60(b)(6), N.C.R.P., DSS requests relief of this Court's judgment dismissing its Petition if the Court agrees, after a review of the record and, specifically the forensic interview recording, that it has a justifiable reason to provide DSS the relief sought.

DSS requested that the trial court "reconsider its ruling in light of certain inconsistencies in between the evidence and the [trial court's] ruling." DSS further stated that it believed in good faith "that certain key evidence, that being a video of a forensic interview with one of the Juveniles, was difficult to hear when played in Court and could have contributed to why the Court ruled as it did." DSS included ten quotations of portions of the interview, along with the video time stamps showing the exact time the statements were made. DSS printed some of the quotations in bold typeface. Finally, DSS requested the trial court to "re-listen to the forensic interview in chambers, perhaps with headphones (or where it can be more clearly heard) or, *read a transcribed copy thereof*, *which is in the process of being completed*." (Emphasis added.)

The trial court held a hearing on DSS's Rule 59/60 motion on 16 December 2022. At the hearing, DSS stated that there were "anomalies" for DSS's counsel and for Hartley in that they "found that video somewhat difficult to hear." The trial court agreed, stating, "It was difficult to hear, plus the child was so energetic running around and talking at the same time. It did present an issue for me." DSS argued that the trial court was required to make determinations regarding the credibility of the witnesses due to the conflicting "testimony" between Kylie, as presented through the videotape, and Father. The trial court stated, "I will go ahead and tell everybody here right now, my ruling was based on the fact that I didn't know what that kid was saying." The trial court reiterated that "the child . . . . was constantly moving about, picking this up, running around, talking this quick. . . . I did not hear very much and I couldn't understand very much." Counsel for Father argued that everyone in the courtroom during the adjudication hearing seemed to be able to hear the videotape and that the trial court would have made it audible if anyone had claimed it was not audible. Ultimately, the trial court took the matter under advisement and told DSS, "I do want that transcript." Counsel for Respondents objected to the trial court's consideration of the transcript of the forensic interview.

On 17 December 2022, the trial court emailed counsel its ruling granting DSS's Rule 59/60 motion. The trial court reversed its earlier ruling and adjudicated the children neglected. The trial court stated that the videotape of the forensic interview played at the adjudication hearing had poor sound quality and was difficult to understand. The trial court reported that DSS provided a transcript of the videotape, noting the transcript presented the same evidence as did the video. The trial court stated the transcript was "clear and understandable, and had it been presented at trial, the [trial court] would have adjudicated the juveniles as neglected juveniles." The trial court directed counsel for DSS to prepare adjudication and disposition orders.

On 21 December 2022, the trial court entered its written order granting the Rule 59/60 motion. In it, the trial court stated:

> 2. [The video of the forensic interview] was a pivotal part of DSS's evidence based on the statements of the Juvenile therein. The sound quality of the video was poor which made it difficult to hear all the statements clearly, and depending on one's hearing and position in the courtroom, some of those present were able to hear the video better than others.
>
> 3. After reading the verbatim transcript of the videoed interview, this Court realized that it did not, in fact, hear certain statements that [Kylie] made in the forensic interview. The Court was able to hear- though with some difficulty- other portions of the forensic interview as it was played on the record during the hearing on DSS's Petition.
>
> 4. Therefore, the undersigned was not aware at the time of the Adjudication hearing that he had not heard the several key statements of [Kylie] which were pivotal and constitute clear, cogent, and convincing evidence in support of DSS's Petition.
>
> 5. As a result, this Court dismissed DSS's Petition for failure to meet the requisite burden of proof- clear, cogent, and convincing evidence.
>
> 6. In hindsight, and with the benefit of the verbatim transcript of the forensic interview, the Court sees that it did have clear[,] cogent[,] and convincing evidence in support of DSS's Petition. Therefore, had it clearly heard the entirety of the forensic interview that was played in

> Court from beginning to end, the Court would have not dismissed DSS's Petition.
>
> 7. After the Adjudication hearing, Counsel for Petitioner, DSS, listened to the forensic interview video again to confirm the statements made by [Kylie] and filed Motions pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure. In support of these Motions, Counsel for Petitioner offered the verbatim sealed transcript of the forensic interview. Counsel for Respondent parents objected to the Court's consideration of the transcript.
>
> 8. The transcript presented the identical evidence as the video played in Court, but in a clear and understandable manner. Had the Court heard all of the statements of [Kylie] in the interview, it would not have dismissed DSS's Petition.
>
> 9. Extraordinary circumstances exist such that equity and justice demands this Court grant DSS the relief sought from the Court's prior Order Dismissing Juvenile Petition.

Also on 21 December 2022, the trial court held a hearing on "interim disposition." The trial court entered its written order on interim disposition on 22 February 2023 in which it ordered kinship placement of the children with their maternal grandmother. Mother was permitted to reside with them, and Father was permitted two hours supervised visitation per week with Martin and no visitation with Kylie. The permanency plan of care was reunification.

On 30 January 2023, the trial court entered its order on adjudication, finding that Father physically abused Mother in the home in the presence of the children and that Kylie witnessed such abuse, including a black eye, at least once. The trial court adjudicated both Kylie and Martin neglected within the meaning of N.C. Gen. Stat. § 7B-101(15). The trial court granted legal and physical custody of the children to DSS.

On 9 February 2023, Mother filed a notice of reservation of right to appeal the 30 January 2023 order. On 28 February 2023, the trial court held a hearing on final disposition, and on 4 April 2023, it filed its written disposition order which continued the children in the custody of DSS and in kinship placement with their maternal grandmother and retained the permanency plan of reunification.

On 6 April 2023, Father and Mother filed a notice of appeal of the adjudication order entered 30 January 2023 and the disposition order entered 4 April 2023.

II. Analysis

A. Petitions for *Writ of Certiorari*

[1] First, we must determine whether this Court has jurisdiction to review Respondents' appeals on their merits. Both Father and Mother filed petitions for *writ of certiorari* because they seek appellate review of judgments they contend are void. Our Supreme Court has said of void judgments:

> A judgment is void, when there is a want of jurisdiction by the court over the subject matter of the action, and a void judgment may be disregarded and treated as a nullity everywhere. . . . A void judgment is, in legal effect, no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless.

Hart v. Thomasville Motors, Inc., 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) (citations and quotation marks omitted).

N.C. Gen. Stat. § 7A-32 authorizes this Court to issue a *writ of certiorari* "in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice." N.C. Gen. Stat. § 7A-32(c). "The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law." *Id.* Rule 21 of the Rules of Appellate Procedure provides in pertinent part:

> The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. 21(a)(1). Our Supreme Court has explained:

> The procedure governing writs of certiorari is found in Rule 21 of the Rules of Appellate Procedure. But Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued. Instead, the

> decision to issue a writ is governed solely by statute and by common law.

Cryan v. Nat'l Council of Young Men's Christian Associations of United States, 384 N.C. 569, 572, 887 S.E.2d 848, 851 (2023) (citation and quotation marks omitted). Our appellate courts employ a two-factor test to determine whether a *writ of certiorari* should issue: (1) "if the petitioner can show merit or that error was probably committed below" and (2) "if there are extraordinary circumstances to justify it," including "a showing of substantial harm." *Id.* at 572, 887 S.E.2d at 851 (quotation marks omitted).

Because, as discussed below, we hold the trial court did not possess subject matter jurisdiction to enter its 21 December 2022 order after its order dismissing the petition on 23 November 2022, any order entered after the dismissal was void. Therefore, any notice of appeal by Father and Mother of any order entered after the dismissal of the petition was ineffective because it was an appeal from a void order, and "all proceedings founded upon [a void judgment] are worthless." *Hart*, 244 N.C. at 90, 92 S.E.2d at 678. Although Mother filed a notice of reservation of right to appeal the trial court's 30 January 2023 order, and both Father and Mother filed notices of appeal of that same order as well as the dispositional order entered 4 April 2023, N.C. R. App. P. 21(a)(1) does not apply to these particular circumstances. This is because Father and Mother seek appeal of a void order. Accordingly, we must determine whether this Court should, "in aid of [our] own jurisdiction," grant Respondents' petitions for *writ of certiorari* pursuant to N.C. Gen. Stat. § 7A-32(c).

Because the trial court did not have jurisdiction to enter orders in this matter after dismissing the juvenile petition, Respondents' contention that the trial court erred has merit. They also make a showing of extraordinary circumstances because of the substantial harm resulting from the separation of a family due to a void order and the lack of finality in a juvenile case. Accordingly, we grant their petitions for *writ of certiorari*.

B. The Trial Court's Subject Matter Jurisdiction After Dismissal

[2] Respondents argue: (1) the trial court did not have subject matter jurisdiction to grant DSS's Rule 59/60 motion; (2) even if the trial court did have subject matter jurisdiction, it abused its discretion in granting the motion; and (3) the trial court erred in adjudicating the children neglected. Because we hold that the trial court did not have subject matter jurisdiction to grant the Rule 59/60 motion, we need not reach the other issues raised.

"Whether or not a trial court possesses subject-matter jurisdiction is a question of law that is reviewed de novo. Challenges to a trial court's subject-matter jurisdiction may be raised at any stage of proceedings, including for the first time" on appeal. *In re M.R.J.*, 378 N.C. 648, 654, 862 S.E.2d 639, 643 (2021).

Respondents argue that N.C. Gen. Stat. §§ 7B-201 and 7B-807 provide that a trial court's jurisdiction in a juvenile abuse, neglect, or dependency action is terminated upon the dismissal of a juvenile petition. We agree. Initially, a trial court obtains jurisdiction over a juvenile abuse, neglect, or dependency proceeding when a petition alleging the same is filed: "The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a). A trial court's jurisdiction ends, however, when it dismisses the juvenile petition upon a finding that the allegations contained in the petition are unproven. N.C. Gen. Stat. § 7B-201(a) provides, "When the court obtains jurisdiction over a juvenile, *jurisdiction shall continue until terminated by order of the court* or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." N.C. Gen. Stat. § 7B-201(a) (emphasis added). N.C. Gen. Stat. § 7B-201(b) further provides that, except in five enumerated circumstances, which are not applicable to this case:

> When the court's jurisdiction terminates, whether automatically or by court order, *the court thereafter shall not modify or enforce any order previously entered in the case*, including any juvenile court order relating to the custody, placement, or guardianship of the juvenile. *The legal status of the juvenile and the custodial rights of the parties shall revert to the status they were before the juvenile petition was filed*, unless applicable law or a valid court order in another civil action provides otherwise.

N.C. Gen. Stat. § 7B-201(b) (emphasis added). N.C. Gen. Stat. § 7B-807(a) provides, "If the court finds that the allegations have not been proven, the court *shall dismiss the petition with prejudice*, and if the juvenile is in nonsecure custody, the juvenile *shall be released to the parent*, guardian, custodian, or caretaker." N.C. Gen. Stat. § 7B-807(a) (emphasis added). In summary, these statutes provide that the trial court's jurisdiction begins upon the filing of a petition and ends when the trial court dismisses the petition upon a finding that the allegations have not been proven.

Here, in the original adjudication hearing, the trial court explicitly stated in open court that DSS's case was "based solely upon the video"

and that DSS did not prove its case by clear, cogent, and convincing evidence, specifically finding that DSS could have provided other evidence such as medical records pertaining to Mother's black eye as well as Father's criminal history. Upon dismissing the petition, the trial court then ordered the children reunited with Father and Mother, as *required* by N.C. Gen. Stat. § 7B-807(a). Finally, the trial court entered its written order summarily dismissing the juvenile petitions (also as required by N.C. Gen. Stat. § 7B-807(a)), which was an order by the trial court causing the termination of its jurisdiction because there was no longer a juvenile petition before it. N.C. Gen. Stat. § 7B-201(a) ("When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court"). Upon the trial court's dismissal of the juvenile petition, and the simultaneous termination of its jurisdiction, "[t]he legal status of the juvenile and the custodial rights of the parties . . . revert[ed] to the status they were before the juvenile petition was filed." N.C. Gen. Stat. § 7B-201(b). Therefore, the trial court's jurisdiction terminated, at the latest, on 23 November 2022 when it entered the written order dismissing the petitions.

As a practical matter, it is not immediately apparent on appeal what the auditory issue was during the adjudication hearing. The full recording of the interview was played before the trial court. Aside from the recording, Father testified that he "heard [Kylie's] remarks in the video." He was questioned on direct and cross-examination regarding the particular allegations contained in the recording of the interview: that Mother "was hit and was screaming"; whether he ever saw Mother with a black eye; the allegation of domestic violence while Kylie attended Valle Crucis School; the appearance of blood in the home; and the issue of whether Father deprived the children of proper nutrition while Mother was at work. Even if these particular allegations could not all be heard properly while the recording was played, there was a second chance to hear and consider them during Father's testimony. There was yet another opportunity to hear and consider such allegations during the attorneys' closing arguments. Counsel for Mother argued there was "no substantiation of any DV other than what was perceived by a seven-year-old." Counsel for DSS specifically reiterated the allegations concerning yelling, blood, a black eye, and that Kylie herself witnessed such things. These were further opportunities for the trial court to hear and consider the allegations, weigh credibility, and make findings of fact, if necessary. In its oral ruling on the matter, the trial court weighed Kylie's credibility, demonstrating its understanding that Kylie made allegations of witnessing Father commit domestic violence. The trial court even mentioned "mom's black eye."

The Rule 59/60 motion cannot operate as a method to claw back jurisdiction and reconsider the evidence, as DSS asked the trial court to do in this case. The trial court may have had second thoughts "[i]n hindsight," but the Rule 59/60 motion was the improper method to seek reconsideration, and granting the motion was an improper method to implement remorse for the trial court's initial ruling.[3] Once the trial court summarily dismissed the petition due to DSS's failure to prove its case, the trial court's subject matter jurisdiction terminated. DSS cannot bypass an appeal with a Rule 59/60 motion, and the trial court cannot swap its initial adjudication decision after dismissal of the petition.

Accordingly, we overrule DSS's argument that N.C. R. Civ. P. 59(a) and 60(b) operate to allow a trial court to act on a juvenile petition even after dismissing a petition for failure to prove the allegations contained within it. Because the trial court's subject matter jurisdiction terminated when it entered its order dismissing the juvenile petition, its order granting DSS's Rule 59/60 motion, and all subsequent orders are *void ab initio*. *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) ("A judgment is void[ ] when there is a want of jurisdiction by the court over the subject matter. A void judgment is in legal effect no judgment. No rights are acquired or divested by it. It neither binds nor bars anyone, and all proceedings founded upon it are worthless.") (ellipsis omitted). Regardless of whether or not N.C. R. Civ. P. 59 and 60 may otherwise be applicable in juvenile cases in some limited circumstances, they are inapplicable here because the trial court lacked jurisdiction to enter an order on the Rule 59/60 motion. Once the trial court divests itself of jurisdiction, it cannot thereafter revive it.

III. Conclusion

For the foregoing reasons, we hold the trial court's subject matter jurisdiction terminated when it dismissed the juvenile petitions following its finding that DSS did not prove its case by clear and convincing evidence. Because its order granting DSS's Rule 59/60 motion and all subsequent orders are *void ab initio* and must be vacated, all orders entered after the order of dismissal of the petitions are hereby vacated.

VACATED.

Judges FLOOD and STADING concur.

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3. We note that DSS could have appealed the trial court's initial adjudication decision. N.C. Gen. Stat. § 7B-1001 specifically allows an appeal from an "involuntary dismissal of a petition." N.C. Gen. Stat. § 7B-1001(a)(2). We note that "[n]either a Rule 59 motion nor a Rule 60 motion may be used as a substitute for an appeal." *Musick v. Musick*, 203 N.C. App. 368, 371, 691 S.E.2d 61, 63 (2010).

LAND v. WHITLEY

[292 N.C. App. 244 (2024)]

DORIS GRIFFIN LAND AND ELLIOTT LAND, PLAINTIFFS
v.
KORI B. WHITLEY, M.D., PHYSICIANS EAST, P.A. D/B/A GREENVILLE OB/GYN, PITT COUNTY MEMORIAL HOSPITAL, INC. D/B/A VIDANT MEDICAL CENTER, AND PITT COUNTY MEMORIAL HOSPITAL, INC. D/B/A VIDANT SURGICENTER, DEFENDANTS

No. COA23-250

Filed 6 February 2024

1. Appeal and Error—interlocutory order—denying Rule 12 motions to dismiss—statutory immunity claim—medical malpractice—during pandemic

In a medical malpractice case arising from an incomplete hysterectomy that was performed on plaintiff during the beginning of the COVID-19 pandemic, defendants (the surgeon, medical practice, and hospital involved) had an immediate right of appeal from an order denying their Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, in which they asserted a claim of statutory immunity under the Emergency or Disaster Treatment Protection Act—an act giving health care providers limited immunity from civil liability for damages resulting from care provided during the pandemic. In its discretion, the appellate court also addressed the denial of defendants' Rule 12(b)(6) and Rule 9(j) motions. However, the denial of defendants' Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction was not immediately appealable.

2. Medical Malpractice—motions to dismiss—statutory immunity—under COVID-19 legislation—requirements—exception to immunity

In a medical malpractice case arising from an incomplete hysterectomy that was performed on plaintiff during the beginning of the COVID-19 pandemic, the trial court properly denied defendants' motions to dismiss under Civil Procedure Rules 12(b)(2) and (6) where defendants (the surgeon, medical practice, and hospital involved) were not entitled to immunity under the Emergency or Disaster Treatment Protection Act—an act giving health care providers limited immunity from civil liability for damages resulting from care provided during the pandemic. First, defendants' affidavits did not, as required for immunity under the Act, show a causal link between the impact of COVID-19 and their failure to properly complete plaintiff's hysterectomy, take appropriate measures after complications developed during the surgery, and remove a piece of plaintiff's uterus that was left in her pelvic cavity during the

procedure and became dangerously infected. Second, the affidavits did not address the third requirement for immunity under the Act regarding whether defendants acted in good faith when treating plaintiff. Finally, plaintiff's complaint sufficiently alleged that defendants engaged in conduct falling under the Act's exception to immunity.

3. Medical Malpractice—Rule 9(j) certification—language used in Rule—different language used in complaint—no strict pleading required

In a medical malpractice case arising from an incomplete hysterectomy that was performed on plaintiff during the beginning of the COVID-19 pandemic, the trial court properly denied defendants' motion to dismiss where defendants (the surgeon, medical practice, and hospital involved) argued that plaintiff's complaint did not comply with Civil Procedure Rule 9(j). The certification in plaintiff's complaint did not perfectly mirror the language in Rule 9(j), since it stated that a medical expert "reviewed all the allegations of negligence" and "all medical records pertaining to the alleged negligence" whereas the Rule requires a review of "the medical care" itself along with the relevant medical records. However, Rule 9(j) does not contain a strict pleading requirement, and plaintiff's language sufficiently conveyed the same principles reflected in the Rule's certification provision.

Appeal by Defendants from an order entered 27 October 2022 by Judge William R. Pittman in Pitt County Superior Court. Heard in the Court of Appeals 17 October 2023.

Miller Law Group, PLLC, by Bruce W. Berger and MaryAnne M. Hamilton, for Plaintiffs-Appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Christopher G. Smith, Hope C. Garber, and David R. Ortiz, for Defendants-Appellants.

Harris, Creech, Ward & Blackerby, P.A., by W. Gregory Merritt, for Pitt County Memorial Hospital, Inc., d/b/a Vidant Medical Center and Pitt County Memorial Hospital, Inc., d/b/a Vidant SurgiCenter, Defendants-Appellants.

Walker, Allen, Grice, Ammons, Foy, Klick & McCullough, L.L.P., by Elizabeth P. McCullough and Kelsey Heino, for Kori B. Whitley,

M.D. and Physicians East, P.A., d/b/a Greenville OB/GYN, Defendants-Appellants.

Todd Law Offices, PLLC, by Elizabeth C. Todd and Brown, Moore & Associates, PLLC, by Matthew C. Berthold and Jennifer L. Maynard, for North Carolina Advocates for Justice, Amicus Curae.

WOOD, Judge.

Defendants Dr. Whitley, Greenville OB/GYN, Vidant Medical Center, and Vidant SurgiCenter (collectively "Defendants") appeal from the trial court's order denying their motions to dismiss on the basis of Rules 12(b)(1), 12(b)(2), 12(b)(6) and 9(j). After careful review, we affirm the order of the trial court.

I. Factual and Procedural Background

The present case occurred during the beginning months of the COVID-19 pandemic and involves the statute enacted during North Carolina's state of emergency.

On 3 May 2020, the North Carolina General Assembly unanimously passed a bill entitled The Emergency or Disaster Treatment Protection Act ("The Act") providing limited immunity for health care providers during the COVID-19 pandemic. N.C. Gen. Stat. § 90-21.130 (2023). Governor Roy Cooper signed the bill into law on 4 May 2020. Retroactive to March 2020, the beginning of the pandemic, the limited immunity act protected health care providers from civil liability for claims of ordinary negligence as a result of an act or omission in the course of arranging for or providing health care services provided each of the following applied:

> (1) The health care facility, health care provider, or entity is arranging for or providing health care services during the period of the COVID-19 emergency declaration, including, but not limited to, the arrangement or provision of those services pursuant to a COVID-19 emergency rule.
>
> (2) The arrangement or provision of health care services is impacted, directly or indirectly:
>
> a. By a health care facility, health care provider, or entity's decisions or activities in response to or as a result of the COVID-19 pandemic; or
>
> b. By the decisions or activities, in response to or as a result of the COVID-19 pandemic, of a health care facility

> or entity where a health care provider provides health care services.
>
> (3) The health care facility, health care provider, or entity is arranging for or providing health care services in good faith.

N.C. Gen. Stat. § 90-21.133(a). The statute specifically excluded gross negligence and willful or intentional conduct from this statutory immunity:

> (b) The immunity from any civil liability provided in subsection (a) of this section shall not apply if the harm or damages were caused by an act or omission constituting gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or health care provider providing health care services; provided that the acts, omissions, or decisions resulting from a resource or staffing shortage shall not be considered to be gross negligence, reckless misconduct, or intentional infliction of harm.

N.C. Gen. Stat. § 90-21.133(b). On 15 August 2022, Governor Cooper lifted the state of emergency thereby ending the statutory limited immunity provided for health care providers by the Act.

Mrs. Land was diagnosed with a high-grade squamous intraepithelial lesion in early 2020, which was at high risk of turning into cervical cancer. Mrs. Land's health care providers ultimately determined that a total vaginal hysterectomy ("TVH") was necessary. On 29 June 2020, Defendant Dr. Whitley, assisted by resident-in-training Dr. Faiz, performed a TVH on Mrs. Land at Vidant SurgiCenter.

Dr. Whitley noted in the operative notes that due to Mrs. Land's anatomy she had difficulty during the procedure. Mrs. Land's long cervix and a uterine fibroid obscured the left cornual region of her uterus. Despite these complications, Dr. Whitley did not convert the vaginal hysterectomy to an abdominal or laparoscopic procedure, alternative surgical methods that would have allowed better visualization of Mrs. Land's uterus. Consequently, a three-inch piece of uterine tissue remained undetected in her abdominal cavity following the TVH surgery.

On 14 July 2020, Mrs. Land attended a routine post-operative visit with Dr. Whitley during which she reported experiencing abdominal pain. Dr. Whitley informed Mrs. Land that the surgery had been difficult and renewed her prescription for oxycodone for pain. Dr. Whitley noted

in her medical record that Mrs. Land had no complaints other than "struggling with constipation" and described her abdomen as being soft, nontender, nondistended, with active bowel sounds. Dr. Whitley did not note in the medical records that Mrs. Land had reported abdominal pain. According to Mrs. Land, Dr. Whitley did not physically examine or touch her body during this visit.

On 25 July 2020, Mrs. Land presented with severe abdominal pain to Vidant Emergency Department in Greenville where she was diagnosed with sepsis, stage 4 kidney failure, and an abdominal infection. On 26 July 2020, Dr. McDonald performed an initial laparoscopic exploration of her abdomen followed by emergency surgery after he detected an abscess in her pelvic cavity. Dr. McDonald converted the procedure to a laparotomy, cut open Mrs. Land's abdomen, removed the infected tissue and explored her pelvic cavity. Dr. Coiner, an OB/GYN physician, was called in to assist with the surgery. The physicians found the infected remnant uterine tissue in Mrs. Land's abdomen.

Dr. McDonald removed approximately twelve inches of Mrs. Land's bowel and left the wound open in order to drain the infection. In his post-operative diagnosis, Dr. McDonald noted Mrs. Land had "diffuse peritonitis, pelvic abscess, and an incomplete vaginal hysterectomy with uterine remnant." Mrs. Land was transferred to the intensive care unit where she experienced respiratory failure and had to be intubated on a ventilator until 28 July 2020. Mrs. Land was finally discharged from Vidant Hospital on 7 August 2020. During recovery, Mrs. Land developed pulmonary emboli in both of her lungs, and she was hospitalized again because of complications from the infected uterine remnant. From 31 August 2020 to 16 November 2020, Mrs. Land followed up with Dr. McDonald for treatment of her abdominal wound. On 18 November 2020, Mrs. Land returned to work. According to Mrs. Land, she remains unable to lift anything or to engage in physical activity and has memory loss and mood disturbances requiring psychiatric care.

On 16 February 2022, Plaintiffs, Mrs. Land and her husband, filed a complaint against Defendants Dr. Whitley, Greenville OB/GYN, Vidant Medical Center, and Vidant SurgiCenter alleging claims arising from the hysterectomy performed by Dr. Whitley and Dr. Faiz and her related follow-up care.

In their complaint, Mr. and Mrs. Land alleged negligence and gross negligence against Dr. Whitley and against all other Defendants under the doctrine of *respondeat superior* and sought damages resulting from the medical malpractice causes of actions. Plaintiffs allege Dr. Whitley violated the duty of care she owed to Mrs. Land by:

> [1.] Failing to safely and fully perform a complete vaginal hysterectomy on June 29, 2020;
>
> [2.] Failing to convert the TVH procedure to an open hysterectomy when she encountered difficulty during the TVH;
>
> [3.] Failing to request the assistance of a second surgeon to assist her when the vaginal hysterectomy proved more difficult than expected;
>
> [4.] Failing to see all of the [uterine tissue] material she should have seen and removed during the TVH;
>
> [5.] Failing to remove all pieces of [her]uterus during the TVH and leaving a portion of [her] uterus in her pelvic cavity that, predictably, became dangerously infected and almost killed her;
>
> [6.] Failing to properly evaluate and examine [Mrs. Land] at the two-week postoperative visit to identify the festering infection caused by the infected retained remnant of uterus; and
>
> [7.] Other negligence as may be determined through discovery and trial in this matter.

On 2 May 2022, Dr. Whitley and Physicians East filed a motion to dismiss and an answer. On 9 May 2022, Vidant Medical Center and Vidant SurgiCenter filed a motion to dismiss and an answer. Plaintiffs filed a memorandum in opposition to the motions to dismiss on 19 October 2022.

On 24 and 25 October 2022, Defendants amended their motions to dismiss on the following grounds: (1) they are immune from suit under the Act, requiring dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, lack of personal jurisdiction under Rule 12(b)(2), and failure to state a claim for relief under Rule 12(b)(6); and (2) the complaint was noncompliant with Rule 9(j) on its face. Defendants attached several affidavits to the amended motions to dismiss, including Dr. Whitley's, regarding COVID-19 procedures at the relevant facilities. On 24 October 2022, Defendants submitted a joint memorandum accompanied by exhibits such as case law, legislative documents, press releases, and media publications about the law at issue and about the impact of COVID-19 in support of their motion.

On 26 October 2022, the trial court heard arguments on Defendants' motions to dismiss. On 27 October 2022, the trial court filed an order denying Defendants' motions. The trial court's order states the trial court carefully reviewed the entire record, the written and oral arguments of counsel, and the proffered and other relevant authority in the light most favorable to Mr. and Mrs. Land, "giving [them] every inference, which could be drawn from the allegations and resolving all doubts in favor of the Plaintiffs." Defendants filed a notice of appeal on 28 November 2022.

II. Appellate Jurisdiction

[1] On 26 May 2023, Plaintiffs filed a motion to dismiss Defendants' appeal on the grounds that the appeal is interlocutory and does not implicate a substantial right.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, an interlocutory appeal "may be taken from [a] judicial order or determination of a judge of a superior or district court, . . . that affects a substantial right claimed in any action or proceeding[.]" N.C. Gen. Stat. § 1-277(a). "A substantial right is one affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a person is entitled to have preserved and protected by law: a material right." *Bowling v. Margaret R. Pardee Mem'l Hosp.*, 179 N.C. App. 815, 818, 635 S.E.2d 624, 627 (2006) (citation and internal quotation marks omitted), *disc. review denied*, 361 N.C. 425, 648 S.E.2d 206 (2007).

"As a general rule, claims of immunity affect a substantial right, and therefore merit immediate appeal." *Stahl v. Bowden*, 274 N.C. App. 26, 28, 850 S.E.2d 588, 590 (2020) (citation omitted). Nonetheless, a party claiming the protection of statutory immunity must satisfy "all of the requirements" of the statute granting the claimed immunity in order to establish a substantial right entitling him to an immediate appeal. *Wallace v. Jarvis*, 119 N.C. App. 582, 585, 459 S.E.2d 44, 46 (1995). "[O]ur Courts generally recognize immunity as a defense that can be raised under Rules 12(b)(1), 12(b)(2), or 12(b)(6)." *Suarez v. Am. Ramp Co. (ARC)*, 266 N.C. App. 604, 610, 831 S.E.2d 885, 890 (2019) (citation omitted). However, generally, the denial of a defendant's motion to dismiss under Rule 12(b)(1) is not immediately appealable. *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 28, 732 S.E.2d 614, 616 (2012) (citation omitted). Therefore, we decline to review "the trial court's order denying [D]efendant[s'] motion to dismiss pursuant to Rule 12(b)(1)" because it "is not properly before this Court." *Id.* at 29, 732 S.E.2d at 616.

Defendants contend their appeal of the order denying their motion under Rule 12(b)(2), a motion to dismiss for lack of personal jurisdiction, is an " 'adverse ruling as to the jurisdiction of the court over the person or property of the defendant,' [and] is immediately appealable and properly before this Court under N.C. Gen. Stat. § 1-277(b)." Defendants further argue that "immunity by virtue of a statute . . . affects a court's jurisdiction over a party." According to Defendants, "if a party is immune from suit by statute, then Rule 12(b)(2) is a proper vehicle for dismissal." Because Defendants are entitled to immediate appeal of the denial of Defendants' Rule 12(b)(2) motion, Plaintiffs' motion to dismiss the appeal as to Rule 12(b)(2) is denied, and we consider the merits on appeal. In our discretion, we also address Defendants' arguments pertaining to their Rule 12(b)(6) and Rule 9(j) motions.

III. Analysis

A. Statutory Immunity and the Emergency or Disaster Treatment Protection Act.

[2] First, Defendants contend that the trial court erred by denying their Rule 12(b) motions to dismiss because they have immunity under the Act against Plaintiffs' claim of negligence. Defendants argue that the Act's three statutory requirements for immunity from civil liability "existed on the face of Plaintiffs' complaint and other materials properly before the trial court, so this suit was barred based on the Act's immunity." We disagree.

"The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). Generally, the parties will present personal jurisdiction issues in one of the following procedural postures: "(1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues." *Id.*

"If the defendant supplements his motion to dismiss with an affidavit or other supporting evidence, the allegations in the complaint can no longer be taken as true or controlling and plaintiff cannot rest on the allegations of the complaint." *Id.* (cleaned up). In this circumstance, in order "to determine whether there is evidence to support an exercise of personal jurisdiction, the court then considers (1) any allegations in the complaint that are not controverted by the defendant's affidavit and

(2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence)." *Id.* at 693-94, 611 S.E.2d at 182-83. In other words, where "unverified allegations in the complaint meet plaintiff's initial burden of proving the existence of jurisdiction and defendants do not contradict plaintiff's allegations, such allegations are accepted as true and deemed controlling." *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 101, 545 S.E.2d 243, 246-47 (2001) (cleaned up). Thus, in deciding a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), courts may consider affidavits and other evidence. *Lippard v. Diamond Hill Baptist Church*, 261 N.C. App. 660, 661, 821 S.E.2d 246, 248 (2018).

When this Court reviews a decision regarding personal jurisdiction, it considers only "whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999). Although the trial court did not make findings in ruling on a Rule 12(b)(2) motion, under Rule 52(a)(2) of the North Carolina Rules of Civil Procedure, the trial court is not required to make specific findings of fact unless requested by a party. *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524 (1981). "Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217-18 (2000).

A motion to dismiss for failure to state a claim under Rule 12(b)(6) should be granted where: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Silver v. Halifax Cty. Bd. of Comm'rs*, 371 N.C. 855, 861, 821 S.E.2d 755, 759 (2018) (citation omitted). The standard of review on appeal from a trial court's order dismissing a complaint pursuant to Rule 12(b)(6) is *de novo*. *McGuire v. Riedle*, 190 N.C. App. 785, 786, 661 S.E.2d 754, 756 (2008).

The Act serves to provide health care providers immunity from any civil liability for any harm or damages resulting from care provided during the COVID-19 pandemic. The Act's stated purpose is

> to promote the public health, safety, and welfare of all citizens by broadly protecting the health care facilities and health care providers in this State from liability that may result from treatment of individuals during the COVID-19

> public health emergency under conditions resulting from circumstances associated with the COVID-19 public health emergency. A public health emergency that occurs on a statewide basis requires an enormous response from State, federal, and local governments working in concert with private and public health care providers in the community. The rendering of treatment to patients during such a public health emergency is a matter of vital State concern affecting the public health, safety, and welfare of all citizens.

N.C. Gen. Stat. § 90-21.131. This purpose is carried out by providing limited statutory immunity for those health care providers who meet the three requirements. For those seeking to use the affirmative defense of the immunity, (1) the health care provider must be "arranging for or providing" health care during the COVID-19 emergency; (2) the care provided must be affected, directly or indirectly, by the COVID-19 pandemic; and (3) the defendant must act in good faith. N.C. Gen. Stat. § 90-21.133(a).

The protections against civil liability afforded the health care providers who qualify for the immunity under these statutes are, however, not unlimited. N.C. Gen. Stat. § 90-21.133(b) provides exceptions to its limitation on liability:

> (b) The immunity from any civil liability provided in subsection (a) of this section shall not apply if the harm or damages were caused by an act or omission constituting gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or health care provider providing health care services; provided that the acts, omissions, or decisions resulting from a resource or staffing shortage shall not be considered to be gross negligence, reckless misconduct, or intentional infliction of harm.

N.C. Gen. Stat. § 90-21.133(b). Where statutory language is clear and unambiguous, our Courts do not "engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *Edwards v. Morrow*, 219 N.C. App. 452, 455, 725 S.E.2d 366, 369 (2012).

When construing these statutory provisions together, it is evident that the Act is not intended to give a health care provider blanket immunity from every claim of civil liability arising during the COVID-19

pandemic. The statutes reflect that the health care provider must show that he or she meets the statutory requirements and has not engaged in actions constituting gross negligence, reckless misconduct, or intentional infliction of harm in order to receive the immunity from any civil liability. This plain reading of the statute is consistent with the general principle of statutory immunity, which as an affirmative defense, is available to a defendant only if he satisfies all of the requirements or elements defined in the relevant statutes. *Stahl*, 274 N.C. App. at 28, 850 S.E.2d at 590.

In reviewing Plaintiffs' complaint on its face and the record evidence before us, we note Plaintiffs concede Defendants have satisfied the first element of the statutory immunity, "as Defendants were providing health care services during the time of the COVID-19 emergency declaration."

The second element of the statute requires Defendants to show Mrs. Land's care was affected, directly or indirectly, by the COVID-19 pandemic. In their affidavits, Dr. Whitley, Dr. Lindbeck, and both the Medical Director and Chief of Staff at ECU Health SurgiCenter, provide detailed information regarding how the pandemic affected health care facilities and patient care in general. However, Defendants' affidavits fail to establish a causal link between the impact of COVID-19 and Mrs. Land's care or treatment. On its face, Plaintiffs' complaint alleges Dr. Whitley failed to fully perform a complete vaginal hysterectomy on 29 June 2020, failed to convert the TVH procedure to an open hysterectomy when she encountered difficulty during the TVH, failed to request the assistance of a second surgeon when the vaginal hysterectomy proved more difficult than expected, failed to see all of the material she should have seen and removed during the TVH, and failed to remove all pieces of the uterus during the TVH leaving a portion of Mrs. Land's uterus in her pelvic cavity.

Dr. Whitley's affidavit does not directly controvert these allegations. Instead, Dr. Whitley's affidavit states that during the pandemic, physicians were concerned that "operative procedures requiring gas insufflation of the abdomen ('laparoscopy') might lead to increase risk of transmission of the virus upon exsufflation and expiration of the gas from the abdomen" which resulted in the reduction of those procedures so that laparoscopy was not viewed as a readily available option should a complication or suspected complication occur. While Dr. Whitley's sworn affidavit provides reasoning for why the TVH procedure was the first option for the hysterectomy procedure, it is devoid of any COVID-19 related explanation of why the TVH procedure was not properly completed, why another surgeon was not consulted after complications

arose, why another surgical procedure could not be utilized on Mrs. Land after complications in the surgery arose, and why a remnant of Mrs. Land's uterus was left in her body.

Furthermore, neither Dr. Whitley's nor Dr. Lindbeck's affidavits offered evidence as to how Mrs. Land's follow-up care was directly or indirectly impacted by the pandemic. Neither affidavit disputes Plaintiffs' contention based upon *respondeat superior* that Dr. Whitley and the other Defendants failed "to properly evaluate and examine Mrs. Land at the two-week postoperative visit to identify the festering infection caused by the infected retained remnant of uterus." The uncontroverted allegations in Plaintiffs' complaint have not been countered by the evidence put forth by Defendants.

Additionally, the affidavits presented by Defendants do not address the last requirement of N.C. Gen. Stat. § 90-21.133(a), that the health care provider must have acted in good faith in providing health care treatment and services. N.C. Gen. Stat. § 90-21.133(a). While Defendants' affidavits discuss how the challenges of COVID-19 impacted their provision of health care to patients in general, there is no assertion Defendants provided treatment and care to Mrs. Land in good faith.

Moreover, even if we were to presume the evidence Defendants presented is sufficient to show that Defendants are entitled to limitations of civil liability based upon the statutory immunity of N.C. Gen. Stat. § 90-21.133(a), Plaintiffs expressly alleged Defendants engaged in acts falling under the statutory exceptions of N.C. Gen. Stat. § 90-21.133(b).

Defendants contend Plaintiffs' complaint contains conclusory allegations of gross negligence with no alleged factual basis. We disagree. A complaint is adequate if it provides sufficient information "to give the substantive elements of a legally recognized claim." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988). The allegations in the complaint must only be "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C. Gen. Stat. § 1A-1, Rule 8(a)(1).

"Gross negligence has been defined as 'wanton conduct done with conscious or reckless disregard for the rights and safety of others.' " *Toomer v. Garrett*, 155 N.C. App. 462, 482, 574 S.E.2d 76, 92 (2002) (quoting *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988)). "Aside from allegations of wanton conduct, a claim for gross negligence requires that plaintiff plead facts on each of the elements of negligence, including duty, causation, proximate cause, and damages." *Id.* (citation omitted).

Plaintiffs need only provide sufficient facts to support the allegation of gross negligence. The determination of whether a given course of conduct represents gross negligence is for the jury. *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 13, 727 S.E.2d 675, 684 (2012) (citation omitted). At the motion to dismiss stage, the court may only take account of the plaintiffs' allegations, construed liberally, and draw all reasonable inferences in plaintiffs' favor. *In re K.G.*, 260 N.C. App. 373, 376, 817 S.E.2d 790, 792 (2018).

Here, Plaintiffs' complaint adequately describes the negligent care Mrs. Land is alleged to have received and lists several ways in which that care breached Dr. Whitley's duty of care as a medical professional. Plaintiffs' complaint alleges Dr. Whitley violated the duty owed to Mrs. Land by (1) failing to safely and fully perform a TVH; (2) failing to convert the TVH procedure to an open hysterectomy when she encountered complications during the surgery; (3) failing to request the assistance of a second surgeon to assist her when the TVH procedure proved to be difficult; (4) failing to see all of the uterine material that should have been discovered and removed during the TVH; (5) failing to remove all pieces of Mrs. Land's uterus during the TVH and leaving a portion of her uterus in her pelvic cavity, which later became infected; (6) failing to properly evaluate and examine Mrs. Land at the two-week postoperative visit to identify the infection caused by the remnant of uterus; and (7) other negligence as may be determined through discovery and trial.

The complaint further expressly alleges that in so failing to meet her duty of care, "Dr. Whitley's failures and violations of the standard of care were negligent, careless, reckless, and grossly negligent." Consequently, Plaintiffs' complaint sufficiently alleges claims not barred by N.C. Gen. Stat. § 90-21.133(a) and at this stage of the litigation, Defendants are not entitled to dismissal of Plaintiffs' claims of gross negligence. We affirm the trial court's denial of Defendants' motion to dismiss under Rule 12(b)(2) and Rule 12(b)(6).

B. Defendants' Motions to Dismiss under Rule 9(j).

[3] Next, Defendants argue the trial court erred when it denied Defendants' motions to dismiss pursuant to Rule 9(j). Defendants contend Plaintiffs' complaint is subject to the requirements of the plain language of Rule 9(j).

Rule 9(j) of the North Carolina Rules of Civil Procedure requires

> Any complaint alleging medical malpractice . . . shall be dismissed unless . . . [t]he pleading specifically asserts that the medical care and all medical records pertaining to the

> alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care . . .

N.C. Gen. Stat. § 1A-1, Rule 9(j). The rule "serves as a gatekeeper . . . to prevent frivolous malpractice claims by requiring expert review before filing of the action." *Vaughn v. Mashburn*, 371 N.C. 428, 434, 817 S.E.2d 370, 375 (2018).

The record demonstrates Plaintiffs provided the following certification as part of their original complaint:

> Plaintiff states that at least one medical health provider who Plaintiff reasonably believes will qualify as expert witnesses under Rule 702 of the North Carolina Rules of Evidence reviewed all of the allegations of negligence related to medical care that is described in this Complaint and all the medical records pertaining to the alleged negligence that are available to Plaintiff after a reasonable inquiry. This expert is, or these experts are, willing to testify that the medical care complained of did not comply with the applicable standard of care . . . .

Defendants specifically argue Plaintiffs'

> assertion that the allegations of negligence pertaining to the medical care described in the Complaint were reviewed similarly fails to comply with the strict pleading requirements of Rule 9(j). The rule does not allow for the certifying expert to rely on a description of allegations of negligence, but requires certification that the medical care itself, and all medical records available to a plaintiff after reasonable inquiry, be reviewed.

We disagree.

The Supreme Court of North Carolina has held Rule 9(j) imposes "a distinct requirement of expert certification." *Moore v. Proper*, 366 N.C. 25, 30, 726 S.E.2d 812, 816 (2012) (citation omitted). It is that requirement and not the specific words used to make the certification that must be given "strict consideration." *Id.* While the use of statutory language may be advisable, Plaintiffs' certification conveys the same principles and language from Rule 9(j), even if the statute's language is ordered

differently within the certification. Plaintiffs contend that a requirement that parties mirror exactly any specific certification language in Rule 9(j) "would be counter to the canons of statutory interpretation," and would "superimpose a provision . . . that the General Assembly did not include." We agree. Defendants' argument is without merit and is overruled.

IV. Conclusion

Because Plaintiffs' complaint, liberally construed, sufficiently alleges claims not barred by N.C. Gen. Stat. § 90-21.133(a), Defendants are not entitled to dismissal of Plaintiffs' gross negligence claims at this stage of litigation. Additionally, Plaintiffs' certification has met the requirements pursuant to Rule 9(j). Consequently, we affirm the trial court's order denying Defendants' motions to dismiss pursuant to Rule 12(b)(2), Rule 12(b)(6), and Rule 9(j).

AFFIRMED.

Judges ZACHARY and STADING concur.

GLENN MOSELEY, PLAINTIFF
v.
JOHNNY A. HENDRICKS, JR. AND CITY OF WILSON, DEFENDANTS

No. COA23-576

Filed 6 February 2024

1. Negligence—contributory negligence—summary judgment—golfing accident—plaintiff struck by golf ball—failure to maintain awareness of surroundings

In a negligence action arising from a golfing accident at a municipal golf course, where defendant hit a ball that struck plaintiff's eye while plaintiff sat inside a golf cart that was parked by the driving range, the trial court properly granted summary judgment to defendant (and the city that owned the golf course) on the issue of plaintiff's contributory negligence. The evidence showed that plaintiff—who had previously played and watched golf, and therefore was familiar with the dangers of being exposed to areas where balls are hit—failed to exercise ordinary care for his safety by failing to maintain awareness of his surroundings, in large part because he had consumed substantial amounts of alcohol that day and was

heavily impaired at the time of the accident. Although the parties disputed whether the golf cart plaintiff was sitting in had inadvertently rolled in front of the unfenced section of the driving range or whether it had originally been parked there, that factual dispute did not constitute a genuine issue of material fact because, either way, a prudent person in plaintiff's position would have eventually noticed that he was in harm's way.

2. Negligence—last clear chance—summary judgment—golfing accident—plaintiff struck by golf ball—defendant looking down when hitting ball

In a negligence action arising from a golfing accident, where defendant hit a ball that struck plaintiff's eye while plaintiff sat inside a golf cart that was parked by the driving range, the trial court properly granted summary judgment to defendant upon concluding that the last clear chance doctrine was inapplicable. The evidence showed that defendant neither discovered nor should have discovered plaintiff's precarious position until after defendant had already hit the ball, since it is standard practice for golfers to look down at the ball and not to look up again once they start preparing to take their shot. Further, defendant and a fellow golfer at the scene testified that neither of them saw the exposed golf cart while defendant was preparing to hit the ball.

3. Damages and Remedies—punitive damages—summary judgment—negligence action—golfing accident

In a negligence action arising from a golfing accident, where defendant hit a ball that struck plaintiff's eye while plaintiff sat inside a golf cart that was parked by the driving range, the trial court properly granted summary judgment to defendant on plaintiff's claim for punitive damages, since none of defendant's actions amounted to fraud, malice, or willful or wanton conduct.

4. Negligence—contributory negligence—summary judgment—golfing accident—city-owned golf course

In a negligence action arising from a golfing accident at a municipal golf course, where plaintiff's eye was struck by a golf ball while plaintiff sat inside a golf cart that was parked by the driving range, the trial court properly granted summary judgment to defendant-city because, even if the defense of governmental immunity was unavailable, there was no genuine issue of material fact regarding plaintiff's contributory negligence during the accident, and therefore plaintiff's negligence claim was barred.

Judge THOMPSON dissenting.

Appeal by plaintiff from orders entered 3 June 2021 and 7 December 2022 by Judge William D. Wolfe in Superior Court, Wilson County. Heard in the Court of Appeals 14 November 2023.

Narron & Holdford, P.A., by Ben L. Eagles, and Schmidt Law, PLLC, by Kurt Schmidt, for plaintiff-appellant.

Brown, Crump, Vanore & Tierney, PLLC, by O. Craig Tierney, Jr. and Noelle K. Demeny, for defendant-appellee Johnny A. Hendricks, Jr.

Cauley Pridgen, P.A., by James P. Cauley, III, Emily C. Cauley-Schulken, and Clayton H. Davis, for defendant-appellee City of Wilson.

ARROWOOD, Judge.

Plaintiff-appellant ("plaintiff") appeals from orders entered by the trial court on 3 June 2021 and 7 December 2022. For the following reasons, we affirm the trial court's orders.

I. Background

Around 10:30 a.m. on a weekend in December 2018, plaintiff, defendant-appellee Johnny A. Hendricks, Jr. ("Defendant Hendricks"), Taylor Keith ("Keith"), Michael Taylor ("Taylor"), and Matt Ellis ("Ellis") started a game of golf at Wedgewood Municipal Golf Course. Plaintiff had previously played and watched golf and was familiar with its rules, etiquette, and dangers.

During the game, plaintiff consumed a substantial amount of moonshine and beer. Although each person in the group drank some of the moonshine that defendant Hendricks brought to the course, plaintiff admitted to drinking the most. Further, Keith, who shared a golf cart with plaintiff, estimated that plaintiff consumed an additional five to ten beers while playing. Taylor testified that plaintiff "by far had had the most alcohol that day" and was "heavily impaired." Near the end of the game, plaintiff testified to losing his balance and falling while trying to tee up his golf ball on the sixteenth hole in part due to his alcohol consumption. According to plaintiff, he had nothing to eat between the time he woke up that morning and the accident.

After the golf game concluded, Ellis departed, but the remaining four—defendant Hendricks, Keith, Taylor, and plaintiff—retrieved some range balls and headed to the course's driving range in their two golf carts. Defendant Hendricks and Taylor were in one cart with defendant driving while plaintiff and Keith were in the other cart with Keith driving. Defendant Hendricks and Keith drove the carts onto the asphalt parking lot located to the right of the driving range and parked them facing "towards the driving range[.]" Approximately sixty to seventy yards of fencing sat along the right side of the driving range between the range area and the parking lot. However, part of the asphalt parking lot extended beyond the fencing and thus "is not covered by the fencing[.]" The fencing consisted of a high-net fence and a low-screen fence.

According to defendant Hendricks, he parked his cart in the parking lot "right in front of the fence where if [he] had driven forward [he] would have hit the fence, and Keith parked the other cart "directly beside [his cart] on the asphalt." However, unlike defendant Hendrick's cart, Keith testified that had his cart been driven forward from where it was parked, it would "have gone straight onto the driving range."

Taylor testified both carts were parked with the tires fully "on the asphalt" of the lot.[1] Conversely, plaintiff did not "remember exactly where [Keith] parked" the cart but believed it was parked forward of the asphalt. Keith also testified that he was unsure whether the front tires of the cart were on the asphalt or just forward of it but believed that at least "90% of the cart [was] over asphalt." Although plaintiff testified that he would not have driven the cart forward past the fence line after it was parked by Keith, he also testified that the parking area was flat without "even the slightest bit of hill[.]"

While defendant Hendricks, Keith, and Taylor walked to the driving range's tee-off area—situated approximately thirty yards from where they parked[2]—plaintiff remained seated in the cart.[3] At this point, plaintiff testified that he was not paying attention to his surroundings and was oblivious to the fact he was sitting next to the driving range and that the others had walked away from him "onto the driving range with

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1. Taylor also testified that the cart plaintiff was sitting in remained in the same spot on the asphalt "from the time [he] was messing with [his] clubs to the time that [he] was fixing to walk onto the driving range."

2. Because the fencing was approximately sixty to seventy yards in length, the tee-off area was thus positioned to the left of the middle area of the fence.

3. Taylor recalled [plaintiff] saying he was going to sit in the cart while everyone else hit range balls.

clubs[.]" Taylor testified that while walking away, he recalled [plaintiff] still sitting in the cart, "twiddling with something."[4]

When defendant Hendricks, Keith, and Taylor reached the tee-off area, defendant Hendricks proceeded to hit first. Defendant Hendricks testified that before hitting the ball,

> [I] looked to make sure there's nobody in my target line, make sure I've got my target line. I check again just to make sure. . . . . There was no golf cart there. And then when I commit to the shot, addressed the ball, keep my head down like I've always been taught since high school golf, take the shot, and as I'm following through I hear the sound and see [plaintiff] where he was not there before.

According to defendant Hendricks, the ball did not go where he intended: "If I was hitting to – aiming at 12:00 o'clock on a dial, the ball went in between 1:00 and 2:00 o'clock." Defendant Hendricks further testified that he never saw the flight of the ball or the ball hitting plaintiff. Thus, according to defendant Hendricks, "There was no chance at all to yell fore. It was a split second."

Keith testified that he saw plaintiff "get struck in the eye" by the ball and that defendant Hendricks could have seen plaintiff "on a straight line" if defendant Hendricks had looked up "at the time he hit the ball[.]" However, Keith also testified that he "never saw a cart at the end of the fence line" when defendant Hendricks was preparing to hit the ball.

Although he never saw plaintiff get hit because he was looking in the opposite direction, Taylor testified that he heard the sounds of defendant Hendricks hitting the ball followed by the ball hitting plaintiff. Because of the short time between the two sounds, Taylor testified that there was not enough time for defendant Hendricks to yell, "Fore!" Plaintiff estimated that after Keith parked, he had been sitting in the cart for a few minutes before he was struck in the eye by the ball.

Plaintiff filed suit against defendant Hendricks on 17 June 2019, alleging that the ball strike caused injury and blindness to his left eye. Plaintiff filed an amended complaint on 6 January 2020 adding the City of Wilson as a defendant. On 14 May 2021, defendant Hendricks filed a motion for summary judgment. After the motion was heard, the trial court entered an order in favor of defendant Hendricks on 3 June 2021

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4. Plaintiff testified that he was texting his wife while sitting in the cart after it was parked.

based upon the finding that there was "no genuine issue as to any material fact and that [d]efendant Hendricks [was] entitled to [j]udgment as a matter of law on [p]laintiff's contributory negligence, the defense of [l]ast [c]lear [c]hance, and [p]laintiff's claim for [p]unitive [d]amages."

Defendant City of Wilson moved for summary judgment on 17 November 2022 on the basis that there were "no genuine issues as to any material fact . . . on the issues of immunity, negligence, and contributory negligence." The trial court entered an order in favor of the city on 7 December 2022. Plaintiff filed a notice of appeal from both orders on 16 December 2022.

II. Discussion

On appeal, plaintiff contends the trial court erred in granting defendant Hendricks's motion for summary judgment on the issues of contributory negligence, last clear chance, and punitive damages. Plaintiff further contends the trial court erred in granting defendant City of Wilson's motion for summary judgment on the issues of sovereign immunity, negligence, and contributory negligence. We take each argument in turn.

A. Standard of Review

"The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524 (2007). "Summary judgment is appropriate when no genuine issue of material fact exists, and a party is entitled to judgment as a matter of law." *Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc.*, 385 N.C. 250, 267 (2023) (citations omitted). Further, under Rule 56(c) of the North Carolina Rules of Civil Procedure, such judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2023).

"A genuine issue is one that can be maintained by substantial evidence." *Value Health Sols., Inc.*, 385 N.C. at 267 (cleaned up). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference." *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 187 (2019) (cleaned up).

B. Contributory Negligence

[1] Plaintiff contends that the trial court erred in granting summary judgment for defendants as to the contributory negligence claim because genuine issues of material fact remain in the matter. We disagree.

"In order to prove contributory negligence on the part of a plaintiff, the defendant must demonstrate: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *Proffitt v. Gosnell*, 257 N.C. App. 148, 152 (2017) (cleaned up). Additionally, "the existence of contributory negligence does not depend on plaintiff's subjective appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an objective standard of behavior . . . ." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673 (1980) (citation omitted).

Thus, "a person who possesses the capacity to understand and avoid a known danger and fails to take advantage of that opportunity, and is injured as a result, is chargeable with contributory negligence." *Proffitt*, 257 N.C. App. at 152–53 (cleaned up). "[I]t is not necessary that plaintiff be actually aware of the unreasonable danger of injury to which his conduct exposes him. Plaintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety." *Smith*, 300 N.C. at 673 (citation omitted).

Here, plaintiff failed to exercise ordinary care for his safety, and there was a proximate connection between that failure and his injury. *See Proffitt*, 257 N.C. App. at 152. Although not an avid golfer, plaintiff testified that—having previously played and watched the sport—he was familiar with its rules and the dangers of being exposed to areas where balls are hit. Thus, when plaintiff became exposed to the flight of defendant Hendricks's ball in the driving range, his lack of situational awareness—due at least in part to his intoxication[5] and the distraction from his cell phone—constituted plaintiff's failure to exercise ordinary care. Although plaintiff testified that he was unaware he was even at the driving range—let alone in an exposed area—he would have known had he acted reasonably by maintaining awareness of his surroundings. *See Pierce v. Murnick*, 265 N.C. 707, 709 (1965) (explaining that a spectator, who was familiar with the sport of wrestling, "was contributorily negligent by sitting in an exposed position when he knew, or should have known, that a [wrestling] contestant might be thrown from the ring.").

Exactly how the golf cart plaintiff was sitting in became exposed to defendant Hendricks's ball is not a material issue. For instance, if the cart was initially parked in the exposed area past the fence line by

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5. Plaintiff's intoxication is evidenced by credible testimony—including his own—that (1) he consumed substantial amounts of moonshine and beer up until the latter part of the golf game and (2) was heavily impaired at the time of the accident.

Keith, a prudent person in plaintiff's position would have noticed such a precarious position and moved out of harm's way—especially given that plaintiff estimated he had been sitting there for a few minutes. Similarly, if the golf cart had rolled forward on its own or if plaintiff himself had inadvertently driven the cart into the exposed area, then plaintiff also failed to exercise reasonable care because a prudent person in such position would have recognized the moving cart and either stopped it before it was exposed or moved out of the way after the fact. Accordingly, the trial court did not err in granting defendants' motions for summary judgment as to contributory negligence.

C. Last Clear Chance

[2] The last clear chance doctrine requires the plaintiff

> show the following essential elements: (1) the plaintiff, by his own negligence put himself into a position of helpless peril; (2) defendant discovered, or should have discovered, the position of the plaintiff; (3) defendant had the time and ability to avoid the injury; (4) defendant negligently failed to do so; and (5) plaintiff was injured as a result of the defendant's failure to avoid the injury.

Trantham v. Est. of Sorrells By & Through Sorrells, 121 N.C. App. 611, 613 (1996) (cleaned up). Additionally, "[t]he doctrine contemplates a last 'clear' chance, not a last 'possible' chance, to avoid the injury; it must have been such as would have enabled a reasonably prudent man in like position to have acted effectively." *Culler v. Hamlett*, 148 N.C. App. 372, 379 (2002) (citations omitted).

Here, plaintiff's contention fails because defendant Hendricks did not discover, nor should he have discovered, plaintiff's position until after he had already hit the ball. Specifically, if the cart had moved forward onto the driving range while defendant Hendricks was looking down and addressing his ball, defendant Hendricks would not have known of plaintiff's precarious position until after he hit the ball. This is evidenced by testimony from defendant Hendricks, Taylor, and Brady Pinner—the golf course supervisor and professional at the Wedgewood Golf Course—that it is standard practice for golfers not to look up again after they have started to address the ball.

Defendant Hendricks testified that, before putting his head down and addressing the ball, he checked in front of him twice and saw no golf cart. Similarly, Keith testified that he saw "a portion of the cart" when defendant Hendricks hit the ball but "never saw a cart" while defendant Hendricks was preparing to hit the ball. Although Keith testified

that defendant Hendricks could have seen plaintiff had he looked up "at the time he hit the ball," such testimony differs from saying defendant Hendricks could have seen plaintiff had he looked up during his preparation period before hitting the ball. Thus, a reasonably prudent golfer in defendant Hendrick's position could not have acted effectively to avoid injury. *See Culler*, 148 N.C. App. at 379 ("The doctrine contemplates a last 'clear' chance, not a last 'possible' chance, to avoid the injury[.]").

Plaintiff's reliance on *Everett v. Goodwin*, 201 N.C. 734 (1931) is also unavailing. In *Everett*, the defendant was in a group that was playing behind the plaintiff on the same hole. Thus, unlike in this case, the plaintiff was clearly visible to the defendant as he was—and had been—playing right in front of him. *Id.*

Golfers in North Carolina indeed have a duty to "give adequate and timely notice to persons who appear to be unaware of their intentions to hit the ball when they know, or should know, that such persons are so close to the intended flight of the ball that danger to them may be reasonably anticipated." *McWilliams v. Parham*, 273 N.C. 592, 597 (1968) (cleaned up). However, they are not "insurer[s] of such persons, nor does such duty arise for the benefit of persons situate[d] in a place where danger from the driven ball might not be reasonably anticipated." *Id.*

D. Punitive Damages

[3] Plaintiff contends that the trial court erred in granting summary judgment on the issue of punitive damages. We disagree. To recover punitive damages in North Carolina, "a claimant must prove that an aggravating factor of fraud, malice, or willful or wanton conduct is present and related to the injury subject to compensatory damages." *Jones v. J. Kim Hatcher Ins. Agencies Inc.*, 893 S.E.2d 1, 14 (N.C. Ct. App. 2023) (citing N.C.G.S. § 1D-15(a)). As discussed above, none of defendant Hendricks's actions rose to this level.

E. Claims Against Defendant City of Wilson

[4] Plaintiff also contends the trial court erred in granting defendant City of Wilson's motion for summary judgment on the issues of sovereign immunity and negligence. However, even assuming arguendo that governmental immunity is not available to defendant City of Wilson as a defense, neither issue needs to be addressed because there was no genuine dispute of material fact as to plaintiff's contributory negligence as detailed in the analysis for his claim against defendant Hendricks. Plaintiff's negligence claim is thus barred by his own contributory negligence.

III. Conclusion

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

AFFIRMED.

Judge WOOD concurs.

Judge THOMPSON dissents by separate opinion.

THOMPSON, Judge, dissenting.

After careful consideration of the matters discussed below, I conclude that there remain genuine issues of material fact regarding the claims against both defendants in this case which render summary judgment inappropriate. I therefore respectfully dissent.

First, I agree with plaintiff that the trial court's allowance of summary judgment in favor of defendants based on the doctrine of contributory negligence was inappropriate because genuine issues of material fact remain, particularly concerning how the golf cart in which plaintiff was seated at the time he was struck by the golf ball came to be on the driving range.

A defendant can establish that the plaintiff was contributorily negligent by showing: "(1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *Daisy v. Yost*, 250 N.C. App. 530, 531, 794 S.E.2d 364, 366 (2016) (citation, internal quotation marks, and brackets omitted). Further, "a plaintiff may relieve the defendant of the burden of showing contributory negligence when it appears from the plaintiff's own evidence that he was contributorily negligent." *Proffitt v. Gosnell*, 257 N.C. App. 148, 152, 809 S.E.2d 200, 204 (2017) (citation, internal quotation marks, and brackets omitted).

> "Summary judgment is rarely an appropriate remedy in cases of negligence or contributory negligence. However, summary judgment is appropriate in a cause of action for negligence where 'the forecast of evidence fails to show negligence on defendant's part, or establishes plaintiff's contributory negligence as a matter of law.' " *Frankenmuth Ins. v. City of Hickory*, 235 N.C. App. 31, 34, 760 S.E.2d 98, 101 (2014) (quoting *Stansfield v. Mahowsky*, 46 N.C. App.

> 829, 830, 266 S.E.2d 28, 29 (1980)). " 'A plaintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, summary judgment is proper.' " *Id.* (quoting *Young v. Fun Services-Carolina, Inc.*, 122 N.C. App. 157, 162, 468 S.E.2d 260, 263 (1996)).

Blackmon v. Tri-Arc Food Systems, Inc., 246 N.C. App. 38, 42, 782 S.E.2d 741, 744 (2016) (brackets omitted). Accordingly, the dispositive question on this argument by defendants is whether evidence from either or both sides in the conflict demonstrates that plaintiff was negligent as a matter of law as to the proximate cause of the injury which occurred when he was seated in a golf cart on the driving range at Wedgewood. My review of the depositions of the witnesses to this incident which appear in the record reveals that genuine issues of material fact remain.

Taylor, who rode in the golf cart with Hendricks on the day in question, testified that the two golf carts were parked fully on the asphalt of the parking lot, with Taylor's and Hendricks's cart facing the fence separating the driving range from the lot and Keith's and plaintiff's cart just past the end of the fencing facing directly onto the driving range. Taylor noted that as he, Hendricks, and Keith walked to the driving range tees, plaintiff was seated in the golf cart, "on his phone . . . [or] twiddling with something." Taylor stated that the threesome intending to drive balls walked past the fence line and onto the edge of the driving range to make their way to the range tees, which Taylor felt was safe because no one was hitting on the driving range. Taylor never saw plaintiff or his golf cart moving or heard any sound from plaintiff or the golf cart in which he was seated up until defendant's drive struck plaintiff. When the ball struck plaintiff, however, Taylor agreed that the golf cart in which plaintiff was seated had "moved" and was then located on the driving range itself.

Keith testified that when the four players parked their two golf carts in or near the parking lot, the cart driven by Hendricks was behind the fencing, while the cart driven by Keith was just past the end of the fence line so that it could have been driven directly onto the driving range. He thought the cart was mainly parked on the parking lot but agreed that the front wheels could have been on the grass. However, he could not recall with certainty the exact location of the golf cart. Keith also stated that "[m]ost of the time" he would engage the brake when stopping a golf cart, but he was not asked and did not state whether he did so in this specific instance. In this circumstance, he did not see the cart, which he had been driving with plaintiff as a passenger, move after he parked it,

took out a club for use on the driving range and walked in that direction. He never saw any golf cart or plaintiff on the driving range.

Defendant testified that plaintiff did not want to hit balls on the driving range and remained in the golf cart on the asphalt of the parking lot. Hendricks further stated that he looked down the driving range once he teed up his first shot and did not see plaintiff or any other obstruction on the range before focusing downward on the ball he was about to hit, but then after hitting the ball, Hendricks saw defendant "sitting in" the golf cart that was "not [there] before." He emphasized that the golf cart in which plaintiff was seated was not on the driving range when he last saw it, but that he never saw the cart move onto the driving range.

Plaintiff testified that he did not recall many details after he fell over, and he specifically did not have clear memories of some members of the group deciding to hit balls on the driving range and explained that he thought the carts might have been parked in the parking lot area because the group was going to load their golf clubs into their vehicles. Although he did not recall much before he was struck by the golf ball, he stated that he had been texting his wife and then, once he was struck, he looked down and saw blood on the gravel, which he believed to be in an area between the asphalt of the parking lot and the grass of the driving range. Plaintiff acknowledged that the golf cart was "more forward" than it had been when Keith parked it, but plaintiff did not recall how any movement occurred. He did emphatically state that he did not move the golf cart himself and, in any event, would not have driven the cart onto the driving range himself because that would be "dangerous."

Brady Pinner, who described his titles as golf course supervisor, golf director, and golf professional at Wedgewood, testified that when he was alerted to the accident, he went to the driving range but could not recall whether a golf cart was located on the range or not. He acknowledged an email incident report from himself which referenced the golf cart in which plaintiff was seated being on the range, but he explained that he did not know whether that report stated his own observation or incorporated the information he received from others in connection to the accident. In any event, Pinner was not present at the time of the accident and thus had no knowledge of how plaintiff came to be on the driving range.

As these excerpts of the deposition testimony show, there are disputes about both the location of the golf cart at the time when plaintiff was struck and about how the golf cart came to be in that location. Plaintiff recalls seeing blood from his injury on gravel (an area between

the parking lot and the driving range). Other parties testified that the cart plaintiff was seated in when struck was partially or fully in the driving range itself. If indeed the golf cart in which plaintiff was seated when he was struck and injured was on the driving range, no witness or party testified to how the golf cart came to be in that location.

Defendant acknowledges this uncertainty but contends:

> There are only two versions of how [p]laintiff ended up on the driving range. Whether the cart was originally parked past the fence line on the driving range; or behind the fence line on asphalt (and then moved), [p]laintiff failed to take reasonable care to notice his surroundings. If he moved the cart onto the range himself, he was negligent in not using ordinary care under [sic] for his own safety. If the cart was parked on the driving range to begin with, then [p]laintiff was negligent by looking down and texting, not being aware of his circumstances and failing to move himself or the cart back behind the fence line.

I disagree. As noted above, the parties and witnesses in this case disagree about where the golf cart was initially parked when plaintiff was left behind by the members of the group who went to see who could hit the longest drive. Further, wherever the golf cart was initially parked by Keith, *if* the cart came to be located on the driving range when plaintiff was struck, there is no evidence regarding how and when it came to be in that location; for example, whether it was moved by plaintiff, rolled or lurched forward without action by plaintiff, or was moved by some party other than plaintiff. Defendant himself testified that when he glanced up at the range before briefly looking down at the ball, he did not see plaintiff. This suggests that the cart could have moved into a dangerous location too quickly for plaintiff to react by looking up. I express no opinion on these possibilities, and I believe that the majority's various suggestions of how plaintiff could have had the time and ability to act to protect himself usurp the role of the factfinder in the trial court. Such "mere speculation or conjecture" is insufficient to sustain summary judgment, *Blackmon*, 246 N.C. App. at 42, 782 S.E.2d at 744 (citation and internal quotation marks omitted), and in any event, the questions of fact regarding exactly where the golf cart was located at the time of the injury and how it came to be there are not for this Court but rather are left to the thoughtful consideration of a factfinder in the trial court, whether a jury or the trial court.

I also find persuasive plaintiff's argument that governmental immunity is not available as a complete defense to the City on plaintiff's

claims that the City was negligent in regard to the fencing not extending fully between the driving range and the adjacent parking area, the location of the tees on the driving range, and in overserving alcohol to the golf group here.

"Under the doctrine of governmental immunity, a county or municipal corporation is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity." *Estate of Williams v. Pasquotank County Parks & Rec. Dep't*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (citations and internal quotation marks omitted).[1] "Governmental immunity covers *only* the acts of a municipality or a municipal corporation committed pursuant to its governmental functions . . . . [but] does not, however, apply when the municipality engages in a proprietary function." *Id.* at 199, 732 S.E.2d at 141 (emphasis in original) (citations, internal quotation marks, and brackets omitted).

> [A] governmental function is an activity that is discretionary, political, legislative, or public in nature and performed for the public good [o]n behalf of the State rather than for itself[, while a] proprietary function, on the other hand, is one that is commercial or chiefly for the private advantage of the compact community.

Id. (citations and quotation marks omitted). In undertaking this sometimes difficult task of distinguishing the two functions, the North Carolina Supreme Court has noted as "the threshold inquiry . . . whether our legislature has designated the particular function at issue as governmental or proprietary." *Id.* at 199–200, 732 S.E.2d at 141 (citations and internal quotation marks omitted). Our legislature has provided:

> The lack of adequate recreational programs and facilities is a menace to the morals, happiness, and welfare of the people of this State. Making available recreational opportunities for citizens of all ages is a subject of general interest and concern, and a function requiring appropriate action by both State and local government. The General Assembly therefore declares that the public good and the general welfare of the citizens of this State require *adequate recreation programs, that the creation, establishment, and operation of parks and recreation programs is a proper governmental function*, and that

1. Waiver is not an issue in this case.

> it is the policy of North Carolina to forever encourage, foster, and provide these facilities and programs for all its citizens.

N.C. Gen. Stat. § 160A-351 (2021) (emphasis added).

Still, the Supreme Court has

> recognize[d] that not every nuanced action that could occur in a park or other recreational facility has been designated as governmental or proprietary in nature by the legislature. We therefore offer the following guiding principles going forward. When the legislature has not directly resolved whether a specific activity is governmental or proprietary in nature, other factors are relevant. We have repeatedly held that if the undertaking is one in which only a governmental agency could engage, it is perforce governmental in nature. This principle remains true. So, when an activity has not been designated as governmental or proprietary by the legislature, that activity is necessarily governmental in nature when it can only be provided by a governmental agency or instrumentality.
>
> We concede that this principle has limitations in our changing world. Since we first declared in *Britt*, over half a century ago, that an activity is governmental in nature if it can only be provided by a governmental agency, many services once thought to be the sole purview of the public sector have been privatized in full or in part. Consequently, it is increasingly difficult to identify services that can only be rendered by a governmental entity.
>
> *Given this reality, when the particular service can be performed both privately and publicly, the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive. Relevant to this inquiry is whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider.* We conclude that consideration of these factors provides the guidance needed to identify the distinction between a governmental and proprietary activity. *Nevertheless, we note that the distinctions between proprietary and governmental functions are*

> *fluid and courts must be advertent to changes in practice.* We therefore caution against overreliance on these four factors.

Estate of Williams, 366 N.C. at 202, 732 S.E.2d at 142–43 (emphasis added) (citations and quotation marks omitted).

Thus, while municipal parks and recreation programs are generally held to be governmental services, the specific circumstances of the particular "parks and rec" activity must be considered in light of the claims advanced by a plaintiff in a "fluid" manner that reflects considerations that are "advertent" to changes in practice. *See id*. The acts or omissions by the City here which plaintiff alleges to have been negligent—in the placement of the fencing between the driving range and the parking lot area, in the location of the driving range tees on the day in question, and in the serving of alcohol to members of the golf group here—do not appear to have conclusively been held to be governmental functions. The record before this Court, on summary judgment, is not fully developed and no party has cited controlling case law where the specific issues of the fencing and placement of tees on a driving range or the sale and potential overserving of alcohol at a parks and recreation facility are addressed.

Moreover, as noted above, the question of contributory negligence by plaintiff remains undecided, and specifically in connection to claims against the City, deposition testimony suggested that the tee area on the driving range was set about 30–35 yards down the driving range with the fence line extending about 60–70 yards in total, such that the driving range tees were set about halfway down the fence line. Pinner also acknowledged that on the date of the incident, the golf group of five men came into the clubhouse at the eleventh hole and purchased eighteen beers. He further noted "hearing" that some people had previously had their cars hit by golf balls from the driving range, although no formal reports had been filed. All of these issues are for the factfinders at trial.

Genuine issues of material fact remain in this case and accordingly, I would reverse the trial court's orders allowing summary judgment in favor of the defendants and remand for further proceedings in the trial court. For this reason, I dissent.

SANU SILWAL, GITA DEVI SILWAL, AND GS2017RE, LLC, PLAINTIFFS
v.
AKSHAR LENOIR, INC., DEFENDANT

No. COA23-589

Filed 6 February 2024

1. Pleadings—motion to amend—summary ejectment—trial de novo in district court—motion improperly denied—lack of prejudice

In a summary ejectment proceeding, in which defendant tenant appealed an adverse ruling to district court for a trial de novo, although the trial court abused its discretion by denying defendant's motion to amend its pleadings—since defendant could have amended its pleadings as a matter of course without seeking leave—defendant could not show prejudice from the error because defendant was still able to present its affirmative defenses and counterclaim to the trial court in response to plaintiff landlord's motion for summary judgment. The trial court's error was not enough, on its own, to require reversal of its order granting summary judgment in favor of plaintiff.

2. Civil Procedure—summary judgment before responsive pleading—summary ejectment action—trial de novo in district court—summary judgment not premature

In a summary ejectment proceeding, in which defendant tenant appealed an adverse ruling to the district court for a trial de novo, the trial court did not commit reversible error by granting summary judgment to plaintiff landlord before defendant filed an answer, where defendant had a full opportunity to oppose plaintiff's motion for summary judgment with a non-defective filing and by presenting its arguments regarding affirmative defenses for the trial court's consideration.

3. Parties—joinder—necessary party—summary ejectment—denial of third-party complaint—separable interest

In a summary ejectment proceeding, in which defendant tenant appealed an adverse ruling to the district court for a trial de novo, the trial court did not commit reversible error by granting summary judgment to plaintiff landlord without allowing defendant to file a third-party complaint against the prior owner of the property at issue (and with whom defendant had entered into a lease for use of the property), where, because the third party's interest in the

controversy was separable, he was not a necessary party such that his non-joinder voided the trial court's order.

4. Landlord and Tenant—commercial lease—option to renew—omitted from recorded memorandum of lease—option not binding on new landlord

In a summary ejectment proceeding, in which defendant tenant appealed an adverse ruling to the district court for a trial de novo, the trial court did not err by granting summary judgment to plaintiff landlord after it correctly determined that plaintiff was bound only by the initial lease term stated in the recorded Memorandum of Lease but not by the options to renew—which were included in the unrecorded lease entered into between defendant and the prior owner of the property—because the options were not included in the Memorandum.

5. Landlord and Tenant—commercial lease—unrecorded renewal term—summary ejectment—disputed by tenant—bond paid at increased renewal rate—no estoppel

In a summary ejectment proceeding initiated by plaintiff landlord to evict defendant tenant upon the expiration of the initial lease term stated in the recorded Memorandum of Lease, plaintiff was not estopped from denying the validity of the lease's unrecorded renewal terms—which were agreed to by defendant and the property's former owner but were not included in the Memorandum—by accepting rent at the increased renewal rate in the form of defendant's bond to stay execution of summary ejectment. Plaintiff was under no burden to challenge the terms of defendant's bond after initiating eviction procedures.

6. Landlord and Tenant—commercial lease—unrecorded renewal term—enforcement of lease—quasi-estoppel inapplicable

In a summary ejectment proceeding initiated by plaintiff landlord to evict defendant tenant upon the expiration of the initial lease term stated in the recorded Memorandum of Lease, quasi-estoppel principles did not apply to bind plaintiff to the lease's unrecorded renewal terms—which were agreed to by defendant and the property's former owner but were not included in the Memorandum—because plaintiff was bound only to the initial term and did not ratify the unrecorded lease terms by enforcing the recorded terms.

7. Landlord and Tenant—commercial lease—unrecorded renewal term—parties' prior transaction—equitable estoppel

In a summary ejectment proceeding initiated by plaintiff landlord to evict defendant tenant upon the expiration of the initial

lease term stated in the recorded Memorandum of Lease, plaintiff was not equitably estopped from denying the validity of the lease's unrecorded renewal terms—which were agreed to by defendant and the property's former owner but were not included in the Memorandum—based on a prior transaction between the parties, which defendant argued was predicated on defendant securing a long-term lease with the former owner, where defendant failed to identify any act or omission by plaintiff that would justify defendant's reliance on plaintiff honoring the lease with the former owner.

Appeal by Defendant from order entered 5 December 2022 by Judge Wesley W. Barkley in Caldwell County District Court. Heard in the Court of Appeals 29 November 2023.

Wilson, Lackey, Rohr & Hall, P.C., by David S. Lackey, for plaintiffs-appellees.

Young, Morphis, Bach & Taylor, LLP, by Jarryd A. de Boer, for defendant-appellant.

MURPHY, Judge.

The trial court abused its discretion when it denied Defendant an opportunity to file pleadings after appeal of a summary ejectment order for a trial de novo before the District Court. However, Defendant cannot show prejudice from this error, and we affirm the trial court's grant of summary judgment in favor of Plaintiffs.

BACKGROUND

This dispute arises from a series of transactions involving real property between Plaintiffs, Defendant, and a third party, Robert Barlowe. From 2013 or 2014 to 2017, Plaintiffs operated a convenience store on real property ("the Premises") leased from Barlowe on Morganton Blvd. in Lenoir.

In 2017, Plaintiffs sold their business to Defendant. Contemporaneously, Defendant entered into a Lease of the Premises with Barlowe. The written Lease Agreement stated, "[t]he term . . . shall be for a period of twenty (20) years beginning [27 July 2017], through and including [31 July 2037], with option to renew in five (5) year period increments[,]" although the rent terms make clear Defendant-Tenant was bound only for the first five years, with the stated twenty years representing the maximum duration should Defendant exercise every renewal option.

The Lease also required, *inter alia*, that Defendant maintain insurance covering its use of the premises. On 26 July 2017, the Caldwell County Register of Deeds recorded a Memorandum of Lease, which identified the parties to the Lease and the Premises, then recited, "[t]he term of the Lease shall be through and including [31 July 2022]. The terms of the Lease are contained in the Lease Agreement . . . ."

On 16 March 2018, Barlowe conveyed the Premises, in fee simple, to Plaintiffs for valuable consideration via a general warranty deed. At this time, Plaintiffs were aware of Defendant's Lease generally, but the parties dispute whether Plaintiffs had actual knowledge that Defendant held options to extend the lease beyond 2022. The Caldwell County Register of Deeds recorded Plaintiffs' deed on the same day of the conveyance, 16 March 2018. On the following day, the Caldwell County Register of Deeds recorded Defendant's full lease agreement for the Premises.

Initially, Plaintiffs and Defendant carried on a landlord-tenant relationship as "a matter of business" with "no like or dislike." On 3 April 2018, Plaintiffs "became aware of the full lease agreement" and thereafter sought to enforce it as written, except for the term, which they viewed as controlled by the recorded Memorandum of Lease. Specifically, they enforced the provisions requiring Defendant to maintain insurance, pay late fees, and pay a share of property taxes.

On 21 January 2022, Plaintiffs notified Defendant to "vacate the leased premises by the end of the day on [31 July 2022]" pursuant to the recorded Memorandum of Lease. Defendant responded on 1 March 2022 by purporting to exercise its five-year renewal option "for the period beginning [1 August 2022.]" Plaintiffs countered that the recorded Memorandum of Lease controlled and only bound them through 31 July 2022.

On 1 August 2022, when Defendant had not vacated the Premises, Plaintiffs initiated summary ejectment proceedings in small claims court. On 2 September 2022, the small claims court entered a judgment for Plaintiffs and ordered Defendant be removed from the Premises. Defendant appealed the judgment to District Court and executed a bond to stay execution on appeal, pursuant to N.C.G.S. § 42-34. Under this bond, Defendant paid $2,061.00 monthly—the rental amount contemplated under the five-year renewal lease term—to the Clerk of Superior Court.

In District Court, Plaintiffs moved for summary judgment. In response, Defendant moved for further pleadings, seeking to file an answer with affirmative defenses, a counterclaim seeking declaratory judgment, and an alternative third-party complaint against Barlowe seeking $25,000.00 damages for breach of contract. Defendant also

made filings in opposition to summary judgment, including interrogatories of Plaintiff Sanu Silwal, an affidavit of Barlowe, an affidavit of Defendant's president, and a deposition of Silwal. The trial court held a hearing on both motions, then granted Plaintiffs' motion and denied Defendant's motion. It further ordered the Clerk to release all rents to Plaintiffs. Defendant moved to set aside the order of summary judgment, which the District Court also denied. Defendant appealed to this Court and executed another bond to stay execution of the order of summary judgment on appeal.

ANALYSIS

Defendant challenges the trial court's grant of summary judgment to the Plaintiffs on both procedural and substantive grounds. Procedurally, it argues the trial court abused its discretion by denying its motion for further pleadings and, having done so, erred in ruling on Plaintiffs' motion for summary judgment before the pleadings were complete. Substantively, it raises several estoppel-based affirmative defenses, arguing Plaintiffs were bound by the options to renew which were not recorded prior to the deed to Plaintiffs.

A. Pleadings

Defendant argues the trial court abused its discretion by denying its motion for further pleadings and relatedly erred by ruling on Plaintiffs' motion for summary judgment without offering Defendant and Barlowe an opportunity to file pleadings. While the trial court abused its discretion by denying Defendant's motion, the error does not merit reversal, and the court did not err by entering summary judgment without permitting Defendant or Barlowe to file pleadings.

Summary ejectment is a small claim action before the magistrate and appealable to the District Court for a trial de novo. N.C.G.S. §§ 7A-210(2), -211, -228(a)-(b) (2023). On appeal to the District Court, the ordinary rules of civil procedure apply, subject to specialized rules prescribed by N.C.G.S. §§ 7A-210 to -239. *Jones v. Ratley*, 168 N.C. App. 126, 131 (Tyson, J., dissenting) ("*Duke Power* [*Co. v. Daniels*, 86 N.C. App. 469 (1987),] supports the application of the general rules to all cases in [D]istrict [C]ourt, including those that originate in small claims court but are appealed for trial *de novo*."), *dissent adopted per curiam*, 360 N.C. 50 (2005); N.C. R. Civ. P. 1; N.C.G.S. § 1A-1 (2022) ("These rules shall govern the procedure in the [S]uperior and [D]istrict courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute.").

"The North Carolina Rules of Civil Procedure are part of the General Statutes. Accordingly, interpreting the Rules of Civil Procedure is a matter of statutory interpretation. A question of statutory interpretation is ultimately a question of law for the courts. We review conclusions of law de novo." *In re E.D.H.*, 381 N.C. 395, 398 (2022) (marks and citations omitted). We review a trial court's ruling on a motion for leave for abuse of discretion. *Cf. Henry v. Deen*, 310 N.C. 75, 82 (1984) ("A motion to amend is addressed to the discretion of the trial court. Its decision will not be disturbed on appeal absent a showing of abuse of discretion.").

1. Defendant's Motion for Further Pleadings

[1] We first consider whether Defendant needed leave to file its pleadings or could have done so as a matter of course. Defendant argues, "if the counterclaims or third-party claims are appropriate, the [trial] judge has no discretion but to allow the motion [for further pleadings]."

On appeal to the District Court for a trial de novo, the parties may, but are not required to, file further pleadings, including those jurisdictionally barred from small claims court. N.C.G.S. § 7A-220 (2023) ("On appeal from the judgment of the magistrate for trial de novo before a [D]istrict [Court] judge, the judge shall allow appropriate counterclaims, cross claims, third party claims, replies, and answers to cross claims, in accordance with [N.C.]G.S. [§] 1A-1, et seq."); *J. S. & Assocs. v. Stevenson*, 265 N.C. App. 199, 201 (2019) ("[W]hen an aggrieved party properly brings an appeal from small claims court to [D]istrict [C]ourt pursuant to [N.C.G.S. §] 7A-228, the parties may also bring their counterclaims, cross-claims, and third-party claims pursuant to [N.C.G.S. §] 7A-220."); *4U Homes & Sales, Inc. v. McCoy*, 235 N.C. App. 427, 435 (2014) ("As a result[] [of N.C.G.S. §§ 7A-219 to -220,] a defendant in a summary ejection action who wishes to assert counterclaims that have a value greater than the jurisdictional amount applicable in small claims court may either assert their claims on appeal to the District Court from an adverse decision by the magistrate or assert those claims in an entirely separate action."); *Fickley v. Greystone Enters.*, 140 N.C. App. 258, 261-62 (2000) ("[The] plaintiffs had the opportunity to file . . . a counterclaim in an appeal from the magistrate's judgment[.]").

Plaintiffs acknowledge "[N.C.]G.S. [§] 7A-220 does not require a [d]efendant to obtain leave of court to file any of the pleadings that Defendant sought to file"; nonetheless, they argue that "Defendant having unnecessarily sought leave of court, the trial court did not err in denying Defendant's Motion for Additional Pleadings." We considered and rejected a similar argument in *Coble Cranes & Equip. Co. v. B & W*

Utils., *Inc.*, 111 N.C. App. 910 (1993). There, the trial court granted summary judgment for the plaintiff without ruling on the defendant's motion to amend her answer. *Id.* at 912. However, at that stage, the defendant "had an absolute right to amend and thus did not need to file a motion[,]" and we rejected the plaintiff's argument that "this right justified the trial court's action with regard to [the] defendant's motion." *Id.* at 913. Rather, we saw "no reason the trial court should not have allowed [the] defendant's motion to amend" because she "filed the motion in a timely manner, and the plaintiff would not have suffered any discernible prejudice by the judge's allowance of the motion." *Id.* Therefore, we held "the trial court's failure to rule on the motion was error[.]" *Id.* at 912.

Here, the trial court similarly abused its discretion by denying Defendant leave to file the pleadings, which it could have filed as a matter of course. Although N.C.G.S. § 7A-220 does not prescribe a timeline for pleadings on appeal for a trial de novo before a District Court judge, Defendant's motion was timely, whether measured from the judgment of small claims court or Defendant's notice of appeal therefrom. *See* N.C. R. Civ. P. 12(a)(1); N.C.G.S. § 1A-1 (2022). Further, there is no reason to believe Plaintiffs "would [] have suffered any discernible prejudice by the judge's allowance of the motion." *Coble Cranes*, 111 N.C. App. at 913.

This abuse of discretion, however, does not merit reversal. Despite the error, in *Coble Cranes*, we affirmed the trial court's entry of summary judgment because "[t]he trial court's failure to allow [the] defendant's motion to amend . . . did not prejudice the defendant[.]" *Id.* Defendant, here, has likewise not suffered prejudice because, as the trial court noted, "[a]ll of [Defendant's affirmative defenses and counterclaim for declaratory judgment] were argued and considered by the [c]ourt during the Motion for Summary Judgment" and "Defendant may bring an independent action against [] Barlowe[.]"[1]

Although the trial court's improper denial of Defendant's motion does not, by itself, merit reversal, two circumstances here were not

1. Moreover, Defendant's claim against Barlowe was not appropriate for third-party practice: "a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him *for all or part of the plaintiff's claim against him*." N.C. R. Civ. P. 14, N.C.G.S. § 1A-1 (2023) (emphasis added). However, Defendant alleges Barlowe is liable to it for damages upon an independent cause of action. A defendant may not serve a third-party complaint merely because the third-party claim involves common factual issues. *See*, *e.g.*, *McCollum v. McCollum*, 102 N.C. App. 347, 348 (1991) ("[The plaintiff's claims against [the defendant] were for an absolute divorce and for an equitable distribution of the marital property. Obviously, the [third-party] [b]ank could not be held liable to [the defendant] should an absolute divorce be granted.").

present in *Coble Cranes*: (1) the trial court granted Plaintiffs' motion for summary judgment without Defendant having filed any answer and (2) Defendant had sought to plead a third-party complaint. We consider these circumstances in our discussion of Defendant's further arguments.

2. Entry of Summary Judgment Absent Defendant's Answer

[2] We next consider whether the trial court erred by entering summary judgment for Plaintiffs without permitting Defendant to first file its answer.

Defendant cites *Alpine Village, Inc. v. Lomas & Nettleton Financial Corp.*, 27 N.C. App. 403 (1975), *cert. denied*, 289 N.C. 302 (1976), for the proposition that summary judgment before Defendant had the opportunity to file its answer was premature. Although Rule 56 of our Rules of Civil Procedure does not fix an appropriate time for the trial court to enter summary judgment, N.C. R. Civ. P. 56, N.C.G.S. § 1A-1 (2023), in *Village, Inc.*, we held the trial court erred by entering summary judgment for the plaintiffs without giving the defendant an opportunity to file its answer. *Village, Inc.*, 27 N.C. App. at 404-05. There, the trial court simultaneously denied the defendant's motion to dismiss and granted the plaintiff's motion for summary judgment. *Id.* at 403. In doing so, the trial court did not consider the defendant's defective affidavit, which, while raising genuine issues of material fact, did not comply with Rule 56 of our Rules of Civil Procedure. *Id.* at 404. On appeal, we held the trial court entered summary judgment prematurely because the trial court's denial of the defendant's motion to dismiss gave it an additional 20 days to file its answer, and the entry of summary judgment before this timeframe deprived the defendant of the opportunity to plead the defective affidavit's substance in its answer. *Id.*

However, *Village, Inc.* acknowledged "summary judgment for [a] claimant, under some circumstances, might be appropriate before the responsive pleading has been filed or even before the time to file responsive pleadings has expired." *Id.* In *Kavanau Real Estate Trust v. Debnam*, we rejected a similar argument and held there was "no justifiable reason for delaying entry of summary judgment" because "[the defendants opposing summary judgment] had nearly four months to prepare defenses and to come forward with material questions of fact with which to defeat the motion for summary judgment" and still had "not come forward with such questions of fact" and therefore did not satisfy their burden "to set forth specific facts showing that there is a genuine issue for trial." *Kavanau Real Est. Tr. v. Debnam*, 41 N.C. App. 256, 261-62 (1979).

Here, unlike *Village, Inc.*, Defendant made a non-defective filing in opposition to summary judgment, which included Silwal's response to interrogatories, an affidavit of Barlowe, an affidavit of Defendant's president, and a transcript of Silwal's deposition. Moreover, Defendant argued, and the trial court considered, its affirmative defenses at the hearing. Defendant, therefore, had a full opportunity "to prepare defenses and to come forward with material questions of fact with which to defeat the motion for summary judgment[,]" *id.* at 261, so the trial court did not err by ruling on Plaintiffs' motion for summary judgment without permitting Defendant to file pleadings.

3. Entry of Summary Judgment Absent Barlowe's Pleadings

[3] Defendant further argues "Barlowe should have been afforded an opportunity to plead or otherwise defend the action." Unlike Defendant, Barlowe is not a party to this action, so we consider whether Barlowe was a necessary party such that his non-joinder voided the trial court's jurisdiction. *See J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 16-17 (1987) ("[T]he necessary joinder rules of N.C.G.S. [§] 1A-1, Rule 19 place a mandatory duty on the [trial] court to protect its own jurisdiction to enter valid and binding judgments . . . . [A] judgment without such necessary joinder is void[.]").

> The [trial] court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

N.C. R. Civ. P. 19(b), N.C.G.S § 1A-1 (2023).

> Necessary parties must be joined in an action. Proper parties may be joined. A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence. A proper party is a party who has an interest in the controversy or subject matter which is separable from the interest of the other parties before the court, so that it may, but will not necessarily, be affected by a decree or judgment which does complete justice between the other parties.

Karner v. Roy White Flowers, Inc., 351 N.C. 433, 438-39 (2000) (marks and citations omitted).

Defendant sought to bring a third-party complaint against Barlowe, alleging that "[i]f the [c]ourt finds that [Plaintiffs] are not bound by the Lease, then and only then is [] Barlowe liable in breach of contract with [Defendant]." Any interest Barlowe had in the controversy between Plaintiffs and Defendant was separable in that the resolution of Plaintiffs' summary ejectment claim against Defendant did not resolve Defendant's potential breach of contract claim against Barlowe and thereby prejudice Barlowe. The trial court did not err by granting Plaintiffs summary judgment against Defendant without affording Barlowe "an opportunity to plead or otherwise defend the action[,]" to which he was neither joined nor a necessary party.

Having considered the trial court's denial of Defendant's motion for further pleadings and simultaneous entry of summary judgment, we conclude the trial court's abuse of discretion in denying Defendant leave to plead an answer and third-party complaint does not merit reversal, and the trial court did not err by ruling on Plaintiffs' motion for summary judgment without these pleadings.

B. Summary Judgment

Turning to the merits of summary judgment, Defendant argues "the trial court erred when it granted Plaintiffs' summary judgment and, based on the record, should have granted summary judgment in favor of [] Defendant."[2]

> The standard of review for an order of summary judgment is firmly established in this state. We review a trial court's order granting or denying summary judgment de novo. 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. All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party. The showing required for summary judgment may be accomplished by proving an essential element of the

2. In its reply brief, Defendant argues "there is a substantial amount of evidence in the record that creates genuine issues of material fact[.]" However, Defendant does not point to any specific issues of fact in support of this argument. Although the parties dispute whether Plaintiffs had actual knowledge that Defendant held options to extend the lease beyond 2022, this issue is not material under the Connor Act. *See Bourne v. Lay & Co.*, 264 N.C. 33, 35 (1965).

> opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense[.]

Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC, 365 N.C. 520, 523 (2012) (marks and citation omitted); *see* N.C. R. Civ. P. 56; N.C.G.S. § 1A-1 (2023).

Defendant raises three estoppel-based affirmative defenses, arguing Plaintiffs were bound by Defendant's options to renew the Lease, despite the options' absence from the recorded Memorandum of Lease. We first consider the effect of the Memorandum of Lease under the Connor Act, then address each of Defendant's affirmative defenses.

1. The Connor Act

[4] The trial court granted Plaintiffs' motion for summary judgment based on its conclusion they were not bound by the renewal terms in Defendant's Lease because the recorded Memorandum of Lease omitted terms. Reviewing this conclusion de novo, we agree.

Under the Connor Act,

> [n]o . . . lease of land for more than three years[] . . . is valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the . . . lessor but from the time of its registration in the county where the land lies[.] . . . Unless otherwise stated either on the registered instrument or on a separate registered instrument duly executed by the party whose priority interest is adversely affected, [] instruments registered in the office of the register of deeds have priority based on the order of registration as determined by the time of registration[.]

N.C.G.S. § 47-18 (2023); *see also Greaseoutlet.com, LLC, v. MK South II, LLC*, 290 N.C. App. 17, 22 & n.2 (2023) (summarizing the act's legislative history, purpose, and nomenclature). "Actual knowledge, however full and formal, of a grantee in a registered deed of a prior unregistered deed or lease will not defeat his title as a purchaser for value in the absence of fraud or matters creating estoppel." *Bourne*, 264 N.C. at 35.

A tenant may, but need not, record the full lease agreement to protect its leasehold interest; rather, "[i]t is sufficient under the Connor Act to register a memorandum, rather than the actual lease, so long as the memorandum recites the lease's key terms sufficient to put the world on record notice the extent of tenant's leasehold interest." *Greaseoutlet.com, LLC*, 290 N.C. App. at 23; *see* N.C.G.S. § 47-118 (2023). Such a

memorandum has "the same legal effect as if the written lease agreement had been registered in its entirety" and "shall set forth: (1) The names of the parties thereto; (2) A description of the property leased; (3) The term of the lease, including extensions, renewals and options to purchase, if any; and (4) Reference sufficient to identify the complete agreement between the parties." N.C.G.S. § 47-118(a), (c) (2023).

Here, the recorded Memorandum of Lease inaccurately reflected, "[t]he term of the Lease shall be through and including [31 July 2022,]" when the actual Lease Agreement included options to renew beyond 31 July 2022. Plaintiffs contend, in essence, that this Memorandum recorded all parts of the Lease Agreement except the renewal terms. Their actions were consistent with this view: Plaintiffs enforced the Lease, including provisions not stated in the Memorandum, then sought to evict Defendant upon expiration of the original five-year term.

We recently considered a nearly identical issue in *Greaseoutlet.com, LLC*. There, the plaintiff-tenant entered into a five-year lease for industrial property. *Greaseoutlet.com, LLC*, 290 N.C. App. at 19. The lessor recorded a memorandum of lease accurately stating the five-year term and expressly incorporating all subsequent amendments. *Id.* at 19, 23. Four months later, the plaintiff and lessor amended the lease to add two successive five-year options to renew. *Id.* at 19. Neither party to the lease recorded the lease as amended. *Id.* Three years later, the original lessor sold the property to the defendant in fee simple, and the defendant promptly recorded its deed. *Id.* at 21. Upon expiration of the original term, the defendant refused to honor the plaintiff's exercise of its option. *Id.* at 19. We held the memorandum, despite purporting to incorporate the amended option to renew, was "insufficient to bind [the defendant] beyond the [expressly stated] initial term" because it failed to actually specify any then-anticipatory amended renewal terms and "[o]ur General Assembly requires that a memorandum of lease *shall* state the term of the lease, *including extensions/renewals*[.]" *Id.* at 24.

Here, the Memorandum of Lease likewise reflected the written Lease Agreement's initial term while omitting renewal terms. We agree with the trial court and Plaintiffs that the recorded memorandum bound Plaintiffs to the Lease for the recited five-year term, but not beyond.

2. Defendant's Payment of Rent Pursuant to Its Bond to Stay Execution

[5] We turn to Defendant's estoppel-based arguments as to why Plaintiffs should nevertheless be bound to the Lease's unrecorded renewal terms. The first of these is that Plaintiffs have implicitly agreed

to renew Defendant's Lease by accepting increased rent for the second five-year term via Defendant's bond to stay execution on appeal of summary ejectment judgment.

Landowners who accept rent pursuant to a preexisting but unrecorded lease are not estopped from denying the validity of the lease. *Bourne*, 264 N.C. at 35-36 (asking "[a]re the plaintiffs estopped from denying the validity of [the] defendant's lease by accepting rent in accordance with its terms for a period of two years and one month?" and answering "in the negative"). However, Defendant relies on *Coulter v. Capitol Finance Co.*, 266 N.C. 214 (1966), to argue that "[b]y accepting and not disputing the increased rental amount, [] Plaintiffs accepted the lease for the second five year term."

In *Coulter*, our Supreme Court, considering a lease with an option to extend at a higher rent, held that a tenant's payment of the increased rent upon the expiration of the original term and the landlord's acceptance without comment "clearly indicate[d] an intent on the part of the lessee to exercise its option to extend the term . . . and a similar intent on the part of the lessor to waive the notice to which she was entitled." *Coulter v. Capitol Fin. Co.*, 266 N.C. 214, 219 (1966). Our Supreme Court noted that the lessor, having not received notice of the tenant's intent to exercise its option, would have been entitled to evict the tenant upon the expiration of the original term. *Id.* at 218. However, the landlord was also entitled to waive notice and treat the tenant as having extended the lease. *Id.* Thus, "[w]hen [] the original lessee[] held over after the expiration of its [original] term, [paid] rent at the rate which was to apply only if it exercised its option to extend the term . . . and the lessor accepted this payment, the extension of the lease was effected[.]" *Id.* at 220.

This case is distinguishable. In *Coulter*, the landlord could have, but did not, evict the tenant from the premises. *Id.* at 218. Here, however, Plaintiffs sought to evict Defendant from the Premises. Their eventual receipt of rent while Defendant remains in possession, pursuant to the eviction procedure, permits no inference that Plaintiffs intended to be bound by the Lease's unrecorded renewal terms. *See* N.C.G.S. § 42-34 (2023) ("[I]t shall be sufficient to stay execution of a judgment for ejectment if the defendant appellant pays to the [C]lerk of [S]uperior [C]ourt any rent in arrears . . . and signs an undertaking that he or she will pay into the office of the [C]lerk of [S]uperior [C]ourt the amount of the tenant's share of the contract rent as it becomes due periodically after the judgment was entered.").

Defendant is correct that these payments were made at the renewal rate rather than the original. However, N.C.G.S. § 42-34(b) provides that

Defendant "pay into the office of the [C]lerk of [S]uperior [C]ourt the amount of the tenant's share of the contract rent as it becomes due periodically after the judgment was entered[,]" and, "[i]f either party disputes the amount of the payment[,] . . . *the aggrieved party* may move for modification of the terms of the undertaking before the [C]lerk of [S]uperior [C]ourt or the [D]istrict [C]ourt." N.C.G.S. § 42-34(b) (2023) (emphasis added). Assuming, *arguendo*, the rent should have been at the rate under the original recorded term, our statutes gave *Defendant* the option to dispute the amount. Plaintiffs were under no burden to police the terms of Defendant's bond lest they estop themselves.

Plaintiffs eventual receipt of rent, pursuant to Defendant's bond to stay execution of summary ejectment, does not estop them from executing the judgment upon dissolution of the stay.

3. Plaintiffs' Enforcement of the Lease

[6] Defendant further argues that Plaintiffs are subject to the unrecorded options to renew because they relied on the Lease, enforced some of its provisions not mentioned in the Memorandum of Lease, and used it as "the basis for [their] Complaint."

"Quasi-estoppel has its basis in acceptance of benefits and provides that [w]here one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it." *Carolina Medicorp v. Bd. of Trustees of State Med. Plan*, 118 N.C. App. 485, 492 (1995) (alteration in original) (marks omitted). "[A] ratification of an unauthorized act or transaction is not valid and binding unless it proceeds upon a full knowledge of the material facts relative thereto . . . . [T]he very essence of ratification, as of an election, [is] that it be done advisedly, with full knowledge of the party's rights[.]" *Cox v. Kingston Carolina R.R. and Lumber Co.*, 175 N.C. 299, 310 (1918).

Having already held Plaintiffs were bound only to the initial recorded term of the Lease, we conclude quasi-estoppel does not apply here. Although Plaintiffs accepted the benefits of the Lease, including portions not reflected in the Memorandum of Lease, they did so without any "right to accept or reject" the Lease. *See Carolina Medicorp*, 118 N.C. App. at 492.

Defendant resists this by arguing "Plaintiffs needed a declaratory judgment before they could cite to the [L]ease to [] Defendant[] without adopting or ratifying the [L]ease." However, Defendant cites no authority to support this assertion, and such a rule would permit Plaintiffs to have unwittingly ratified the lease without full knowledge of their rights,

in contrast to *Cox*'s holding that "the very essence of ratification, as of an election, [is] that it be done advisedly, with full knowledge of the party's rights[.]" *Cox*, 175 N.C. at 310.

Plaintiffs did not ratify the portions of the untimely-recorded Lease Agreement to which they were *not* bound by enforcing the portions to which the parties *were* bound.

4. Defendant's Prior Transaction with Plaintiffs

[7] Lastly, Defendant contends that Plaintiffs are estopped from denying the Lease based on their 2017 transaction with Defendant. According to Defendant, Plaintiffs understood the transaction "was conditioned on Defendant securing a long-term lease with [Barlowe,]" and "are now estopped from denying the very lease that was the condition and part of the transaction."

> North Carolina courts have also long recognized the doctrine of equitable estoppel, otherwise known as estoppel in pais. Generally speaking, the doctrine applies
>
> > when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.
>
> In such a situation, the party whose words or conduct induced another's detrimental reliance may be estopped to deny the truth of his earlier representations in the interests of fairness to the other party. In applying the doctrine, a court must consider the conduct of both parties to determine whether each has conformed to strict standards of equity with regard to the matter at issue.

Whitacre Partnership v. Biosignia, Inc., 358 N.C. 1, 16-17 (2004) (marks and citations omitted); *see Bourne*, 264 N.C at 37 ("It is essential to an equitable estoppel that the person asserting the estoppel shall have done or omitted some act or changed his position in reliance upon the representations or conduct of the person sought to be estopped. A change of position which will fulfill this element of estoppel must be actual, substantial, and justified.").

Defendant has not identified any act, representation, or omission by Plaintiffs that would justify its reliance on Plaintiffs to honor its Lease with Barlowe should Plaintiffs acquire the Premises. Without this, Defendant has not forecasted evidence sufficient to establish its affirmative defense of equitable estoppel.

Having considered the Connor Act and Defendant's estoppel arguments, we hold the recorded Memorandum of Lease bound Plaintiffs for only the term stated in the Memorandum of Lease and not to the options to renew not stated therein. We further hold Plaintiffs were not bound to the unrecorded renewal terms by adoption or estoppel.

CONCLUSION

On appeal from small claims court for a trial de novo, Defendant had the right to plead as a matter of course, and the trial court abused its discretion by denying, Defendant's motion for leave to plead an answer and third-party complaint against Barlowe. Nevertheless, this abuse of discretion did not prejudice Defendant and does not merit reversal, and the trial court did not err in ruling on Plaintiffs' motion for summary judgment without these pleadings where Defendant made a filing in opposition to summary judgment and Barlowe was not a necessary party.

The trial court did not err on the merits of summary judgment where the recorded Memorandum of Lease bound Plaintiffs only to the now-elapsed original term stated in the Memorandum of Lease and where Plaintiffs neither adopted nor were estopped from denying the Lease's unrecorded options to renew.

AFFIRMED.

Chief Judge DILLON and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
JAMES FREDRICK BOWMAN, DEFENDANT

No. COA23-82

Filed 6 February 2024

1. Sexual Offenses—right to unanimous verdict—first-degree forcible sexual offense—multiple "sexual acts" alleged—jury instructed on only one of two counts

In defendant's trial for rape, assault, and related charges, the trial court committed plain error by instructing the jury on only one of two counts of first-degree forcible sexual offense, which violated defendant's right to a unanimous verdict and entitled him to a new trial on those charges. Although the trial court informed the jury that its verdict needed to be unanimous, where defendant was alleged to have committed—and the evidence at trial supported—three "sexual acts" for purposes of forcible sexual offense but was only charged with two counts of that offense, since neither the trial court's instruction nor the verdict sheet specified which sexual act was to be considered for each charge, the jury's verdict could not be matched with discrete acts committed by defendant.

2. Sentencing—clerical errors—prior record level—aggravating factor—acceptance of defendant's admission—remand required

Where the trial court committed multiple clerical errors in defendant's judgment for rape and related charges—including marking defendant as a prior record level V with fourteen points rather than a prior record level IV with twelve points, marking a box for the aggravating factor that the offense was committed while defendant was on pretrial release even though he had not been on pretrial release, and failing to check a box indicating the trial court's acceptance of defendant's admission to a different aggravating factor—the matter was remanded for correction of those errors.

Judge THOMPSON dissenting in part.

Appeal by Defendant from judgment entered 25 January 2022 by Judge Josephine K. Davis in Durham County Superior Court. Heard in the Court of Appeals 17 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jasmine McGhee, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Defendant-Appellant.

CARPENTER, Judge.

James Fredrick Bowman ("Defendant") appeals from judgment entered after a jury found him guilty of two counts of first-degree forcible sexual offense, one count of first-degree forcible rape, one count of possession of a firearm by a felon, one count of assault by pointing a gun, one count of assault on a female, and one count of communicating threats. On appeal, Defendant argues the trial court erred by instructing the jury on only one count of first-degree forcible sexual offense, thus jeopardizing his right to a unanimous verdict. Additionally, Defendant argues remand is required to correct clerical errors in the judgment. After careful review, we agree with Defendant. Therefore, we reverse in part and remand this case for a new trial concerning the two counts of first-degree forcible sexual offense and for correction of clerical errors in the judgment.

I. Factual & Procedural Background

At around 5:00 a.m. on 9 September 2019, S.B. ("Victim") awoke when Defendant banged on her window, yelling at her to open the door to her home. Once Victim opened the door, Defendant accused Victim of sleeping with someone else and punched her in the chest. Defendant appeared to be heavily intoxicated and was armed with a handgun. Defendant exclaimed, "[s]ince you want to act like a whore, I'm going to treat you like a whore." Defendant, while brandishing a gun, then ordered Victim to strip. Defendant proceeded to assault Victim anally, orally, and vaginally, while threatening to kill Victim, dismember her body, and bury her in pieces.

On 21 October 2019, a Durham County grand jury indicted Defendant for the following seven offenses: one count of first-degree forcible rape, two counts of first-degree forcible sexual offense, one count of possession of a firearm by a felon, one count of assault by pointing a gun, one count of assault on a female, and one count of communicating threats. On 23 March 2021, the case went to trial, which ended in a hung-jury mistrial. On 17 January 2022, the case went to a second trial in Durham County Superior Court.

At the close of all evidence, the trial court held a charge conference and instructed the jury. Defendant did not object to the jury instructions. The trial court read the elements for first-degree forcible sexual offense and explained the burden of proof. The trial court did not read the instructions for each count charged, nor did the court otherwise notify the jury that Defendant was charged with two separate counts of first-degree forcible sexual offense.

The trial court did state that "all 12 of you must agree to your verdict. You cannot reach a verdict by majority vote." But while the verdict sheets listed two counts of first-degree forcible sexual offense, the two counts were not separated by specific instances of sexual act. The two counts were simply separated on the verdict sheet as "count 2" and "count 3." This is similar to Defendant's indictment, which listed the two first-degree forcible sexual offenses as the second and third counts.

The jury found Defendant guilty on all seven charges, including the two counts of first-degree forcible sexual offense. Defendant then admitted the existence of an aggravating factor. The trial court entered judgment on the jury's verdicts and imposed a consolidated aggravated-range sentence of 365 to 498 months of active imprisonment. Defendant gave oral notice of appeal in open court following the entry of judgment.

II. Jurisdiction

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

III. Issues

The issues on appeal are whether: (1) the trial court committed plain error by instructing the jury on only one count of first-degree forcible sexual offense, thus jeopardizing Defendant's right to a unanimous verdict; and (2) remand is required to correct clerical errors in the judgment.

IV. Analysis

A. Jury Instructions

[1] Defendant first contends the trial court committed plain error by instructing the jury on only one count of first-degree forcible sexual offense, thus jeopardizing his right to a unanimous verdict. After careful review, we agree with Defendant.

When the issue is properly preserved at trial, "[t]he question of whether a trial court erred in instructing the jury is a question of law reviewed *de novo*." *State v. McGee*, 234 N.C. App. 285, 287, 758 S.E.2d

661, 663 (2014). We review unpreserved jury-instruction issues, however, for plain error. *State v. Collington*, 375 N.C. 401, 410, 847 S.E.2d 691, 698 (2020). Here, Defendant did not object to the jury instructions at trial, so we will review only for plain error. *See id.* at 410, 847 S.E.2d at 698.

Under plain-error review, 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. 506, 519, 723 S.E.2d 326, 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)).

First-degree forcible sexual offense includes "a sexual act with another person by force and against the will of the other person" by use, or threatened use, of a deadly weapon. N.C. Gen. Stat. § 14-27.26 (2021). A sexual act includes "[c]unnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body." *Id.* § 14-27.20(4).

"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, 309 S.E.2d 188, 191 (1983). "When reviewing a trial court's charge to the jury, the instructions must be considered in their entirety." *State v. Parker*, 119 N.C. App. 328, 339, 459 S.E.2d 9, 15 (1995). And in criminal cases, "a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment." *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986).

In *State v. Bates*, this Court found the trial court's failure to distinguish between separate counts of first-degree sexual offense was a plain error because such a failure jeopardized the defendant's right to a unanimous verdict. 172 N.C. App. 27, 38, 616 S.E.2d 280, 288 (2005). The jury convicted the defendant of six counts of first-degree sexual offense. *Id.* at 29, 616 S.E.2d at 283. The trial court, however, read the instruction only once for eleven counts of the same offense. *Id.* at 38, 616 S.E.2d at 288. Thus, we held that the defendant's right to a unanimous jury verdict was jeopardized. *Id.* at 38, 616 S.E.2d at 288.

But "the Supreme Court remanded the case to this Court for reconsideration in light of its decision in *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006)." *State v. Bates*, 179 N.C. App. 628, 629, 634 S.E.2d 919, 920 (2006). On remand, we reconsidered the case based on four factors: "(1) the evidence; (2) the indictments; (3) the jury charge; and (4) the verdict sheets." *Id.* at 633, 634 S.E.2d at 922. Concerning the evidence and indictments, we looked to determine whether "it is possible" to match guilty verdicts with specific incidents. *Id.* at 633, 634 S.E.2d at 922. Concerning the jury instructions, we looked to whether the "instructions were adequate to ensure that the jury understood that it must agree unanimously as to each verdict on each charge." *Id.* at 633, 634 S.E.2d at 922.

And concerning the verdict sheets, we looked to whether "the presentation of the charges on the verdict sheets was adequate for the jury to distinguish the charges based on the evidence presented at trial." *Id.* at 634, 634 S.E.2d at 922–23. The counts in *Bates* had date ranges and "differentiated between some of the counts by including next to the charge the words '(by cunnilingus)' or '(inserting finger into victim's vagina),' reducing the risk that the jurors considered different incidents in reaching their verdict and increasing the likelihood of unanimity." *Id.* at 634, 634 S.E.2d at 923.

After considering all of the factors, we held that it was "possible to match the jury's verdict of guilty with specific incidents presented in evidence and in the trial court's instructions." *Id.* at 634, 634 S.E.2d at 923. We held that the "defendant's right to unanimous verdicts . . . was not violated." *Id.* at 634, 634 S.E.2d at 923.

Here, the jury convicted Defendant on two counts of first-degree forcible sexual offense, and the trial court instructed the jury on first-degree forcible sexual offense only once. The trial court advised the jury that its verdict must be unanimous as to each charge, but the verdict sheet did not specify which sexual act was to be considered for each charge. Unlike in *Bates*, the jury here could not determine which sexual act applied to which count. The counts in this verdict sheet lacked corresponding dates and descriptions of the alleged sexual acts—both of which were included in the *Bates* verdict sheet. *See id.* at 634, 634 S.E.2d at 923.

The Dissent correctly notes that corresponding dates will be unhelpful here because all of the alleged sexual acts occurred on the same date. And the Dissent correctly notes that the number of alleged sexual acts exceeds the number of first-degree forcible sexual-offense charges. Here, Defendant allegedly committed three sexual acts: At gunpoint,

he penetrated Victim's anus with his fingers and penis; Defendant also forced Victim to perform oral sex. The State, however, only charged Defendant with two counts of first-degree forcible sexual offense.

The jury convicted Defendant on both counts of first-degree forcible sexual offense, which begs the question: Which two sexual acts did the jury unanimously agree upon? Both anal acts? One oral act and one anal act? And if the latter, which anal act? For example, one juror may have been unconvinced about the oral act and completely convinced of both anal acts. Whereas another juror may have been unconvinced about one anal act and completely convinced of the other anal act and the oral act. But because of the ambiguity in the jury instruction and verdict sheets, we cannot confirm whether this actually occurred. Thus, under the facts of this case, we cannot conclude there was unanimity of verdict concerning these offenses.

In *Bates*, the trial court guarded against this possibility by labeling the counts according to the specific type of alleged sexual act. *Id.* at 634, 634 S.E.2d at 923 (noting that the trial court "differentiated between some of the counts by including next to the charge the words '(by cunnilingus)' or '(inserting finger into victim's vagina)' "). Had the trial court done the same here, we would agree with the Dissent. But here, the trial court did not differentiate counts by the type of alleged sexual act, thus jeopardizing Defendant's right to a unanimous verdict concerning the first-degree forcible sexual-offense charges. In other words, we agree with Defendant and disagree with the Dissent because it is impossible to know if the jury convicted Defendant "of the *particular* offense[s] charged in the warrant or bill of indictment." *See Williams*, 318 N.C. at 628, 350 S.E.2d at 356 (emphasis added).

We also disagree with the Dissent's assertion that Defendant's right to a unanimous verdict was not jeopardized because section 14-27.26 lacks a list of "discrete criminal activities in the disjunctive." On the contrary, section 14-27.26 prohibits certain sexual acts, N.C. Gen. Stat. § 14-27.26, and "sexual acts" are discrete criminal activities, *see id.* § 14-27.20(4). These discrete criminal activities include "[c]unnilingus, fellatio, analingus, or anal intercourse, but do not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body." *Id.* § 14-27.20(4).

The Dissent cites *State v. Lawrence* for support. 360 N.C. 368, 627 S.E.2d 609 (2006). But sexual acts are distinct and distinguishable from the malleable acts analyzed in *Lawrence*: "immoral, improper, or indecent liberties." *Id.* at 374, 627 S.E.2d at 612. The *Lawrence* Court correctly

described "immoral, improper, or indecent liberties" as an "ambit." *Id.* at 374, 627 S.E.2d at 612. Immoral, improper, or indecent liberties are not defined by statute: We have defined them "as 'such liberties as the common sense of society would regard as indecent and improper.' " *State v. Every*, 157 N.C. App. 200, 205, 578 S.E.2d 642, 647 (2003) (quoting *State v. McClees*, 108 N.C. App. 648, 653, 424 S.E.2d 687, 690 (1993)).

A sexual act, however, is not an ambit. *See* N.C. Gen. Stat. § 14-27.20(4). It is statutorily defined and only includes "[c]unnilingus, fellatio, analingus, or anal intercourse" and "the penetration . . . by any object into the genital or anal opening of another person's body." *Id.* Society cannot differ on what a "sexual act" is because the General Assembly has defined it. *See In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974) ("[When a statute] contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be."). Therefore, the Dissent's *Lawrence* analysis is inapposite.

Accordingly, because it was not "possible to match the jury's verdict of guilty with specific incidents presented in evidence" without a special verdict sheet, the trial court's single instruction as to first-degree forcible sexual offense was erroneous and jeopardized Defendant's right to a unanimous verdict. *See Bates*, 179 N.C. App. at 634, 634 S.E.2d at 923. Further, this error was "fundamental" because it affected the integrity of the trial concerning Defendant's first-degree forcible sexual-offense charges. *See Grice*, 367 N.C. at 764, 767 S.E.2d at 320–21. Therefore, the trial court plainly erred. *See id.* at 764, 767 S.E.2d at 320–21.[1]

B. Clerical Errors

[2] Defendant also contends the trial court made several clerical errors in the judgment, and thus the judgment should be corrected on remand. In the event we discover a clerical error in the judgment, the State has no objection to remand on this issue. Again, we agree with Defendant.

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696–97 (2008) (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)). A clerical error is " '[a]n error resulting from a minor

1. We note that Defendant's strategy on appeal is not without risk. The State only charged him with two counts of first-degree forcible sexual offense, but based on the facts, the State could indict Defendant on a third count.

mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.' " *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting BLACK'S LAW DICTIONARY (7th ed. 1999)).

Defendant first contends the trial court made a clerical error by indicating in the judgment that Defendant was a Prior Record Level ("PRL") V with 14 points. The sentencing worksheet reflects that the trial court marked Defendant as a PRL V with 14 points on the sentencing sheet. The record, however, reflects that Defendant is a PRL IV with 12 points. The stipulated prior record-level worksheet established Defendant as a PRL IV with 12 points. During sentencing, both the State and Defendant advised the trial court that Defendant was a PRL IV. Further, the trial court sentenced Defendant to between 365 and 498 months of active imprisonment, which coincides with the sentence applicable to a PRL IV defendant concerning a Class B1 sex-related felony. *See* N.C. Gen. Stat. § 15A-1340.17(c)–(f) (2021). For these reasons, the trial court made a clerical error by listing Defendant as a PRL V with 14 points. *See Jarman*, 140 N.C. App. at 202, 535 S.E.2d at 878.

Defendant next contends the trial court made a clerical error on Defendant's sentencing sheet by marking box twelve for findings of aggravating and mitigating factors. Box twelve states: "The defendant committed the offense while on pretrial release on another charge." And the record shows the trial court marked box twelve on Defendant's sentencing sheet. Prior to sentencing, however, the State expressed it was not proceeding with aggravating factor twelve because Defendant was not on pretrial release. Additionally, the plea arrangement for aggravating factor 12a stated the State was not proceeding with any other factors. Therefore, the trial court made a clerical error in marking box twelve on the sentencing sheet. *See Jarman*, 140 N.C. App. at 202, 535 S.E.2d at 878.

Lastly, Defendant contends the trial court made a clerical error by failing to check the box on the aggravating-factors sheet, indicating it "accept[ed] the defendant's admission to the aggravating factor(s) noted above and finds the supporting evidence to be beyond a reasonable doubt." The record reflects the box was not marked on the aggravating-factors sheet. At trial, however, the trial court accepted Defendant's plea to the aggravating factor and imposed a sentence in the aggravated range. Therefore, the trial court made a clerical error on the aggravating-factors sheet by failing to indicate it accepted Defendant's admission to the aggravating factor. *See Jarman*, 140 N.C. App. at 202, 535 S.E.2d at 878.

Accordingly, because the trial court made several clerical errors in the judgment, we remand this case to allow the trial court to correct them. *See Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696–97.

V. Conclusion

We conclude the trial court committed plain error in its instruction as to the first-degree forcible sexual-offense charges, because in the absence of a special verdict form, the instructions jeopardized Defendant's right to a unanimous verdict. *See Grice*, 367 N.C. at 764, 767 S.E.2d at 320–21. Therefore, we reverse and remand this case for a new trial concerning the two counts of first-degree forcible sexual offense. We also remand for correction of clerical errors in the judgment. *See Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696–97.

REVERSED IN PART AND REMANDED.

Judge HAMPSON concurs.

Judge THOMPSON dissents in part by separate opinion.

THOMPSON, Judge, dissenting.

I respectfully dissent from the portion of the majority opinion that concludes the trial court committed plain error when it instructed the jury only once on the offense of first-degree forcible sexual offense, while defendant was indicted on two counts of that offense and where the jury received two jury verdict sheets, one for each of the counts, and returned each marked guilty. As explained below, controlling precedent indicates that the trial court did not err in failing to repeat its accurate jury instruction regarding this offense a second time in reference to the second count of the offense.

The record reflects that these two offenses—each included in a single indictment designated as case file 19 CRS 2364—cite N.C. Gen. Stat. § 14-27.26 and then allege: "The jurors for the State upon their oath present that on or about [9 September 2019] and in [Durham County] the defendant named above unlawfully, willfully, and feloniously [did] engage in a sex offense with [the victim], by force and against the victim's will." At trial, the victim testified that defendant sexually assaulted her at gunpoint, penetrating her with his penis anally, orally, and vaginally, as well as penetrating her anally with his fingers. The victim's testimony

of vaginal penetration by defendant's penis supported the first-degree rape indictment and related jury instructions, while the assaults by penetration of the victim's mouth and anus by defendant's penis and the penetration of her anus by defendant's fingers could support the two first-degree forcible sexual offenses. Regarding the latter offense, without objection from defendant, the trial court charged the jury:

> The defendant has been charged with first degree forcible sexual offense. For you to find the defendant guilty of first degree forcible sexual offense, the State must prove to you four things beyond a reasonable doubt. First, that the defendant engaged in a sexual act with the alleged victim. A sexual act means fellatio, which is any touching by the lips or tongue of one person and the male sex organ of another; anal intercourse, which is any penetration, however slight, of the anus of any person by their male or sexual organ; and, [ ] any penetration, however slight, by an object into the genital or anal opening of a person's body. And, second, that the defendant used or threatened to use force sufficient to overcome any resistance the alleged victim might make. The force necessary to constitute sexual offense need not be actual physical force. Fear or coercion may take the place of physical force. And, third, that the alleged victim did not consent and it was against the alleged victim's will. Consent induced by fear is not consent at law. And, fourth, that the defendant employed and/or displayed a dangerous or deadly weapon. A handgun is a dangerous or deadly weapon. A dangerous or deadly weapon is a weapon which is likely to cause death or serious injury. In determining whether the particular object is a dangerous or deadly weapon, you should consider the nature of the object, the manner in which it was used, the size and strength of the defendant as compared to that of the alleged victim.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant engaged in a sexual act which—act with the alleged victim and the defendant did so by force and/or threat of force and that this was sufficient to overcome any resistance which the alleged victim might make, that the alleged victim did not consent and it was against the alleged victim's will and that the defendant employed and/or displayed a weapon,

> it would be your duty to return a verdict of guilty of first degree forcible sexual offense. If you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of first degree forcible sexual offense but consider whether or not the defendant is guilty of second degree forcible sexual offense.

Defendant does not contend that this instruction was incorrect in any way; instead, he represents that the trial court plainly erred in failing to repeat this instruction before sending the jury to deliberate whether, *inter alia*, defendant committed *two* counts of this particular offense. Ultimately, the jury, having before it evidence that defendant had been indicted on two counts of first-degree forcible sexual offense, having heard testimony about three distinct acts which if the testimony were believed would support the two counts of that offense, and having been correctly charged regarding the elements of that offense by the trial court, elected in its role as finder of fact, to return two unanimous verdicts of guilty on the two counts of that offense as listed on one of the verdict sheets as "COUNT 2" and "COUNT 3" following the case file number.

The majority opinion relies primarily on this Court's decision in *State v. Bates*, 179 N.C. App. 628, 629, 634 S.E.2d 919, 920 (2006), *disc. review denied*, 361 N.C. 696, 653 S.E.2d 2 (2007) —where the trial court gave a proper instruction for first-degree sexual offense only once while the defendant was charged with eleven counts of that offense—which opinion in turn was issued on remand from the North Carolina Supreme Court after reconsideration in light of *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006). The defendant in *Bates* "was indicted on eleven counts of first-degree sexual offense; evidence was presented of six to ten incidents of first-degree sexual offense, and the jury returned a verdict of guilty on six charges. 179 N.C. App. at 632, 634 S.E.2d at 921–22 (citation omitted). As noted by the majority decision here, on review of these offenses, this Court "adopt[ed] the analysis in [an unpublished post-*Lawrence* Court of Appeals decision] and . . . . consider[ed] four factors to determine whether defendant Bates was denied a unanimous verdict: (1) the evidence; (2) the indictments; (3) the jury charge; and (4) the verdict sheets." *Id.* at 633, 634 S.E.2d at 922.

The Court first noted that as to factors one and two, "[w]here the number of incidents equal the number of indictments, the risk of a non-unanimous verdict is substantially lower," while where "*more counts were charged than the evidence supported*"—as in *Bates*—there is "more opportunity for confusion." *Id.* (emphasis added). Forcible sexual

offense is defined as the commission of "a sexual act[1] with another person by force and against the will of the other person" by means of one or more of three listed methods of force—including by the use of a weapon, an element not contested in defendant's appeal. N.C. Gen. Stat. § 14-27.26 (2021). Here, the evidence at trial that could sustain the two counts of forcible sexual offense by defendant against the victim was (1) anal penetration with defendant's fingers, (2) anal penetration with defendant's penis, and (3) oral penetration with defendant's penis. Thus, this case is distinguishable because defendant was charged with two counts of forcible sexual offense and evidence was presented at trial of three sexual acts which could constitute forcible sexual offense—thus, one *fewer* count was charged than the evidence supported.

Turning to the third factor, the majority decision acknowledges that, as in *Bates*, the trial court here instructed the jury correctly as to forcible sexual offense and instructed the jury as to unanimity, which "adequately ensured that the jury would match its unanimous verdicts with the charges against the defendant [and] favors a finding that the jury verdicts were unanimous in the present case." *Id.* at 634, 634 S.E.2d at 922.

Finally, the Court in *Bates* noted that "where 'the verdict sheets . . . identified the . . . offenses only by the felony charged . . . and their respective case numbers . . . the verdict sheets did not lack the required degree of specificity needed for a unanimous verdict if they could be properly understood by the jury based on the evidence presented at trial.' " *Id.* at 634, 634 S.E.2d at 922 (quoting *State v. Wiggins*, 161 N.C. App. 583, 592–93, 589 S.E.2d 402, 409 (2003), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004)). The verdict sheets here, unlike those in *Bates*, include *both* the felony charges *and their respective case numbers*, to wit: the case file number 19 CRS 2364 followed by the designations "COUNT 2" and "COUNT 3." Moreover, while the majority decision suggests that the "lack[of] corresponding dates and descriptions of the alleged sex acts—both of which were included in the *Bates* verdict sheet"—were dispositive in the majority's analysis, a careful reading of *Bates* reveals that the verdict sheets therein only "gave date ranges for the different counts [which] . . . did not correspond with any specific evidence at trial; thus, *they failed to fully clarify which incidents corresponded to which charges*." *See id.* at 634, 634 S.E.2d at 923 (emphasis added). In contrast, here the inclusion of a date for each of the forcible

1. A sexual act includes "[c]unnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.20(4) (2021).

sexual offense charges would have provided the jurors no additional clarity since all of the alleged conduct constituting the offenses was alleged to have occurred on the same date and in very close temporal proximity, unlike the circumstance in *Bates* where the alleged sexual offenses occurred over months.

In sum, on each of the four factors noted in *Bates* and cited by the majority decision, there was *less likelihood of jury confusion than in Bate*s, in which case this Court nonetheless held that "it is possible to match the jury's verdict of guilty with specific incidents presented in evidence and in the trial court's instructions" and therefore the "defendant's right to unanimous verdicts as to his convictions of six counts of first-degree sexual offense was not violated." *Id.* at 634, 634 S.E.2d at 923. Thus, in my view, it is impossible to rely upon *Bates* and reach the result of the majority here in finding that the trial court committed error, let alone plain error, in giving the forcible sexual offense instruction only once in the circumstances of this case. *See id.* at 634, 634 S.E.2d at 923 (finding no error); *see also Lawrence*, 360 N.C. at 376, 627 S.E.2d at 613 (finding no error); *see also Wiggins*, 161 N.C. App. at 595, 589 S.E.2d at 410 (finding no error).

My position is further buttressed by additional pertinent analyses found in *Bates* and the *Lawrence* line of cases.

In *Bates*, the Court also addressed unanimity of jury verdicts in connection with the offense of taking indecent liberties with a child, of which defendant was indicted on ten counts. *Bates*, 179 N.C. App. at 630, 634 S.E.2d at 920. There was evidence at trial of "a number" of such offenses against the child victim over a period of months, and the jury returned guilty verdicts on seven of the ten charges presented to it. *Id.* On appeal, the defendant argued

> that *because he was convicted of a lesser number of counts of indecent liberties than the number of incidents presented in evidence, and the indictment and verdict sheets did not match the counts to the evidence*, it is possible that the jury did not agree about which acts supported the guilty verdict for each count. Thus, defendant argues, a risk of a nonunanimous verdict was created, which violated defendant's right to a unanimous verdict.

Bates, 179 N.C. App. at 631, 634 S.E.2d at 921. This Court rejected that argument, emphasizing that under Lawrence, " 'a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered *a higher number of incidents of immoral or indecent behavior*

than the number of counts charged, and (2) *the indictments lacked specific details to identify the specific incidents*.' " *Id.* (quoting *Lawrence*, 360 N.C. at 375, 627 S.E.2d at 613) (emphasis added).

The Supreme Court in *Lawrence*, in turn based its holding on *State v. Hartness*, stating "that '[t]he risk of a nonunanimous verdict does not arise in cases such as the one at bar *because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive*.' " *Lawrence*, 360 N.C. at 375, 627 S.E.2d at 613 (quoting *State v. Hartness*, 326 N.C. 561, 564, 391 S.E.2d 177, 179 (1990)). "Unlike a drug trafficking statute, which may list possession and transportation, entirely distinct criminal offenses, in the disjunctive, the indecent liberties statute simply forbids 'any immoral, improper, or indecent liberties.' " *Id.* at 374 (citing N.C. Gen. Stat. § 14-202.1(a)(1) (2005)). The Supreme Court then observed, "[t]hus, *even if some jurors found that the defendant engaged in one kind of sexual misconduct, while others found that he engaged in another*, the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of 'any immoral, improper, or indecent liberties.' " *Id.* ((emphasis added) (citations omitted)).

Similarly, and pertinent to the case before us, N.C. Gen. Stat. § 14-27.26 does not list "discrete criminal activities in the disjunctive," *id.*, but rather simply defines forcible sexual offense as commission of "a sexual act with another person by force and against the will of the other person," including by the use of a weapon, N.C. Gen. Stat. § 14-27.26. As in *Lawrence*, here, whether the jury found that defendant committed two forcible sexual offenses by any combination of the acts evidenced at trial—anal penetration by defendant's fingers, anal penetration by defendant's penis, or oral penetration by defendant's penis—the jury "unanimously f[ou]nd that there occurred sexual [acts] within the ambit of" the forcible sexual offense statute. *See Lawrence*, 360 N.C. at 375, 627 S.E.2d at 613 (citation omitted). Thus, under the reasoning of *Hartness*, *Lawrence*, and *Bates*, defendant has failed to show error in the jury instructions.

For the reasons explained above, the trial court did not err in instructing the jury. Accordingly, I respectfully dissent from the majority's decision to the contrary on this issue.

STATE OF NORTH CAROLINA
v.
NICHOLAS RYAN BUCHANAN

No. COA23-517

Filed 6 February 2024

1. Child Abuse, Dependency, and Neglect—felony child abuse inflicting serious bodily injury—intent—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of felony child abuse inflicting serious bodily injury, where substantial evidence showed that defendant intentionally inflicted serious bodily injury upon his eight-month-old daughter. Although defendant testified that his daughter fell out of his arms and hit her head on the bar of her portable bed after he tripped and fell while carrying her, the child's post-injury medical reports and the testimony of a child abuse pediatrician who examined her indicated that the child's injuries—which included a large subdural hemorrhage, significant cerebral edema, and areas of infarction throughout her brain—were consistent with physical abuse and were too severe to have resulted from the type of fall that defendant had described.

2. Child Abuse, Dependency, and Neglect—felony child abuse inflicting serious bodily injury—jury instructions—accident—plain error analysis

There was no plain error in a prosecution for felony child abuse inflicting serious bodily injury, where defendant could not show that the trial court's failure to instruct the jury on the defense of accident prejudiced him at trial. The court's instructions conformed to the pattern jury instructions for the charged offense, the definition of intent, and the State's burden to prove every element of the charged offense beyond a reasonable doubt. Further, although defendant testified that the injuries his eight-month-old daughter sustained were accidental, the jury also heard testimony from a child abuse pediatrician who examined the child and opined that the child's injuries were consistent with physical abuse and too severe to have been accidental.

3. Child Abuse, Dependency, and Neglect—felony child abuse inflicting serious bodily injury—jury instruction—lesser-included offenses—degree of bodily injury

In a prosecution for felony child abuse inflicting serious bodily injury, the trial court did not err in declining defendant's requests

for jury instructions on two lesser-included offenses—felony child abuse inflicting serious physical injury and misdemeanor child abuse —because the State's evidence was positive as to the element of serious bodily injury, and there was no conflicting evidence pointing to a lesser degree of bodily harm associated with the lesser offenses. Notably, the evidence showed that the victim—defendant's eight-month-old daughter—suffered a large subdural hemorrhage, significant cerebral edema, and areas of infarction throughout her brain; underwent an emergency craniotomy, after which she was intubated and completely sedated for one week; experienced multiple seizures and periods of blindness while in the hospital; underwent three more surgeries; and ultimately suffered permanent brain damage and eyesight impairment.

Appeal by Defendant from judgment dated 12 August 2022 by Judge Gregory R. Hayes in Mitchell County Superior Court. Heard in the Court of Appeals 10 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Catherine R. Laney, for the State-Appellee.

William D. Spence for Defendant-Appellant.

COLLINS, Judge.

Defendant Nicholas Buchanan appeals from judgment entered upon a guilty verdict of felony child abuse inflicting serious bodily injury. Defendant argues that the trial court erred by denying his motion to dismiss, plainly erred by failing to instruct the jury on the defense of accident, and erred by denying his requested jury instructions on the lesser-included offenses of felony child abuse inflicting serious physical injury and misdemeanor child abuse. We find no error in part and no plain error in part.

I. Background

Defendant was indicted for felony child abuse inflicting serious bodily injury. The matter came on for trial on 9 August 2022. Evidence of the following was presented at trial: Defendant and his wife ("Mother") are the biological parents of Cecilia,[1] who was born on 12 February 2019. Defendant and Mother separated when Cecilia was approximately

1. We use a pseudonym to protect the identity of the minor child.

six months old. Cecilia lived with Mother during the week and with Defendant during the weekend.

Mother dropped Cecilia off at Defendant's residence for the weekend on 25 October 2019. On 26 October 2019, at approximately 1:30 p.m., Defendant brought Cecilia to Blue Ridge Regional Hospital in Spruce Pine with a head injury. Cecilia was immediately transferred by ambulance to Mission Children's Hospital in Asheville due to the severity of her injury. Upon her admission to the hospital, the doctors determined that Cecilia had sustained a large subdural hemorrhage, meaning that there was a "large amount of blood inside her brain"; significant cerebral edema, meaning brain swelling; and widespread infarction, meaning that "portions of her brain . . . were so swollen that blood was prevented from going to those portions of her brain, and so those portions of her brain had become necrotic or died." Cecilia underwent an emergency craniotomy; the neurosurgeon drilled holes into her skull and removed part of her scalp to drain the blood around her brain and allow the swelling to occur without further damaging her brain.

A. Defendant's Narrative and Testimony

Defendant was interviewed by the Department of Social Services ("DSS") at the hospital and gave the following explanation for Cecilia's injuries: Defendant put Cecilia to bed at 9:00 p.m. Cecilia woke up at 1:30 a.m. and Defendant fed her a bottle. Defendant went to put her in the Pack 'n Play where she usually slept, but "he fell because he had lost a significant amount of weight and his pants fell down, so they kind of tripped him and he fell forward." Cecilia's head hit the Pack 'n Play first, and then she fell to the ground. Defendant told DSS that Cecilia vomited after she fell, "but that she always spits up, so he just figured he would put her to sleep and she was fine." Cecilia woke up at approximately 9:30 a.m. and Defendant fed her a bottle, "but she seemed lethargic, like she wasn't crawling, she wasn't trying to sit up, and that's when he became more alarmed." Defendant made "a couple of different statements" as to why he did not seek medical attention sooner. Defendant told DSS that he did not have gas in his car, that he had a flat tire, and that he did not have a car seat and he did not think ambulances had car seats.

Defendant testified at trial to the following: Defendant put Cecilia to bed between 9:00 p.m. and 10:00 p.m. on 25 October 2019. Cecilia woke up at approximately 1:00 a.m. and Defendant fed her a bottle and changed her diaper. After Cecilia fell back asleep in Defendant's arms, he stood up to put her in the Pack 'n Play where she usually slept. Defendant took "maybe one or two steps, then [his] pants fell off and [he] tripped and

fell with [Cecilia]." As a result of Defendant's fall, Cecilia hit the back of her head on the bar of the Pack 'n Play and fell to the ground. Defendant picked Cecilia up and "she was like a little stunned, I guess you would say, but she wasn't crying super hard. She wasn't puking." Cecilia had "like a tiny little knot on the back of her head, like the lower bulb of the head."

Defendant called Mother four times, but she did not answer the phone. Defendant then texted, "[Mother], something is wrong with [Cecilia], answer the phone." When Mother did not reply, he re-sent the text. Defendant called Mother a fifth time approximately twenty seconds later, and Mother answered the phone. Defendant and Mother exchanged a series of phone calls over the next hour and ultimately decided not to take Cecilia to the hospital because Defendant told Mother "she was fine[.]" At approximately 1:45 a.m., Defendant sent Mother a picture of Cecilia "reaching out for [Defendant]" accompanied by a text stating, "I sat her down and she did this so I think we're okay." Defendant kept Cecilia awake for "maybe two, two-and-a-half hours" to "make sure that she didn't lose consciousness or anything else."

Cecilia woke up around 7:30 a.m. Defendant texted Mother that Cecilia was "fine" and sent a photo of her holding a bottle. Shortly before 11:00 a.m., Cecilia started "getting really fussy" and "wouldn't eat hardly[.]" Cecilia then "went limp, intense limp, projectile vomited, and that's when [Defendant] knew something was really bad wrong. And [Defendant] noticed one of her eyes was real tiny and one was huge." Defendant called his mother between 11:00 a.m. and 12:30 p.m. and asked her to take Cecilia and him to the hospital. Defendant testified that he did not seek medical attention sooner because he did not have gas in his car, he had a flat tire, he did not have a car seat, "there might have been . . . something mechanical wrong with the car[,]" and Cecilia "didn't have any symptoms up until I called my mom to come get me and her."

B. Dr. Monahan-Estes' Report and Testimony

Dr. Sarah Monahan-Estes, a child abuse pediatrician at Mission Children's Hospital, examined Cecilia after her surgery and submitted a written report. The report stated, in relevant part, as follows: Cecilia was "referred by the PICU for concerns of physical abuse." Defendant stated that "[Cecilia] fell out of his arms and hit the back of her head on the bar of the pack-n-play." Defendant further stated that Cecilia "went limp then tense, limp then tense" and she "may have" thrown up one time. Defendant told Dr. Monahan-Estes that "he didn't have a car seat so he

couldn't drive [Cecilia] to the hospital" and that "he didn't think ambulances had infant car seats so he didn't call 911." Dr. Monahan-Estes' report noted that "[t]here was significant delay in seeking medical care by both parents as the father was in communication with the mother from the time the incident reportedly happened." Dr. Monahan-Estes ultimately concluded in her report that "[t]he injury seen on examination is not consistent with the history provided, as such there is concern for physical abuse."

At trial, Dr. Monahan-Estes testified to the following: Cecilia's largest injuries were intracranial. Cecilia had a very large subdural hemorrhage, meaning that "there was this large amount of blood inside her brain, and that blood and a series of other things [were] causing swelling in her brain"; significant cerebral edema, meaning brain swelling; and areas of infarction, meaning that "there were portions of her brain that were so swollen that blood was prevented from going to those portions of her brain, and so those portions of her brain had become necrotic or died." Cecilia also had infraspinatus ligamentous injuries, meaning that "the ligaments in between her spine were damaged." Consequently, Dr. Monahan-Estes was "concerned that her neck was injured from moving too far forward or back." Furthermore, Cecilia had bilateral confluent retinal hemorrhages, meaning that there was "bleeding on the inside of both of her eyes, all the way through both all of the layers of her eyes."

Because Cecilia "had significantly more and significantly more severe injuries than would be expected from a short fall, from falling from the father's arms into a Pack 'N Play, or even onto the floor[,]" Dr. Monahan-Estes concluded in her report that "there is concern for physical abuse."

C. Cecilia's Post-Surgery Condition

Cecilia was intubated and completely sedated for one week following the surgery. Because Cecilia was in severe condition, an intracranial pressure monitor was placed in her head to "monitor the level of pressure that her brain is under." After Cecilia regained consciousness, she suffered approximately twelve seizures and at least two periods of blindness while she was in the hospital. Cecilia was transferred to Levine's Children's Hospital in Charlotte on 25 November 2019 for specialized rehabilitation. Cecilia underwent another surgery on 12 December 2019 to replace the part of her scalp that was previously removed. On 16 December 2019, after fifty-one days of hospitalization, Cecilia was discharged from the hospital and moved into her adoptive mother's home for continued rehabilitation.

Cecilia suffered permanent brain damage to the right side of her brain, thereby severely restricting her mobility on the left side of her body. Due to the pressure and swelling in her brain, Cecilia's optical nerve was damaged, and her eyesight is permanently impaired. Just prior to trial, Cecilia underwent two additional surgeries: on 28 May 2020, Cecilia underwent a surgery to repair the bone flap on her head that had started to dissolve, and on 20 June 2022, Cecilia underwent a surgery to remove screws in her skull that were beginning to protrude through her skin.

The jury returned a guilty verdict of felony child abuse inflicting serious bodily injury. The trial court sentenced Defendant to 157 to 201 months of imprisonment. Defendant appealed.

II. Discussion

A. Motion to Dismiss

[1] Defendant first argues that the trial court erred by denying his motion to dismiss because the State failed to produce substantial evidence that he intentionally inflicted serious bodily injury to Cecilia.

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).

Under North Carolina law,

> [a] parent . . . of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child

> which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class B2 felony.

N.C. Gen. Stat. § 14-318.4(a3) (2023). "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Liberato*, 156 N.C. App. 182, 186, 576 S.E.2d 118, 120 (2003). "In determining the presence or absence of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged." *Id.* (citation omitted). "[W]hen an adult has exclusive custody of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries." *Id.* at 186, 576 S.E.2d at 120-21 (citations omitted).

Here, Cecilia's medical reports indicate that she sustained a large subdural hemorrhage, meaning that there was a "large amount of blood inside her brain"; significant cerebral edema, meaning brain swelling; and widespread infarction, meaning that "portions of her brain . . . were so swollen that blood was prevented from going to those portions of her brain, and so those portions of her brain had become necrotic or died." Defendant told Dr. Monahan-Estes at the hospital that "he was walking to put [Cecilia] back to sleep [and] his pants fell off around his ankles and he tripped falling with [Cecilia]," and that "[Cecilia] fell out of his arms and hit the back of her head on the bar of the pack-n-play." However, Dr. Monahan-Estes testified that the injuries Cecilia sustained were inconsistent with Defendant's narrative "[b]ecause she had significantly more and significantly more severe injuries than would be expected from a short fall, from falling from the father's arms into a Pack 'N Play, or even onto the floor." Dr. Monahan-Estes testified that

> accidental injuries happen every day, all the time. Anyone who has children or grandchildren or friends or knows anybody or has tried to walk down a sidewalk, we all trip, we all fall. Accidental injuries occur all the time, and we have expected injuries that occur when those accidents happen. So when you have short falls, parents fall all of the time and bump their kids' heads on things or drop their babies. We all know this occurs. But the injury that [Cecilia] had was so much more severe than what would

> have ever been expected from falling and hitting her head, even if she hit her head really hard on the bar of the Pack 'N Play.

Dr. Monahan-Estes testified that "there was no accidental history provided to [her] that was consistent with the injuries seen on exam" and that the injuries Cecilia sustained were consistent with physical abuse. Cecilia's medical reports and Dr. Monahan-Estes' testimony constitute substantial evidence to support a conclusion that Defendant intentionally inflicted serious bodily injury to Cecilia. *See id.* (holding that the trial court did not err by denying defendant's motion to dismiss where two expert witnesses testified that the injuries sustained by the victim were intentionally inflicted, and that "the amount of force required to cause such injuries was greater than that resulting from [the victim] falling off either a mattress or a chair, which was the explanation given by defendant").

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

B. Jury Instruction on the Defense of Accident

[2] Defendant next argues that the trial court plainly erred by failing to instruct the jury on the defense of accident. Defendant did not request a jury instruction on the defense of accident,[2] nor did he object to its omission; we thus review only for plain error.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (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). "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).

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Hamilton*, 262 N.C. App. 650, 660, 822 S.E.2d 548, 555 (2018) (quotation marks and citation

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2. Defendant's only mention of the word accident during the charge conference was related to his argument that the trial court should instruct the jury on misdemeanor child abuse.

omitted). "This is a duty which arises notwithstanding the absence of a request by one of the parties for a particular instruction." *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988) (citations omitted). "All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *Id.* (citations omitted).

The pattern jury instruction for the defense of accident in non-homicide cases states:

> When evidence has been offered that tends to show that the alleged assault was accidental and you find that the injury was in fact accidental, the defendant would not be guilty of any crime even though the defendant's acts were responsible for the alleged victim's injury. An injury is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence. Culpable negligence is such gross negligence or carelessness as imparts a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. When the defendant asserts that the alleged victim's injury was the result of an accident the defendant is, in effect, denying the existence of those facts which the state must prove beyond a reasonable doubt in order to convict the defendant. The burden is on the state to prove those essential facts and in so doing disprove the defendant's assertion of accidental injury. The State must satisfy you beyond a reasonable doubt that the alleged victim's injury was not accidental before you may return a verdict of guilty.

N.C.P.I.—Crim. 307.11 (footnote omitted).

Even assuming arguendo that the trial court erred by not instructing the jury on the defense of accident, Defendant has failed to establish prejudice. The trial court instructed the jury, in relevant part, in accordance with the pattern jury instructions on felony child abuse inflicting serious bodily injury, the definition of intent, and the State having the burden to prove every element of the charged offense beyond a reasonable doubt. N.C.P.I.—Crim. 239.57 (felonious child abuse inflicting serious bodily injury); N.C.P.I.—Crim. 120.10 (definition of intent); N.C.P.I.—Crim. 101.10 (burden of proof and reasonable doubt). The jury instructions, when viewed together, directed the jury that it could only find Defendant guilty of felony child abuse inflicting serious bodily injury if it found beyond a reasonable doubt that Defendant "intentionally

inflicted a serious bodily injury to [Cecilia] or intentionally assaulted [Cecilia] which proximately resulted in serious bodily injury to [Cecilia], or intentionally assaulted [Cecilia], which proximately resulted in permanent or protracted loss or impairment of any mental or emotional function of [Cecilia]."

The jury heard Defendant's testimony that "[his] pants fell off and [he] tripped and fell with [Cecilia]," resulting in her hitting the back of her head on the bar of the Pack 'n Play and falling to the ground. However, the jury also heard testimony from Dr. Monahan-Estes that Cecilia "had significantly more and significantly more severe injuries than would be expected from a short fall, from falling from the father's arms into a Pack 'N Play, or even onto the floor." The jury thus found beyond a reasonable doubt that Defendant's testimony was not credible by finding him guilty of felony child abuse inflicting serious bodily injury. In light of the instructions provided to the jury and the testimony offered at trial, Defendant has failed to show that the trial court's failure to instruct the jury on the defense of accident "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings[.]" *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quotation marks, brackets, and citations omitted).

Accordingly, the trial court did not plainly err by not instructing the jury on the defense of accident.

C. Jury Instruction on Lesser-Included Offenses

[3] Defendant argues that the trial court erred by denying his requested jury instructions on the lesser-included offenses of felony child abuse inflicting serious physical injury and misdemeanor child abuse.

We review challenges to the trial court's decisions regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

"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) (citations omitted). "It is well settled that a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternative verdicts." *Id.* at 562, 572 S.E.2d at 772 (quotation marks and citation omitted). "On the other hand, the trial court need not submit lesser included degrees of a crime to the jury 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. (quotation marks, emphasis, and citations omitted). "If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense . . . and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of the lesser-included offense." *State v. Brichikov*, 383 N.C. 543, 554, 881 S.E.2d 103, 112 (2022) (quotation marks, emphasis, brackets, and citations omitted).

The distinguishing element at issue here between felony child abuse inflicting serious bodily injury, felony child abuse inflicting serious physical injury, and misdemeanor child abuse is the level of harm inflicted upon the child. The crux of Defendant's argument is that the trial court's refusal to instruct the jury on the lesser-included offenses "deprived the jury of an option to determine the baby's injuries were not as severe as the State's expert child abuse pediatrician testified/reported[.]"

Felony child abuse inflicting serious bodily injury requires a showing of serious bodily injury, which is defined as "[b]odily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-318.4(d)(1) (2023). Felony child abuse inflicting serious physical injury requires a showing of serious physical injury, which is defined as "[p]hysical injury that causes great pain and suffering[,]" including mental injury. *Id.* § 14-318.4(d)(2) (2023). Misdemeanor child abuse requires a showing of physical injury, which "includes cuts, scrapes, bruises, or other physical injury which does not constitute serious injury." *See id.* § 14-34.7(c) (2023).[3]

Here, there was no evidence presented at trial from which the jury could have rationally found that Defendant committed the lesser offense of felony child abuse inflicting serious physical injury or misdemeanor child abuse because the State's evidence is positive as to the element of serious bodily injury and there is no conflicting evidence. Dr. Monahan-Estes testified that Cecilia had a very large subdural hemorrhage; that she had significant cerebral edema; and that her brain had areas of infarction. Cecilia underwent an emergency craniotomy in

3. Physical injury is not defined in N.C. Gen. Stat. § 14-318.2. However, the pattern jury instruction for misdemeanor child abuse cites N.C. Gen. Stat. § 14-34.7(c), which defines physical injury for certain assaults on law enforcement personnel. *See* N.C.P.I.—Crim. 239.60.

which the neurosurgeon drilled holes into her skull and removed part of her scalp to drain the blood around her brain and allow the swelling to occur without further damaging her brain. Cecilia was intubated and completely sedated for one week following the surgery. After Cecilia regained consciousness, she suffered approximately twelve seizures and at least two periods of blindness while she was in the hospital.

Cecilia was transferred to Levine's Children's Hospital in Charlotte on 25 November 2019 for specialized rehabilitation. Cecilia underwent another surgery on 12 December 2019 to replace the part of her scalp that was previously removed. On 16 December 2019, after fifty-one days of hospitalization, Cecilia was discharged from the hospital and moved into her adoptive mother's home for continued rehabilitation.

Cecilia suffered permanent brain damage to the right side of her brain, thereby severely restricting her mobility on the left side of her body. Due to the pressure and swelling in her brain, Cecilia's optical nerve was damaged, and her eyesight is permanently impaired. On 28 May 2020, Cecilia had a third surgery to repair the bone flap on her head that had started to dissolve. Cecilia had a fourth surgery on 20 June 2022 to remove screws in her skull that were beginning to protrude through her skin. This evidence fully satisfies the State's burden of proving that Defendant intentionally inflicted serious bodily injury to Cecilia. *See Brichikov*, 383 N.C. at 554, 881 S.E.2d at 112.

Accordingly, the trial court did not err by denying Defendant's requested jury instructions on the lesser-included offenses of felony child abuse inflicting serious physical injury and misdemeanor child abuse.

III. Conclusion

For the foregoing reasons, we find no error in part and no plain error in part.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges HAMPSON and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
KEVIN SALVADOR GOLPHIN, DEFENDANT

No. COA22-713

Filed 6 February 2024

Sentencing—juvenile—first-degree murder—life without parole —statutory factors—incorrigibility

The sentencing court did not abuse its discretion by sentencing defendant to two consecutive sentences of life imprisonment without parole for the murders of two law enforcement officers killed by defendant and his brother in 1997 when defendant was 17 years old. The sentences, which were imposed after a new sentencing hearing was held in light of *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), were based on the court's unchallenged—and therefore binding—findings of fact, which properly addressed and weighed each of the nine mitigating factors contained in N.C.G.S. § 15A-1340.19B(c). Further, the court expressly made the additional required finding that defendant was one of those exceedingly rare juveniles who could not be rehabilitated and was permanently incorrigible and that, as a result, life imprisonment without parole should be imposed rather than life imprisonment with parole.

Appeal by defendant from order entered on or about 13 April 2022 by Judge Thomas H. Lock in Superior Court, Cumberland County. Heard in the Court of Appeals 23 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly N. Callahan, for the State.

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STROUD, Judge.

Defendant appeals from an order of the superior court sentencing him to life imprisonment without the possibility of parole based on an

offense he committed while a juvenile. Because the sentencing court did not abuse its discretion by sentencing Defendant to life imprisonment without the possibility of parole, we affirm.

I. Background

In 1997, Defendant and his brother shot and killed two law enforcement officers when the officers attempted to arrest the brothers for stealing a car. Defendant was arrested, indicted, and tried, and in 1998 Defendant was found guilty by a jury of two counts of first-degree murder.[1] Defendant was 17 years, 9 months, and 2 days old at the time of the murders. The jury recommended Defendant be sentenced to death on each count of first-degree murder, and the trial court thereafter sentenced Defendant to death. Defendant appealed his convictions, and his convictions were upheld on direct appeal in *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000). Our Supreme Court has already addressed the underlying facts of this case, and we will refer to the Supreme Court's opinion as needed for the purposes of this appeal. *See id.*

In 2002, Defendant filed a motion for appropriate relief ("MAR") challenging his convictions and death sentences. Defendant asserted his trial counsel was ineffective and the first-degree murder indictments were facially defective. The trial court denied his motion in a written order dated March 2004.

In May 2004, Defendant filed a second MAR. The superior court stayed the proceeding pending the United States Supreme Court's decision in *Roper v. Simmons*, in which the Supreme Court ultimately ruled sentencing a juvenile to death was a violation of the Eighth Amendment to the United States Constitution. *See Roper v. Simmons*, 543 U.S. 551, 572-73, 161 L. Ed. 2d 1, 23-24 (2005). The superior court held a resentencing hearing in December 2005, and Defendant was thereafter resentenced to mandatory life imprisonment without the possibility of parole.

In June 2012, the United States Supreme Court ruled a mandatory sentence of life imprisonment without the possibility of parole was unconstitutional for a juvenile, and a sentencing court must instead consider how juvenile offenders differ from adult offenders. *See Miller v. Alabama*, 567 U.S. 460, 479-80, 183 L. Ed. 2d 407, 424 (2012). A month later, in July 2012, the North Carolina General Assembly revised our

1. Defendant was also found guilty of two counts of robbery with a dangerous weapon, one count of assault with a deadly weapon with intent to kill, one count of discharging a firearm into an occupied vehicle, and one count of possession of a stolen vehicle. However, only the two murder convictions are at issue on appeal.

sentencing statutes to remove mandatory life sentences without the possibility of parole for juveniles convicted of murder and enacted a discretionary sentencing framework that permitted a sentencing court to sentence a juvenile offender to either life imprisonment with or without the possibility of parole after considering several factors. *See* 2012 N.C. Sess. Laws 2012-148, § 1; N.C. Gen. Stat. §§ 15A-1340.19A (2012) *et seq*.

In 2016, the United States Supreme Court further determined that the law from *Miller* must be applied retroactively to juveniles already sentenced to mandatory life imprisonment without the possibility of parole. *See Montgomery v. Louisiana*, 577 U.S. 190, 206, 193 L. Ed. 2d 599, 618 (2016). On or about 23 January 2018, Defendant filed another MAR alleging his sentences of life without parole were unconstitutional under *Miller* and *Montgomery*. On 19 July 2018, the superior court granted Defendant's motion and ordered a second resentencing hearing for December 2018.

The resentencing hearing was held in April 2022. The State presented testimony from the officer who performed the initial investigation of the 1997 murders. The officer testified as to the facts underlying the murders, which are consistent with our Supreme Court's recitation in *State v. Golphin*. *See generally Golphin*, 352 N.C. at 380-88, 533 S.E.2d at 183-88. The State also presented victim impact testimony from the family members of the slain officers.

Defendant presented expert testimony regarding his mental state and maturity. Dr. Duquette, an expert on child psychology, pediatric neuropsychology, and mental and psychiatric disorders, performed an examination on Defendant in 2019 when Defendant was thirty-nine years old. Dr. Hilkey, an expert in forensic psychology, also testified about his psychological evaluation of Defendant. Dr. Hilkey met Defendant four times as part of his evaluation. Dr. Hilkey testified his report was also specifically for the purpose of evaluating whether Defendant was "eligible or meets criteria for a reconsideration for parole as is defined in Miller v. Alabama." In addition to Drs. Duquette's and Hilkey's reports, Defendant also admitted into evidence social worker records of his abusive childhood, about 300 pages of Department of Public Safety disciplinary records, additional mental health records and assessments by correctional staff, child protective services records, Defendant's academic records, and a letter from Defendant's wife.

Defendant also testified on his own behalf. Defendant stated he had little structure in his life until he was incarcerated. Defendant also testified he received little psychological or psychiatric treatment before 1997. Defendant stated he had improved mentally while incarcerated by

reading, writing, meditating, praying, and taking advantage of optional mental health and anger management programs. Defendant also earned his GED and testified he wanted to continue his education by taking college courses in psychology and sociology with the goal of counselling other at-risk youths. Defendant further testified his plan in 1997 to steal a car and flee to Virginia was "dumb[,]" and he would inevitably be apprehended. Defendant testified the plan was "[t]o steal a car, go to Richmond, rob the Food Lion that [Defendant] used to work at, build up enough money to go to St. Petersburg, Florida and from there, try to leave the country." Defendant testified he made a mistake and regretted the events leading to the murder of the two law enforcement officers, and he felt remorse for killing Trooper Lowry and Deputy Hathcock.

The State then presented victim impact testimony from the family of the officers. Trooper Lowry's widow testified that her husband's murder had a life-long impact on her and her children. Trooper Lowry's widow testified no family should have to go through the resentencing hearings. Trooper Lowry's brother gave similar testimony. The State also submitted a record of Defendant's disciplinary infractions while incarcerated showing Defendant had frequent issues up until 2014. Since 2014, Defendant only had two disciplinary infractions, and Defendant was "counseled" on both; the record does not indicate the severity of a "counseled" infraction but does indicate that no punishment was imposed.

The superior court entered a written order ("Sentencing Order") in April 2022. The superior court first concluded the factors listed in *Miller* were subsumed into nine factors set out in North Carolina General Statute Section 15A-1340.19B(c). Based on the evidence presented at the resentencing hearing and "the factual summary of the crimes contained in *State v. Golphin*, 352 N.C. 364 (2000)[,]" the superior court found the following as to mitigating factors:

> 1. **Age at the time of the offense.** Defendant was 17 years, 9 months, and 2 days old at the time of these murders. His age stands in stark contrast to that of the defendants in *Miller*, who were 14 years old at the time of the murders of which they were convicted. In that this defendant was less than three months from his eighteenth birthday, the court assigns this factor little mitigating weight.
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> 2. **Immaturity.** The defendant was immature at the time of the murders, but not in any way substantially

different from other teens of his chronological age. The court finds this factor carries no significant mitigating weight.

3. **Ability to appreciate the risks and consequences of the conduct.** The court finds the defendant suffered from some diminished impulse control at the time of the murders. On the other hand, Defendant, together with his slightly older brother, planned and committed an armed robbery in South Carolina earlier that day, stole an automobile, and were attempting to drive to Virginia on I-95 when Trooper Lowry stopped the vehicle. The evidence shows Defendant was aware he was about to be arrested for the South Carolina crimes and made the decision to resist arrest. The evidence further shows that Defendant and his brother immediately fled the scene of the murders in the stolen car. Shortly thereafter, Defendant and his brother switched positions in the vehicle, and Defendant then drove the car alongside the vehicle of a witness to the murders so that his brother could shoot a rifle at the witness. When Defendant wrecked the automobile while fleeing from law enforcement officers giving chase, he ran from the vehicle toward a group of tractor-trailers parked near a tire repair shop in an effort to avoid apprehension. Defendant's actions demonstrate an ability to appreciate the risks and consequences of his criminal conduct. Hence, the court finds this factor carries little mitigating weight.

4. **Intellectual capacity.** Defendant's educational records suggest he suffered from a possible learning disorder. However, his academic performance improved significantly during the times he was enrolled in the in-patient treatment facilities, the Virginia Treatment Center for Children and Thirteen Acres. Defendant's cognitive functioning was tested in June, 1992 when he was 12 years old, and his full-scale IQ was determined to be 84. In March, 2019, Dr. Peter Duquette administered an IQ test to Defendant and measured his full-scale IQ at 87, lending credence to the earlier score. These scores are in the low average range of IQ scores. The court does not find Defendant's intellectual capacity to be so diminished as to give it any mitigating weight.

5. **Prior record.** The evidence regarding Defendant's prior experience with the juvenile justice system is relatively sparse. Defendant had juvenile delinquency dispositions that apparently stemmed from conflicts with his mother, and he reportedly had received juvenile probation for offenses involving assault and resisting arrest. The court finds this factor to have slight mitigating value.

6. **Mental health.** As a child, Defendant was diagnosed with oppositional defiant disorder, attention deficit hyperactivity disorder (ADHD), and dysthymic disorder. Defendant at no time has exhibited any symptoms of psychosis. Defendant suffers from posttraumatic stress disorder as a result of severe childhood physical and emotional abuse. Though this abuse was tragic, Defendant's mental disorders did not impair his ability to appreciate the risks and consequences of his criminal conduct. The court does not find Defendant's mental health to carry any mitigating weight.

7. **Familial or peer pressure exerted upon the defendant.** Defendant's closest relationship was with his slightly older brother, Tilmon. Though Defendant was about a year and a half younger than his codefendant, Defendant, by his own admission, primarily planned the robbery in South Carolina, and was driving the stolen vehicle at the time Trooper Lowry stopped it. Moreover, Defendant's actions precipitated the Golphins' violent encounter with the law enforcement officers when Defendant refused to submit to Trooper Lowry's command to place his hands behind his back. Defendant appears to have occupied the leadership role in his relationship with his brother and in the commission of their crimes on 23 September 1997. The court does not find this factor to have any mitigating weight.

8. **Likelihood that the defendant would benefit from rehabilitation in confinement.** Upon his incarceration in prison, Defendant committed approximately two dozen infractions that resulted in disciplinary action, including sanctions for disobeying orders and cursing officers. Most notably, Defendant spent almost a decade in solitary confinement due to his participation in an escape plot. Defendant resisted a strip search in 2014

and threatened a correctional officer with a broom handle. Though Defendant's conduct in prison has improved since 2014, improved behavior often accompanies maturation. Aside from some improvement in the level of his disruptive behavior, the court finds no credible evidence that Defendant has experienced any true rehabilitation and assigns this factor no significant weight.

9. **Any other mitigating factor or circumstance.** The court has considered all the evidence presented, and, in particular, has considered the two mitigating circumstances found by the jury at the time of Defendant's original sentencing hearing: the age of the defendant at the time of the crimes, and the defendant's lack of parental involvement or support in treatment for psychological problems. The court analyzed Defendant's age and immaturity in numbered paragraphs (1) and (2) above, and the court analyzed Defendant's childhood psychological problems in paragraph number (6) above. The court again finds these factors to carry no or little mitigating weight, and the court finds no other mitigating factor or circumstance.

Based on these statutory mitigating factors and the circumstances of the murders, the superior court "conclude[d] that Defendant's crimes demonstrate his permanent incorrigibility and not his unfortunate yet transient immaturity" and sentenced Defendant to consecutive sentences of life imprisonment without the possibility of parole for both first-degree murder convictions. Defendant appealed.

II. Standard of Review

Orders weighing the *Miller* factors and sentencing juveniles are reviewed for abuse of discretion. *State v. Sims*, 260 N.C. App. 665, 671, 818 S.E.2d 401, 406 (2018) ("The [sentencing] court's weighing of mitigating factors to determine the appropriate length of the sentence is reviewed for an abuse of discretion[,] . . . [i]t is not the role of an appellate court to substitute its judgment for that of the sentencing judge." (citation and quotation marks omitted)). "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).

III. Sentencing

We begin with a brief summary of relevant constitutional law as to the sentencing of juvenile homicide offenders.

A. Constitutional Standards

Defendant was tried in 1998 for the first-degree murder of two law enforcement officers, and during the sentencing portion of his trial he was sentenced to death. However, after he was sentenced and before his execution, the United States Supreme Court determined in *Roper v. Simmons* that the imposition of the death penalty on juvenile offenders was unconstitutional under the Eighth Amendment. *See Roper*, 543 U.S. at 569-70, 161 L. Ed. 2d at 21-23. The Supreme Court concluded the maximum constitutionally allowed punishment for a juvenile offender, even one who commits first-degree murder, was life imprisonment without the possibility of parole. *Id.* at 572, 161 L. Ed. 2d at 23.

The Supreme Court later held in *Miller v. Alabama* that imposing a *mandatory* sentence of life imprisonment without the possibility of parole on a juvenile also violates the Eighth Amendment. *See Miller*, 567 U.S. at 465, 183 L. Ed. 2d at 414-15. Nonetheless, a sentence of life imprisonment without the possibility of parole is still permissible, but the sentencing framework in any given jurisdiction must allow the sentencing authority the discretion to consider those unique characteristics of youth and the possibility of imposing a sentence less than the maximum permissible punishment under the Eighth Amendment. *See id.* at 474-76, 183 L. Ed. 2d at 420-22.

In response to the Supreme Court of the United States decisions, North Carolina General Statute Section 15A-1340.19A was created to apply when sentencing juveniles "convicted of first degree murder[.]" *See* N.C. Gen. Stat. § 15A-1340.19A (2021). North Carolina General Statute Section 15A-1340.19B establishes nine factors a defendant may submit mitigating evidence on:

> (c) The defendant or the defendant's counsel may submit mitigating circumstances to the court, including, but not limited to, the following factors:
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> (1) Age at the time of the offense.
>
> (2) Immaturity.
>
> (3) Ability to appreciate the risks and consequences of the conduct.

(4) Intellectual capacity.
(5) Prior record.
(6) Mental health.
(7) Familial or peer pressure exerted upon the defendant.
(8) Likelihood that the defendant would benefit from rehabilitation in confinement.
(9) Any other mitigating factor or circumstance.

N.C. Gen. Stat. § 15A-1340.19B(c) (2021). The sentencing court must consider these factors "in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole." *See* N.C. Gen. Stat. § 15A-1340.19C(a) (2021). North Carolina General Statute Section 15A-1340.19C further requires that a sentencing court's order sentencing a juvenile defendant convicted of murder "shall include findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order." *Id.* The Supreme Court of North Carolina has concluded this statutory sentencing scheme is constitutional and gives effect to "the substantive standard enunciated in *Miller*." *State v. James*, 371 N.C. 77, 89, 813 S.E.2d 195, 204 (2018).

In addition, our Supreme Court has imposed another requirement, above and beyond those required by the Eighth Amendment, when a sentencing court sentences a juvenile defendant to life imprisonment without the possibility of parole. *See State v. Kelliher*, 381 N.C. 558, 587, 873 S.E.2d 366, 387 (2022). In *Kelliher*, our Supreme Court determined under Article I, Section 27 of the North Carolina Constitution that "juvenile offenders are presumed to have the capacity to change" and an express finding of fact as to a juvenile's permanent incorrigibility is required before a juvenile can be sentenced to life imprisonment without the possibility of parole. *See id.* ("Thus, unless the [sentencing] court *expressly finds* that a juvenile homicide offender is one of those 'exceedingly rare' juveniles who cannot be rehabilitated, he or she *cannot* be sentenced to life without parole." (emphasis added)). Accordingly, a sentencing court must consider the factors in North Carolina General Statute Section 15A-1340.19B *and* "expressly find[] that a juvenile homicide offender is one of those 'exceedingly rare' juveniles who cannot be rehabilitated" to sentence a juvenile to life imprisonment without the possibility of parole. *Id.*

B. Defendant's Arguments

We first note that Defendant did not challenge any of the sentencing court's findings of fact as unsupported by competent evidence. The sentencing court's findings are therefore binding on appeal. *In re K.W.*, 282 N.C. App. 283, 286, 871 S.E.2d 146, 149 (2022) (noting unchallenged findings of fact are binding on appeal). Defendant's arguments are numerous and, in many places, overlap or repeat themselves. For clarity, we will group Defendant's arguments into two major categories. Generally, Defendant contends the superior court incorrectly weighed the evidence of mitigation when applying the factors codified in North Carolina General Statute Section 15A-1340.19B(c). Defendant also argues the superior court should have come to the opposite conclusion and sentenced him to consecutive sentences of life imprisonment with the possibility of parole instead of life imprisonment without the possibility of parole.

1. State v. Kelliher

Defendant's first group of arguments is based on *State v. Kelliher*, 381 N.C. 558, 873 S.E.2d 366. Defendant contends: (1) our Supreme Court's opinion in *State v. Kelliher* requires this Court to reverse the Sentencing Order because, under *Kelliher*, no juvenile who "can be rehabilitated" can be sentenced to life imprisonment without the possibility of parole; (2) Defendant not only has the potential for rehabilitation, as identified in *Kelliher*, but the evidence admitted at the resentencing hearing conclusively shows that Defendant *has already been* rehabilitated and is therefore parole eligible; and (3) because Defendant is eligible for parole, he must be parole eligible within forty years of his incarceration.

As to Defendant's argument that "the North Carolina Supreme Court held that this State's Constitution prohibits [life without the possibility of parole] for a juvenile offender who 'can be rehabilitated[,]' " we agree. But Defendant's argument as to how *Kelliher* applies to him *only* takes issue with the weight and credibility the sentencing court assigned to the evidence heard at the resentencing hearing. In Defendant's view, the sole conclusion that could be supported by the evidence was that Defendant was capable of reform, was in fact reformed, and therefore, must be parole eligible within 40 years of his incarceration. However, Defendant did not challenge the sentencing court's findings of fact as unsupported by the evidence, so those findings are binding on appeal. *See In re K.W.*, 282 N.C. App. at 286, 871 S.E.2d at 149. And "[t]he [sentencing] court's weighing of mitigating factors to determine the appropriate length of the sentence is reviewed for an abuse of discretion[,] . . . [i]t is not the role of an appellate court to substitute its judgment for

that of the sentencing judge." *Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406 (citation and quotation marks omitted). Accordingly, we turn to the factors considered by the sentencing court.

2. Mitigating Factors

Defendant's second group of arguments is based on how the Court weighed mitigating factors. Defendant asserts the sentencing court erred (1) in applying North Carolina General Statute Section 15A-1340.19B(c), which codified the *Miller* factors, by "ignoring uncontradicted, credible evidence as to" mitigating factors and (2) by relying on the jury's findings regarding additional mitigating factors at the 1998 trial.

North Carolina General Statute Section 15A-1340.19B(c) sets out nine mitigating factors, and North Carolina General Statute Section 15A-1340.19C requires the sentencing court to consider each factor if evidence is presented on that factor. *See* N.C. Gen. Stat. §§ 15A-1340.19B; 15A-1340.19C. Defendant presented evidence on all nine factors and raises arguments regarding the sentencing court's weighing as to each factor. Further, the sentencing court must also "expressly find[] that a juvenile homicide offender is one of those 'exceedingly rare' juveniles who cannot be rehabilitated" to sentence a juvenile to life imprisonment without parole. *Kelliher*, 381 N.C. at 587, 873 S.E.2d at 387.

a. Age at the Time of the Offense

The first factor the sentencing court considered was Defendant's "[a]ge at the time of the offense." N.C. Gen. Stat. § 15A-1340.19B(c)(1). The sentencing court found "Defendant was 17 years, 9 months, and 2 days old at the time of these murders." Compared to the defendants in *Miller*, who were 14 years old, the sentencing court assigned Defendant's age "little mitigating weight." *See Miller*, 567 U.S. at 466, 183 L. Ed. 2d at 414. Defendant does not challenge this finding as unsupported by the evidence. Instead, Defendant contends the sentencing court should have weighed this fact differently.

Defendant asserts this factor should have been assigned a greater weight, but "[i]t is not the role of an appellate court to substitute its judgment for that of the sentencing judge." *Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406. Defendant contends that by assigning his age "little mitigating weight" the sentencing court essentially rewrote *Miller* and his age should have been accorded "substantial mitigating weight" instead. Defendant does not argue *why* the sentencing court's comparison to *Miller* was an abuse of discretion. Nor does Defendant argue there was no competent evidence to support this finding.

While Defendant was under 18 years old when he participated in killing the law enforcement officers, he was less than 3 months from his 18th birthday, which differs greatly from the 14-year-olds in *Miller*, where the factor weighed heavier. *See Miller*, 567 U.S. at 466, 183 L. Ed. 2d at 414. The sentencing court's reasoning for assigning "little mitigating weight" to Defendant's age is clear.

b. Immaturity

The sentencing court next considered Defendant's "[i]mmaturity" in 1997, at the time of the murders. *See* N.C. Gen. Stat. § 15A-1340.19B(c)(2). The sentencing court found Defendant "was immature at the time of the murders, but not in any way substantially different from other teens of his chronological age. The court finds this factor carries no significant mitigating weight." Again, Defendant does not contend this finding was unsupported by the evidence but argues the sentencing court ignored competent evidence, namely Dr. Hilkey's and Dr. Duquette's reports and testimony, when it assigned this factor "no significant mitigating weight." Defendant asserts the evidence presented could only support the conclusion that he was substantially less mature than his fellow 17-year-olds at the time of the murders.

When Dr. Duquette was asked "did Mr. Golphin have the emotional and behavioral maturity of a much younger boy?" Dr. Duquette answered "my read of that is yes. Without having examined Mr. Golphin at that age, *it's hard for me to know with absolute certainty* but yes, I think so." (Emphasis added.) Dr. Duquette also testified that "adolescents are notorious for, you know, some level of impulsive behavior and sensation seeking[,]" a hallmark of adolescence is an inability to consider the consequences of their actions, and "that [adolescents'] brains may not be fully ready to handle all of that responsibility" of adulthood.

Dr. Hilkey testified that Defendant likely had an underdeveloped frontal cortex when he was 17 years old, but Dr. Hilkey's assessment was based entirely on the records of other entities during Defendant's childhood and his own observations of Defendant 25 years after the murders. Additionally, Dr. Hilkey testified Defendant was aware the purpose of the assessment was for resentencing under *Miller* and that the results might have been skewed by Defendant's answers to the self-assessment portion of Dr. Hilkey's evaluation of Defendant if Defendant were untruthful. Additionally, while these assessments have "some degree of confidence[,]" estimating the impact a Defendant's answers may have on the assessment is still "not an exact science."

Ultimately, as to Defendant's maturity at 17 years old, the sentencing court needed to make a credibility determination as to the evidence presented at the resentencing hearing and "pass upon the credibility of certain evidence and . . . decide what, or how much, weight to assign to it." *Sims*, 260 N.C. App. at 675, 818 S.E.2d at 409 (citation, quotation marks, and original brackets omitted). As to that weight, once again, "[i]t is not the role of an appellate court to substitute its judgment for that of the sentencing judge." *Id.* at 671, 818 S.E.2d at 406. As noted by Dr. Hilkey, while Defendant's experts were highly-experienced and well-qualified, compensating for any potential skewing of results is "not an exact science," and there was competent evidence in the record to support a determination that Defendant's maturity was not significantly less than other 17-year-olds at the time of the murders. *See id.*

c. Ability to Appreciate the Risks and Consequences of the Conduct

The sentencing court then considered Defendant's "[a]bility to appreciate the risks and consequences of [his] conduct[,]" including the murders and circumstances leading to the murders. N.C. Gen. Stat. § 15A-1340.19B(c)(3). The sentencing court found Defendant had some diminished impulse control, but also that Defendant planned an armed robbery, including how he and his brother would escape. The sentencing court also found Defendant was aware that he was about to be arrested and decided to resist arrest, that he immediately fled the scene of the shooting, that he fled on foot after he wrecked the stolen car, and that Defendant tried to "avoid apprehension." The sentencing court found "Defendant's actions demonstrate an ability to appreciate the risks and consequences of his criminal conduct. Hence, the court finds this factor carries little mitigating weight."

Defendant asserts the evidence showed he, at most, only knew right from wrong. Defendant asserts his plan "was the plan of a child[,]" that "all but guaranteed he would be caught." Defendant asserts the expert testimony and reports can only support a conclusion that he was unable to appreciate the risks and consequences of his conduct, and that his poorly thought-out plan only further supports this conclusion.

Again, Defendant simply casts the evidence in the light most favorable to the outcome he desires and asserts only one reasonable conclusion could be drawn from the evidence. But there was competent evidence in the record showing Defendant could appreciate risk and consequences. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406. The sentencing court took judicial notice of our Supreme Court's opinion in

State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000), to which we defer for a full recitation of the evidence presented at Defendant's 1998 trial, including Defendant's fleeing from police and attempt to hide one of the officers' weapons before he was apprehended. *See Golphin*, 352 N.C. at 384-88, 533 S.E.2d at 186-87. A defendant trying to hide inculpatory evidence and fleeing from the scene of a shooting is competent evidence that supports a finding Defendant was able to appreciate the risks of his conduct. *See Sims*, 260 N.C. App. at 676, 818 S.E.2d at 409. Like the case in *Sims*, "[D]efendant essentially requests that this Court reweigh the evidence which the [sentencing] court was not required to find compelling[,]" which we will not do. *Id.* (citing *Golphin*, 352 N.C. at 484, 533 S.E.2d at 245).

d. Intellectual Capacity

Next, the sentencing court considered Defendant's "[i]ntellectual capacity" in 1997. N.C. Gen. Stat. § 15A-1340.19B(c)(4). The sentencing court found Defendant suffered from a learning disability, his academic performance improved while enrolled at the inpatient care facility, and that Defendant's IQ was "in the low average range of IQ scores." The sentencing court found Defendant's intellectual capacity was not "so diminished as to give it any mitigating weight."

Defendant again argues the sentencing court ignored his evidence, but the sentencing court's finding was supported by evidence presented by Defendant's own expert witnesses. Dr. Duquette's report states Defendant "has a well-documented history of learning disability[;]" Defendant's stay at the inpatient care facility "represented [his] most successful academic period of growth[;]" and Defendant's "cognitive testing showed low average intelligence (WISC-III: Full Scale IQ=84)." Dr. Hilkey's report states Defendant's academic records indicate his "[i]nformation processing speed is impaired, as is behavioral initiation. These deficits are consistent with his diagnosed learning disability[;]" Defendant improved during his two years at the inpatient facility; and Defendant "appeared to be functioning in an average to low average intellectual range based on interview behaviors" during the 2019 assessment. These reports are competent evidence to support the sentencing court's fourth finding that Defendant was in the low to average IQ range. Again, Defendant asks us to disturb the weight the sentencing court assigned to the evidence presented below, which this Court has repeatedly held is not our role. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406.

e. Prior Record

The sentencing court then considered Defendant's "[p]rior record" at 17 years old. N.C. Gen. Stat. § 15A-1340.19B(c)(5). The sentencing court found "Defendant's prior experience with the juvenile justice system is relatively sparse[,]" with "dispositions that apparently stemmed from conflicts with his mother, and he reportedly had received juvenile probation for offenses involving assault and resisting arrest." The sentencing court found this factor to have "slight mitigating value."

Once again, Defendant does not challenge the sentencing court's finding as to his prior record but claims it should have given it greater mitigating value. Defendant argues "[i]n light of the substantial and undisputed evidence of abuse and trauma that his mother inflicted, it is unreasonable to use" the offenses involving his mother "to undercut the *proper weight of this factor*." (Emphasis added.) But the sentencing court considered the evidence regarding Defendant's abuse as a child by his mother, made findings about this abuse, and considered this along with the other factors. We are not permitted to second-guess the sentencing court. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406. Defendant apparently also "had received juvenile probation for offenses involving assault and resisting arrest" that did not stem from his mother, although these offenses were "relatively sparse." Defendant does not make any arguments regarding the offenses not involving his mother, and the sentencing court assigned some mitigating value based on Defendant's minimal criminal record. Again, Defendant asks this Court to weigh the evidence presented differently, and we will not. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406.

f. Mental Health

The sentencing court next considered Defendant's "[m]ental health" diagnoses and their impact on his behavior. N.C. Gen. Stat. § 15A-1340.19B(c)(6). The sentencing court found Defendant:

> was diagnosed with oppositional defiant disorder, attention deficit hyperactivity disorder (ADHD), and dysthymic disorder. Defendant at no time has exhibited any symptoms of psychosis. Defendant suffers from post-traumatic stress disorder as a result of severe childhood physical and emotional abuse. Though this abuse was tragic, Defendant's mental disorders did not impair his ability to appreciate the risks and consequences of his criminal conduct.

The sentencing court found Defendant's mental health diagnoses did not "carry any mitigating weight."

Defendant asserts the sentencing court erred because (1) "the court rewrote [this factor] by requiring mental health issues cause, or be linked to, the offense[;]" (2) the court merged this factor into the third factor, Defendant's ability to appreciate the risks and consequences of his conduct; and (3) the court's finding Defendant's "mental health conditions played no role in his crime is irreconcilable with the uncontradicted record."

The sentencing court did not rewrite North Carolina General Statute Section 15A-1340.19B(c)(6) by linking Defendant's mental health to the circumstances of the murders. North Carolina General Statute Section 15A-1340.19B(c)(6) lists "[m]ental health" as a factor, and the sentencing court is required to "consider any mitigating factors in determining whether, *based upon all the circumstances of the offense and the particular circumstances of the defendant*, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole." N.C. Gen. Stat. § 15A-1340.19C(a) (emphasis added). Here, the sentencing court did not err by considering Defendant's mental health disorders in the context of "the circumstances of the offense and the particular circumstances of the defendant[.]" N.C. Gen. Stat. § 15A-1340.19C(a). North Carolina's sentencing framework does not require the sentencing court to consider Defendant's "mental health" in a vacuum, and the sentencing court must necessarily consider the effect of Defendant's mental health on his criminal conduct. *See generally* N.C. Gen. Stat. § 15A-1340.19C(a).

For similar reasons, the sentencing court did not merge this factor with North Carolina General Statute Section 15A-1340.19B(c)(3) regarding the ability to appreciate risk and consequences. *See* N.C. Gen. Stat. § 15A-1340.19B(c)(3). Although the sentencing court used similar language for two findings, the Sentencing Order shows the sentencing court independently considered both factors.

Finally, we again note, it is not our role to override the sentencing court's determinations on the credibility and weight to assign to Defendant's evidence. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406. A sentencing court may assign no weight to a defendant's mental health diagnoses if the court does not find the "defendant's mental health at the time [of the offense] to be a mitigating factor[.]" *See id.* at 679, 818 S.E.2d at 411.

g. Familial or Peer Pressure Exerted upon Defendant

The sentencing court also considered the "[f]amilial or peer pressure exerted" by Defendant's brother on Defendant's actions leading to the 1997 murders. N.C. Gen. Stat. § 15A-1340.19B(c)(7). The sentencing court found (1) "Defendant's closest familial relationship was with his slightly older brother[;]" (2) Defendant, "by his own admission, primarily planned the robbery in South Carolina, and was driving the stolen vehicle at the time Trooper Lowry stopped it[;]" (3) the traffic stop that ultimately led to the death of the two law enforcement officers began escalating when Defendant refused to put his hands behind his back as ordered; and (4) "Defendant appears to have occupied the leadership role in his relationship with his brother and in the commission of their crimes on 23 September 1997." The sentencing court did "not find this factor to have any mitigating weight."

Defendant asserts this was error because the evidence indicates his brother was the initial aggressor on 23 September 1997, and "[i]t is undisputed that [Defendant's brother] escalated the traffic stop by shooting [Trooper] Lowry and [Deputy] Hathcock[.]" Defendant asserts his brother "significantly, if not fatally, wounded both officers before [Defendant] engaged in any violence."

Defendant fails to acknowledge the evidence supporting the sentencing court's finding: Defendant and his brother were closer than Defendant and his mother. Defendant admitted this plan was primarily his. But Defendant admitted that he did not comply with Trooper Lowry's orders to put his hands behind his back, and the situation began escalating after Defendant refused to follow Trooper Lowry's orders. Further, Defendant removed Trooper Lowry's service weapon from its holster and shot each officer again. There is competent evidence in the record to support this finding, and the sentencing court was within its discretion to assign this factor no mitigating weight. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406.

h. Likelihood that Defendant Would Benefit from Rehabilitation in Confinement

Next, the sentencing court considered the "[l]ikelihood that [Defendant] would benefit from rehabilitation in confinement." N.C. Gen. Stat. § 15A-1340.19B(c)(8). The sentencing court found Defendant committed "approximately two dozen infractions that resulted in disciplinary action[;]" Defendant spent "almost a decade in solitary confinement due to his participation in an escape plot[;]" "Defendant resisted a strip search in 2014 and threatened a correctional officer with a broom

handle[;]" and although his behavior had admittedly improved since 2014, there was "no credible evidence that Defendant has experienced any true rehabilitation and [the sentencing court] assign[ed] this factor no significant weight."

Defendant does not challenge these findings as unsupported by competent evidence but instead highlights the progress he contends he made between 2014 and the resentencing hearing in 2022. Defendant asserts that he has been reformed, and as a result, he is not among the class of juvenile homicide offenders "who cannot be rehabilitated[.]" *See Kelliher*, 381 N.C. at 587, 873 S.E.2d at 387. Defendant argues that (1) *Kelliher* demands reversal of the life imprisonment without the possibility of parole sentences, and (2) this factor ignores "the undisputed evidence of [Defendant's] substantial growth and improvement while incarcerated."

Much of Defendant's argument is dedicated to showing how he has improved while incarcerated, and therefore, he contends he *must* be considered as capable of rehabilitation within the meaning of *Kelliher* and *Miller*. But Defendant's argument ignores both evidence unfavorable to him and the sentencing court's discretion in weighing the evidence. Defendant's disciplinary records documenting his infractions were admitted into evidence, and Dr. Duquette testified the criminality of men decreases as they mature in their "mid to late 20's[.]" While Defendant may be commended on the improvements he has made while incarcerated, every part of this finding of fact is supported by competent evidence. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406.

i. Any Other Mitigating Factor or Circumstance

Finally, the sentencing court considered additional mitigating factors, circumstances, and evidence under the catch-all factor in North Carolina General Statute Section 15A-1340.19B(c)(9). *See* N.C. Gen. Stat. § 15A-1340.19B(c)(9). The sentencing court noted that it "in particular, has considered the two mitigating circumstances found by the jury at the time of Defendant's original sentencing hearing: the age of the defendant at the time of the crimes, and the defendant's lack of parental involvement or support in treatment for psychological problems." The sentencing court found "these factors to carry no or little mitigating weight, and the court finds no other mitigating factor or circumstance."

Defendant argues the sentencing court abused its discretion by not giving more weight to what he considered the "catch-all" evidence – "Remorse, Childhood abuse and trauma, and Circumstances of the offense" – to which the sentencing court assigned no weight. Contrary to

Defendant's arguments, the sentencing court did consider Defendant's evidence of his remorse, childhood abuse, and the circumstances of the murders in making its findings.

As to remorse, the sentencing court weighed this evidence in factor 8, whether Defendant would benefit from rehabilitation. The sentencing court found Defendant's behavior had improved, but that "improved behavior often accompanies maturation." The sentencing court also found Defendant's behavior had improved only since 2014, shortly after the *Miller* decision, and before 2014 Defendant was frequently disciplined while incarcerated. Further, in the Sentencing Order, the sentencing court explicitly states "[t]he court has considered all the evidence presented" in its discussion of the catch-all mitigating factors. Along with hearing Defendant's apology, the sentencing court heard evidence that Defendant was made aware before his psychological assessments he could be resentenced under *Miller* to life imprisonment with the possibility of parole and that it was possible Defendant provided untruthful answers to the assessments to skew the results. The sentencing court also heard testimony from Trooper Lowry's widow, which is confirmed by the original trial transcript, that on the day of the original sentencing, "[Defendant] stood up and he looked at me and he said I was gonna tell you I was sorry but I'm not now."

As to Defendant's childhood abuse and trauma, the sentencing court found in factor 6 when considering his mental health issues, that "Defendant suffers from posttraumatic stress disorder as a result of severe childhood physical and emotional abuse. Though this abuse was tragic," the sentencing court determined it was ultimately not worth any mitigating weight.

Finally, regarding the circumstances of the murders, the sentencing court took "judicial notice of the factual summary of the crimes contained in *State v. Golphin*, 352 N.C. 364 (2000)[,]" and fully considered the factual circumstances of the murders. As to all three "catch-all" factors argued by Defendant, the sentencing court considered all Defendant's evidence, and we will not disrupt the sentencing court's weighing of the evidence and testimony on appeal. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406.

Defendant also asserts the sentencing court erred by "relying upon the jury's findings[,]" (capitalization altered), from his 1998 trial because the jury's sentencing findings were "based on outdated law–indeed, legal standards subsequently held unconstitutional–and a different evidentiary record." Defendant asserts the findings at issue here were made in an "irrelevant vacuum[,]" even though the jury's findings were mitigating

factors for purposes of sentencing Defendant, and the jury's findings could have done nothing but help him in 1998 and during resentencing.

This argument is somewhat baffling as Defendant apparently contends the sentencing court should *not* have considered that a jury had previously found there were circumstances outside of Defendant's control that supported a mitigated sentence. Defendant argues, even though the jury in 1998 agreed his age and mental health disorders weighed in favor of mitigation, these findings should be disregarded. In essence, Defendant argues because the findings were made too early, they must be disregarded, even though the findings were favorable to him.

Defendant's argument as to the jury is without merit. First, we note the sentencing court did not "rely" on the jury's previous findings without consideration of *Miller*. The sentencing court expressly *reconsidered* these findings, and the evidentiary support underlying each, *in light of Miller*. The sentencing court "analyzed Defendant's age and immaturity in numbered paragraphs (1) and (2) above, and the court analyzed Defendant's childhood psychological problems in paragraph number (6) above." For the same reasons we discuss above, there is competent evidence to support the sentencing court's findings as to Defendant's age, mental health disorders, and lack of treatment for those disorders, and we will not disrupt this finding. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406.

j. Incorrigibility

Finally, though not a factor under North Carolina General Statute Section 15A-1340.19B(c), under *Kelliher*, the sentencing court must also find "that a juvenile homicide offender is one of those 'exceedingly rare' juveniles who cannot be rehabilitated[.]" *See Kelliher*, 381 N.C. at 587, 873 S.E.2d at 387. Here, the sentencing court found, "Defendant's crimes demonstrate his permanent incorrigibility[.]" While Defendant contends *Kelliher* should control this case as it also involved a 17-year-old in a double murder, the distinguishing factor is that in *Kelliher*, the sentencing court found the defendant was "neither incorrigible nor irredeemable[,]" likely in part based on the fact that the defendant did not pull the trigger for either murder.[2] *Id.* at 559, 873 S.E.2d at 370. Here, after Defendant's brother shot both officers, Defendant shot them both, again. The officers were incapacitated after Defendant's brother first shot them, yet

2. While *Kelliher* involved two consecutive sentences of life with parole, "aggregated sentences may give rise to a *de facto* life without parole punishment[.]" *See State v. Kelliher*, 381 N.C. 558, 873 S.E.2d 366 (2022).

Defendant still removed Trooper Lowry's weapon from its holster and shot each officer again. Thus, *Kelliher* does not prevent the sentencing court from finding Defendant to be permanently incorrigible.

k. Summary

Ultimately, the Sentencing Order properly addressed each factor as required by North Carolina General Statute Section 15A-1340.19A and *Kelliher*. *See Kelliher*, 381 N.C. at 587, 873 S.E.2d at 387. Defendant did not challenge the sentencing court's findings of fact as unsupported by the evidence, and we do not reconsider the weight the sentencing court assigned to each finding. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406. We acknowledge there is room for different views on the mitigating impact of each factor, but given the sentencing court's findings, the court did not abuse its discretion in sentencing Defendant to consecutive terms of life imprisonment without the possibility of parole. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527; *Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406.

IV. Conclusion

The sentencing court did not abuse its discretion when reviewing the mitigating factors under North Carolina General Statute Section 15A-1340.19B(c), or when it concluded Defendant should be sentenced to life imprisonment without the possibility of parole rather than life imprisonment with the possibility of parole. The Sentencing Order is affirmed.

AFFIRMED.

Chief Judge DILLON and Judge STADING concur.

STATE OF NORTH CAROLINA
v.
PASTOR EDENILSON GUERRERO, DEFENDANT

No. COA23-377

Filed 6 February 2024

1. Search and Seizure—traffic stop—probable cause—positive drug dog sniff—heroin trafficking—legalization of hemp irrelevant

In a prosecution for trafficking in heroin by possession and by transportation, the trial court did not err in denying defendant's motion to suppress evidence seized from his car after an officer—based on a tip from a confidential informant—initiated a traffic stop and a police canine alerted to the presence of drugs inside the vehicle. Regardless of whether the informant's tip was reliable, the positive canine alert was sufficient in itself to establish probable cause for the search. Defendant's argument—that, since the legalization of hemp in North Carolina, a positive canine alert does not necessarily indicate the presence of illegal drugs—not only lacked merit, but it also lacked any application to the facts of the case where the substance that defendant was suspected of possessing (and that was eventually discovered inside his vehicle) was heroin, not marijuana or hemp.

2. Drugs—trafficking in heroin—by possession—by transportation—sentencing—no lesser included offense at issue

In a drug trafficking case, defendant's argument on appeal lacked merit where he contended that the trial court improperly sentenced him for trafficking in heroin and for possession of heroin when possession is a lesser included offense of trafficking. In actuality, the court sentenced defendant for one count of trafficking in heroin by possession and one count of trafficking in heroin by transportation, which was proper because the two types of trafficking were distinct offenses that defendant could be convicted of separately even where the same heroin formed the basis for each charge.

Appeal by defendant from judgments entered 31 August 2022 by Judge Nathan Hunt Gwyn III in Union County Superior Court. Heard in the Court of Appeals 9 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General T. Hill Davis, III, for the State.

Law Office of Mark L. Hayes, by Mark L. Hayes, for defendant-appellant.

FLOOD, Judge.

Pastor Guerrero ("Defendant") appeals his convictions for one count of trafficking in heroin by possession and one count of trafficking in heroin by transportation, arguing the trial court erred (A) in denying his motion to suppress because the information given by a confidential informant and the canine-alert were insufficient to establish probable cause, and (B) because possession is a lesser included offense of trafficking. After careful review, we conclude the canine-alert was sufficient in itself to establish probable cause, and the trial court did not err in sentencing Defendant for trafficking by transportation and possession.

I. Factual and Procedural Background

On 10 January 2022, Defendant was indicted for one count of trafficking in heroin by possession, one count of trafficking in heroin by transportation, and one count of maintaining a vehicle for controlled substances. Based on a traffic stop that resulted in officers discovering heroin in Defendant's vehicle, the indictment alleged Defendant knowingly possessed twenty-eight grams or more of heroin.

On 10 March 2022, Defendant filed a Motion to Suppress the evidence seized during the search of his vehicle, arguing, in relevant part, that information given by a confidential informant ("C.I.") and a positive drug alert by a canine were insufficient to establish probable cause.

On 13 through 15 July 2022, a suppression hearing was held on Defendant's motion. At the hearing, Ben Baker ("Baker"), a lieutenant with the Union County Sheriff's Office, testified that on 11 November 2020, he received a call from a C.I. regarding heroin trafficking in Union County, North Carolina. The C.I. described to Baker a man in a Honda vehicle who had recently been seen at a known heroin trafficker's residence in Union County. According to Baker, the C.I. specifically described a male wearing a reflective vest whom he had recently seen at a heroin trafficker's home, driving a "light – like a goldish maybe Honda Accord," leaving a Taco Bell in Indian Trail on Highway 74 East. The C.I. also provided Baker with the license plate number for the vehicle. When questioned about his history with this particular C.I., Baker testified that he had received reliable information from this C.I. over fifty times in the last seven years.

After receiving this report from the C.I., Baker disseminated the information to his team of nine narcotics investigators in Union County.

One officer who received the report was Union County Sherriff's Officer Jonathan Presson ("Presson"). Presson testified that he received information to "be on the look out for a silver in color Honda Accord occupied by a single Mexican driver wearing a reflective vest traveling eastbound on Highway 74 leaving the Taco Bell." The report further included information that the driver had "recently" been at a known heroin trafficker's house, but there was no timeline given as to when the driver had been at the trafficker's house. Based on the information Presson received, he believed there was a possibility the driver had illegal drugs in the car.

After receiving this information, Presson responded to the described area of Highway 74 and located a vehicle that matched the description relayed by Baker. Presson followed behind the vehicle and initiated a traffic stop after he observed the vehicle run a red light. When Presson approached the passenger side window of the vehicle, he observed a "single occupant, male Mexican driver" who was "wearing a neon orange shirt with reflective tape on the left and right shoulders."

While Presson was conducting the traffic stop, Detective Robillard ("Robillard"), a canine officer, reported to the scene with her canine, "Yago," and conducted a canine narcotics search around the vehicle. Yago was trained to detect cocaine, methamphetamine, heroin, marijuana, and MDMA, but could not differentiate between which substances he detected when he "alerted." Yago "alerted" to the vehicle's passenger side door by sitting, indicating that there was an odor of narcotics coming from the inside of the vehicle. The entirety of the canine search lasted less than one minute.

After Yago alerted, Presson and Robillard conducted a search of the vehicle and found a plastic bag that contained a brownish residue that Presson believed to be heroin. No other narcotics were found in the vehicle.

On 29 August 2022, the trial court denied Defendant's Motion to Suppress. In its order, the trial court made the following, relevant, conclusions of law:

> 14. That while Yago was trained to detect and alert to the presence of multiple controlled substances, including marijuana, there is no evidence before this [c]ourt to suggest that marijuana was located in . . . Defendant's vehicle. Accordingly, a canine's inability to differentiate between legal hemp and illegal marijuana does not appear to be relevant to this inquiry;

> 15. The evidence before this [c]ourt suggests the only controlled substance located in . . . Defendant's vehicle was believed to be heroin, one of the substances to which Yago alerts;
>
> 16. That the positive alert from Yago provided probable cause to search . . . Defendant's vehicle;
>
> 17. That Det. Presson had probable cause to believe . . . Defendant had drugs in his vehicle when he began searching Defendant's car based on the totality of the circumstances, including but not limited to:
>
> a. Yago's positive alert for the presence of narcotics on the suspect vehicle;
>
> b. The corroboration of shared information provided by a [C.I.] believed to be a reliable source of information;
>
> c. . . . Defendant's evasive actions in pulling his car off the road to an unsafe location, as well as Defendant's unusual nervousness under the circumstances.

A jury trial was held from 30 through 31 August 2022. At the conclusion of the evidence, the jury found Defendant guilty of all three counts in the indictment. Defendant was sentenced to two consecutive prison terms of 225 to 282 months for trafficking in heroin by possession and trafficking in heroin by transportation. The trial court entered an arrested judgment for the maintaining a vehicle charge. Defendant gave oral notice of appeal.

II. Jurisdiction

This Court has jurisdiction to review this appeal from a final judgment of a superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Analysis

Defendant presents two issues on appeal: whether the trial court erred in (A) denying Defendant's Motion to Suppress when it based probable cause on an unreliable canine sniff and a C.I. whose reliability could not be adequately challenged after the trial court denied Defendant's Motion to Compel the C.I.'s identity, and (B) sentencing Defendant for possession of heroin when possession is a lesser included offense of trafficking.

A. Motion to Suppress

[1] Defendant argues the trial court erred in denying his Motion to Suppress because it based probable cause on Yago's unreliable alert and a C.I. whose reliability could not be adequately challenged. We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Unchallenged findings of fact "are presumed to be supported by competent evidence and are binding on appeal." *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (citation omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). Conclusions of law are reviewed *de novo*. *State v. Allen*, 197 N.C. App. 208, 210, 676 S.E.2d 519, 521 (2009).

"[I]t is a well-established rule that a search warrant is not required before a lawful search based on probable cause of a motor vehicle in a public roadway . . . may take place." *State v. Highsmith*, 285 N.C. App. 198, 202, 877 S.E.2d 389, 392 (2022) (citation omitted). Whether probable cause exists "is a 'commonsense, practical question' that should be answered using a 'totality-of-the-circumstances approach.' " *State v. Degraphenreed*, 261 N.C. App. 235, 241, 820 S.E.2d 331, 335 (2018) (citation omitted). "Probable cause does not mean actual and positive cause nor [does it] import absolute certainty." *State v. Johnson*, 288 N.C. App. 441, 456, 886 S.E.2d 620, 631 (2023) (citation omitted).

1. Reliability of Yago's Alert

First, Defendant argues Yago's alert did not establish probable cause because, since the legalization of hemp in North Carolina, a positive canine alert does not necessarily indicate the presence of illegal drugs; therefore, the alert here did not provide sufficiently reliable information that drugs were present. This argument is unsupported by the facts of this case and the jurisprudence of this State.

"[A] positive alert for drugs by a specially trained drug dog gives probable cause to search the area or item where the dog alerts." *Degraphenreed*, 261 N.C. App. at 246, 820 S.E.2d at 338 (alteration in original) (citation omitted) (concluding a canine's positive alert for illegal drugs was "sufficient to support a reasonable belief that the automobile carrie[d] contraband materials"). The legalization of hemp does

not alter this well-established general principle. *See State v. Walters*, 286 N.C. App. 746, 758, 881 S.E.2d 730, 739 (2022) ("The legalization of hemp has no bearing on the continued illegality of methamphetamine, and the Fourth Amendment does not protect against the discovery of contraband, detectable by [a] drug-sniffing dog . . . ."). Moreover, "we have repeatedly applied precedent established before the legalization of hemp, even while acknowledging the difficulties in distinguishing hemp and marijuana *in situ*." *Id.* at 758, 881 S.E.2d at 739.

In this case, the State and Defendant place heavy emphasis on why our analyses in *State v. Teague*, 286 N.C. App. 160, 179, 879 S.E.2d 881, 896 (2022), *disc. rev. denied*, 891 S.E.2d 281 (N.C. 2023) (reasoning the legalization of hemp does not alter the principle that the smell of marijuana is sufficient to show probable cause), and *Johnson*, 288 N.C. App. at 457–58, 886 S.E.2d at 632–33 (declining to reach the issue of whether the smell of marijuana alone is sufficient to give rise to probable cause for the issuance of a search warrant while acknowledging the Industrial Hemp Act does not modify the State's burden of proof), do or do not apply to the facts of this case. Neither party cited to *Walters*, which we conclude is dispositive. *See Walters*, 286 N.C. App. at 758, 881 S.E.2d at 739 (concluding the defendant's argument that the legalization of hemp altered a canine's reliability was "simply not presented by the facts of [the] case, where . . . methamphetamine and hemp were in the same bag, and the canine was trained to detect both substances").

Here, when Presson conducted the traffic stop of Defendant, he believed, based on the C.I.'s information, that Defendant may have had heroin in his vehicle. Neither Presson nor any of the responding officers smelled marijuana on Defendant nor had any suspicions he may have had marijuana. After Yago alerted to the presence of narcotics, Presson and Robillard discovered heroin in Defendant's vehicle, not marijuana or hemp. Not only has our case law made it clear the legalization of hemp has no bearing on our Fourth Amendment jurisprudence, but the argument also does not comport with the facts of this case. *See Teague*, 286 N.C. App. at 179, 879 S.E.2d at 896 ("Assuming, *arguendo*, hemp and marijuana smell 'identical,' then the presence of hemp does not make all police probable cause searches based on the odor unreasonable.") (citation omitted); *see also Johnson*, 288 N.C. App. at 457–58, 886 S.E.2d at 632 ("The smell of marijuana 'alone . . . supports a determination of probable cause, even if some use of industrial hemp products is legal under North Carolina law. This is because *only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause*.' ") (citation omitted).

The principle that the legalization of hemp has no bearing on our Fourth Amendment jurisprudence is even more clear in this case than it was in *Walters*, where officers discovered both illegal methamphetamine and legal hemp. In this case, there was no marijuana or hemp discovered on Defendant's person, nor did officers have any suspicions that it would be.

Accordingly, Yago's alert was reliable and gave law enforcement officers the required probable cause to search Defendant's vehicle for illegal contraband. *See Degraphenreed*, 261 N.C. App. at 246, 820 S.E.2d at 338.

2. Certification of Yago

Second, Defendant argues Yago's alert was unreliable because there was insufficient evidence of Yago's training, experience, and certifications. This argument, however, was not preserved for our review. In his reply brief, Defendant asserts that this issue was preserved because he "vigorously" pursued this line of questioning at the hearing when he asked Robillard extensive questions about Yago's training and certification. Despite Defendant's argument, questioning witnesses is insufficient to comply with our preservation rules.

"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 . . . ." N.C. R. App. P. 10(a)(1). "This Court has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount . . . .' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (citation omitted).

Defendant did not argue to the trial court that Yago's alert was unreliable because of her certification and training. He did not raise this argument in his written Motion to Suppress nor did he raise it in front of the trial court at the hearing. While the suppression order details Yago's training, the order specifically notes that Defendant did not challenge "any aspect of Yago's training[.]" Moreover, Defendant challenges the use of the term "bona fide" organization as insufficient to establish Yago's credentials; however, Defendant did not object to any of the State's questioning or Robillard's testimony that Yago was certified by a "bonda fide" organization.

Accordingly, this issue was not preserved, and we decline to reach it on the merits. *See Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5.

3. Identity of the Confidential Informant

Third, Defendant argues it would be a violation of his due process rights if this Court considered the C.I.'s information in its probable cause analysis because Defendant did not have the information he needed to attack the credibility of the C.I. evidence. Further, the same standard applied to motions to compel a C.I.'s identity cannot be applied to whether the C.I.'s identity should be released for purposes of the motion to suppress. Given that Yago's alert alone was sufficient to establish probable cause, however, we do not need to reach this argument.

B. Possession as a Lesser Included Offense

[2] Finally, Defendant argues the trial court erred in sentencing him for possession of heroin and trafficking in heroin when possession is a lesser included offense of trafficking. This argument is likewise unsupported by the facts of this case and our Supreme Court's jurisprudence.

Defendant was sentenced for trafficking in heroin *by* transportation and possession, not trafficking *and* possession. Moreover, "possessing, manufacturing, and transporting heroin are separate and distinct offenses[,]" and a defendant may be "convicted and punished separately" for trafficking in heroin by possession and trafficking in heroin by transporting "even when the contraband material in each separate offense is the same . . . ." *State v. Perry*, 316 N.C. 87, 103–04, 340 S.E.2d 450, 461 (1986). While Defendant seemingly challenges the validity of this holding, it is not our prerogative to ignore Supreme Court precedent. We further decline Defendant's "challenge" to devise a hypothetical where a defendant transports drugs without possessing drugs.

The trial court, therefore, did not err in sentencing Defendant for each count.

IV. Conclusion

We conclude the trial court did not err in denying Defendant's Motion to Suppress because Yago's alert established the prerequisite probable cause to conduct the search. We further conclude the trial court did not err in sentencing Defendant for trafficking in heroin by transportation and trafficking in heroin by possession.

NO ERROR.

Judges WOOD and STADING concur.

STATE OF NORTH CAROLINA
v.
JULIE ANN MINCEY

No. COA23-447

Filed 6 February 2024

1. Appeal and Error—guilty plea to habitual felon status—statutory right of appeal—statutory mandate—factual basis for plea

After a criminal defendant was convicted of embezzlement and obtaining property by false pretenses and then pleaded guilty to attaining habitual felon status, defendant had a statutory right of appeal from the entry of her guilty plea under N.C.G.S. § 15A-1444(a2), since she disputed her status as a habitual felon and was therefore arguing pursuant to subsection (a2)(3) that her term of imprisonment was unauthorized by statute. Furthermore, defendant's right to appeal was automatically preserved where she argued that the trial court acted contrary to the statutory mandate in N.C.G.S. § 15A-1022(c), which required the court to determine whether a factual basis existed for defendant's guilty plea.

2. Sentencing—habitual felon status—underlying felony reclassified as misdemeanor—factual basis for guilty plea

After a jury convicted defendant of embezzlement and obtaining property by false pretenses, the trial court properly determined pursuant to N.C.G.S. § 15A-1022(c) that a factual basis existed for defendant's guilty plea to attaining habitual felon status where, even though one of defendant's underlying felonies (committed in Colorado) used to determine whether she had attained habitual felon status was later reclassified as a misdemeanor under Colorado law, the evidence presented during the colloquy (held pursuant to section 15A-1022(c)) showed that the crime constituted a felony at the time that defendant committed it.

Judge ARROWOOD dissenting.

Appeal by Defendant from judgment entered 8 August 2022 by Judge John E. Nobles, Jr. in Craven County Superior Court. Heard in the Court of Appeals 14 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Llogan R. Walters, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Defendant.

WOOD, Judge.

On 8 August 2022, a jury convicted Julie Ann Mincey ("Defendant") of nine counts of embezzlement and one count of obtaining property by false pretenses. Defendant then pleaded guilty to attaining habitual felon status. The same day, the trial court sentenced her to forty-four to sixty-five months imprisonment, and Defendant gave oral notice of appeal in open court. Defendant argues the trial court erred in determining a factual basis exists for her guilty plea because the state of Colorado now classifies an underlying felony for which she was convicted as a misdemeanor. We hold the trial court complied with N.C. Gen. Stat. § 15A-1022(c) and therefore committed no error.

I. Factual and Procedural History

On 3 February 2020, 3 August 2020, and 1 February 2021, a grand jury indicted Defendant for sixteen felony offenses: fourteen counts of embezzlement, two counts of obtaining property by false pretenses, and also for attaining habitual felon status. The victims were patrons of the travel agency for which Defendant worked.

Defendant's trial was held 1-8 August 2022. Of the sixteen charged offenses, five were dismissed, and eleven ultimately reached the jury, specifically ten counts of embezzlement and one count of obtaining property by false pretenses. The jury found Defendant not guilty of one count of embezzlement but guilty of the remaining ten offenses. Defendant then pleaded guilty to attaining habitual felon status.

The trial court consolidated the offenses and entered one judgment, imposing a sentence in the mitigated range of forty-four to sixty-five months imprisonment and ordering restitution of $53,402.58. Defendant gave oral notice of appeal in open court. All other facts are provided as necessary in our analysis.

II. Analysis

Defendant argues the trial court failed to comply with N.C. Gen. Stat. § 15A-1022(c), which states:

> The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
>
> (1) A statement of the facts by the prosecutor.
>
> (2) A written statement of the defendant.
>
> (3) An examination of the presentence report.
>
> (4) Sworn testimony, which may include reliable hearsay.
>
> (5) A statement of facts by the defense counsel.

N.C. Gen. Stat. § 15A-1022(c) (2022). Specifically, Defendant argues there was no factual basis for the guilty plea because the second underlying felony used to determine Defendant had attained habitual felon status is no longer a felony. Defendant contends this Court should consider whether a defendant's underlying felonies are still felonies at the time a defendant committed the substantive offense for which he or she is currently being sentenced.

The habitual felon indictment alleged:

> UNDERLYING FELONY NUMBER 2:
>
> On April 22, 1991, in case number 90 CR 1082, in the District Court of Denver County, Colorado, the Defendant, then known as Julie Ann Mincey was convicted of Second Degree Forgery, a Class 5 felony, in violation of Colorado Statute 18-5-103; the aforesaid offense occurred on or about March 15, 1990, and was committed against the State of Colorado.

The trial court engaged in the colloquy required under N.C. Gen. Stat. § 15A-1022(c). Specifically, the State repeated to the trial court the information contained in the indictment regarding the second underlying felony conviction. The State then admitted into evidence "copies of the statutes from Colorado . . . in effect on the dates of those convictions, as well as certified records of [Defendant's] prior convictions." Specifically, the State admitted "State's Sentencing Exhibit Number 3 [which] is the statute from 1991 which is the subject of the second conviction in the defendant's habitual felon indictment."

Defendant's counsel did not object to the factual basis and incorrectly stated that second-degree forgery is still a felony in Colorado:

> THE COURT: All right. All right. Any objection to this being made part of the record?
>
> [DEFENDANT'S COUNSEL]: No, your Honor. I think [the State] and I probably did the same research and we would agree that the statutes under which [Defendant] was convicted, three predicate felonies, were all designated as felonies under Colorado law at the time and still designated as felonies. There are six levels of felonies in Colorado, Judge, these follow within those ranges."

After Defendant's conviction, she determined Colorado had reclassified second-degree forgery as a misdemeanor subsequent to her 1991 conviction. Therefore, Defendant argues, the appropriate remedy is to vacate the trial court's judgment and remand for resentencing, absent the habitual felon sentencing enhancement.

[1] Before reaching the merits of Defendant's argument, we first must determine whether this Court has jurisdiction to address Defendant's appeal. Defendant appeals from the trial court's judgment which is based on her guilty plea. N.C. Gen. Stat. § 15A-1444(a2) provides a limited right of appeal from a defendant's entry of a guilty plea:

> A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:
>
> > (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
> >
> > (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
> >
> > (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

N.C. Gen. Stat. § 15A-1444(a2) (2022). "Being an habitual felon is not a crime but rather a status which subjects the individual who is subsequently convicted of a crime to increased punishment for that crime." *State v. Patton*, 342 N.C. 633, 635, 466 S.E.2d 708, 710 (1996). Because Defendant appeals the trial court's judgment based on her purportedly

deficient plea to attaining habitual felon status and therefore challenges whether her term of imprisonment was authorized by statute, she has a right of appeal pursuant to N.C. Gen. Stat. § 15A-1444(a2)(3). Therefore, this Court need not grant Defendant's petition for a *writ of certiorari* because she has a statutory right of appeal. Defendant's petition for *writ of certiorari* is dismissed as moot.

This Court has held "the requirements for accepting a defendant's stipulation to habitual felon status are statutory mandates." *State v. Williamson*, 272 N.C. App. 204, 210, 845 S.E.2d 876, 881 (2020). "[I]t is well established that when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Chandler*, 376 N.C. 361, 366, 851 S.E.2d 874, 878 (2020). "[A] trial court's determination as to whether a sufficient factual basis exists to support a defendant's guilty plea is a conclusion of law reviewable de novo on appeal." *State v. Robinson*, 381 N.C. 207, 217, 872 S.E.2d 28, 35 (2022). Therefore, we consider whether the trial court complied with N.C. Gen. Stat. § 15A-1022(c)'s statutory mandate requiring it to determine whether there was a factual basis for Defendant's guilty plea.

[2] N.C. Gen. Stat. § 14-7.1(a) states, "Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon and may be charged as a status offender pursuant to this Article." N.C. Gen. Stat. § 14-7.1(a) (2022). N.C. Gen. Stat. § 14-7.1(b), in turn, provides:

> For the purpose of this Article, a felony offense is defined *to include* all of the following:
>
> (1) An offense that is a felony under the laws of this State.
>
> (2) An offense that is a felony under the laws of another state or sovereign that is substantially similar to an offense that is a felony in North Carolina, and to which a plea of guilty was entered, or a conviction was returned regardless of the sentence actually imposed.
>
> (3) An offense that is a crime under the laws of another state or sovereign that does not classify any crimes as felonies if all of the following apply:
>
> a. The offense is substantially similar to an offense that is a felony in North Carolina.

> b. The offense may be punishable by imprisonment for more than a year in state prison.
>
> c. A plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed.
>
> (4) An offense that is a felony under federal law. Provided, however, that federal offenses relating to the manufacture, possession, sale and kindred offenses involving intoxicating liquors shall not be considered felonies for the purposes of this Article.

N.C. Gen. Stat. § 14-7.1(b). (Emphasis added). This Court has held, "*Any person* who has been convicted of or pled guilty to three felony offenses is declared by statute to be an habitual felon." *State v. Ross*, 221 N.C. App. 185, 188, 727 S.E.2d 370, 373 (2012) (emphasis added).

Here, the trial court conducted the necessary colloquy pursuant to N.C. Gen. Stat. § 15A-1022(c) to determine whether there was a factual basis for Defendant's guilty plea to attaining habitual felon status. The State entered the Colorado statutes to show Defendant's underlying crimes constituted felonies at the time she committed them. Specifically, in 1991, Colorado classified second-degree forgery as a "class 5 felony." Colo. Rev. Stat. § 18-5-103(2) (1991). Therefore, second-degree forgery was a felony at the time of Defendant's April 1991 conviction. Accordingly, we hold the trial court did not err in determining there was a factual basis for Defendant's guilty plea.

It is true that in 1993, Colorado repealed Colo. Rev. Stat.§ 18-5-103 and in its place enacted Colo. Rev. Stat. § 18-5-104 (1993) which classified second-degree forgery as a "class 1 misdemeanor." Colo. Rev. Stat. § 18-5-104(2) (1993); 1993 Colo. Sess. Laws 324 (West). Nonetheless, we hold that pursuant to N.C. Gen. Stat. § 15A-1022(c), there was sufficient evidence for the trial court to properly determine a factual basis existed showing Defendant had committed three prior felonies, including the second-degree forgery felony. Both N.C. Gen. Stat. § 14-7.1(a) and this Court's decision in *Ross* make clear that *any person* who is convicted of or pleads guilty to three felony offenses attains habitual felon status. Moreover, the definition of "felony offense" in N.C. Gen. Stat. § 14-7.1(b) *includes*, but by the language of the statute is not limited to, the examples listed in that subsection. We hold this application of the habitual felon statute is compatible with the "primary goals" of a recidivist statute:

> to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious

> enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.

State v. Hall, 174 N.C. App. 353, 354, 620 S.E.2d 723, 725 (2005) (quoting *Rummel v. Estelle*, 445 U.S. 263, 284, 100 S. Ct. 1133, 1144–45 63 L. Ed. 2d 382, 397 (1980)); *see also State v. Kirkpatrick*, 345 N.C. 451, 454, 480 S.E.2d 400, 402 (1997).

Finally, Defendant offers two examples which she argues provide analogous support for the proposition that this Court should consider whether an underlying predicate felony is classified as a felony at the time a defendant commits the substantive offense for which he or she is being sentenced. First, Defendant argues we should read *State v. Mason* to mean that this Court considers reclassifications of felonies rather than prior classifications for purposes of establishing violent habitual offender status under N.C. Gen. Stat. § 14-7.7 (2022). 126 N.C. App. 318, 484 S.E.2d 818, 821 (1997). In *Mason*, however, this Court merely rejected the argument that using reclassified statuses of felonies (from H and F to reclassification as Class E felonies) violated the defendant's protection against *ex post facto* laws. *Id.* at 323–24, 484 S.E.2d at 821.

Second, Defendant argues that for purposes of calculating a defendant's prior record level, the statute specifically provides: "In determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed." N.C. Gen. Stat. § 15A-1340.14(c) (2014). However, the legislature is entitled to include such a requirement in one part of this State's statutes while choosing not to include it in another part. For purposes of the habitual felon statute in N.C. Gen. Stat. § 14-7.1, there is no statutory requirement to consider whether an underlying crime is a felony at the time of a defendant's substantive offense. We decline to read such a requirement into the statute.

Because the trial court complied with N.C. Gen. Stat. § 15A-1022(c) in accepting Defendant's guilty plea, the trial court committed no error. Therefore, the judgments of the trial court are affirmed.

AFFIRMED.

Judge THOMPSON concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the majority's opinion. Unlike the majority, I believe defendant has no right of appeal under N.C.G.S. § 15A-1444(a2). *See State v. Young*, 120 N.C. App. 456, 459 (1995) ("Having pleaded guilty to being an habitual felon, and not having moved in the trial court to withdraw his guilty plea, defendant is not entitled to an appeal of right from the trial court's ruling."). However, this Court has allowed petitions for writ of certiorari "in order to permit review of appeals concerning the adequacy of the factual bases underlying defendants' guilty pleas." *State v. Robinson*, 275 N.C. App. 330, 333 n. 2 (2020) (citing *State v. Keller*, 198 N.C. App. 639, 641–42 (2009)). Accordingly, I would allow the petition.

Also in my view, the majority erroneously concludes that courts should review prior offenses based on their classification at the time the prior offense was committed. Our law indicates otherwise. Statute governing habitual felon status defines a felony offense as

> (1) An offense that *is* a felony under the laws of this State.
>
> (2) An offense that *is* a felony under the laws of another state or sovereign that is substantially similar to an offense that is a felony in North Carolina, and to which a plea of guilty was entered, or a conviction was returned regardless of the sentence actually imposed.
>
> (3) An offense that *is* a crime under the laws of another state or sovereign that does not classify any crimes as felonies if all of the following apply:
>
> a. The offense is substantially similar to an offense that is a felony in North Carolina.
>
> b. The offense may be punishable by imprisonment for more than a year in state prison.
>
> c. A plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed.

N.C.G.S. § 14-7.1(b) (emphasis added). "It is well-established that the 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." *State v. Fuller*, 376 N.C. 862, 867 (2021) (cleaned up). The statute's use of the present tense "is," as emphasized above, indicates the legislature's intent that prior offenses must be considered felonies at the time of the offense for which the defendant is being sentenced for purposes of § 14-7.1.

Further, "we may look to other similar statutes to help define terms." *Id.* at 868 (citing *In re Banks*, 295 N.C. 236, 239–40 (1978)); *see also In re Miller*, 243 N.C. 509, 514 (1956) ("[T]here is a presumption against inconsistency, and when there are two or more statutes on the same subject, in the absence of an express repealing clause, they are to be harmonized and every part allowed significance, if it can be done by fair and reasonable interpretation."). Our statute regarding prior record levels for felony sentencing states that "[i]n determining the prior record level, the classification of a prior offense is the classification assigned to that offense *at the time the offense for which the offender is being sentenced is committed.*" N.C.G.S. § 15A-1340.14(c) (emphasis added). While the majority correctly identifies the authority of the legislature to include a provision within one statute and not another, this explicit clarification within a similar statute from our legislature, coupled with the present-tense language of the habitual felon statute, clearly indicates that courts are meant to examine the classifications of prior offenses at the time of the offense the defendant is being sentenced, not at the time the prior offense was committed.

Our case law also supports this interpretation. In *State v. Mason*, the trial court treated a defendant's crimes as Class E felonies for purposes of establishing violent habitual offender status even though they were Class H and F felonies at the time of their commission. 126 N.C. App. 318, 324 (1997). The majority is correct that the Court in *Mason* concluded that considering reclassifications rather than the classification at the time of the offense for violent habitual felon status did not violate *ex post facto* laws. *Id.* However, this Court has held that when the legislature has promoted an offense to a higher class, the amended class is used to determine violent habitual felon status. *See State v. Wolfe*, 157 N.C. App. 22, 37 (2003); *see also State v. Covington*, No. COA06-1575, 2007 WL 2827983 at *4 (N.C. App. Oct. 2, 2007) (holding that where a defendant's previous crimes were Class H felonies at the time of his convictions but had been reclassified by the legislature as Class A through E felonies by the time of his present conviction, the reclassified convictions "may be used to achieve violent habitual felon status.").

In *State v. Wolfe*, a defendant argued that one of the felonies the State presented did not qualify to achieve violent habitual felon status.

157 N.C. App. at 37. Specifically, a previous voluntary manslaughter conviction was a Class F felony when the defendant was convicted in 1987, but it was a Class D felony at the time of his trial for the substantive offense. *Id.* The Court rejected his argument that the State could not "elevate an offense classification from its previous class for purposes of satisfying violent habitual felon status." *Id.* To allow trial courts to enhance punishment under *Mason* and *Wolfe* but instruct them otherwise when the reclassification potentially reduces punishment, as is the case *sub judice*, would be inconsistent and contrary to principles of justice.

In contrast, this Court held that a defendant's prior conviction for grand larceny, though it no longer constituted a felony, served as a valid predicate offense for the defendant to attain habitual felon status. *State v. Hefner*, 289 N.C. App. 223, 230 (2023). However, a statutory amendment after the defendant's conviction increasing the amount required to establish grand larceny included a savings clause that provided the amendment "does not affect liability incurred under the previous version of the statute." *Id.* Additionally, the statutory amendment did not change the classification of grand larceny as a felony. *Id.*

This case is distinguishable from *Hefner*. While the offense in *Hefner* remained a felony after the amendment, the 1993 amendment to the Colorado second-degree forgery statute at issue here reduced the classification of the offense from a Class 5 felony to a Class 1 misdemeanor. Colo. Rev. Stat. § 18-5-104 (2022) (classifying second-degree forgery as a Class 2 misdemeanor); *see also* 1993 Colo. Legis. Serv. H.B. 93-1302 (West). Even more so, the 1993 amendment contained no savings clause maintaining liability under previous versions of the statute. The facts that permitted the outcome in *Hefner* are not present in this case, and *Hefner* does not control here. Accordingly, the trial court should consider the prior conviction's classification at the time of sentencing for the substantive offense. Therefore, I would remand this matter for resentencing.

STATE OF NORTH CAROLINA
v.
JAMES DIA'SHAWN ROBINSON, DEFENDANT

No. COA23-365

Filed 6 February 2024

1. Appeal and Error—preservation of issues—criminal case—objections to evidence—not raised at trial—not raised in appellate brief—plain error not argued

In a prosecution for first-degree murder and discharging a weapon into an occupied vehicle causing serious bodily injury, defendant failed to preserve for appellate review his objections to the admission of text messages relating to his motive for trying to rob the victims before shooting them. First, defendant could not raise his constitutional challenges to the evidence on appeal where he did not first raise them at trial. Second, where defendant's appellate brief did not mention the objections defendant did raise at trial, those objections were deemed abandoned on appeal. Finally, defendant could not argue for the first time on appeal that the text messages were irrelevant or unfairly prejudicial, because he did not specifically and distinctly contend in his brief that plain error review applied to those arguments.

2. Constitutional Law—fair-cross-section claim—underrepresentation of Black jurors in jury pool—systematic exclusion—sufficiency of evidence

In a prosecution for first-degree murder and discharging a weapon into an occupied vehicle causing serious bodily injury, the trial court did not err in denying defendant's fair-cross-section claim, in which defendant—a Black male—argued that his Sixth Amendment right to an impartial jury was violated where only eight of the fifty members of the jury pool for his trial were also Black. Although defendant offered statistical evidence tending to show Black underrepresentation in the jury pool, this evidence, standing alone, was insufficient to show that such underrepresentation was due to systematic exclusion of Black jurors in the jury selection process.

Appeal by Defendant from judgment entered 27 May 2022 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 4 October 2023.

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

Marilyn G. Ozer, for Defendant-Appellant.

CARPENTER, Judge.

James Dia'Shawn Robinson ("Defendant") appeals from judgment entered after a jury found him guilty of two counts of first-degree murder and four counts of discharging a weapon into an occupied vehicle causing serious bodily injury. On appeal, Defendant argues the trial court erred by: (1) allowing certain text messages into evidence; and (2) denying his challenge to the selection of the jury pool. After careful review, we dismiss Defendant's first argument and disagree with his second argument. Accordingly, we discern no error.

I. Factual & Procedural Background

On 12 August 2019, a Wake County grand jury indicted Defendant for two counts of first-degree murder. On 24 August 2021, a Wake County grand jury indicted Defendant for four counts of discharging a weapon into an occupied vehicle causing serious bodily injury. Beginning on 13 May 2022, the State tried Defendant in Wake County Superior Court.

During jury selection, Defendant raised a fair-cross-section challenge under the Sixth Amendment, arguing that members of Defendant's race were underrepresented in the jury pool. Of the fifty-member jury pool, thirty-nine were White, eight were Black, and three were Hispanic. Defendant is a Black male.

Defendant offered statistical evidence tending to show Black underrepresentation in the jury pool for his trial, but Defendant admitted that he lacked evidence "that the underrepresentation was due to systematic exclusion of the group in the jury selection process." The trial court denied Defendant's challenge to the jury pool.

At trial, evidence relevant to this appeal tended to show the following. On 16 July 2019, Ryan Veach, an admitted drug dealer, drove Defendant to the parking lot of a skating rink in Raleigh, North Carolina to meet Brendan Hurley and Anthony McCall. During the encounter, Defendant shot and killed Hurley and McCall. Defendant also sustained three gunshot wounds. Defendant and Veach disposed of the bodies and other evidence in various locations around Raleigh.

In order to prove that Defendant and Veach met with Hurley and McCall in order to rob Hurley and McCall, the State sought to introduce

text messages between Veach and a third party. The third party was one of Veach's drug customers, to whom Veach allegedly owed money. The challenged text messages concerned Veach's alleged scam of the third party, which was the alleged reason why Veach owed money to the third party. The State offered the text messages to show that Defendant, through Veach, was motivated to rob Hurley and McCall because Veach owed money to the third party.

Defendant objected to the introduction of the text messages because the messages were hearsay, were not illustrative, and lacked a proper foundation. The trial court ruled that only Veach's messages, not the third party's, could be admitted, and the State agreed to allow Veach to read the messages aloud, rather than publishing the document to the jury.

On 27 May 2022, the jury found Defendant guilty of two counts of first-degree murder and four counts of discharging a weapon into an occupied vehicle causing serious bodily injury. The trial court sentenced Defendant to two consecutive terms of life imprisonment without parole for each first-degree murder count. The trial court consolidated the four counts of discharging a weapon into an occupied vehicle causing serious bodily injury and sentenced Defendant to the between sixty and eight-four months of imprisonment, to run concurrently with his life sentences. 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) allowing Veach's text messages into evidence; and (2) denying Defendant's challenge to the selection of the jury pool.

IV. Analysis

A. Text Messages

[1] First, Defendant challenges the admission of Veach's text messages on several grounds. Defendant argues that: (1) they are irrelevant; (2) they are unfairly prejudicial; (3) they violate the Confrontation Clause; and (4) they violate Defendant's "right to a fair trial." After careful review, we dismiss Defendant's arguments because they are not properly before this Court.

"In order to preserve an issue for appellate review, the appellant must have raised that specific issue before the trial court to allow it

to make a ruling on that issue." *Regions Bank v. Baxley Com. Props., LLC*, 206 N.C. App. 293, 298–99, 697 S.E.2d 417, 421 (2010) (citing N.C. R. App. P. 10(b)(1)); *State v. Harris*, 253 N.C. App. 322, 327, 800 S.E.2d 676, 680 (2017) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)) ("The specific grounds for objection raised before the trial court must be the theory argued on appeal because 'the law does not permit parties to swap horses between courts in order to get a better mount in the [appellate court].' ").

This rule applies equally to unraised constitutional issues. *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982); *State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 596, 607 (2001) (citing *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.").

The North Carolina Supreme Court, however, "has elected to review 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) (citing *State v. Sierra*, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994)).

But when an appellant is limited to plain-error review and fails to make a plain-error argument, we will "only address the grounds under which the contested admission of evidence was objected, as any other grounds have been waived." *Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680; *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995) (citing N.C. R. App. P. 10(a)(4)) (holding that an appellant "waived appellate review of those arguments by failing specifically and distinctly to argue plain error"); N.C. R. App. P. 10(a)(4) (allowing certain unpreserved arguments in criminal appeals only "when the judicial action questioned is specifically and distinctly contended to amount to plain error").

Furthermore, "[i]t is well-settled that arguments not presented in an appellant's brief are deemed abandoned on appeal." *Davignon v. Davignon*, 245 N.C. App. 358, 361, 782 S.E.2d 391, 394 (2016) (citing N.C. R. App. P. 28(b)(6)); *State v. Evans*, 251 N.C. App. 610, 625, 795 S.E.2d 444, 455 (2017) (deeming an argument abandoned because the appellant did "not set forth any legal argument or citation to authority").

At trial, Defendant objected to Veach's text messages because they were hearsay, were not illustrative, and lacked a proper foundation. But on appeal, Defendant fails to argue about hearsay, illustration, or foundation. Thus, any such arguments are now abandoned. *See Davignon*, 245 N.C. App. at 361, 782 S.E.2d at 394.

Rather than pressing his trial-court arguments, Defendant now attempts to "swap horses" on appeal. *See Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680. And because Veach's text messages were admitted evidence in a criminal trial, Defendant may press a different argument—so long as he argues plain error. *See Gregory*, 342 N.C. at 584, 467 S.E.2d at 31; *Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680.

Defendant, however, has made no plain-error argument on appeal. Defendant failed to explain the plain-error standard in his brief; indeed, Defendant never even mentioned "plain error" in his brief. In other words, Defendant has failed to "specifically and distinctly . . . argue plain error." *See Frye*, 341 N.C. at 496, 461 S.E.2d at 677. Therefore, Defendant waived his unpreserved arguments and is limited to "the grounds under which the contested admission of evidence was objected." *See Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680; *Frye*, 341 N.C. at 496, 461 S.E.2d at 677.

But as we detailed above, Defendant failed to make any hearsay, illustration, or foundation arguments on appeal. With those arguments also abandoned, Defendant has no horse left. *See Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680. Therefore, we dismiss Defendant's arguments concerning Veach's text messages because they are not properly before this Court. *See Davignon*, 245 N.C. App. at 361, 782 S.E.2d at 394; *Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680.

B. Fair Cross Section Challenge

[2] In his final argument, Defendant asserts that his right to an impartial jury was violated, and the trial court erred in denying his fair-cross-section claim. After careful review, we disagree.

"A criminal defendant has a constitutional right to be tried by a jury of his or her peers." *State v. Blakeney*, 352 N.C. 287, 296, 531 S.E.2d 799, 808 (2000) (citing U.S. Const. amend. VI; N.C. Const. art. I, §§ 24, 26). "This constitutional guarantee assures that members of a defendant's 'own race have not been systematically and arbitrarily excluded from the jury pool which is to decide [his] guilt or innocence.' " *State v. Bowman*, 349 N.C. 459, 467, 509 S.E.2d 428, 434 (1998) (quoting *State v. McNeill*, 326 N.C. 712, 718, 392 S.E.2d 78, 81 (1990)).

This constitutional right is known as the "fair cross section requirement," and it has three elements:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not

> fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 668, 58 L. Ed. 2d 579, 587 (1979).

Concerning the third element, "statistical evidence indicating a disparity between the number of minorities serving on a jury in relation to the number of minorities in the community, standing alone, is insufficient to prove that the underrepresentation is a product of systematic exclusion of the minority group." *State v. Corpening*, 129 N.C. App. 60, 64, 497 S.E.2d 303, 306 (1998) (citing *State v. Harbison*, 293 N.C. 474, 481, 238 S.E.2d 449, 453 (1977)).

Here, Defendant only offers statistical evidence tending to show disparities to prove systematic exclusion. Indeed, at trial, Defendant admitted that he "lacked the third factor: that the underrepresentation was due to systematic exclusion of the group in the jury selection process." To compensate for this missing element, Defendant now points to several fair-cross-section cases and asserts that "[r]acial disparity in jury pools has been a pervasive, uncured problem in our State which North Carolina's dependence on *Duren* has failed to remedy, affecting the community's sense of justice."

Defendant, however, only offers statistical evidence as proof of systematic exclusion, and without more, he fails to establish a fair-cross-section claim under *Duren*. *See Duren*, 439 U.S. at 364, 99 S. Ct. at 668, 58 L. Ed. 2d at 587; *Corpening*, 129 N.C. App. at 64, 497 S.E.2d at 306. Therefore, the trial court did not err in denying Defendant's challenge to the jury pool.

V. Conclusion

We dismiss Defendant's first issue concerning Veach's text messages because Defendant's arguments are not properly before this Court, and we conclude the trial court did not err in denying Defendant's fair-cross-section claim.

NO ERROR.

Judges TYSON and HAMPSON concur.

TRUE HOMES, LLC v. CITY OF GREENSBORO

[292 N.C. App. 361 (2024)]

TRUE HOMES, LLC AND D.R. HORTON, INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS
v.
CITY OF GREENSBORO, DEFENDANT

No. COA23-48

Filed 6 February 2024

1. Cities and Towns—water and sewer—capacity use fees—prospective fees for new development—statutory authority exceeded

In an action by developers (plaintiffs) seeking a refund of capacity use fees collected by the city of Greensboro (defendant) to recover costs associated with the expansion of the city's water and sewer system for new development, the trial court properly granted summary judgment in favor of plaintiffs regarding fees charged by defendant prior to the 2017 amendment of N.C.G.S. § 160A-314(a), where defendant exceeded its authority under the pre-2017 version of the statute by charging fees for prospective services, since the fees were collected prior to when plaintiffs were given official access to water and sewer service.

2. Cities and Towns—water and sewer—capacity use fees—post-statutory amendment—multiple types of charges collected—authority exceeded

In an action by developers (plaintiffs) seeking a refund of capacity use fees collected by the city of Greensboro (defendant) to recover costs associated with the expansion of the city's water and sewer system for new development, the trial court properly granted summary judgment in favor of plaintiffs regarding fees charged by defendant after 1 October 2017, when the legislature amended N.C.G.S. § 160A-314(a) to allow municipalities to charge fees for prospective services and enacted a new law authorizing municipalities to adopt a system development fee. First, defendant exceeded its statutory authority by charging fees for prospective services during the grace period immediately after the amendment (up to 1 July 2018), since the statutory language allowing fee collection during that period only applied to municipalities with local enabling acts, which defendant did not have. Further, defendant was without authority to collect fees after 1 July 2018 for existing development because it was simultaneously charging both the original capacity use fees (for existing development) and system development fees pursuant to the new legislation (for new development).

3. Cities and Towns—water and sewer—capacity use fees—city's motion to strike new affidavits denied—no abuse of discretion

In an action by developers (plaintiffs) seeking a refund of capacity use fees collected by the city of Greensboro (defendant), the trial court did not abuse its discretion by denying defendant's motion to strike portions of two affidavits that were submitted by plaintiffs' employees after giving deposition testimony. Despite defendant's argument that the new affidavits contradicted previous interrogatories and depositions, the affidavits highlighted the central dispute in the case regarding what qualified as water and sewer service by explaining the temporary nature of the water and sewer availability given to plaintiffs until they paid the capacity use fees, at which time they were granted official access to the system.

Appeal by defendant from order entered 24 August 2022 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 18 October 2023.

Scarbrough, Scarbrough & Trilling, PLLC, by John F. Scarbrough; Milberg Coleman Bryson Phillips Grossman, PLLC, by Lucy Inman, James R. DeMay, Daniel K. Bryson, and John Hunter Bryson; and Shipman & Wright, LLP, by William G. Wright and Gary K. Shipman, for plaintiffs-appellees.

Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan, Stephen M. Russell, Jr., and Tyler D. Nullmeyer, for defendant-appellant.

DILLON, Chief Judge.

In this case, we consider whether the City of Greensboro's charging of capacity use fees exceeded its municipal authority under N.C. Gen. Stat. § 160A-314(a), prior to its 2017 amendment. We also consider whether Greensboro's fees were authorized by subsequent 2017 legislation.

I. Background

In 1988, Greensboro began charging capacity use fees under a city ordinance.[1] Greensboro's ordinance stated these capacity use fees were

1. In the Record, the city ordinance was originally Greensboro, N.C., Code § 22-5.1 (1988) but, by the year 1998, became Greensboro, N.C., Code § 29-53 (1998).

designed to help Greensboro recover the costs associated with expanding the city's water and sewer system to accommodate new development without increasing the costs for existing system users. During the time period relevant to this case, the typical single-family house was charged $1,970 in capacity use fees, which were paid by the companies building the houses.

On 4 March 2019, residential real estate development and home building companies True Homes, LLC, and D.R. Horton ("Developers") brought suit against Greensboro,[2] alleging the City illegally collected its capacity use fees and seeking a refund of fees collected since 4 March 2016. *See Quality Built Homes Inc. v. Town of Carthage*, 371 N.C. 60, 74, 813 S.E.2d 218, 228–29 (2018) (*Quality Built Homes II*) (restricting the statute of limitations to three years prior to the lawsuit's commencement). The trial court subsequently granted Developers' motion for class certification under Rule 23 of our Rules of Civil Procedure, defining the class as all natural persons, corporations, or other entities who paid water and sewer capacity use fees to Greensboro since 4 March 2016. The class's capacity use fees paid during that period totaled $5,252,309.06.

The parties filed cross-motions for summary judgment. Greensboro also moved to strike portions of Developers' affidavits.

On 15 July 2022, the trial court granted summary judgment for Developers and denied Greensboro's motion to strike. The following month, on 24 August 2022, the trial court entered its judgment, ordering Greensboro to refund $5,252,309.06, plus pre- and post-judgment interest. Greensboro timely appealed.

II. Analysis

Greensboro makes several arguments regarding the legality of its capacity use fees. Greensboro also argues that the trial court should have granted its motion to strike portions of Developers' affidavits. We address each argument in turn.

A. Fees Collected Prior to 2017 Legislation

[1] Greensboro first argues that the trial court erred in granting Developers' motion for summary judgment and simultaneously denying Greensboro's motion for summary judgment, concerning the fees collected prior to the 2017 legislation.

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2. Eastwood Construction, LLC, and Eastwood Development Corporation were originally plaintiffs as well, but they voluntarily dismissed their claims.

We review a summary judgment order *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

"Since 1982 [our Supreme Court] has cautioned that municipalities may lack the power to charge for prospective services absent the essential 'to be' language." *Quality Built Homes Inc. v. Town of Carthage*, 369 N.C. 15, 20–21, 789 S.E.2d 454, 458 (2016) (*Quality Built Homes I*) (citing *Town of Spring Hope v. Bissette*, 305 N.C. 248, 251, 287 S.E.2d 851, 853 (1982) (dictum)).[3] Because the pre-2017 statute lacked the "to be" language and only authorized municipalities to "establish and revise . . . rates, fees, charges, and penalties for the use of or the services *furnished* by any public enterprise[,]" N.C. Gen. Stat. § 160A-314(a) (2016) (emphasis added), our Supreme Court concluded the statute only permitted municipalities to charge for *contemporaneous* services. *Quality Built Homes I*, 369 N.C. at 22, 789 S.E.2d at 459.

It is well established that municipalities, absent a local enabling act granted by the General Assembly, were not permitted to charge for prospective services under the previous versions of N.C. Gen. Stat. § 160A-314(a)—doing so would be *ultra vires*. *See id*. at 16, 789 S.E.2d at 455 ("As creations of the legislature, municipalities have only those powers delegated to them by the General Assembly.").

Thus, the present case turns on whether Greensboro's capacity use fees were "prospective" or "contemporaneous."

Greensboro argues their capacity use fees were contemporaneous because water and sewer service was available here when Developers used "jumpers"—temporary pipes that bypass the meter box (before meter installation by Greensboro) and connect the water and sewer system to an under-construction property—to access water during construction *before* the capacity use fees were due. We disagree.

Past decisions have developed binding jurisprudence establishing when fees are considered prospective and, thus, illegal.[4] In the seminal

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3. Many North Carolina municipalities heeded the Supreme Court's warning and sought local acts. *See*, *e.g.*, An Act to Allow the Towns of Knightdale and Zebulon to Impose Water and Wastewater Capacity Charges, ch. 668, § 2, 1987 N.C. Sess. Laws 1235, 1236; An Act to Allow the Town of Rolesville to Impose Impact Fees, ch. 996, § 1, 1987 N.C. Sess. Laws 178, 178; An Act to Allow the Town of Wendell to Impose Water and Wastewater Capacity Charges, ch. 68, § 2, 1987 N.C. Sess. Laws 53, 54.

4. Greensboro used the term "capacity use fee" to describe its charges. Municipalities referred to these fees by a variety of names, such as "impact fee" in *Quality Built Homes* and "capacity fee" in *Kidd* and *Daedalus*.

case, *Quality Built Homes I*, fees were due "[u]pon approval of a subdivision of real property" and had to be paid to receive "final plat approval." *Id.* at 16, 789 S.E.2d at 455–56. If the property was already subdivided, the municipality would refuse to issue building permits until the fees were paid. *Id.* at 17, 789 S.E.2d at 456. The stated purpose for the fees was "to cover the costs of expanding the water and sewer systems." *Id.* at 16, 789 S.E.2d at 456 (cleaned up). Our Supreme Court concluded that the Town had exceeded its delegated authority by adopting ordinances establishing the fees. *Id.* at 22, 789 S.E.2d at 459.

In a subsequent case, *Kidd Construction Group, LLC v. Greenville Utilities Commission*, the defendant had established impact fees which were due "as a precondition to development approval, to the issuance of building permits, and to receiving service." 271 N.C. App. 392, 395, 845 S.E.2d 797, 799 (2020). The defendant had been chartered by our General Assembly with the authority to establish fees for "services rendered." *Id.* at 398, 845 S.E.2d at 801. The stated purpose of the impact fees was to "recover a proportional share of the cost of capital facilities constructed to provide service capacity for new development or new customers connecting to the water/sewer system." *Id.* at 395, 845 S.E.2d at 798–99. Our Court concluded that the impact fees were for future services and, therefore, not authorized under the legislative charter setting for the defendant's powers.

More recently, in *Daedalus, LLC v. City of Charlotte*, our Court considered fees established by the City of Charlotte which were due "at the time property owners appl[ied] for new water and sewer service." 282 N.C. App. 452, 454, 872 S.E.2d 105, 108 (2022). Fee payment was a "mandatory precondition of connecting to [the developer's] existing water and sewer infrastructure." *Id.* at 455, 872 S.E.2d at 108. Unlike the other cases, the municipality in this case did not have a stated purpose for the fees. *Id.* at 454, 872 S.E.2d at 108. Our Court held the fees were not authorized, as they "were charged for future discretionary spending and not for contemporaneous use of the system or for services furnished." *Id.* at 462, 872 S.E.2d at 113.

In this case, when viewed in the light most favorable to Greensboro, the evidence shows that capacity use fees were collected after the following events: plan or development approval; plat approval; installation of water mains and laterals; issuance of building permits; substantial construction progress; issuance of individual trade permits, including plumbing permits; commencement of water and sewer services through jumper connections to the system; and multiple plumbing inspections. Towards the end of the construction process (and after

the aforementioned events), Developers would request that Greensboro install the meter, at which time the capacity use fees were due, the meter was set, and volumetric billing service began. Afterwards, the final plumbing and building inspections occurred, and then a certificate of occupancy was issued.

Despite Greensboro's contentions, we hold its capacity use fees were similar in all material aspects to those other municipalities' fees, which were held to be *ultra vires* and illegal.

Though the fees at issue here were collected later in the construction process than in previous cases, Greensboro's fees were still collected *before* official water and sewer service was available to the properties. The fees were due at the time of meter installation, and official water and sewer service could not begin until the meter was installed and volumetric billing began. Though Greensboro may have been acting in Developers' interests with developer-friendly policies that allowed developers to use the system on a temporary basis during construction, it is clear that Developers were denied *official* use of the system until *after* paying the fees. Further, Greensboro's stated purpose for its capacity use fees is strikingly similar to the stated purposes in the other cases, as they were all used to recover costs associated with *expanding* the systems for *new* development.

Thus, for the foregoing reasons, we affirm the trial court's granting of summary judgment for Developers and denial of summary judgment for Greensboro regarding the capacity use fees charged prior to the 2017 legislation.

B. Fees After 2017 Legislation

[2] In response to *Quality Built Homes I*, the General Assembly amended N.C. Gen. Stat. § 160A-314(a) to confer prospective charging authority upon municipalities, effective 1 October 2017. *See* N.C. Gen. Stat. § 160A-314(a) (2017) (replacing the word "furnished" with the phrase "furnished or to be furnished").

The General Assembly also adopted the Public Water and Sewer System Development Fee Act (the "System Development Fee Act" or the "Act"), N.C. Gen. Stat. § 162A-200, *et seq.*, (also effective 1 October 2017) which authorized municipalities to charge a "system development fee." Essentially the same as Greensboro's capacity use fee, a system development fee is "[a] charge or assessment for service . . . imposed with respect to *new* development to fund costs of capital improvements necessitated by and attributable to such *new* development[.]" N.C. Gen. Stat. § 162A-201(9) (2022) (emphases added).

However, a municipality is not authorized to collect a system development fee until it complies with the "conditions and limitations" of the System Development Fee Act. *Id.* § 162A-203(a) (2022). Among other requirements, Section 162A-205 requires the system development fee be calculated "based on a written analysis . . . prepared by a financial professional or licensed professional engineer" and then "adopted by resolution or ordinance of the local government unit in accordance with G.S. 162A-209." *Id.* § 162A-205(1), (8) (2022). The written analysis must also be posted on the municipality's website "[f]or not less than 45 days" prior to a public hearing to consider its adoption. *Id.* § 162A-209(a), (b) (2022).

Here, Greensboro complied with all requirements necessary to adopt a system development fee under the Act: Greensboro conducted a written analysis, posted the results on the city website on 16 March 2018, and held a public hearing on 15 May 2018; the city council voted to adopt the system development fee on 19 June 2018; and the ordinance went into effect on 1 July 2018.

1. Fees Collected 1 October 2017 to 1 July 2018

The issue is whether Greensboro was authorized to begin charging prospective fees under the System Development Fee Act on 1 October 2017 (when the Act went into effect) or not until 1 July 2018. Greensboro's fees collected between 1 October 2017 and 1 July 2018 totaled $2,008,999.82.

The System Development Fee Act states that

> [a] system development fee adopted by a local governmental unit *under any lawful authority* other than this Article *and in effect on October 1, 2017*, shall be conformed to the requirements of this Article not later than July 1, 2018.

N.C. Gen. Stat. § 162A-203(b) (2022) (emphases added). Greensboro argues that the amended version of Section 160A-314(a) (adding the "to be furnished" language) is the "lawful authority" to which Section 162-203(b) refers, whereas Developers argue the term "lawful authority" refers to municipalities' local acts authorized by the General Assembly on or before 1 October 2017.

Notably, no other municipality cited in our line of jurisprudence has asserted this novel argument when rebutting developers' lawsuits. The municipalities in *Kidd* and *Daedalus* were required to refund their fees collected during the grace period. *See Kidd*, 271 N.C. App. at 396, 845 S.E.2d at 799; *Daedalus*, 282 N.C. App. at 455, 872 S.E.2d at 108.

We review issues of statutory construction *de novo*. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citations omitted). "In resolving issues of statutory construction, we look first to the language of the statute itself." *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996). The Act itself requires a narrow construction "to ensure that system development fees do not unduly burden new development." N.C. Gen. Stat. § 162A-215 (2022).

Here, the General Assembly included the phrases "lawful authority" and "in effect on October 1, 2017." When viewed together, these phrases clearly refer to the local enabling acts authorized by the General Assembly that were legal on 1 October 2017. Greensboro did not have a local enabling act; thus, Greensboro did not fall into this category and did not have authority to charge prospective system development fees during the grace period. We conclude the grace period from 1 October 2017 to 1 July 2018 was intended to give those municipalities with local enabling acts time to conform with the new requirements imposed by the System Development Fee Act, not to allow municipalities who failed to previously heed the Supreme Court's warning to benefit from the nine-month grace period.

2. Fees Collected After 1 July 2018

Greensboro also "occasionally" charged capacity use fees for "existing development" after 1 July 2018, which totaled $14,865.70.

Under the Act, "existing development" refers to "land subdivisions, structures, and land uses in existence at the start of the written analysis process[,]" and "new development" refers to development "occurring after the date a local government beginning the written analysis process[.]" N.C. Gen. Stat. § 162A-201(3), (6) (2022).

Greensboro argues charging fees for existing development is outside the scope of the Act because it requires only that fees for new development conform to the Act's requirements. Developers argue the existing development fees were not allowed because Greensboro was simultaneously charging both the original capacity use fees (for existing development) *and* fees adopted under the System Development Fee Act (for new development) in violation of *Kidd*, 271 N.C. App. at 395, 845 S.E.2d at 799 ("The [Act] grants local government utilities specific authority to assess *one type of upfront charge*—a system development fee—as long as that fee is calculated in accordance with the [Act's] 'written analysis' process."). Because Greensboro was charging multiple types of upfront charges, we conclude the fees collected for existing development starting 1 July 2018 were *ultra vires*, illegal, and must be refunded.

C. Greensboro's Motion to Strike

[3] Finally, Greensboro argues the trial court erred by denying its motion to strike portions of two of Developers' affidavits. Greensboro contends those affidavits sought to materially alter Developers' sworn deposition testimony and interrogatory responses.

We review the trial court's denial of a motion to strike for abuse of discretion. *Blair Concrete Servs., Inc. v. Van-Allen Steel Co., Inc.*, 152 N.C. App. 215, 219, 566 S.E.2d 766, 768 (2002).

"[A] party opposing a motion for summary judgment cannot create an issue of fact by filing an affidavit contradicting his prior sworn testimony." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 225, 768 S.E.2d 582, 596 (2015). The trial court should exclude the portions of an affidavit if "[t]he additions and changes appearing in the affidavits are conclusory statements or recharacterizations more favorable" to the party who submitted the affidavit. *Marion Partners, LLC v. Weatherspoon & Voltz, LLP*, 215 N.C. App. 357, 362–63, 716 S.E.2d 29, 33 (2011).

Here, a True Homes employee and a D.R. Horton employee each submitted new affidavits after giving deposition testimony. Both employees' affidavits contained identical language: "At the time the Capacity Use Fees were required to be paid, no water or sewer service was being furnished to the property. The City would not provide water and sewer service until a water meter was installed."

In True Homes's prior interrogatory responses, the company acknowledged that "[w]ith respect to construction activities, the City allowed [True Homes] to bypass the meter box with a straight pipe or jumper on dates prior to a meter being set[,]" and True Homes could "fill and drain tubs for testing purposes prior to a meter being set[.]" However, True Homes also stated it could not access Greensboro's water or sewer service as a "metered customer" until capacity use fees were paid and a meter was set. During previous True Homes employee depositions, employees also acknowledged that (1) mains and laterals were installed and "operational, in the sense that it can be used [ ] for water and sewer service" when True Homes purchased a finished lot and (2) True Homes used water through jumpers during construction to test plumbing.

In D.R. Horton's prior depositions, an employee acknowledged that the water mains were operational when D.R. Horton bought finished lots. He further stated that he was unaware if any construction sites

actually used jumpers but that it "wouldn't surprise [him] a bit" if they were used.

We conclude the new affidavits do not necessarily contradict Developers' previous interrogatories and depositions. Rather, they demonstrate the problem at the heart of this case: Developers and Greensboro fundamentally disagree on what qualifies as water and sewer service. Greensboro believes access to the system via temporary jumpers qualifies; however, we agree with Developers, as discussed *supra*, that only *official* and *permanent* water and sewer service qualifies, which occurs here only after fees are paid and the meter is set.

Developers were not creating new issues of fact with their affidavits. They were simply explaining the temporary nature of the water and sewer availability prior to gaining official access to the system, which occurred only after they paid capacity use fees and received a set meter. Developers' affidavits were not recharacterizations of the evidence in a more favorable light; the affidavits simply further emphasized Developers' consistent point that official and permanent service was not available until later, only after the fees were paid.

Therefore, Greensboro has failed to show that the trial court abused its discretion in denying the motion to strike.

III. Conclusion

We affirm the trial court's order granting summary judgment in favor of Developers and denying Greensboro's motion to strike.

AFFIRMED.

Judges TYSON and GRIFFIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 FEBRUARY 2024)

CASHION v. CASHION No. 23-327	Iredell (22CVS1856)	Dismissed.
CONNETTE v. THE CHARLOTTE-MECKLENBURG HOSP. AUTH. No. 23-460	Mecklenburg (11CVS18175)	Affirmed.
IN RE J.M.M.M. No. 23-540	Rowan (22JT167)	Reversed in part and vacated and remanded in part
IN RE K.J.B.H. No. 23-632	Davie (22JB28)	Affirmed in Part and Remanded in Part
MILLER v. E. BAND OF CHEROKEE INDIANS No. 23-278	Graham (20CVS130)	Dismissed
ODINDO v. KANYI No. 23-794	Wake (21CVD602190) (22CVD1497)	Dismissed
PAYNE v. RAYNOR No. 23-780	Chatham (20CVS418)	Affirmed
PHILLIPS v. EXTRA SPACE MGMT., INC. No. 23-303	Mecklenburg (19CVS1663)	No Error
PORTER v. GOODYEAR TIRE & RUBBER CO. No. 23-631	N.C. Industrial Commission (17-034676)	Affirmed in Part; Vacated in Part; and Remanded
SANDERS v. N.C. DEP'T OF TRANSP. No. 22-440	Cumberland (18CVS7897)	Affirmed
STATE v. ALVARADO No. 23-385	Durham (18CRS56417) (21CRS795)	No Error
STATE v. ARMSTRONG No. 23-220	Mecklenburg (18CRS242372) (18CRS242373)	No Error

STATE v. BARNES No. 23-239	Wilson (18CRS53149-50) (19CRS358)	No Error
STATE v. BENBOW No. 23-315	Mecklenburg (19CRS246111) (19CRS246113-14)	No Error
STATE v. BOYNTON No. 23-484	New Hanover (19CRS59260)	No Error
STATE v. COOPER No. 22-662	Wake (17CRS219916)	No Error
STATE v. HILL No. 23-264	Brunswick (20CRS53070)	No Error
STATE v. HUNTLEY No. 23-346	Union (21CRS422) (21CRS51670-72)	NO ERROR AT TRIAL, REMANDED FOR RESENTINCING
STATE v. INGRAM No. 23-207	Alamance (20CRS51128) (20CRS587)	Affirmed
STATE v. JONES No. 22-981	Mecklenburg (14CRS11612-14) (14CRS11616)	No Error
STATE v. KIRKPATRICK No. 23-449	Avery (20CRS50445)	No error in part; no prejudicial error in part
STATE v. McCANTS No. 23-511	Buncombe (20CRS86132) (21CRS416)	No Error.
STATE v. McCOY No. 23-329	Brunswick (20CRS52125)	Dismissed Without Prejudice
STATE v. McKINNON No. 22-813	Mecklenburg (03CRS233731) (03CRS233733)	Dismissed
STATE v. MERTES No. 23-512	Forsyth (21CRS51796) (21CRS51962-68) (21CRS54948) (21CRS54968) (21CRS55237) (21CRS55368) (21CRS55888) (21CRS805)	Dismissed

STATE v. PRATT No. 23-822	Durham (19CRS54709) (20CRS50022)	Vacated and Remanded
STATE v. ROBERTS No. 23-501	Cabarrus (21CRS51233-34) (22CRS386)	No Error
STATE v. ROEBUCK No. 23-335	Forsyth (20CRS52316)	No Error.
STATE v. SPRUILL No. 23-12	Martin (19CRS50596-98) (21CRS271)	No Error
STATE v. VELASQUEZ No. 23-368	Wake (21CRS201978-80)	No Error
STATE v. VELEZ No. 23-199	Craven (20CRS594)	No Error; Remanded for correction of clerical error.
STATE v. WILLIAMS No. 23-628	Henderson (20CRS53669-70) (21CRS42)	No Error
THE VENABLE GRP., LLC v. SNOW No. 23-483	New Hanover (21CVS4244)	Affirmed
TROUTT v. WATSON No. 23-535	Wake (20CVS8349)	Dismissed
VIRMANI v. PROF'L SEC. INS. CO. No. 23-580	Mecklenburg (21CVS10633)	Reversed

CAPE HOMEOWNERS ASSOCIATION, INC., DESMOND P. McHUGH AND WIFE, GERALDINE McHUGH, MICHAEL L. BODNAR AND WIFE, PATRICIA L. BODNAR, DONNA J. MARTIN AND SPOUSE, PETER MARTIN, PLAINTIFFS
v.
SOUTHERN DESTINY, LLC, DEFENDANT

No. COA23-593

Filed 20 February 2024

Appeal and Error—interlocutory order—denial of motion to intervene—failure to establish substantial right

An appeal from an order denying proposed intervenor-defendant's motion to intervene in a pending declaratory judgment action (regarding property rights in a residential subdivision) was dismissed for lack of appellate jurisdiction because proposed intervenor-defendant failed to include in its opening brief sufficient facts and arguments demonstrating that the order affected a substantial right, and its attempts to rectify the deficiencies in a reply brief were unavailing.

Appeal by Proposed Intervenor-Defendant from order entered 16 February 2023 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 10 January 2024.

Shipman & Wright, LLP, by Gary K. Shipman, for Plaintiffs-Appellees.

Adams, Howell, Sizemore & Adams, P.A., by Jeremy Jackson and Ryan J. Adams, for Defendant-Appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Lindsey S. Barber, Daniel F. E. Smith, and Walter L. Tippett, Jr., for Proposed Intervenor-Defendant-Appellant.

COLLINS, Judge.

Proposed Intervenor-Defendant Bill Clark Homes of Wilmington, LLC, ("BC Homes") appeals from the trial court's interlocutory order denying its motion to intervene in the above-captioned pending action. Because BC Homes has failed to demonstrate in its opening brief that the challenged order affects a substantial right, we dismiss this appeal for lack of appellate jurisdiction.

I. Background

The underlying case concerns property rights in the Cape Subdivision, a residential development, and an adjacent property which has been historically used as a golf course ("Subject Property"). Plaintiffs are the Cape Homeowners Association, Inc., and owners of individual lots within the Cape Subdivision. Defendant Southern Destiny, LLC, is the current owner of the Subject Property. Defendant ceased operating a golf course on the Subject Property in 2018 and sought to develop portions of it into residential subdivisions.

Plaintiffs filed suit against Defendant on 6 May 2019. Plaintiffs sought a declaratory judgment that Defendant had no right to use the private streets and roads of the Cape Subdivision to develop the Subject Property; that the individual plaintiffs "acquired a right to have the [Subject Property] or any portion thereof kept open for their reasonable use"; and that the individual plaintiffs acquired an easement appurtenant over the Subject Property.[1] Plaintiffs also sought injunctive relief and asserted claims for interference with an easement and nuisance; the Cape Homeowners Association also separately asserted a claim for trespass. On 18 July 2019, Defendant filed an answer and asserted a counterclaim for a declaratory judgment that it held an express easement, easement implied by prior use, prescriptive easement, easement by necessity, or easement by estoppel to use the private streets and roads of the Cape Subdivision to develop the Subject Property. Plaintiffs filed a motion to dismiss and an answer on 22 August 2019. Thereafter, the parties filed cross-motions for judgment on the pleadings; the trial court denied both motions.

On 20 September 2019, Defendant and BC Homes entered into a contract for the purchase of the Subject Property. The contract stated, in part, that "[Defendant] will make all reasonable efforts to resolve [the pending action]" and if Defendant does not prevail, the contract "shall terminate and thereafter . . . shall be null and void[.]"

Plaintiffs and Defendant attended mediation on 19 February 2020; a representative from BC Homes also attended the mediation. Plaintiffs issued a subpoena to BC Homes on 27 February 2020 to obtain all contracts and correspondence between BC Homes and Defendant relating to the Subject Property. BC Homes objected to the subpoena on the grounds that "the information sought is proprietary in nature, is subject

1. Plaintiffs also sought a declaratory judgment on other property rights, none of which are relevant to this appeal.

to the terms of a Nondisclosure Agreement, and is, upon information and belief, wholly irrelevant to the issues in this litigation."

On 2 April 2020, Plaintiffs filed a motion to join BC Homes as an additional defendant, alleging that, by virtue of the contract between Defendant and BC Homes for the purchase of the Subject Property, BC Homes "is united in interest with the Defendant, and the interest of [BC Homes], who has not consented to be joined as a party Defendant in this matter, is such that a complete determination of the claims before this Court cannot be made without the presence of [BC Homes]."

Plaintiffs noticed a hearing on their motion to join BC Homes as an additional defendant for 28 July 2020. BC Homes' counsel sent Plaintiffs' counsel a letter on 24 July 2020 stating, "When we talked on Wednesday afternoon, you agreed to withdraw your motion in the above-referenced action if [BC Homes] would agree to be bound by the final judgment in this case as it relates to the use of the subdivision roads and the property now owned by [Defendant]." The letter further stated, "In the event [BC Homes] acquires title to the Property, [BC Homes] agrees that it will be bound by the courts' final determinations . . . . I trust that this letter is sufficient and will enable you to withdraw your motion to add [BC Homes] as a party to this lawsuit." Plaintiffs' motion to add BC Homes as an additional defendant was not heard on 28 July 2020.

Plaintiffs and Defendant filed cross-motions for summary judgment. On 3 December 2020, the trial court entered an order granting Defendant summary judgment based on its conclusions that Defendant had an express easement to use the private streets and roads of the Cape Subdivision, and that Plaintiffs did not have an easement implied by plat requiring Defendant's property be kept open for Plaintiffs' reasonable use. Plaintiffs appealed to this Court.

We affirmed the portion of the trial court's order concluding that Plaintiffs had no easement implied by plat over the Subject Property. *Cape Homeowners Ass'n v. S. Destiny, LLC*, 284 N.C. App. 237, 250, 876 S.E.2d 568, 576 (2022). However, we reversed the trial court's entry of summary judgment in Defendant's favor based on its conclusion that Defendant had an express easement to use the private streets and roads of the Cape Subdivision. *Id.* at 249, 876 S.E.2d at 576. We remanded the case to the trial court to enter summary judgment in Plaintiff's favor on the express easement claim and to address Defendant's alternative claims for an easement implied by prior use, prescriptive easement, easement by necessity, and easement by estoppel in the private streets and roads of the Cape Subdivision. *Id.* at 249-50, 876 S.E.2d at 576.

In the fall of 2022, Defendant's ownership changed. Disputes have now arisen between BC Homes and Defendant's new owner. BC Homes filed a breach of contract action against Defendant in New Hanover County Superior Court on 23 November 2022 and filed a motion to intervene in this matter on 7 December 2022. In its motion to intervene, BC Homes alleged that it had entered into a contract with Defendant to purchase the Subject Property, and that Defendant had failed to make reasonable efforts to obtain an easement to use the private streets and roads of the Cape Subdivision to develop the Subject Property. After a hearing on 31 January 2023, the trial court entered an order on 16 February 2023 denying BC Homes' motion to intervene. The trial court made the following relevant findings of fact and conclusions of law in its order:

> 18. All discovery has been completed, mediation has been completed, and all material which the [c]ourt needs to consider on the motion for summary judgment for the existence of implied easements is before this [c]ourt.
>
> 19. [BC Homes] contractually obligated itself to the very condition that it now complains of; namely that Defendant would be responsible for pursuing all litigation in this matter. The Defendant's obligations are set out in the contract signed by the parties and for Defendant's alleged failure to comply with its obligations under the contract, [BC Homes] has a remedy, namely damages in the breach of contract action presently pending in New Hanover County.
>
> 20. The interest of [BC Homes] is a contingent interest, not a direct or immediate interest in the property that is the subject of this action.
>
> . . . .
>
> 23. [BC Homes] is not entitled to Intervention as of Right pursuant to Rule 24(a) of the North Carolina Rules of Civil Procedure.
>
> 24. Intervention would delay these proceedings which, at this point, are in a position to be resolved on Defendant's claims for easement by implication.
>
> 25. [BC Homes] is not entitled to permissive joinder pursuant to Rule 24(b) of the North Carolina Rules of Civil Procedure.

BC Homes appealed to this Court.

II. Discussion

A. Appellate Jurisdiction

As a threshold issue, we must determine whether we have jurisdiction to hear this appeal.

"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) (quotation marks and citations omitted). An order denying a motion to intervene is interlocutory in nature. *See Stockton v. Estate of Thompson*, 165 N.C. App. 899, 900, 600 S.E.2d 13, 15 (2004). "As a general rule, there is no right of appeal from an interlocutory order." *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 95 (2015) (citation omitted). "The reason for this rule is to prevent fragmentary, premature[,] and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Id.* (quotation marks and citation omitted).

"There is a statutory exception to this general rule when the challenged order affects a substantial right." *Denney v. Wardson Constr., LLC*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019) (citing N.C. Gen. Stat. § 7A-27(b)(3)(a)). "An interlocutory order affects a substantial right if the order deprives the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Suarez v. Am. Ramp Co.*, 266 N.C. App. 604, 608, 831 S.E.2d 885, 889 (2019) (quotation marks, brackets, and citations omitted). A substantial right is "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 (quotation marks, brackets, and citations omitted).

"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) (quotation marks and citation omitted); *see also* N.C. R. App. P. 28(b)(4). "The appellant[] must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hanesbrands*, 369 N.C. at 219, 794 S.E.2d at 499 (quotation marks and citations omitted).

"Importantly, this Court will not construct arguments for or find support for appellant's right to appeal from an interlocutory order on our own initiative." *Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438 (quotation marks and citation omitted). "That burden falls solely on the appellant." *Id.* (citation omitted). Accordingly, "if 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." *Id.* (citation omitted).

> 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 the statement of the grounds for appellate review in its opening brief, BC Homes asserts, essentially as a matter of law, that the

> [d]enial of a motion to intervene is an interlocutory order that "affects a substantial right and is therefore immediately appealable." *Anderson v. Seascape at Holden Plantation, LLC*, 232 N.C. App. 1, 6—7, 753 S.E.2d 691, 696 (2014); *see also Alford* [*v. Davis*, 131 N.C. App. 214, 216, 505 S.E.2d 917, 919 (1998)] (providing that denial of a motion to intervene affects "substantial rights which might be lost if the order is not reviewed prior to final judgment"). Accordingly, the Court has jurisdiction to hear this appeal pursuant to N.C.G.S. §§ 7A-27(b)(3)(a), 1-277(a), as denial of BC Homes's Motion to Intervene affects a substantial right.

However, unlike a trial court's ruling on sovereign immunity, the denial of a motion to intervene does not affect a substantial right essentially as a matter of law. *See*, *e.g.*, *Nicholson v. F. Hoffmann-Laroche*, *Ltd.*, 156 N.C. App. 206, 208-09, 576 S.E.2d 363, 365 (2003) (holding that the denial of a motion to intervene in a class action did not affect a substantial right); *Howell v. Howell*, 89 N.C. App. 115, 117-18, 365 S.E.2d 181, 182-83 (1988) (holding that the denial of a motion to intervene in a divorce action did not affect a substantial right). Accordingly, BC Homes was required to explain, in the statement of the grounds for appellate review in its opening brief, why the facts of this particular case demonstrated that the order denying its motion to intervene affects a substantial right. BC Homes failed to do so.

Plaintiffs argue in their brief that BC Homes' appeal should be dismissed because it failed to show that the challenged order affects a substantial right that will be lost if the order is not immediately appealable. In response, BC Homes significantly augments its analysis in its reply brief as to why the trial court's order denying its motion to intervene affects a substantial right in this particular case. However, BC Homes may "not . . . use their reply brief to independently establish grounds for appellate review" as "a reply brief does not serve as a way to correct deficiencies in the principal brief." *Larsen*, 241 N.C. App. at 78, 772 S.E.2d at 96 (quotation marks, brackets, and citations omitted).

In its reply brief, BC Homes additionally cites cases from this Court that, in its view, support the proposition that an order denying a motion to intervene is immediately appealable "even without stating reasoning or an analysis of the facts to reach such a conclusion." Although the Court in those cases permitted an immediate appeal from an order denying a motion to intervene, none of those cases established a bright-line rule that an order denying a motion to intervene is immediately appealable. Instead, the Court simply held that, based on the facts of each particular case, the appeal was permissible. *See Alford v. Davis*, 131 N.C. App. 214, 216, 505 S.E.2d 917, 919 (1998) ("We believe appellants' motion to intervene claims substantial rights which might be lost if the order is not reviewed prior to final judgment; therefore we consider their appeal." (citation omitted)); *United Servs. Auto. Ass'n v. Simpson*, 126 N.C. App. 393, 395, 485 S.E.2d 337, 339 (1997) ("Applying this test to the present case, we conclude that the order affects the [appellants'] substantial rights and, consequently, the appeal is properly before us."); *Anderson v. Seascape at Holden Plantation*, *LLC*, 232 N.C. App. 1, 7, 753 S.E.2d 691, 696 (2014) ("Under the facts presented here, we conclude that the trial court's order affects a substantial right of the [appellant].").

Because BC Homes has not presented "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right[,]" we dismiss this appeal for lack of appellate jurisdiction. *Doe*, 273 N.C. App. at 21, 848 S.E.2d at 9.

III. Conclusion

For the foregoing reasons, we dismiss this interlocutory appeal for lack of appellate jurisdiction.

DISMISSED.

Judges HAMPSON and THOMPSON concur.

JENNIFER C. DURBIN, Plaintiff
v.
MATTHEW L. DURBIN, Defendant

No. COA23-308

Filed 20 February 2024

Child Custody and Support—custody modification order—ongoing conflict—no findings linking conflict to children's welfare—no substantial change in circumstances

An order modifying child custody—from granting the parents joint custody to granting the mother primary physical custody and final decision-making authority on major parenting decisions—was reversed where the trial court's findings of fact did not support its conclusion that a substantial change in circumstances affecting the children's welfare had occurred. The court's findings showed a high degree of conflict between the parties, which the court described as "ongoing" since the initial custody order and which was largely characterized by the father's hostile communications with one of the parenting coordinators assigned to the case, along with his frequent refusal to cooperate with the mother or the parenting coordinator in managing the children's medical care. However, it could not be presumed from the mere existence of an ongoing conflict that the conflict adversely affected the children, especially where the court made no specific findings linking the conflict to the children's welfare and where, in fact, the court's findings suggested that the children—both of whom were teenagers approaching adulthood—were relatively insulated from the conflict.

Judge COLLINS dissenting.

Appeal by Defendant from order entered 8 July 2022 by Judge Julie Bell in Wake County District Court. Heard in the Court of Appeals 1 November 2023.

Jackson Family Law, by Jill Schnabel Jackson, for plaintiff-appellee.

Fox Rothschild LLP, by Kip D. Nelson and Jonathan L. Taggart, for defendant-appellant.

MURPHY, Judge.

When ruling on a motion for the modification of child custody, the existence of an ongoing conflict or propensity for conflict between the parties that has persisted since the original custody order does not preclude a conclusion on behalf of the trial court that the ongoing conflict constitutes, or contributes to, a substantial change in circumstances affecting the welfare of the children. However, it is also not presumed from the mere existence of an ongoing conflict that the conflict adversely affects the children, especially where, as here, the trial court's findings of fact actually suggest the children were relatively insulated from the conflict. As the trial court's findings of fact in this case did not support its conclusion of law that a substantial change in circumstances affecting the welfare of the children had occurred, we reverse the trial court's modification order.

BACKGROUND

This case arises from an 8 July 2022 order of the trial court modifying child custody shared between Plaintiff, Jennifer Durbin, and Defendant, Matthew Durbin, in response to Plaintiff's 8 October 2021 motion. The order, which substantially rendered permanent the terms of two temporary child custody orders entered 12 January 2022 and 9 February 2022, replaced the previously effective *Consent Order for Child Custody and Child Support* entered 30 October 2020. The original order provided, in relevant part, that Plaintiff and Defendant shared joint legal custody, shared physical custody in roughly equal measures, shared a responsibility for communicating information pertaining to the children's health, and expressly contemplated the children having routine medication. The original order further established an obligation to act in good faith to "enhance and nourish the relationship between each other and the children" and to avoid scheduling activities for the children during the other party's custodial time.

In addition to the original order, the parties entered into an *Order Appointing Parenting Coordinator by Consent* on 10 December 2020 appointing Tiffany Lesnik as the replacement for their original parenting coordinator, Dr. Kari Lenox. In the wake of her appointment, Defendant and Lesnik developed a contentious relationship, with Defendant moving on 30 April 2021 for the termination of Lesnik's appointment and for review of her decision as to the reallocation of custody in the summer of 2021 to accommodate Plaintiff's vacation plans. The trial court denied both motions, and conflict between Lesnik and Defendant seemingly continued through October of the same year, with Defendant continually alleging Lesnik's preferential treatment of Mother.

On 8 October 2021, Plaintiff made a *Motion to Modify Child Custody*, citing, *inter alia*, Defendant's interference with the children's therapy appointments and insufficient attentiveness to the children's medical needs as the basis for modification. After entering the two aforementioned temporary orders on 12 January 2022 and 9 February 2022, the trial court entered its *Order Modifying Child Custody* on 8 July 2022, which severely decreased Defendant's time with the children and delegated "final decision-making authority" on all major parenting decisions to Plaintiff:

> FINDINGS OF FACT
>
> 1. Plaintiff is a resident of Wake County, North Carolina.
>
> 2. Defendant is a resident of Wake County, North Carolina.
>
> 3. [] Plaintiff and [] Defendant were married to each other on [26 May] 2007 and separated from each other on or about [23 September] 2016.
>
> 4. There were two children born of the marriage, . . . born [10 December] 2008[] and . . . [8 September] 2010.
>
> 5. A permanent custody order was entered on [30 October] 2020.
>
> 6. The parties' first parent coordinator was Dr. Kari Lenox.
>
> 7. Tiffany Lesnik was appointed the Parent Coordinator on [15 December] 2020. Her term expired on [15 December] 2021.
>
> 8. On [24 September] 2021, the PC filed a report to the Court detailing numerous problems with the current custody order and requesting an expedited hearing.

9. After a hearing on [27 October] 2021, the Court entered a temporary custody order giving [] Plaintiff sole legal custody and primary physical custody, with [] Defendant exercising alternate-weekend visitation.

10. A second Parent Coordinator report was filed on [8 December] 2021.

11. After a hearing on [10 January] 2022, the Court entered a new temporary custody order and appointed Lisa LeFante as the new Parent Coordinator on [9 February] 2022.

12. There is an ongoing conflict between the parties that is interfering with important decisions being made that affect the health, education and welfare of the minor children.

13. The case continues to be a high-conflict and the parties have had three different parent coordinators.

14. [] Defendant at times will refuse to respond to Plaintiff's requests for information in a timely manner.

15. During Ms. Lesnick's tenure as PC, [] Defendant refused or delayed providing information that the PC requested, and he was hostile and behaved inappropriately in his responses to the PC. Specifically:

a. On or about [9 April] 2021, the PC contacted [] Defendant and asked for some basic information about his positive COVID test, including when he tested positive, whether anyone else lived with him, and if anyone in his home had tested positive. The PC's questions were reasonable under the circumstances.

b. Defendant reacted with hostility, refusing to respond to the questions, demanding to know why she needed medical information, accusing the PC of breaching his trust, calling her questions "bizarre," and accusing the PC of colluding in a "witch hunt" with Plaintiff.

c. Defendant ultimately provided answers to the PC's questions after several days, but his delay in responding was unreasonable and his hostile response was inappropriate.

d. On [23 September] 2021, [] Defendant contacted [] Plaintiff claiming he was dealing with a "behavioral issue" with [the parties' elder son] and wanting to review the phone and text logs for [that son's] phone.

e. When the PC contacted the parties and asked Mr. Durbin to provide some information on what the "behavioral issue" was so that the parties could address it in a uniform manner, Defendant refused to provide any information. Further, Defendant's response on [24 September] 2021, at 9:40 a.m., was hostile, telling the PC neither she [n]or Plaintiff were "ready for co-parenting," accusing the PC of lying, and threatening to "limit or cease [his elder son's] cell phone usage" if he didn't get what he wanted.

16. Both minor children attend therapy. [The parties' elder son] sees Dr. Brian Mackey and [the parties' younger son] sees Dr. Jennifer Hayden. Both children have good relationships with their therapists.

17. There were substantial problems with scheduling regular therapy for the minor children for several months in 2020. Defendant was uncooperative with both Dr. Lenox and Ms. Lesnick in the PC's attempts to ensure that [the parties' elder son] was receiving regular therapy.

18. The current PC, Lisa LeFante, did not testify that problems continued under her tenure with Defendant making sure that [the parties' elder son] attended regular therapy.

19. Both Dr. Mackey and Dr. Hayden testified that the scheduling problems were resolved and that [] Defendant now brings both children to therapy and seems supportive of their treatment.

20. Over Plaintiff's objections, [] Defendant began requiring the children to speak with Plaintiff's estranged mother, who lives in California and suffers from severe mental illness.

21. There has been an ongoing dispute between the parties about the children's medical conditions and the consistent administration of prescribed medications. Specifically:

a. [The parties' elder son] has asthma and serious allergies requiring him to use inhalers on a regular basis and to carry an EpiPen and emergency inhaler at all times. [The elder son's] medication is kept in a blue bag that he carries with him at all times.

b. [] Plaintiff and her husband testified that they have been in [the elder son's] presence when he was with

[] Defendant on several occasions and they did not see the medication bag, so they presumed that it was not with [him]. Defendant testified that the bag was always there, but sometimes it was in a backpack. The Court does not have sufficient information to determine whether the medication was present or not.

c. [] Plaintiff had contacted the PC on more than one occasion to voice concerns about Defendant's failure to administer the child's medication as prescribed.

d. Plaintiff and her husband testified that on at least 4 occasions, when [the parties' elder son] returned from visits with Defendant, that the count on his inhaler (which has a dosage counter on the medication) was inconsistent with the number of doses he should have taken while in Defendant's custody.

e. [] Defendant offered no explanation, but it appears to the Court that he takes a "hands off" approach and lets [the parties' elder son] regulate his own medication.

f. The Court finds that, in light of [the elder son's] medical condition, it is in the child's best interest for both parents to take responsibility for making sure that he takes his medicine consistent with the doctor's recommendations and not leave it to the child to be responsible for his own medications.

g. On [29 July] 2021, the PC issued a directive on the medication issue. The email said, in relevant part, "I am going to ask you both to keep a medication administration chart while [your elder son] is with you that will indicate: The medication administered, the amount, the date and the time."

h. Despite [the elder son's] diagnosed medical problems, and the PC's directive, the conflict over the child's medication continued. Defendant did not maintain the medication log, made the child maintain the medication log, told Plaintiff and the PC that the child (who is 12) was responsible for his own medication, and argued with both Plaintiff and PC in multiple emails rather than simply make sure [the elder son] received his medication and maintaining the log so that both parents could make sure that they were consistent and coordinated in their administration of medication for [him].

i. [The parties' younger son] broke his arm while zip-lining.

22. Defendant did not cooperate with Ms. Lesnik's directives regarding [his elder son's] medication.

23. Plaintiff wanted to get the children vaccinated for Covid 19. [] Defendant disagreed and wanted to speak to the children's pediatrician and allergist.

24. Defendant received recommendations from the pediatrician (Dr. Fennell) regarding the Covid vaccine. Defendant's recollection of the doctor's recommendations, and what he told Plaintiff about it, were different from what the doctor had actually said and provided in correspondence to Defendant. This caused further conflict between the parties and substantially delayed Plaintiff's ability to get the kids vaccinated.

25. Defendant schedules extracurricular activities during Plaintiff's custodial time without her consent.

26. Plaintiff frequently presumes any delay of information or mistake in providing information is intentional on the part of [] Defendant. While the Court believes that delays and mistakes by Defendant in providing information to Plaintiff creates more conflict between the parties, so does Plaintiff's presumption.

27. The amount of conflict between the parties is not in the children's best interest, but neither party seems capable of reducing the conflict.

28. Since the entry of the [12 January] 2022, temporary order, there have been fewer custodial exchanges between the parties. The reduction in exchanges has helped reduce some of the conflict between the parties.

29. Defendant and his mother both testified that the boys seem "sad" to him. However, [the parties' elder son] is doing so well in therapy that he can decrease the frequency of his appointments.

30. Plaintiff and her husband testified to very positive relationships with the children.

31. [] Plaintiff has remarried . . . . Her new husband has a very positive and close relationship with the children.

32. The Court finds that the above listed findings constitute a substantial change in circumstances warranting the entry of a temporary custody order modifying the terms of the October 2020 Permanent Custody Order.

CONCLUSIONS OF LAW

1. The parties are properly before the Court and that the Court has jurisdiction over the parties and the subject matter herein and there exist facts justifying this Court to assume jurisdiction to determine the custody of the minor children.

2. North Carolina is the home state of the minor children.

3. Pursuant to N.C.G.S. § 50-13.7, since the entry of the last custody order there has been a substantial change in circumstances that adversely affects the minor children and a modification of the permanent custody order is warranted.

4. This Order is in the best interests of the minor children.

5. Both parties have the ability to comply with the terms and conditions contained herein.

6. Findings of Facts that are more appropriately considered Conclusions of Law are incorporated by reference as if fully set forth herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. The permanent custody order is modified as follows:

   a. The parties shall continue to share joint legal custody, The parties shall in good faith confer and attempt to mutually agree on major decisions affecting the children's health, education and welfare. In the event the parties are unable to reach mutual agreement on a major decision, [] Plaintiff shall have final decision-making authority. Day-to-day decisions shall be made by the custodial parent.

   b. [] Plaintiff shall exercise primary physical custody and [] Defendant shall have visitation as follows:

      i. Defendant shall have custody of the minor children on alternate weekends from the end

of school Friday until the beginning of school Monday morning.

ii. In the event one child does not have school on a custodial exchange day (either Friday or Monday), the parties shall exchange custody of both children—the child who is in school and the child who is not in school—at 5 p.m. on that regular exchange day.

c. Therapy: The minor children shall continue in therapy at 3C Family Services until such time as their individual therapists release each child from therapy. Neither parent shall take any action to terminate or interfere in the therapeutic relationship. In addition:

i. The parents may participate in the children's therapy as directed by the individual therapist.

ii. The children's individual therapists shall recommend the frequency and duration of appointments for each child and the parties shall comply with the recommendation.

iii. Appointments shall be scheduled for each child to comply with the therapist's recommendations, regardless of whose custodial time the appointment may fall on. The custodial parent shall transport the child to and from the therapy appointment as scheduled. In the event there is a dispute between the parties on the day or time a therapy appointment is to be scheduled, the Parent Coordinator shall determine the time and date of the appointment.

d. Medication: The parties shall comply with the Parent Coordinator's directive on medication for the children. Specifically, the parties shall maintain a medication log for [the parties' elder son] as outlined in the [24 August] 2021, directive issued by the Parent Coordinator. Neither parent shall make the child complete the log, or make the child responsible for maintaining his own medication schedule. Both parents shall ensure that the children take any and all medication as prescribed by their respective medical providers, including but not limited to making sure that Epipens and inhalers are available to the child as directed by the physician(s).

e. The parents shall subscribe to Our Family Wizard within 5 days of entry of this order. All communication

between the parties shall be through Our Family Wizard and all medical appointments and extracurricular activities shall be placed on the OFW calendar. In the event of an emergency involving a child, the parties may text one another.

f. [] Defendant shall not threaten, insult or harass the Parent Coordinator, and shall not use abusive language in his communication with her (i.e., calling her a liar). Neither party shall record the Parent Coordinator.

2. Holiday Custodial Schedule. The holiday/summer custodial schedule as outlined herein shall supersede the regular custodial schedule listed above. After the holiday/summer schedule concludes, the regular custodial schedule listed above shall continue as if the holiday/summer schedule never occurred. While [the parties' younger son] remains enrolled at The Raleigh School, the parties shall use [] The Raleigh School calendar to determine the dates of the holidays referenced in provisions (3a) to (3f), below. Once [the parties' younger son] is no longer attending The Raleigh School, the parties shall use the WCPSS calendar to determine the dates of holidays and school breaks.

. . . .

3. Transportation. Each parent will be responsible for picking up the children at school, the residence of the other parent, or child's activity to begin his or her custodial time with the children.

4. Lisa LeFante shall remain the parent coordinator until the expiration of her term. Either party may ask for the reappointment of Ms. LeFante or another parent coordinator at the expiration of her term.

5. Medical Emergencies. In the event of a medical emergency, the party who is with the minor child shall promptly notify the other parent as soon as it is practicable to do so. If any injury, accident or health-related problem arises which necessitates the hospitalization of the child, both parties shall have the right to visit the child at reasonable times for reasonable periods of time. Defendant and Plaintiff shall promptly notify the other of any serious illness and/or injury to the child which requires medical attention. Each party shall inform the other of any medical or

health problems which arose while the child is in the physical custody of one of the parents.

6. Both parents shall provide each other with any medication which the child is taking at the time of the transfer of physical custody of the child and they shall provide each other with sufficient information to allow the other party to obtain refills of that medication, if appropriate.

7. Non-disparagement. [] Defendant and Plaintiff each will endeavor, in good faith, to enhance and nourish the relationship between each other and the children. Each party will attempt to foster feelings of affection between the child(ren) and the other party, and neither party shall do anything to estrange the child(ren) from the other party or to injure the child(ren)'s opinion of the other party in any manner. Neither party shall disparage the other parent within hearing of the minor children or allow any third party to do so. Neither party shall discuss the litigation with the children.

8. Child-Related Activities and Appointments. Each party shall provide to the other party information concerning a child's activities and each shall encourage participation by the other parent. Neither party shall schedule activities for a child during the other party's custodial time without prior consent, and any programs or enrollments by a child which may involve significant time commitments by the other parent shall be agreed upon in advance. If one parent schedules an appointment (medical, therapy, school conference, etc.) for a child, that parent shall immediately notify the other parent so that parent may attend.

9. Access to Information. Both parents shall have equal access to all personnel at the school and shall be permitted to communicate directly with those persons without interference by the other parent. It is the responsibility of each parent to obtain report cards and interim grade reports directly from the school and not rely on the other parent. For any written documents for which there cannot be duplication (school work, progress chart, weekly folders, and the like) the parent in possession shall make copies for the other parent of any and all important documents and/or documents with deadlines. Both parents shall have equal access to all opportunities for field trips,

chaperoning, parent participation at school functions, PTA and the like, and no parent shall interfere with the other parent's right or ability to participate.

10. Telephone and Electronic Contact. Each parent shall be entitled to communicate with the children via telephone, email, text, IM, Skype, twitter, Facebook or any other age-appropriate electronic means. All such communication shall be at reasonable times and at reasonable periods of the day.

11. Records. Each parent shall be entitled to immediate access to any third-party records and information pertaining to the child including, but not limited to, medical, dental health, school or educational records.

12. Travel. Should either parent plan to take the child out of North Carolina, that parent shall inform the other forty-eight (48) hours in advance of the planned travel and shall inform the other of the destination, address and telephone number; in the event such travel is not planned in the 48-hour time frame, the traveling parent shall inform the other immediately at the time the plans are made. Should cither parent wish to take a child out of the country, that parent shall inform the other 30 days in advance of the planned travel and shall fully inform the other parent of the complete itinerary of the travel and provide contact information, including telephone numbers. Both parents shall cooperate in obtaining passports for the children. At the request of the traveling parent, the non-traveling parent shall execute any consent forms or other written documents necessary.

13. Relocation. Should either party decide to relocate outside of Wake County or more than 20 miles from his or her current residence, that party shall notify the other at least 90 days in advance of such a move, or if relocation is likely to occur in less than 90 days, the party wishing to relocate shall notify the other within twenty-four hours of being informed (or making a decision) that relocation must or is likely to occur. If the relocation takes a parent thirty (30) or more miles from his or her current residence, the children shall remain in the physical custody of the non-relocating parent pending further agreement of the parties or entry of a court order. Both parties

> will discuss changes in the custodial schedule that will benefit the children. In the event the parties cannot agree upon changes to the custodial schedule, the parties shall participate in mediation as soon as practicable after the notice, but within 30 days from the notice of relocation. In the event no agreement is reached in mediation, but as soon as practicable following the declaration of an impasse, but within thirty (30) days, the parties shall participate in arbitration regarding the custody issue, as set out herein.
>
> 14. All PC Directives previously issued and not otherwise modified by the provisions of this order shall remain in effect.
>
> 15. This cause is retained by the Court for entry of further Orders.

Defendant timely appeals from the 8 July 2022 order.

ANALYSIS

Defendant argues the trial court erred in entering its 8 July 2022 order because no substantial change in circumstances affecting the children's wellbeing existed, because modification was not in the best interests of the children, and because the order improperly delegated *de facto* sole custody to Plaintiff. As we agree the order was not entered pursuant to a substantial change in circumstances affecting the children's wellbeing, we reverse.

When reviewing the modification of a child custody order, we "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 (2003) (citations omitted). Unopposed findings of fact "are presumed to be supported by the evidence and are binding on appeal," *James v. Pretlow*, 242 N.C. 102, 104 (1955) (marks and citations omitted), while conclusions of law are reviewed de novo. *In re C.B.C*, 373 N.C. 16, 19 (2019). Whether a substantial change in circumstances has occurred and whether that change affected the minor children are conclusions of law and must be supported by the trial court's findings of fact. *Shipman*, 357 N.C. at 475; *see also Cox v. Cox*, 238 N.C. App. 22, 26 (2014) ("The trial court's conclusions of law must be supported by adequate findings of fact.").

Here, the trial court's findings of fact begin with general observations that this case is, and continues to be, high-conflict. The order then notes that a variety of conflicts and developments have occurred since

the entry of the 2020 order: the management of the case shifting between three separate parenting coordinators; defendant responding slowly to requests for information by Plaintiff and one of the parenting coordinators; "hostile" behavior by Defendant toward the same parenting coordinator; Defendant exposing the children to Plaintiff's estranged mother, the boys' maternal grandmother; an ongoing dispute as to the administration of the eldest child's asthma medication; the parties' younger son having broken his arm; Defendant having scheduled activities during Plaintiff's custodial time; Defendant and Plaintiff disagreeing as to the appropriateness of the children receiving Covid vaccines; Plaintiff remarrying; and Plaintiff assuming bad faith on the part of Defendant.[1] The order then notes that the decreased reduction in custodial changes since the entry of the 12 January 2022 temporary order "has helped reduce some of the conflict between the parties," concludes as a matter of law that a substantial change in circumstances affecting the children had occurred, and orders, *inter alia*, that Defendant's custodial time be permanently reduced to alternate weekends and that Plaintiff have "final decision-making authority" on "major decisions affecting the children's health, education and welfare."

Accepting, as we must, the trial court's unchallenged finding of fact, *see James*, 242 N.C. at 104, we do not believe the trial court's findings of fact actually demonstrated a substantial change in circumstances affecting the welfare of the children. At the threshold, we note that the absence of meaningful findings as to the circumstances as they existed at the time of the 30 October 2020 consent order makes our review difficult, as we cannot determine with certainty what the circumstances, as the trial court determined them to be, were *at the time of that order*. *Cf. Benedict v. Coe*, 117 N.C. App. 369, 377 (1994) ("[T]he [modified order] contains no findings as to the existing circumstances [at previous points in time]. It contains no findings of changed circumstances since these dates."), *disapproved of on other grounds by Pulliam v. Smith*, 348 N.C. 616 (1998); *see also Woodring v. Woodring*, 227 N.C. App. 638, 645 (2013) (marks and citations omitted) ("[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."). Nonetheless, our review of the record and the findings in the modified order present us with information sufficient to make a determination on the question of

1. The order also notes that Defendant was "uncooperative" with the parenting coordinator's requests that the eldest child regularly attended therapy. However, further findings of fact clarify that this problem had been resolved at the time of the order's entry.

whether a substantial change in circumstances affecting the welfare of the children occurred.

In determining whether the trial court's findings of fact support a substantial change in circumstances affecting the welfare of the children, we review two of our recent custody modification cases, *Smith v. Dressler*, 291 N.C. App. 197 (2023), and *Conroy v. Conroy*, 291 N.C. App. 145 (2023), which are particularly instructive, as both cases turned on the issue of whether a substantial change in circumstances had occurred. In *Smith*, the trial court had entered a modified custody order concerning the parties' minor child, citing among the purportedly changed circumstances that the plaintiff 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," as well as that the defendant did not schedule visitation time with some members of the plaintiff's family. *Smith*, 291 N.C. App. at 209. The trial court also noted that the minor child had received a number of injuries while under the defendant's supervision—injuries the plaintiff alleged indicated abuse or neglect on the part of the defendant—and that the defendant had not disclosed a potential Covid infection. *Id.* at 211. We also noted that "CPS [] found no evidence of abuse after investigating [the] [f]ather at [the] [m]other's behest," which was a factor the trial court had used when deciding whether a substantial change in circumstances had occurred. *Id.*

We vacated and remanded the order on the basis that no substantial change of circumstances existed. *Id.* at 213. The plaintiff's marriage, new child, discharge from the Air Force, and changes in living arrangements and employment had already been disclosed to the trial court prior to the entry of the previously-effective custody order; therefore, they did not qualify as substantially changed circumstances since the entry of the prior order. *Id.* at 209-10 ("[T]he 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.") (citing, *inter alia*, *Woodring*, 227 N.C. App. at 645, and *Ford v. Wright*, 170 N.C. App. 89, 96 (2005)). Considering only the remaining changes in circumstances—the injuries to the child alleged to constitute abuse or neglect—we rejected the plaintiff's argument that a substantial change in circumstances affecting the welfare of the child had occurred, noting the absence of evidence that the injuries to the child were the product of abuse or neglect. *Id.* at 213. Moreover, we further remarked that, even if we considered the evidence previously disclosed and addressed in the prior order, that information would not have been sufficient to

constitute a substantial change in circumstances affecting the welfare of the child. *Id.* at 212.

By contrast, in *Conroy v. Conroy*, the trial court's findings of fact supporting a substantial change in circumstances included an escalating pattern of the plaintiff's increasingly erratic behavior. While the trial court found that the plaintiff "expressed significant disdain and contempt for [any] person that she apparently perceived to be 'against' her," *Conroy*, 291 N.C. App. at 153, the primary thrust of the trial court's order concerned her extreme behaviors toward her children and the defendant. These behaviors included blaming her thirteen-year-old daughter for issues raised to the trial court; speaking about the defendant in expletives in the presence of the children; preventing the children going on a pre-planned trip with the defendant by locking them inside the home; threatening to call the police on the defendant while her daughter was riding to soccer practice with the defendant; attempting, in bad faith, to have the defendant ejected from one of their children's basketball games; cursing at, and taking the call phone of, one of her children's friends for remarks made in the wake of the November 2020 presidential election[2]; destroying the children's electronics in front of them as a means of punishment; *choking her daughter*; encouraging the children to bully one another; and engaging in otherwise excessive corporal punishment. *Id.* at 153-57.

Although the plaintiff in *Conroy* argued that these behaviors did not constitute a substantial change in circumstances because her interpersonal relationships had always been poor and her behavior toward the defendant had been "erratic and unpredictable" since at least the entry of the original custody order, *id.* at 162, we held that the parties'

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2. For more complete context, the entirety of the trial court's finding of fact with respect to this incident was as follows:

> Following the election of Joe Biden in November 2020, [the plaintiff] became offended by a comment made by one of [her son]'s friends. [The plaintiff] 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, [the plaintiff] brought this child's mother[] . . . in to testify on her behalf. [The mother] testified that her son was so afraid of [the plaintiff] after the [i]ncident that her husband had to go to [the plaintiff's] home to retrieve their son's cell phone on their son's behalf. Throughout her own and [the other mother's] testimony, [the plaintiff] completely failed to recognize any problem with her own behavior (directed at a child) and, instead, blamed said child for "provoking" her.

Conroy, 291 N.C. App. at 154-55.

"continued communication problems and their failure or inability to cooperate and co-parent constituted a substantial change." *Id.* at 164. In doing so, we relied primarily on the following excerpt from *Laprade v. Barry*:

> 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 [the minor child's] welfare that constitutes a change of circumstances. In fact, it is foreseeable the communication problems are likely to affect [the minor child] 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.

Laprade v. Barry, 253 N.C. App. 296, 303-04 (2017) (emphasis in original) (citing *Shipman*, 357 N.C. at 473-75); *id.* at 163.

To be sure, the facts of this case fall in a gray area between *Smith* and *Conroy*. Like the plaintiff in *Smith*, Plaintiff's arguments to the trial court included a range of allegations that Defendant had mishandled the health of one of the children, including allegedly unsafe conduct during the height of the pandemic. *Smith*, 291 N.C. App. 211. And, also as in *Smith*, a contributing factor in the trial court's conclusion that a substantial change affecting the welfare of the children had occurred was Plaintiff's remarriage. *Id.* at 209. However, these circumstances alone, especially in the absence of a finding of the remarriage's impact on the minor children's wellbeing, does not constitute a substantial change in circumstances.[3] *See id.* at 212; *see also Hassell v. Means*, 42 N.C. App.

3. We also note that the Plaintiff's remarriage had occurred in March 2019, well before the entry of the October 2020 consent order.

524, 531 ("Remarriage in and of itself is not a sufficient change of circumstance to justify modification of a child custody order."), *disc. rev. denied*, 298 N.C. 568 (1979); *Kelly v. Kelly*, 77 N.C. App. 632, 636 (1985) ("Remarriage without a finding of fact indicating the effect of remarriage on a child is not a sufficient change of circumstance to justify modification of a child custody order."). Moreover, like in *Smith*, ordinary injury and response to common illness are not themselves sufficient to constitute a substantial change in circumstances affecting the wellbeing of the children. *Smith*, 291 N.C. App. at 211-13.

Meanwhile, this case also shares a number of salient features with *Conroy*, most notably in the trial court's observation of deteriorating communication between the parties. Defendant, like the plaintiff in *Conroy*, has, according to the trial court's findings, developed a contentious relationship with, and wariness of, other participants in the case,[4] *see Conroy*, 291 N.C. App. 153, and has reacted negatively toward them on a number of occasions. Similar to the findings of fact in *Conroy*, the trial court described decision-making conflicts over major parenting decisions between the parties as "ongoing" and noted the "case continue[d] to be high-conflict"; however, unlike in *Conroy*, a significant portion of the negative communications noted by the trial court in its findings of fact were directed at, or involved, the parenting coordinator. Also unlike in *Conroy*, no specific findings linked the parties' negative communication to the wellbeing of the children; and, in fact, the instances of conflict actually discussed by the trial court all appear to have been communications to which the children were not privy. *But see Conroy*, 291 N.C. App. at 153 (noting among the trial court's findings of fact that the plaintiff's "significant disdain and contempt for" others, including that voiced in front of the minor children, involved in the case resulted in direct distress to—and, at times, punishment of—the minor children); *Laprade*, 253 N.C. App. at 301 (noting among the trial court's findings of fact that the defendant's behavior toward

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4. Including, perhaps, the trial court:

> [DEFENDANT'S COUNSEL:] . . . I'm going to implore you to please, you know, give Mr. -- give what Mr. Durbin says a fair shake. I know that he's been in front of you several times and you've been very displeased with him in past hearings, but I'm asking for you to let that go for a little bit, listen to what he says, and take it seriously. Thank you.
>
> THE COURT: For the record, the Court will note that the court listens to all parties in every hearing, takes everything seriously, and makes decisions upon the evidence. So the Court will take exception to the statement otherwise.

the child with relation to the parties' conflicts led to high anxiety in the parties' minor child).

Indeed, the only findings directly concerning the children's wellbeing with relation to the parties' conflicts were the broad observations in findings 27 through 29.[5] These findings, however, relate to the reduction in conflict between the parties and not to any specific impact on the wellbeing of the children, limiting the relation between the two to a cursory note about conflict not being in the children's best interest. The only finding of the three involving the wellbeing of the children pertains to the eldest son's progress in therapy—treatment which, by the trial court's own findings, was supported without conflict by both parties as of the time of the order's entry.

While it may be "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 [the] child," *see Laprade*, 253 N.C. App. at 303, it is also not to be presumed from the mere existence of an ongoing conflict that the conflict adversely affects the child, especially where the trial court's findings of fact actually suggest the children were relatively insulated from the conflict. This is especially true where, as here, both boys are active teenagers approaching adulthood, can articulate their preferences for themselves, and can take far more responsibility for their activities and schedules than a younger child could.

Nor is it the case that conflict between a party and a prior parenting coordinator necessarily constitutes a substantial change in circumstances affecting the welfare of the child. Parenting coordinators serve an important function on behalf of our courts, *see generally* N.C.G.S. § 50-92 (2023), but they are, ultimately, susceptible to human error and bias, especially when their station requires involving themselves in their assignees' emotionally-charged conflicts. Such susceptibility

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5. These findings read, in full, as follows:

> 27. The amount of conflict between the parties is not in the children's best interest, but neither party seems capable of reducing the conflict.
>
> 28. Since the entry of the [12 January] 2022, temporary order, there have been fewer custodial exchanges between the parties. The reduction in exchanges has helped reduce some of the conflict between the parties.
>
> 29. Defendant and his mother both testified that the boys seem "sad" to him. However, [the parties' elder son] is doing so well in therapy that he can decrease the frequency of his appointments.

is especially present when a disparity exists in the parents' ability to manage the optics of the communications to which the parenting coordinator is exposed and advantageously leverage the necessary, yet inorganic, rules of engagement presented by court-ordered custodial arrangements. For this reason, conflict between a party and a parenting coordinator is not *per se* evidence of impact on minor children whose custody is involved in that case. Were it otherwise, a trial court may be tempted to modify a custody order out of mere logistical convenience to itself and its coordinator appointees, rather than acting with due concern for a disfavored parent's "fundamental right to make decisions concerning the care, custody, and control of his or her children . . . ." *Adams v. Tessener*, 354 N.C. 57, 60 (2001) (marks omitted) (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)).

The trial court's conclusion that "there has been a substantial change in circumstances that adversely affects the minor children" is not supported by its findings of fact; we therefore reverse the trial court's modification order. *Ford*, 170 N.C. App. at 96. Having so held, Defendant's arguments as to the best interests of the children and the legal status of the custodial arrangement ordered by the trial court are moot. *Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99 (1996) (marks and citations omitted) ("A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

CONCLUSION

The trial court's modification of child custody was not supported by a substantial change in circumstances affecting the children's wellbeing, and we therefore reverse the order of the trial court. *Ford*, 170 N.C. App. at 96.

REVERSED.

Judge TYSON concurs.

Judge COLLINS dissents by separate opinion.

COLLINS, Judge, dissenting.

I would affirm the trial court's order granting primary decision-making authority and primary physical custody to Plaintiff. I therefore respectfully dissent.

I. Background

Plaintiff and Defendant were married on 26 May 2007. They had two children together, Charles, born in 2008, and Timothy, born in 2010.[1] On 23 September 2016, the parties separated. They entered into a consent order for child custody and child support on 9 February 2017 ("Initial Consent Order") wherein they agreed to share legal and physical custody of the children and to various other custody terms.

Plaintiff filed a motion to modify child custody on or around 27 October 2020. The trial court entered a consent order on 30 October 2020 ("Permanent Custody Order") maintaining all the terms of the Initial Consent Order but adding a term specifically providing for the appointment of a parenting coordinator. The parties entered into a consent order on 15 December 2020 appointing Tiffany Lesnik ("PC" or "Parenting Coordinator") as their parenting coordinator for a one-year term. The parties gave the PC authority over the following: transition time/pickup/delivery; sharing of vacations and holidays; method of pickup and delivery; transportation to and from visitation; participation in child care/daycare and baby-sitting; bed time; diet; clothing; recreation; before and after school activities; extracurricular activities; discipline; health care management; alterations in schedule which do not substantially interfere with the basic time share agreement; participation in visitation, including significant others and relatives; telephone contact; alterations to appearance, including tattoos or piercings; the children's passports; and education.

Defendant filed motions on 30 April 2021 to modify or terminate the PC's appointment as their parenting coordinator and for an expedited review of two of the PC's decisions concerning the parties' summer 2021 custodial schedule. In June 2021, Defendant filed a motion for attorney's fees and for apportionment of the PC's fees between the parties. Defendant's motions came on for hearing on 8 July 2021. The trial court entered an order on 2 August 2021 finding, in pertinent part:

> 10. Defendant testified that approximately eight (8) parenting coordinator decisions made between January 14, 2021 and April 13, 2021 created unnecessary confusion and conflict between the parties. Additionally, the decisions concerning the 2021 summer schedule created an unequal distribution of days between the parties which

1. We use pseudonyms to protect the identities of the minor children. *See* N.C. R. App. P. 42.

> Defendant testified was not the intent of the Custody Order because the Custody Order intends the parties to share equal physical custody of their minor children.
>
> . . . .
>
> 13. The Parent Coordinator's decisions were based on rational and reasonable consideration of the children's best interests, and the Parent Coordinator communicated with the children's school, both parents, and the minor child's therapist in reaching her decisions.
>
> 14. The Parent Coordinator's decisions did not substantially alter the time-sharing arrangement set forth in the custody order.
>
> 15. The Court finds the parenting coordinator's March 1, 2021 decision concerning Father's Day weekend and the alterations to the custodial schedule during the summer of 2021 were reasonable.
>
> 16. The parties are high conflict.
>
> 17. The parties will benefit from the continued services of a parenting coordinator. . . .

The trial court thus declined to modify the PC's decisions, denied Defendant's motion to modify or terminate the PC's appointment, dismissed Defendant's motion for attorney's fees, and held Defendant responsible for the PC's fees related to the hearing.

The PC filed a Parenting Coordinator's report[2] ("first report") on 24 September 2021,[3] alleging problems with the current custody arrangement, requesting a change in custody, suggesting that Defendant undergo a psychological evaluation, and requesting an expedited hearing. A hearing on the report was set for 27 October 2021.

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2. "The parenting coordinator may file a report with the court regarding any of the following: (1) The parenting coordinator's belief that the existing custody order is not in the best interests of the child. (2) The parenting coordinator's determination that the parenting coordinator is not qualified to address or resolve certain issues in the case. (3) A party's noncompliance with a decision of the parenting coordinator or the terms of the custody order. (4) The parenting coordinator's fees as set forth in G.S. 50-95. (5) The parenting coordinator's request that the parenting coordinator's appointment be modified or terminated." N.C. Gen. Stat. § 50-97(a) (2021).

3. The PC's first report is not in the record.

On 8 October 2021, Plaintiff filed a motion to modify child custody, seeking to modify the Permanent Custody Order.

Defendant filed a Motion for Psychological Evaluation on 19 October 2021, moving for an order requiring Plaintiff to submit to a psychological evaluation. Defendant alleged that the PC had filed a report "suggest[ing] Defendant should undergo a psychological evaluation" but that "Plaintiff exhibits many behaviors that are to the detriment of the minor children, and Defendant's ability to co-parent with her" and the "[PC] is, for some reason, hyper focused on Defendant, and refuses to hold Plaintiff accountable for any of her erratic and harmful behavior."

The PC's first report came on for hearing on 27 October 2021. On 8 December 2021, the PC filed a second Parenting Coordinator's report ("second report") with the court detailing problems with the Permanent Custody Order and requesting an expedited hearing.[4] The PC's appointment as the parties' Parenting Coordinator expired on 15 December 2021. The second report came on for hearing on 10 January 2022.

By order entered 11 January 2022, the trial court appointed Lisa Lefante as the parties' parenting coordinator for a term of two years. The order noted that the parties had not consented to the appointment of a parenting coordinator, that the matter was a high-conflict case, and that the appointment of the parenting coordinator was in the best interests of the children. The second parenting coordinator had the same scope of authority as the PC, with the addition of authority over the minor children's therapy.

The following day, 12 January 2022, the trial court entered a Temporary Order for Child Custody ("First Temporary Order") based upon its hearing of the PC's first report. The trial court found, in relevant part, as follows:

> 8. There is an ongoing conflict between the parties that is interfering with important decisions being made that affect the health, education and welfare of the minor children.
>
> 9. On or about April 9, 2021, the PC contacted the Defendant and asked for some basic information about his positive COVID test, including when he tested positive, whether anyone else lived with him, and if anyone in his home had tested positive. The PC's questions were reasonable under the circumstances.

4. The PC's second report is not in the record.

10. Defendant reacted with hostility, refusing to respond to the questions, demanding to know why she needed medical information, accusing the PC of breaching his trust, calling her questions "bizarre," and accusing the PC of colluding in a "witch hunt" with Plaintiff.

11. Defendant ultimately provided answers to the PC's questions after several days, but his delay in responding was unreasonable and his hostile response was inappropriate.

12. On September 23, 2021, the Defendant contacted the Plaintiff claiming he was dealing with a "behavioral issue" with [Charles] and wanting to review the phone and text logs for [Charles's] phone.

13. When the PC contacted the parties and asked Mr. Durbin to provide some information on what the "behavioral issue" was so that the parties could address it in a uniform manner, Defendant refused to provide any information. Further, Defendant's response on September 24, 2021, at 9:40 a.m., was hostile, telling the PC neither she [n]or Plaintiff were "ready for co-parenting," accusing the PC of lying, and threatening to "limit or cease [Charles's] cell phone usage" if he didn't get what he wanted.

14. Defendant's response was unproductive and hostile and the Court has serious concerns about his ability to coparent with the Plaintiff.

15. There are issues with the children attending therapy as recommended. Specifically:

a. The minor children are both in therapy at 3C Family Services. [Charles's] therapist is Brian Mackey. [Timothy's] therapist is Jennifer Hayden. Both children have attended therapy regularly for over a year and both children have a good rapport with their individual therapists.

b. Dr. Mackey, [Charles's] therapist, had recommended that [Charles] attend therapy weekly. [Charles] suffers from anxiety.

c.

d. There have been ongoing problems scheduling appointments for [Charles] during the Defendant's

custodial time going back to October 2020. The Defendant complained about appointments being scheduled during his custodial time or scheduled during school hours.

e. As a result of the conflict, [Charles] had numerous cancelled therapy appointments during 2021 and as of the hearing date, half of all remaining therapy appointments were cancelled for the rest of the year.

f. Defendant was previously held in contempt for interfering with the children's therapy.

g. The Court finds that it is immaterial whose custodial time the children's therapy appointments are scheduled on, so long as the children are receiving therapy as directed by the therapists.

16. There has been an ongoing dispute between the parties about the children's medical conditions and the consistent administration of prescribed medications. Specifically:

a. [Charles] has asthma and serious allergies requiring him to use inhalers on a regular basis and to carry an Epipen at all times.

b. The Plaintiff had contacted the PC on more than one occasion to voice concerns about Defendant's failure to administer the child's medication as prescribed.

c. On July 29, 2021, the PC issued a directive on the medication issue. The email said, in relevant part, "I am going to ask you both to keep a medication administration chart while [Charles] is with you that will indicate: The medication administered, the amount, the date and the time."

d. Despite [Charles's] diagnosed medical problems, and the PC's directive, the conflict over the child's medication continued. Defendant did not maintain the medication log, made the child maintain the medication log, told Plaintiff and the PC that the child (who is 12) was responsible for his own medication, and argued with both Plaintiff and PC in multiple emails rather than simply make sure [Charles] received his medication and maintaining the log so that both

parents could make sure that they were consistent and coordinated in their administration of medication for [Charles].

e. Defendant's refusal to comply with the PC's directive had an adverse effect on [Charles's] health and was not in the child's best interest.

17. The minor children attend two different schools. [Charles] attends Oberlin Middle School while [Timothy] attends The Raleigh School. The schools operate on two slightly different schedules when it comes to teacher workdays and holidays so that there are instances when one child does have school and the other does not on a specific day or days.

18. While the order is clear that the Raleigh School calendar controls for determining holiday and vacation days for the children, there have been repeated disputes and problems with determining custodial exchange times and days. This conflict over the school schedules has served to increase the conflict between the parties.

19. The Defendant has been hostile to the Parent Coordinator. He has frequently resorted to calling her a liar, threatened to file grievances with the State Bar, has responded to the PC's questions about mundane issues with transcripts of prior court hearings and claims that the PC has lied, misled the court, colluded with Plaintiff and Plaintiff's counsel.

20. Defendant's aggressive and hostile responses to the PC are inappropriate. The Court previously found that the PC was acting appropriately and was to remain in place until the end of her appointed term. The PC is due cooperation and respect from both parties, and the appropriate response of a party to a disagreement with the PC is to bring it to the Court, not to attempt to threaten and intimidate the Parent Coordinator.

21. The parties[']inability to communicate with one another effectively make it appropriate to require them to utilize Our Family Wizard for all non-emergency communications.

22. The Court finds that the above listed findings constitute a substantial change in circumstances warranting the

> entry of a temporary custody order modifying the terms of the October 2020 Permanent Custody Order.

Upon these findings, the trial court concluded that "it is appropriate and in the best interests of the minor children to enter a temporary custody order."[5] The trial court thus ordered, in pertinent part, as follows: the parties continue to share joint legal custody but Plaintiff shall have final decision-making authority; Plaintiff have primary physical custody and Defendant have visitation "on alternate weekends from the end of school Friday until the beginning of school Monday morning"; the parties comply with the PC's directive on the children's medication; and Defendant not to threaten, insult, or harass the PC, and not to use abusive language in his communication with her. Any provisions of the Permanent Custody Order and PC directives not modified by the First Temporary Order remained in effect.

The trial court entered another Temporary Order for Child Custody ("Second Temporary Order") on 9 February 2022, based on the 10 January 2022 hearing on the PC's second report. The trial court found, in relevant part, as follows:

> 9. At the prior hearing on the Parent Coordinator'[s] first report to the Court, the Court found that the Defendant was aggressive and threatening toward the Parent Coordinator and ordered him to stop using hostile language and threatening the PC.
>
> 10. Following the hearing on the first PC report the Defendant took the following actions:
>
> > a. Defendant filed a bar grievance against the Parent Coordinator[.]
> >
> > b. Defendant, through counsel, undertook extensive discovery including requests for production of documents requiring the Parent Coordinator to spend more than 10 hours producing hundreds of pages of emails, including all her emails with the Defendant.
> >
> > c. Defendant's counsel noticed the Parent Coordinator to appear and testify at a deposition. Counsel would

5. *See* N.C. Gen. Stat. § 50-97(d) (2021) ("The court, after a hearing on the parenting coordinator's report, shall be authorized to issue temporary custody orders as may be required for a child's best interests.").

not provide the Parent Coordinator, whose term had expired, why having her sit for a deposition would be productive.

d. Defendant threatened to file a motion for sanctions against the Parent Coordinator.

e. Immediately after the last hearing, the Defendant informed the minor children of changes in the custodial schedule prior to any order having been submitted, causing distress to the children. He did not inform the Plaintiff in advance that he was going to tell the children about the litigation.

11. The Defendant has been intent on getting the Parent Coordinator removed, beginning with his Motion to Modify or Terminate Parent Coordinator's Appointment filed on April 30, 2021.

12. The Defendant's actions, including those actions by and through counsel, directed at the Parent Coordinator are, in the Court's view, retaliatory.

13. While the Parent Coordinator has done an excellent job in her role, the Court is concerned that because of the Defendant's tactics and animosity, she cannot be effective in her role going forward. The Court also does not want to expose the Parent Coordinator to further retaliatory actions by the Defendant.

. . . .

20. There is an ongoing conflict between the parties that is interfering with important decisions being made that affect the health, education and welfare of the minor children.

21. The Court finds that the above listed findings constitute a substantial change in circumstances warranting the entry of a temporary custody order modifying the terms of the October 2020 Permanent Custody Order.

Based upon its findings, the trial court concluded that it was appropriate and in the best interests of the minor children to enter a temporary custody order. The trial court maintained the custody provisions from the First Temporary Order but modified the parenting coordinator.

Plaintiff's motion to modify the Permanent Custody Order came on for hearing on 3 March 2022. By order entered 8 July 2022 ("Order on Appeal"), the trial court concluded that there had been a substantial change in circumstances that adversely affected the minor children since entry of the Permanent Custody Order, and that modification of the Permanent Custody Order was warranted.

The trial court made 32 findings of fact, some with sub-findings; the relevant findings of fact are recited above by the majority. Upon its conclusion that there had been a substantial change in circumstances adversely affecting the minor children since entry of the Permanent Custody Order, and that a modification of the permanent custody order was warranted, the trial court essentially ordered the custody terms of the First Temporary Order and the Second Temporary Order become permanent.

Defendant appealed.

II. Analysis

Defendant argues that the trial court erred by concluding that there was a substantial change of circumstances affecting the welfare of the children and that modification was in the best interest of the children, and by awarding primary decision-making authority to Plaintiff.

> It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody. The party seeking to modify a custody order need not allege that the change in circumstances had an adverse effect on the child. While allegations concerning adversity are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.
>
> . . . .
>
> The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that

> a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.
>
> 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.
>
> . . . .
>
> In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Shipman v. Shipman, 357 N.C. 471, 473-75, 586 S.E.2d 250, 253-54 (2003) (quotation marks, brackets, and citations omitted).

A. Change of Circumstances

When considering a party's request to modify a custody order, "courts 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. In appropriate cases, either may support a modification of custody on the ground of a change in circumstances." *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998). Where "the effects of the change on the welfare of the child are not self-evident," it "necessitate[s] a showing of evidence directly linking the change to the welfare of the child[,]" and requires that "the trial court make findings of fact regarding that connection." *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255, 256 (emphasis omitted).

Defendant argues that no evidence was presented and no findings of fact were made to establish the circumstances that existed in October 2020 when the Initial Custody Order was entered. I agree with the majority that "the Record and the findings in the [Order on Appeal] present us with information sufficient to make a determination on the question of whether a substantial change in circumstances affecting the welfare of the child occurred." Therefore, I too reject Defendant's argument.

Defendant next argues that there was no substantial change in circumstances. I disagree with Defendant's argument and the majority's analysis on this issue.

The trial court's findings show a high level of conflict between the parties, primarily caused by Defendant, that has interfered with important actions being taken and important decisions being made, which has negatively affected the health and welfare of the minor children. Defendant has been uncooperative and hostile toward Plaintiff: Defendant refused to timely respond to Plaintiff's request for information; Defendant began having the children speak with Plaintiff's estranged mother, over Plaintiff's objections; Defendant failed to timely administer Charles's asthma medication and then refused to keep a medication chart detailing the amount, the date, and the time of Charles's medication administration to ensure Charles received his medication; Defendant misrepresented to Plaintiff what the doctor's recommendation was regarding the children's COVID vaccines, delaying them getting vaccinated; and Defendant failed to communicate with Plaintiff before scheduling the children's activities during Plaintiff's custodial time.

Similarly, Defendant was uncooperative and hostile toward the PC: Defendant refused or delayed in responding to the PC's request for information, including refusing to respond to the PC's request for basic information regarding his positive COVID test; Defendant refused to provide the PC with information regarding his son's alleged "behavior issue" and instead told her that neither she nor Plaintiff were "ready

for co-parenting"; Defendant was uncooperative with the PC's attempts to ensure that Charles was receiving regular therapy; and Defendant refused the PC's directive to keep a medication chart to ensure that Charles timely and consistently received his asthma medication.

The findings show that Defendant's uncooperative and hostile behavior has negatively affected the children: Charles did not appropriately receive his asthma medication when with Defendant; Defendant's refusal to keep a medication chart to help ensure that Charles consistently received his medication put Charles's health at risk; the children were delayed in receiving their COVID vaccinations; both children are in therapy; and there were difficulties scheduling Charles's therapy. Furthermore, as noted in prior cases, conflict between parents affect children differently as they become older, involved in more activities, and are more aware of the conflicts:

> 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) (emphasis and citation omitted); *see also Shell v. Shell*, 261 N.C. App. 30, 37, 819 S.E.2d 566, 572 (2018) ("Here, the trial court specifically noted the changes in communication and cooperation since the 2012 order. Although the parties had always had trouble communicating, Father had become even less willing to cooperate with Mother.").

There is no support for the majority's assertion that "the trial court's findings of fact actually suggest the children were relatively insulated from the conflict" and it is naïve to think that the children have been or could be insulated from this conflict. Joint decision making and shared custody–with the children frequently going back and forth between parents–requires a high level of parental cooperation. Just as in *Laprade*, "it is beyond obvious" here that the high level of conflict caused by Defendant has taken its toll on the children's welfare, including directly impeding Plaintiff's ability to parent and co-parent the children. *Laprade*, 253 N.C. App. at 303-04, 800 S.E.2d at 117. Furthermore, just as in *Laprade*, it is foreseeable that the conflict is likely to continue to affect the children more and more as they become older. *Id.* at 304, 800 S.E.2d at 117.

The trial court also made findings of fact regarding circumstances that positively affected the children. Since the entry of the First Temporary Order, wherein Plaintiff was given primary custody of the children and Defendant given alternate weekend visitation, "there have been fewer custodial exchanges between the parties. The reduction in exchanges has helped reduce some of the conflict between the parties." Furthermore, Charles "is doing so well in therapy that he can decrease the frequency of his appointments." Additionally, Plaintiff has remarried, and her new husband has "very positive relationships with the children." These findings show the "changed circumstances which [had] salutary effects" on the children. *Pulliam*, 348 N.C. at 619, 501 S.E.2d at 899.

The findings of fact are amply supported by the record evidence, including: the hearing testimony; court filings included in the record on appeal, including the Initial Consent Agreement, Permanent Custody Order, First Temporary Order, and Second Temporary Order; and the documentary exhibits, including numerous emails between the parties and between parties and the PC.

The majority suggests that the conflict between the Defendant and the PC may have been a result of the PC's "error and bias" and that Plaintiff manipulated the communications with the PC to Plaintiff's advantage.[6] Essentially, the majority lays the blame for Defendant's

6. The majority writes, "Parenting coordinators serve an important function on behalf of our courts, *see generally* N.C.G.S. § 50-92 (2021), but they are, ultimately, susceptible to human error and bias, especially when their station requires involving themselves in their assignees' emotionally-charged conflicts. Such susceptibility is especially present when a disparity exists in the parents' ability to manage the optics of the communications to which the parenting coordinator is exposed and advantageously leverage the necessary yet inorganic rules of engagement presented by court-ordered custodial arrangements."

conduct on Plaintiff. There is no basis in the record to support the majority's position and the majority's conjecture was soundly rejected by the trial court in its intermediate orders, none of which are challenged on appeal.

"[I]n custody cases, the trial court sees the parties in person and listens to all the witnesses." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citation omitted). With this perspective, the trial court is able "to observe the demeanor of the witnesses and determine their credibility, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Yurek v. Shaffer*, 198 N.C. App. 67, 80, 678 S.E.2d 738, 747 (2009) (citations omitted). This opportunity of observation "allows the trial court to detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges." *Adams*, 354 N.C. at 63, 550 S.E.2d at 503 (quotation marks and citations omitted).

The record in this case includes evidence of Defendant's disruptive litigiousness and the trial court's orders consistently rejecting Defendant's claims. Defendant filed a motion on 30 April 2021 to review two of the PC's decisions. Defendant also filed a motion to modify or terminate the PC's appointment. Defendant then filed a motion for attorney's fees and to apportion the PC's fees between the parties. At the hearing on his motions, "Defendant testified that approximately eight (8) parenting coordinator decisions made between January 14, 2021 and April 13, 2021 created unnecessary confusion and conflict between the parties. Additionally, the decisions concerning the 2021 summer schedule created an unequal distribution of days between the parties . . . ." The trial court, in denying Defendant's motions, found that the PC's decisions were "based on rational and reasonable consideration of the children's best interests" and "did not substantially alter the time-sharing arrangement set forth in the custody order," and that the parties would continue to benefit from the continuing services of a parenting coordinator.

The PC filed a report on 24 September 2021 detailing numerous problems with the permanent custody order and suggesting that Defendant receive a psychological evaluation. In response, Defendant moved the trial court to order Plaintiff to undergo a psychological evaluation, alleging that "Plaintiff exhibits many behaviors that are to the detriment of the minor children, and Defendant's ability to co-parent with her," and that "[a]n evaluation of Plaintiff would substantially assist the Court in its determination of whether Plaintiff is a fit and proper person to parent the minor children."

After a hearing on 27 October 2021 on the PC's first report, Defendant engaged in the following litigation, characterized as "retaliatory" by the trial court: Defendant filed a bar grievance against the PC; Defendant undertook extensive discovery requiring the PC to spend more than 10 hours producing hundreds of pages of emails, including all her emails with the Defendant; Defendant noticed the PC to appear and testify at a deposition; and Defendant threatened to file a motion for sanctions against the PC. Also, immediately following that hearing, Defendant unilaterally informed the minor children of changes in the custodial schedule prior to any order having been submitted, causing distress to the children. The trial court found that Defendant "was aggressive and threatening toward the Parent Coordinator" and "ordered [Defendant] to stop using hostile language and threatening the PC."

The trial court's First Temporary Order, issued after a hearing on the PC's first report, made numerous findings regarding Defendant's hostile and disruptive behavior which negatively affected the children's physical and mental health, most of which were included in the Order on Appeal.

These intermediate orders, none of which are challenged on appeal, establish that Defendant's pattern of litigious, uncooperative, and hostile conduct, and Defendant's refusal to cooperate with the PC, adversely affected the children's health, and that Defendant's involvement of the children in the litigation caused distress to the children.

Furthermore, the findings of fact supported the trial court's conclusions of law that since the entry of the last custody order there has been a substantial change in circumstances that adversely affects the minor children and a modification of the permanent custody order is warranted.

Defendant argues essentially that because this case has always been high conflict and because he has always been difficult, there has been no substantial change in circumstances. However, the findings of fact do not evidence a mere continuation of conflict and Defendant's poor behavior; the findings show an increase in both, starting after entry of the Permanent Custody Order and continuing to escalate until the entry of the First Temporary Order changing the terms of the custody. Moreover, even if this case presented merely a sustained high level of conflict caused by Defendant's continuous difficult behavior over a period of time, the effect of the conflict and behavior has led to a substantial change in the parenting coordinator's and Plaintiff's ability to deflect and absorb such conflict and ensure the health and

well-being of the children. This substantial change has negatively affected the children.

B. Best Interests

"Upon determining that a substantial change in circumstances affecting the welfare of the minor child occurred, a trial court must then determine whether modification would serve to promote the child's best interests." *Shipman*, 357 N.C. at 481, 586 S.E.2d at 257 (citation omitted). Trial courts are "vested with broad discretion in custody cases and will not be overturned absent an abuse of discretion." *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 903 (2008) (citation omitted).

As detailed above, the trial court's findings of fact are supported by substantial record evidence. Moreover, the findings of fact amply support its conclusion of law that modification of the Permanent Custody Order would serve the children's best interests.

C. Primary Decision Making

"[North Carolina] trial courts have wide latitude in distributing decision-making authority between the parties based on the specifics of a case." *Peters v. Pennington*, 210 N.C. App. 1, 17, 707 S.E.2d 724, 736 (2011) (citation omitted). The trial court's deviation from pure joint legal custody is reviewed on appeal for abuse of discretion, but "a trial court's findings of fact must support the court's exercise of this discretion." *Id*.

Here, the trial court ordered as follows:

> The parties shall continue to share joint legal custody. The parties shall in good faith confer and attempt to mutually agree on major decisions affecting the children's health, education and welfare. In the event the parties are unable to reach mutual agreement on a major decision, the Plaintiff shall have final decision-making authority. Day-to-day decisions shall be made by the custodial parent.

This decision was supported by sufficient findings of fact to show that such a decision was warranted, namely, Defendant's extensive history of misconduct and refusal to cooperate with Plaintiff and the PC. As discussed above, the trial court made findings of fact detailing past conflict between the parties which illustrate Defendant's hostility and refusal to cooperate and the effect Defendant's misconduct had on the minor children.

Defendant has failed to show that the trial court's decision giving final decision-making authority to Plaintiff on major issues involving the

children was manifestly unsupported by reason or that it could not have been the result of a reasoned decision. Accordingly, I would hold that the trial court did not err.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY GEORGE JONES DATED JULY 20, 2017 AND RECORDED IN BOOK 5574 AT PAGE 273 IN THE BUNCOMBE COUNTY PUBLIC REGISTRY, NORTH CAROLINA

No. COA23-594

Filed 20 February 2024

Mortgages and Deeds of Trust—nonjudicial power of sale foreclosure—reverse mortgage—validity of debt—competency of mortgagor—equitable versus legal defenses

In determining whether a reverse mortgage lender had the right to a nonjudicial power of sale foreclosure pursuant to a deed of trust, the trial court erred by determining that the lender failed to comply with statutorily mandated credit counseling provisions and, as a result, that the note on the subject property did not constitute a valid debt as required by N.C.G.S. § 45-21.16(d) (listing six mandatory elements for foreclosure). Where it was undisputed that the mortgagor received loan counseling by phone and that the counselor certified the session prior to the loan closing, the lender met the conditions precedent to foreclosure. Further, where the trial court based its decision on its concern about the mortgagor's mental capacity, rather than constituting a legal defense appropriate for the hearing held under section 45-21.16, that concern raised a potential equitable defense to the foreclosure that should have been asserted in an action to enjoin the foreclosure sale under section 45-21.34; thus, the matter was remanded for further proceedings.

Appeal by petitioner from order entered 14 March 2023 by Judge Daniel A. Kuehnert in Buncombe County Superior Court. Heard in the Court of Appeals 28 November 2023.

Alexander Ricks, PLLC, by Amy P. Hunt, for petitioner-appellant.

Deutsch & Gottschalk, P.A., by Tikkun A.S. Gottschalk, for respondents-appellees.

ZACHARY, Judge.

Petitioner American Advisors Group (hereinafter "AAG") appeals from the superior court's order denying its "right to a [nonjudicial] power of sale foreclosure" on the ground that AAG, as reverse mortgage lender, failed to comply with the statutorily required credit counseling provisions, and therefore the Note did not evidence a valid debt. After careful review, we reverse and remand for further proceedings.

BACKGROUND

In 2017, 83-year-old George Jones qualified for a reverse mortgage on his home. A reverse mortgage is a loan that is marketed to people 62 years of age and older and that is secured by a first mortgage or first deed of trust on the mortgagor's principal residence. This type of mortgage requires no repayment until a future time, upon the earliest occurrence of one or more events specified in the reverse mortgage loan contract; the debt often becomes payable upon death or when the encumbered property is no longer the homeowner's primary residence. *See* N.C. Gen. Stat. § 53-257(6) (2023).

In the present case, Jones received the statutorily required loan counseling on 19 May 2017, which AAG notes was "conducted by a third-party unrelated to the lender and approved by HUD." The court found that the loan counseling "took place via telephone and lasted 75 minutes." When the counseling was completed, the counselor input the following to the HUD database: "Certificate issued. Client appeared to understand reverse mortgage concepts and responded appropriately to most questions."

On 20 July 2017, a "traveling notary" came to Jones's house and notarized his signature on the loan closing documents, including an adjustable rate home-equity conversion note (the "Note") and deed of trust ("Deed of Trust"). Jones agreed to repay all sums advanced to him by AAG, not to exceed $211,500.00, and secured the debt with the Deed of Trust on his home in Asheville, North Carolina (the "Property"). The Deed of Trust was recorded at Book 5574, page 273 of the Buncombe County Registry. AAG paid the loan proceeds into Jones's bank account.

Jones died on 25 December 2019, and the entire debt immediately became due pursuant to the terms of the Note. Shortly after his death, AAG notified one of Jones's sons, who was serving as the administrator of Jones's estate, that the "death was an event of default under the Deed of Trust" and "that the loan balance of $105,393.23 was due and owing."

On 4 May 2021, the substitute trustee on the Deed of Trust initiated the instant nonjudicial power-of-sale foreclosure before the Buncombe County Clerk of Superior Court. On 12 April 2022, this matter came on for hearing before the assistant clerk, who subsequently entered an order "denying authorization to sell real property" under the power-of-sale provision in the Deed of Trust. AAG timely appealed to superior court.

On 14 November 2022, AAG's appeal came on for hearing de novo in Buncombe County Superior Court. On 14 March 2023, the superior court entered an order denying AAG's right to proceed with the nonjudicial foreclosure. The court concluded that 1) the proper persons were served; 2) AAG was the holder of the debt; 3) the "[p]ayments [on the debt were] in default under the Note and Deed of Trust"; 4) the debt, as a reverse mortgage, did not qualify as a "home loan"; 5) the respondents (Jones's heirs) were "not in a period of protected military status"; and 6) the Deed of Trust contained a power-of-sale provision.

However, the court also concluded that the loan counseling that Jones received prior to the loan closing failed to "satisfy the requirements of N.C. Gen. Stat. §[§] 53-269 and 270 because the notes input by the counselor to the electronic HUD system indicated [that Jones] responded appropriately to 'most' questions, and the lender did not follow up on this note." According to the trial court, "This note required further inquiry on the part of the lender [AAG]. Therefore, the Note is not a valid debt."

AAG timely appealed to this Court.

DISCUSSION

On appeal, AAG argues that "the trial court erred in concluding that [AAG] could not proceed with foreclosure, because [AAG] presented evidence to satisfy all elements of N.C. Gen. Stat. § 45-21.16[,]" including the validity of the debt. We agree.

"When the trial court sits without a jury, the standard of review 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." *In re Bradburn*, 199 N.C. App. 549, 551, 681 S.E.2d 828, 830 (2009) (cleaned up), *disc. review denied*, 363 N.C. 803, 690 S.E.2d 531 (2010). We review de novo "[t]he trial court's conclusions of law[.]" *Id.*

Section 45-21.16(d) provides that the clerk of superior court may authorize a nonjudicial power-of-sale foreclosure upon evidence supporting six findings: "(i) a valid debt, (ii) default, (iii) the right to foreclose [under the instrument], (iv) notice, . . . (v) 'home loan' classification . . . ,

and (vi) that the sale is not barred by the debtor's military service." *In re Clayton*, 254 N.C. App. 661, 665, 802 S.E.2d 920, 923–24 (2017) (citation omitted), *disc. review and cert. denied*, 370 N.C. 223, 809 S.E.2d 866 (2018). On review from the clerk of court's determination, the superior "court's de novo hearing is limited to making a determination on the same issues as the clerk of court." *Id.* (citation omitted).

As our Supreme Court has explained, legal defenses to any of the findings may be properly advanced and considered at a nonjudicial foreclosure hearing under section 45-21.16; however, equitable defenses may not. *In re Goforth Props., Inc.*, 334 N.C. 369, 374–75, 432 S.E.2d 855, 859 (1993). Instead, equitable defenses must be raised in a separate action to enjoin the foreclosure sale. *Id.*

In the instant case, it is undisputed that, as the superior court concluded, AAG satisfied each of the six requirements, except for the existence of a valid debt. The parties contest the validity of the debt.

Generally, "introduction of a promissory note along with evidence of execution and delivery . . . , in the absence of probative evidence to the contrary, will support the finding of a valid debt in a proceeding to foreclose under a power of sale." *In re Cooke*, 37 N.C. App. 575, 579, 246 S.E.2d 801, 804 (1978). Here, although AAG possessed the Note, endorsed in blank, the court found that "the notes input by the [loan] counselor to the electronic HUD system indicated [that Jones] responded appropriately to 'most' questions, and [AAG] did not follow up on this note." Thus, the trial court concluded that the debt was not a "valid debt" subject to foreclosure under Chapter 45 because the loan counseling "did not satisfy the requirements of N.C. Gen. Stat. §[§] 53-269 and 270." During the foreclosure hearing, the court expressed its concern regarding Jones's mental capacity, stating, "I believe [Jones] signed it. . . . [T]he sole issue in my mind has to do with the fact that the counseling session . . . raised a question which should have halted the [loan] process; and it goes to the . . . capacity of [Jones]."

This issue is similarly raised on appeal by Respondents, who maintain that "[t]here is substantial evidence that Mr. Jones, who was 83 years old at the time, lacked the mental capacity to understand what he was doing when he spoke with the credit counselor, or later, when he signed the mortgage documents." Thus, they agree with the trial court that the reverse mortgage agreement violated the counseling provisions of the Reverse Mortgage Act and is unenforceable. Because it is unenforceable, Respondents contend that there is no valid debt and AAG may not foreclose on the Property.

Our General Assembly enacted the Reverse Mortgage Act to protect older homeowners from abusive practices associated with reverse mortgages. *See* N.C. Gen. Stat. §§ 53-255–56. As relevant to the case at bar, section 53-270 of the Reverse Mortgage Act provides that "[r]everse mortgage lenders are prohibited from . . . [c]losing a reverse mortgage loan without receiving certification from a person who is certified as a reverse mortgage counselor by the State that the borrower has received counseling on the advisability of a reverse mortgage loan[.]" *Id.* § 53-270(6). It further requires that the borrower receive counseling regarding "the various types of reverse mortgage loans and the availability of other financial options and resources for the borrower as well as potential tax consequences." *Id.* Relatedly, section 53-269 provides that "[t]he North Carolina Housing Finance Agency shall adopt rules governing the training of counselors and necessary standards for counselor training" and shall "maintain a list of counselors who have satisfied training requirements[.]" *Id.* § 53-269(a)–(b).

Here, it is undisputed that Jones received loan counseling, which the court found "took place via telephone and lasted 75 minutes[,]" and that the counselor certified the counseling prior to the loan closing. Thus, AAG complied with the statutory counseling provision.

Hence, the crux of the matter presented is whether a borrower's possible diminished mental capacity, as evinced in a loan counselor's notes, may be properly raised as a defense in a nonjudicial power-of-sale foreclosure. Indeed, "[a] deed executed by an incompetent grantor may be set aside by a suit in equity[.]" *In re Godwin*, 121 N.C. App. 703, 705, 468 S.E.2d 811, 813 (1996). Nonetheless, it is well settled that "the incompetency of a mortgagor is an equitable rather than a legal defense to a foreclosure and may not be raised in a hearing under" N.C. Gen. Stat. § 45-21.16. *Id.*

Accordingly, the trial court erred in concluding that there was no valid debt. "[B]ecause the foreclosure by power[-]of[-]sale statute is designed to provide a less timely and expensive procedure than foreclosure by action, it does not resolve all matters in controversy between mortgagor and mortgagee." *In re Gray*, 225 N.C. App. 46, 49, 741 S.E.2d 888, 890 (2013) (cleaned up). Thus, "equitable defenses to the foreclosure . . . should be asserted in an action to enjoin the foreclosure sale under" N.C. Gen. Stat. § 45-21.34. *Id.* (citation omitted).

CONCLUSION

For the reasons stated herein, we reverse the trial court's order denying AAG's right to proceed under Chapter 45 with a nonjudicial power-of-sale foreclosure, and remand for further proceedings.

REVERSED AND REMANDED.

Judges TYSON and FLOOD concur.

IN THE MATTER OF RASHID LALIVERES

No. COA23-742

Filed 20 February 2024

Sexual Offenders—registration—out-of-state conviction—registration required in state of conviction

The trial court did not err by requiring petitioner to register as a sex offender in this state based on his 1993 conviction in New York of attempted first-degree rape, for which petitioner was required to register as a sex offender under New York law. Despite petitioner's argument that the offense was not substantially similar to a North Carolina offense, his registration in this state was mandatory pursuant to N.C.G.S. § 14-208.6(4)(b) based on his registration requirement in New York independent of any determination of substantial similarity.

Appeal by Petitioner from judgment entered 2 December 2022 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 24 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas Brent Sorensen, for the State-Respondent-Appellee.

Jason Christopher Yoder, for Petitioner-Appellant.

WOOD, Judge.

Rashid Laliveres ("Petitioner") appeals from a judgment requiring him to register as a sex offender upon his relocation to North Carolina,

arguing his out-of-state conviction from New York is not substantially similar to a reportable North Carolina offense. After careful review of applicable law, we affirm the trial court.

I. Factual and Procedural Background

On 10 September 1993, Petitioner was convicted of attempted first-degree rape in New York pursuant to N.Y. Penal § 130.35(1). On 16 March 2022, after Petitioner moved to North Carolina, the Wake County Sheriff's Office notified Petitioner that he was required to register as a sex offender based upon his out-of-state conviction. On this same day, Petitioner filed a petition for judicial determination on this registration requirement.

On 2 December 2022, the trial court held a hearing on Petitioner's petition. At the hearing, the State presented evidence Petitioner had been convicted on 10 September 1993 under N.Y. Penal § 130.35 for attempted first-degree rape and that Petitioner had been convicted under the first section of the New York statute whereby Petitioner was found guilty of attempted "rape in the first degree when he or she engages in sexual intercourse with another person . . . by forcible compulsion." N.Y. Penal § 130.35(1). The prosecutor argued that N.Y. Penal § 130.35 was substantially similar to N.C. Gen. Stat. § 14-27.22, governing second-degree forcible rape because the North Carolina statute "involves the same type of behavior, by force and against the will of another person" as the New York statute.

The State submitted copies of the relevant New York penal code section, the North Carolina statue, and Petitioner's DCI (Department of Criminal Information) reflecting the underlying out-of-state conviction at trial. Both the State and defense counsel acknowledged that the conviction under N.Y. Penal § 130.35 was for attempted first-degree rape. On 2 December 2022, the trial court concluded N.Y. Penal § 130.35 was substantially similar to N.C. Gen. Stat. § 14-27.22, a reportable offense, and entered an order requiring Petitioner to register as a sex offender in North Carolina. On 6 December 2022, Petitioner filed written notice of appeal.

II. Appellate Jurisdiction

In conjunction with his brief, Petitioner has filed a petition for *writ of certiorari* requesting that this Court utilize Rule 21 of the North Carolina Rules of Appellate Procedure to review the merits of his appeal. The record indicates that Petitioner's trial counsel filed written notice of appeal on 6 December 2022, but there is neither a certificate of

service indicating the notice of appeal was served on the State nor any form of evidence indicating the filed notice of appeal was served on the State. Petitioner's petition recognizes that if this Court determine that his "written notice of appeal was technically defective because it does not include a certificate of service, he will have lost his appeal of right, as the time for filing a valid notice of appeal has expired" pursuant to Rule 3 of our Rules of Appellate Procedure. However, Petitioner argues that the record demonstrates his desire to appeal the order in this case; the record was settled without any objection by the State during the issuance of appellate entries, extension on the proposed record, production of transcripts delivered to the State, and service of the proposed record; and he has a statutory right to counsel in this proceeding based on having the right to effective counsel. N.C. Gen. Stat. § 7A-451(19).

An order for sex offender registration is a civil order. Therefore, a petitioner is required to file a written notice of appeal under Rule 3. Under Rule 3,

> Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule.

N.C. R. App. P. Rule 3 (a). In response, the State argues Petitioner's failure to indicate that the State was properly served with Petitioner's notice of appeal divests this Court of jurisdiction. *State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011).

The State and Petitioner acknowledge this Court's authority to grant, in its discretion, a petition for *writ of certiorari* under Rule 21 to reach the merits on appeal. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005). Pursuant to Rule 21(a), we may issue a *writ of certiorari* in appropriate circumstances when the right to appeal was lost by a failure to take timely action. In the exercise of our discretion, we allow Petitioner's petition for *writ of certiorari* and address the merits of his appeal. *State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 206 (2010).

III. Analysis

A. Petitioner's Out-of-state Reportable Conviction and North Carolina's Sex Offender Registration.

Petitioner argues the trial court erred in ordering him to register as a sex offender "based on substantial similarity for an 'attempt' offense

that occurred in New York because attempts are not included in the definition of a reportable conviction based on an out-of-state offense that is substantially similar to an offense against a minor or a sexually violent offense." Petitioner reasons that based on these grounds, "the order should be reversed." We disagree.

The question of "whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law." *State v. Fortney*, 201 N.C. App. 662, 671, 687 S.E.2d 518, 525 (2010) (citation omitted). Questions of law are reviewed by an appellate court *de novo*. *Id.* at 669, 687 S.E.2d at 524. Under a *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). The trial court determines whether the statutes are substantially similar by "compar[ing] the elements of the out-of-state . . . offense to those purportedly similar to a North Carolina offense." N.C. Gen. Stat. § 14-208.12B(c) (2023).

North Carolina's "Sex Offender and Public Protection Registration Program" requires that certain individuals residing in North Carolina "register" for the program with the sheriff of the county where they reside if they have a "reportable conviction." N.C. Gen. Stat. § 14-208.7(a).

N.C. Gen. Stat. § 14-208.6(4)(b) provides a "reportable conviction" is

> [a] final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section, *or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.*

N.C. Gen. Stat. § 14-208.6(4)(b) (2023) (emphasis added). The State contends the emphasized portion of the statute

> became effective December 1, 2006, and applies to all offenses committed prior to, on, or after that date and to all individuals who move into this State prior to, on, or after that date as later amended effective October 1, 2010. S.L. 2006-247 §§ 19(a) 19(e) [Amended by S.L. 2010-174, § 16(a), eff. Oct. 1, 2010].

Accordingly, if Petitioner's "conviction in New York requires him to register as a sex offender there, which the State contends it does, then he is required to register as a sex offender in North Carolina." In short, the State argues Petitioner is subject to North Carolina sex offender registration

requirements because his out-of-state conviction required registration under New York's sex offender registration statute. Therefore, the fact that his out-of-state conviction was an attempt offense is irrelevant and Petitioner's registration is mandatory. The State contends the requirement to register is not premised upon a theory of "substantial similarity" between the North Carolina and New York statutes. We agree.

The State of New York's Sex Offender Registration Act creates a duty for any sex offender to register. N.Y. CORRECT. § 168-f. New York defines a "sex offender" as any person who is convicted of any of the offenses set forth in the subdivisions of "sex offense" or "sexually violent offense." N.Y. CORRECT. § 168-a(1). Petitioner was convicted of attempted rape under N.Y. PENAL § 130.35. The Sex Offender Registration Act defines N.Y. PENAL § 130.35 as a "sexually violent offense." N.Y. CORRECT. § 168-a(3). Under the penal code, a "sexually violent offense" includes a conviction of an attempt to commit any of the provisions of sections 130.35, 130.50, 130.65, 130.66, 130.67, 130.70, 130.75, 130.80, 130.95 and 130.96 of the penal law. N.Y. CORRECT. § 168-a(3)(a).

Under the Sex Offender Registration Act of New York, Petitioner's prior conviction for attempted first-degree rape mandates that he register as a sexual offender in New York. N.Y. CORRECT. §§ 168-a(1)–(3), 168-f. Because Petitioner's out-of-state conviction is a final conviction requiring registration under the Sex Offender Registration Act of New York, pursuant to N.C. Gen. Stat. § 14-208.6(4)(b), Petitioner has a reportable conviction in North Carolina and is required to register here. N.C. Gen. Stat. § 14-208.6(4)(b) (2023).

The State aptly notes, "N.C. Gen. Stat. § 14-208.12B has erroneously been relied upon in these proceedings as it only applies to out-of-state reportable convictions which are solely based upon substantial similarity of offenses." In fact, all of Petitioner's arguments on appeal assert the trial court erred in ordering Petitioner's registration as a sex offender based on the "substantial similarity between convictions."

N.C. Gen. Stat. § 14-208.12B provides, in part:

> (a) When a person is notified by a sheriff that the person may be required to register based on an out-of-state conviction as provided in G.S. 14-208.6(4)(b), or a federal conviction as provided in G.S. 14-208.6(4)(c), that is substantially similar to a North Carolina sexually violent offense, or an offense against a minor, the sheriff shall notify the person of the right to petition the court for a judicial determination of the requirement to register.

> Notification shall be served on the person and the district attorney, as provided in G.S. 1A-1, Rule 4(j), or delivery by any other means that the person consented to in writing. The person may petition the court to contest the requirement to register by filing a petition to obtain a judicial determination as to whether the person is required to register under this Article. The judicial review shall be by a superior court judge presiding in the district where the petition is filed. The review under this section is limited to determine whether or not the person's out-of-state or federal conviction is substantially similar to a reportable conviction, as defined in G.S. 14-208.6(4)(a).

N.C. Gen. Stat. § 14-208.12B (2023). However, we conclude that the requirement for Petitioner to register "as a sex offender is not solely based upon substantial similarity between convictions." Our statute makes it clear: a reportable conviction requiring registration as a sex offender includes "a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state." N.C. Gen. Stat. § 14-208.6(4)(b) (2023). Our statutes do not provide "any discretion in placing an individual on the sex offender registry" because the portion of our statutes which require Petitioner's registration are mandatory. *Bunch v. Britton*, 253 N.C. App. 659, 677-78, 802 S.E.2d 462, 475 (2017) (citing N.C. Gen. Stat. § 14-208.7(a) and N.C. Gen. Stat. § 14-208.6(4)(b)).

Because Petitioner's out-of-state final conviction required him to register as a sex offender under New York's registration statutes, he is required to register as an offender under North Carolina law independent of any substantial similarity analysis. N.Y. Correct. § 168; N.C. Gen. Stat. § 14-208.6(4)(b) (2023). Therefore, we hold that Petitioner is mandated to register as a sex offender in North Carolina due to his previous out of state conviction which required him to register under the laws of New York. Pursuant to N.C. Gen. Stat. §§ 14-208.7(a) and 14-208.6(4)(b), the trial court correctly concluded Petitioner is required to comply and register as a sex offender. Thus, Petitioner's arguments are overruled.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order requiring Petitioner to register as a sex offender in this State.

AFFIRMED.

Judges TYSON and STADING concur.

LONGPHRE v. KT FIN., LLC

[292 N.C. App. 428 (2024)]

JOHN LONGPHRE AND KAORI LONGPHRE, PLAINTIFFS
v.
KT FINANCIAL, LLC, DEFENDANT

No. COA23-660

Filed 20 February 2024

1. Contracts—promissory notes—no specified interest accrual date—statutory provision applied—from time notes became due

In an action by plaintiffs to collect on two overdue promissory notes—which secured loans totaling $330,000 from plaintiffs to defendant with interest set at thirty percent per annum—where the notes stated that "[a]ll accrued interest and unpaid principal shall be paid in full on or before" one year after the notes were executed, the trial court did not err by determining that interest started accruing not when the funds were disbursed but a year later. Although the notes did not contain a specified accrual date, the terms of the notes were not ambiguous; therefore, in the absence of an explicit accrual date, the trial court properly applied the statutory guidance in N.C.G.S. § 24-3(1), under which interest accrued from the time the notes became due.

2. Attorney Fees—promissory notes—collection—statutory percentage rate—notice requirements met

In an action by plaintiffs to collect on two overdue promissory notes—which secured loans totaling $330,000 from plaintiffs to defendant with interest set at thirty percent per annum and included an attorney fees provision in the event collection became necessary—the trial court did not err by awarding attorney fees to plaintiffs in accordance with N.C.G.S. § 6-21.2(2), where plaintiffs complied with the notice requirements of section 6-21.2(5). The trial court's award of fifteen percent attorney fees, which was calculated as a percentage of the reduced outstanding balance defendant owed to plaintiffs (as determined by the trial court after applying a statutory interest accrual provision), did not exceed the statutory basis for attorney fees.

Appeal by defendant from judgment entered 24 January 2023 by Judge Lora C. Cubbage in Guilford County Superior Court. Heard in the Court of Appeals 24 January 2024.

Fox Rothschild LLP, by Troy D. Shelton, for the plaintiffs-cross-appellants/appellees.

Vann Attorneys, PLLC, by James R. Vann, and Ian S. Richardson, for the plaintiffs-cross-appellants/appellees.

Rossabi Law Partners, by Gavin J. Reardon, and Amiel J. Rossabi, for the defendant-appellant/cross-appellee.

TYSON, Judge.

John Longphre and Kaori Longphre (collectively "Longphres") loaned KT Financial, LLC ("KT Financial") $330,000 secured by two separate promissory notes. KT Financial appeals the portion of the trial court's order granting the Longphres attorney's fees for legal services incurred while collecting on KT Financial's outstanding debt. The Longphres cross appeal the portion of the trial court's order, which reduced the interest KT Financial owed the Longphres. We affirm.

I. Background

The Longphres loaned KT Financial $230,000 secured by a promissory note ("Note One") executed on 7 April 2020. Approximately one month later, the Longphres loaned an additional $100,000 to KT Financial on 1 May 2020 ("Note Two"). KT Financial also pledged two properties as collateral for both loans.

The terms of both promissory notes are the same. The interest due for both promissory notes was thirty percent (30%) per annum, and the notes specified "[a]ll accrued interest and unpaid principal" was due one year after the notes were executed. The notes also empowered the Longphres to collect attorney's fees if legal proceedings were instituted to collect on the accounts.

KT Financial failed to make any payments on the balances of either loan by their respective due dates. The Longphres sent a letter to KT Financial on 24 June 2022 and demanded $382,556.16 for the principal amount plus accrued interest on Note One and $164,356.16 for the principal amount plus accrued interest on Note Two. The letter provided: "Unless you pay within five (5) days from the date of this letter, you will be liable for attorneys' fees pursuant to North Carolina General Statute § 6-21.2." The letter explained the Longphres would seek attorney's fees of $57,383.42 for Note One and $24,753.42 for Note Two.

KT Financial failed to make any payments to the Longphres for either note. The Longphres filed a complaint against KT Financial on 18 July 2022, seeking collection of both promissory notes with interest

and attorney's fees. The Longphres filed a Rule 12(c) Motion for Judgment on Pleadings on 30 September 2022.

A hearing was held on 9 January 2023. The Longphres' motion was "granted in part and denied in part" on 24 January 2023. At the hearing, KT Financial argued both notes were interest free for the first year, which was supported by several provisions in the promissory notes. The trial court agreed with KT Financial and recalculated the interest for both notes as accruing after 1 May 2021. The interest KT Financial owed was reduced to $120,156.16, which was a $96,756.16 reduction from the $216,912.32 interest quoted in the demand letter the Longphres had sent to KT Financial. The trial court also awarded the Longphres $67,523.42 in attorney's fees pursuant to the fifteen percent rate established in N.C. Gen. Stat. § 6-21.2 (2023).

KT Financial entered a notice of appeal from the trial court's award of attorney's fees on 20 February 2023. The Longphres filed a notice of cross-appeal on 21 February 2023 regarding the portions of the order outlining the interest calculations.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Issues

The Longphres argue the trial court erred by calculating interest beginning on 1 May 2021 instead of from the day both notes were issued. KT Financial appeals the trial court's award of attorney's fees to the Longphres pursuant to N.C. Gen. Stat. § 6-21.2 (2023).

IV. Contract Interpretation – Interest Calculation

[1] The Longphres argue the trial court erred by holding interest began to accrue for each note one year after proceeds were disbursed. They assert the language in the contract providing "[a]ll accrued interest and unpaid principal shall be paid in full on or before" one year after the funds were disbursed indicate interest began accruing the day the loan proceeds were disbursed.

KT Financial argues the contract, when read as a whole, and the Longphres' actions after the funds were disbursed indicate the loan was interest free for one year. More specifically, KT Financial cites the following characteristics as proof the parties intended for interest to accrue one year after the funds were disbursed: (1) neither of the promissory notes provided a date on which interest shall begin to accrue;

(2) no periodic payments were required before the note was due in full; (3) the notes included an acceleration clause; (4) neither note provided interest was due until the note was paid in full; (5) neither note provided any variation in the interest rate depending upon when the loan reached the maturity date or if payment on the notes defaulted; (6) the notes were each secured by multiple parcels of real property; and, (7) a thirty percent interest rate is astronomical unless the first year is interest free. Essentially, KT Financial argues each party gambled on time and certain outcomes. KT Financial gambled they could repay both notes in the first year before the thirty percent interest rate began to accrue. The Longphres gambled KT Financial would be unable to repay the loan in the first year, and the thirty percent interest rate would accrue.

A. Standard of Review

"We review de novo the trial court's order granting judgment on the pleadings." *Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co.*, 369 N.C. 500, 507, 797 S.E.2d 264, 269 (2017) (citation omitted).

B. Analysis

"A contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court." *Dept. of Transportation v. Idol*, 114 N.C. App. 98, 100, 440 S.E.2d 863, 864 (1994) (citation omitted).

"A contract term is ambiguous only when, 'in the opinion of the court, the language of the [contract] is fairly and reasonably susceptible to either of the constructions for which the parties contend.' " *State v. Philip Morris USA Inc.*, 363 N.C. 623, 641, 685 S.E.2d 85, 96 (2009) (first quoting *Wachovia Bank & Tr.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970) (citation omitted); then citing *Walton v. City of Raleigh*, 342 N.C. 879, 881-82, 467 S.E.2d 410, 412 (1996) ("Parties can differ as to the interpretation of language without its being ambiguous . . . .")).

"If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton*, 342 N.C. at 881, 467 S.E.2d at 411 (citation omitted).

"[R]ules of construction are used to interpret ambiguities in contracts. They are not used to rewrite provisions to fit the needs of a litigant. Where a provision in an agreement . . . is clear and unambiguous on its face, there is no need to apply rules of construction." *Beachcrete, Inc. v. Water St. Ctr. Assocs., L.L.C.*, 172 N.C. App. 156, 160, 615 S.E.2d 719, 722 (2005) (citation omitted).

Our general statutes provide guidance for the time from which interest accrues, if a promissory note is silent regarding when interest commences: "(1) All bonds, bills, notes, bills of exchange, liquidated and settled accounts shall bear interest *from the time they become due* . . . unless it is specially expressed that interest is not to accrue until a time mentioned in the said writings or securities." N.C. Gen. Stat. § 24-3(1) (2023) (emphasis supplied).

While the Longphres argue the default rules of the Uniform Commercial Code ("UCC") should apply, the record is devoid of any information indicating whether the contract involved the sale of goods, nor does either promissory note mention the UCC. *See* N.C. Gen. Stat. § 25-2-102 (2023) (explaining the UCC only applies "to transactions in goods"); *Haywood Street Redevelopment Corp. v. Peterson Co.*, 120 N.C. App. 832, 837, 463 S.E.2d 564, 567 (1995) (explaining "[t]his case is not, however, governed by the UCC" and then quoting N.C. Gen. Stat. § 25-2-102). Further, the Longphres failed to raise or argue at trial that the UCC applied, and any argument that the UCC applies is not preserved for appeal. N.C. R. App. P. 10(a).

Here, the trial court found, and we agree, the terms of the contract are not ambiguous. *See Philip Morris*, 363 N.C. at 641, 685 S.E.2d at 96; *Walton*, 342 N.C. at 881, 467 S.E.2d at 411; *Beachcrete*, 172 N.C. App. at 160, 615 S.E.2d at 722.

KT Financial asserted before the trial court: "It says accruing interest, but it does not say when the accruing interest actually starts. The word is 'accruing interest,' and you have to say accruing interest from this date or from thirty days from now or whenever." In the absence of any specified accrual date, N.C. Gen. Stat. § 24-3(1) applies and interest accrues "*from the time they become due*." N.C. Gen. Stat. § 24-3(1).

This reading of the contract is further supported by the Longphres' failure to seek repayment until 24 June 2022, approximately two years after the funds were disbursed and one year after payment was due. Further, both promissory notes explain the due dates for each loan occur one year *after* the funds were disbursed, providing "[a]ll accrued interest and unpaid principal shall be paid in full on or before [one year]."

If the Longphres intended for interest to accrue immediately after the loan was disbursed, i.e., throughout the year before payments were due, the notes should have specified the date interest would begin to accrue. *See* N.C. Gen. Stat. § 24-3(1). The trial court did not err as a matter of law by failing to include interest for each note for the first year before repayment was due. *See Idol*, 114 N.C. App. at 100, 440 S.E.2d at 864. The trial court's order on this issue is affirmed.

V. Attorney's Fees

[2] KT Financial argues the trial court erred by awarding the Longphres fifteen percent in attorney's fees based upon the newly calculated outstanding balance.

A. Standard of Review

"[R]easonableness is the key factor under all attorney's fees statutes." *Institution Food House v. Circus Hall of Cream*, 107 N.C. App. 552, 558, 421 S.E.2d 370, 374 (1992) (citation omitted).

B. Analysis

"A formal credit agreement executed by the parties prior to the establishment of an open account is evidence of indebtedness; and if such an agreement contains a provision for attorney's fees it will be legally enforceable pursuant to G.S. 6-21.2." *W.S. Clark & Sons, Inc. v. Ruiz*, 87 N.C. App. 420, 422, 360 S.E.2d 814, 816 (1987) (citation omitted).

N.C. Gen. Stat. § 6-21.2 provides guidance for assessing attorney's fees, in addition to interest, on uncollected notes:

> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, . . . subject to the following provisions:
>
> . . .
>
> > (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

N.C. Gen. Stat. § 6-21.2 (2023).

The statute further provides five days' prior notice must be provided to the "party sought to be held on said obligation." N.C. Gen. Stat. § 6-21.2(5) (2023). The notice must include the outstanding balance and explain the "party sought to be held on said obligation has five days from the mailing of such notice to pay the 'outstanding balance' without the attorneys' fees." *Id.*

Here, the Longphres sent the required five days' prior notice to KT Financial regarding their outstanding balances, complying with N.C. Gen. Stat. § 6-21.2(5). The Longphres' trial attorney also prepared and submitted before the trial court an affidavit listing his attorney's fees and citing the fifteen percent statutorily-based attorney's fee set out in N.C. Gen. Stat. § 6-21.2(2). The fifteen percent attorney's fees the trial court assessed do not exceed the statutory basis for attorney's fees and were calculated as a percentage of the reduced outstanding balance KT Financial owed to the Longphres. N.C. Gen. Stat. § 6-21.2(2)–(3). KT Financial's argument is without merit and overruled.

VI. Conclusion

The trial court properly applied N.C. Gen. Stat. § 24-3(1) regarding the interest accrual date for the notes. The trial court properly assessed attorney's fees against KT Financial according to N.C. Gen. Stat. § 6-21.2(2), after the Longphres had provided the requisite prior statutory notice, and properly calculated the attorney's fees as fifteen percent of the reduced outstanding balance KT Financial owed to the Longphres. N.C. Gen. Stat. § 24-3(1)–(2). The order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges WOOD and STADING concur.

N.C. STATE BAR v. DeMAYO

[292 N.C. App. 435 (2024)]

THE NORTH CAROLINA STATE BAR, Plaintiff
v.
MICHAEL A. DeMAYO, Attorney, Defendant

No. COA23-391

Filed 20 February 2024

1. Attorneys—discipline—false statements to another attorney—knowingly made—sufficiency of evidence

An order of discipline by the State Bar Disciplinary Hearing Commission (DHC) was reversed where the record did not support a finding by clear, cogent, and convincing evidence that defendant knowingly made false statements to an ex-associate from his law firm in an email, in which he denied commenting on the ex-associate's divorce to a mutual client (who had just obtained a legal settlement, resulting in defendant and the ex-associate disputing the division of attorney fees for her case). Although the evidence showed that defendant's statements in the email were incorrect, it did not establish that defendant knew that they were incorrect at the time that he wrote them, and such a finding would require stacking too many inferences upon each other.

2. Attorneys—discipline—false statements to another attorney—during professional dispute—Rule 8.4(c)—fitness as a lawyer

In a disciplinary matter, where defendant lawyer emailed an ex-associate from his law firm and falsely asserted that he had not discussed the ex-associate's divorce with a mutual client (who had just obtained a legal settlement, resulting in defendant and the ex-associate disputing the division of attorney fees for her case), an order of discipline by the State Bar Disciplinary Hearing Commission (DHC) was reversed because the DHC erred in finding that defendant had violated Rule 8.4(c) of the Rules of Professional Conduct. Although the findings in the order showed that defendant's statements in the email were false, the order neither found that defendant's misstatements reflected adversely on his fitness as a lawyer nor provided any rationale for why a lawyer's misstatement—whether made knowingly or not—during a professional dispute with another attorney would have justified discipline under Rule 8.4(c).

Appeal by Defendant from Order entered 20 January 2023 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 25 October 2023.

The North Carolina State Bar, by Deputy Counsel Kathryn H. Shields and Katherine Jean, for Plaintiff-Appellee.

Womble Bond Dickinson LLP, by Raymond M. Bennett, James P. Cooney III and Jonathon D. Townsend, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Michael A. DeMayo (Defendant) appeals from an Order of Discipline by a Disciplinary Hearing Panel of the Disciplinary Hearing Commission (DHC) of the North Carolina State Bar (State Bar) entered on 20 January 2023. The Record before us tends to reflect the following:

Defendant, an attorney licensed by the State Bar, employed Ryan Valente (Valente) as an associate attorney at Defendant's law firm, DeMayo Law Offices. On 20 April 2020, Valente submitted his resignation from DeMayo Law Offices, effective 20 May 2020. Shortly after Valente's resignation became effective, on 22 May 2020, one of the firm's clients, K.D.,[1] sent an email to DeMayo Law Offices requesting that her file be transferred to Valente. Defendant emailed K.D. to arrange a Webex meeting to discuss this request. In this email, dated 22 May 2020, Defendant wrote, in part:

> I must discuss a few items related and unrelated to your inquiries and will potentially have a negative impact on the outcome of your case. I am ultimately responsible for every client represented by our firm it's very important to me to have a very transparent and honest conversation with any client since my ultimate desire is not only trust and professionalism but that every client obtain the best economic results. Understand that I have no desire to sway or impact who ultimately represents you and any fee splits are already contractually confirmed but I do have an ethical and professional obligation to communicate a few items about your case.

1. The client is referred to by initials to protect the privacy of non-parties who were parties to the underlying legal proceedings.

A Webex meeting was arranged between Defendant and K.D. on 26 May 2020. K.D. recorded the meeting without Defendant's knowledge. During the recorded Webex meeting, Defendant stated:

> I'm not really sure what happened with him. I don't want to get into his personal life, but there was a divorce. There was a custody. There was a remarriage. There was a ex-wife dating one of the defense lawyers we go against all the time. So I'm sure all of that had some impact on his productivity, but notwithstanding, I'm not insensitive to my staff.

Following the meeting, K.D. decided to have her case transferred to Valente. On or about 19 January 2021, K.D. settled her claim for $589,000.00. The attorney fees were $196,313.68. Following the settlement, Defendant and Valente disagreed on the division of attorney fees. Defendant informed Valente the DeMayo Law Firm would be pursuing a contractual claim to the attorney fees based on the client's contract and Valente's employment contract with the DeMayo Law Firm. Defendant claimed that the DeMayo Law Firm was entitled to 85% of the total attorney fees based on the contract. He then stated via email:

> For Settlement Purposes only, DLAW offers a time sensitive offer to resolve the division of attorney fees at a reduced rate of 75% of the total collected attorney's fees. The amount of $147,235,26 [sic] would be accepted in lieu of the total amount owed. To resolve this matter, please notify DLAW in three business days and all monies must be received by DLAW on 2-12-2021 by 5:00 pm. Failure to resolve this dispute at this stage will result in an immediate referral to outside counsel who will [sic] a Declaratory Judgment Action. In addition DLAW will ask outside counsel and Ethics Counsel to determine if sufficient grounds exist to refer this matter to the North Carolina State Bar, for taking over a case without the sufficient knowledge, skill and qualifications to properly handle same. DLAW seeks an amicable and quick resolution of this matter but will take all necessary steps to insure [sic] that a fair and equitable result occurs. DLAW has no immediate plans to pursue or include the client in any necessary subsequent legal actions. DLAW hopes you will accept this offer in the spirit in which it is offered. We look forward to your response.

In response, Valente informed Defendant via email dated 7 February 2021, he would invoke the doctrine of unclean hands to any claim pursued by Defendant citing various factors, including:

> Attorney Michael DeMayo made false and untrue statements to [K.D.] after she made clear her intention to terminate representation and retain Ryan Valente as counsel by telling [K.D.] he was professionally and ethically required to have a conversation with her about items related and unrelated to her case that may negatively impact the outcome, in violation of the Rules of Professional Conduct.

On 8 February 2021, Defendant responded to Valente's allegation Defendant made false statements to K.D.:

> As to mentioning your personal circumstances to this or any client, you are sadly mistaken. I personally was not aware of the severity and complexity of your personal struggles but they would have never been fodder or a topic of discussion with anyone much less a client.

On 9 February 2021, Valente filed a grievance with the State Bar. On 3 January 2022, the State Bar filed a Complaint against Defendant alleging two violations of Rule 8.4(d) and one violation of Rule 8.4(c).

On 20 January 2023, the DHC issued a written Order of Discipline against Defendant. The DHC found Defendant knew the statements he made to Valente in his email dated 8 February 2021, were false and concluded Defendant "engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the Defendant's fitness as a lawyer in violation of Rule 8.4[ ](c)." The Order suspended Defendant's law license for one year with the suspension stayed for two years. On 3 February 2023, Defendant timely filed written Notice of Appeal.

Issues

The dispositive issues on appeal are whether the DHC erred in: (I) finding Defendant knowingly made false statements of fact; and (II) concluding Defendant's statements to Valente violate Rule 8.4(c) of the North Carolina Rules of Professional Conduct.

Analysis

Appeals from a decision of the DHC are reviewed pursuant to the "whole record test." *N.C. State Bar v. Talford*, 356 N.C. 626, 632, 576

S.E.2d 305, 309 (2003) (citation and quotation marks omitted). The whole-record test

> requires the reviewing court to determine if the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law[.] Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion. The whole-record test also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn. Moreover, in order to satisfy the evidentiary requirements of the whole-record test in an attorney disciplinary action, the evidence used by the DHC to support its findings and conclusions must rise to the standard of clear[, cogent,] and convincing. Ultimately, the reviewing court must apply all the aforementioned factors in order to determine whether the decision of the lower body, e.g., the DHC, has a rational basis in the evidence.

Id. at 632, 576 S.E.2d at 309-10 (alterations in original) (footnotes, citations, and quotation marks omitted). "However, the mere presence of contradictory evidence does not eviscerate challenged findings, and the reviewing court may not substitute its judgment for that of the committee." *N.C. State Bar v. Key*, 189 N.C. App. 80, 84, 658 S.E.2d 493, 497 (2008) (citations omitted). Thus, "[t]he 'whole record' test does not allow the reviewing court to replace the [Committee's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *N.C. State Bar v. Nelson*, 107 N.C. App. 543, 421 S.E.2d 163, 166 (1992) (alteration in original) (citations and quotation marks omitted), *aff'd per curiam*, 333 N.C. 786, 429 S.E.2d 716 (1993).

I. Challenged Finding

[1] First, Defendant argues the Record does not support a finding by clear, cogent, and convincing evidence Defendant *knowingly* made false statements to Valente in his email dated 8 February 2021. We agree.

The DHC, in its Order of Discipline, found, in relevant part:

> 23. During the 26 May 2020 call, Defendant stated:
>
> > "I'm not really sure what happened with him. Uh, I don't want to get into his personal life, but there was a

> divorce, there was a custody, there was a remarriage, uh, there was a ex-wife dating one of the defense lawyers we go against all the time, so I'm sure all of that had some impact on his productivity."
>
> 24. In February 2021, Defendant and Valente were in a dispute over what portion of the legal fee from K.D.'s case Defendant was entitled to collect.
>
> 25. During email communications related to this dispute, Valente told Defendant that K.D. informed him that Defendant made comments to K.D. about Valente's divorce.
>
> 26. On 8 February 2021, Defendant told Valente in an email that he did not mention Valente's personal circumstances to K.D.
>
> 27. Defendant also told Valente he was not aware of the "severity and complexity" of Valente's "personal struggles but they would never have been fodder or topic of discussion with anyone much less a client."
>
> 28. Defendant's statements to Valente about his WebEx discussion with K.D. were false.
>
> 29. Defendant knew these statements were false at the time he made them to Valente.

In making these Findings, the State Bar relied on Defendant's 8 February 2021 email and the 26 May 2020 Webex recording and transcript. These documents reflect Defendant's 8 February 2021 statements were incorrect; however, they do not establish Defendant *knew* these statements were incorrect. The State Bar contends "[t]he DHC can make reasonable inferences from the evidence concerning knowledge and intent." Indeed, our Court has previously concluded "it is axiomatic that one's state of mind is rarely shown by direct evidence and must often be inferred from the circumstances." *N.C. State Bar v. Sutton*, 250 N.C. App. 85, 112, 791 S.E.2d 881, 901 (2016) (citation omitted). However, "[a] basic requirement of circumstantial evidence is reasonable inference from established facts. Inference may not be based on inference." *Lane v. Bryan*, 246 N.C. 108, 112, 97 S.E.2d 411, 413 (1957). "Every inference must stand upon some clear and direct evidence, and not upon some inference or presumption." *Id.* (citations omitted).

On appeal, the State Bar argues it can be inferred from the evidence, including the recording of the discussion, that Defendant "thought carefully" before he made his initial statement to K.D. about Valente's

personal circumstances in May 2020. From this, the State Bar posits, it might then be inferred Defendant recalled making this statement when he wrote the email to Valente in February 2021. First, there are no findings by the DHC making either inference. This merely constitutes the State Bar's speculation on what the DHC might have inferred.

Moreover, even the rationale advanced by the State Bar on appeal infers Defendant's knowing misstatement from an inference that he must have recalled the prior statement about Valente because of an inference Defendant "thought carefully" before making the statement about Valente. This does not constitute circumstantial evidence of Defendant's knowledge at the time he emailed Valente. To the contrary, it is mere speculation built upon inference from inference from inference. *See Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 654, 547 S.E.2d 48, 50 (2000) (citing *Lane*, 246 N.C. at 112, 97 S.E.2d at 413) ("inferences must be based on established facts, not upon other inferences. In other words, a jury may draw an inference from a set of facts, but may not then use that inference to draw another inference.").

Applying the whole-record test, there is not clear, cogent, and convincing evidence to support the Order's Finding of Fact Defendant *knew* his statements were false at the time Defendant made those statements in his email to Valente on 8 February 2021. Thus, the trial court erred in finding "Defendant knew these statements were false at the time he made them to Valente." Therefore, this Finding does not support the DHC's Conclusions of Law.

II. The DHC's Conclusion of Law

[2] Next, Defendant argues the DHC erred in concluding Defendant's statements to Valente in the email dated 8 February 2021 violated Rule 8.4(c) of the North Carolina Rules of Professional Conduct. Rule 8.4(c) provides it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer." N.C. R. Prof. Conduct 8.4(c).

Here, the State Bar contends Defendant's "false statement adversely reflects on his fitness as an attorney." The DHC's Order found: Defendant made statements to K.D. concerning some of Valente's personal struggles during a Webex call on 26 May 2020; on 8 February 2021, Defendant denied making these statements in an email to Valente; and Defendant's statements to Valente about his Webex discussion with K.D. were false. The Order does not, however, find that Defendant's statements to K.D. regarding Valente reflected on Defendant's fitness as a lawyer. Further, nothing in the Order indicates any rationale for why such a

misstatement—knowing or not—would justify discipline under Rule 8.4(c) in this particular case. Moreover, the State Bar on appeal offers no support for its contention that a misstatement in the midst of a professional dispute with another lawyer necessarily constitutes conduct reflecting adversely on a lawyer's fitness as a lawyer.

Thus, the DHC's Findings do not support its Conclusion Defendant violated Rule 8.4(c) of the North Carolina Rules of Professional Responsibility. Therefore, the DHC erred in concluding grounds existed to discipline Defendant under N.C. Gen. Stat. § 84-28(b)(2). Consequently, we reverse the Order of Discipline entered by the DHC.[2]

Conclusion

Accordingly, for the foregoing reasons, the Order of Discipline entered by the DHC of the North Carolina State Bar is reversed.

REVERSED.

Judges GORE and GRIFFIN concur.

2. As we reverse the Order of Discipline and conclude the sole ground for discipline is not supported by the evidence or Findings of Fact, we do not reach Defendant's argument as to the discipline imposed.

SMITH v. SMITH

[292 N.C. App. 443 (2024)]

CAROL SPERRY SMITH, PLAINTIFF
v.
DALE PRESTON SMITH, DEFENDANT

No. COA23-339

Filed 20 February 2024

1. Divorce—equitable distribution—classification of property—stipulation—consideration by trial court

The trial court in an equitable distribution matter did not err in distributing certain real property to defendant husband upon classifying it as his separate property without first entering an order setting aside a prior written agreement in which the parties stipulated that the property was marital. The court properly considered a pre-trial order in which the parties entered into an additional set of stipulations, one of which stated that the parties disagreed about how to classify the real property at issue but agreed as to its value and that the property should be distributed to defendant. Further, the court's final equitable distribution order accurately reflected the property value listed in both of the parties' written stipulations.

2. Divorce—equitable distribution—unequal division of marital property—required finding—not using verbatim statutory language

The trial court in an equitable distribution matter did not abuse its discretion where, in ordering an unequal division of the parties' marital property, the court wrote in its order that "an unequal division . . . is equitable" rather than using verbatim language from N.C.G.S. § 50-20(c), which required the court to find that an "equal division is not equitable" and to explain why. The court was not required to quote the exact language from section 50-20(c) in entering the finding required therein, and the court did provide explanations supporting the unequal distribution of the marital property at issue.

3. Divorce—equitable distribution—statutory distributional factors—findings of fact—evidentiary support

In an equitable distribution matter where the trial court ordered an unequal division of the parties' marital property to the advantage of defendant husband, to whom the court distributed the marital residence, competent evidence supported the court's findings pertaining to the distributional factors listed in N.C.G.S. § 50-20(c),

including that: the marital residence as non-liquid property was the parties' biggest asset, while other more liquid assets that were to be distributed to defendant had already been liquidated to pay off marital debt; although plaintiff wife lived in the marital home for over three months post-separation, defendant continued to pay the expenses related to the home, and after plaintiff moved out, defendant moved back in and continued to pay all related expenses; and, while plaintiff did not contribute any of her own monies toward the marital residence, defendant sold his inherited stocks and took out a loan on his separate real property to pay for the residence.

4. Divorce—equitable distribution—unequal division of marital property—no abuse of discretion

The trial court in an equitable distribution matter did not abuse its discretion in: failing to enter an order setting aside a written stipulation by the parties, in which they agreed to classify certain real property as marital; not using verbatim statutory language in its finding that an equal division of marital property was not equitable; and finding that three distributional factors supported the need for an unequal distribution of marital property. Thus, the court did not abuse its discretion in ordering an unequal division of the parties' marital estate.

Judge ARROWOOD dissenting.

Appeal by Plaintiff from an equitable distribution judgment and order entered 31 August 2022 by Judge Lee F. Teague in Pitt County District Court. Heard in the Court of Appeals 14 November 2023.

W. Gregory Duke, for Plaintiff-Appellant.

The Graham Nuckolls Conner Law Firm, PLLC, by Jon G. Nuckolls, for Defendant-Appellee.

WOOD, Judge.

Carol Smith ("Plaintiff") appeals the trial court's judgment and order of equitable distribution awarding an unequal distribution of the marital estate. For the reasons discussed herein, we affirm the trial court's decision.

I. Factual and Procedural Background

Plaintiff and Dale Smith ("Defendant") were married on 1 June 2002, separated on 28 January 2018, and granted a divorce on 28 May 2019. The parties have no children together.

During the marriage and until 2016, Plaintiff worked part-time as an adjunct professor at Pitt Community College in Greenville, North Carolina. A month before separation, Plaintiff began a new job working as a part-time caregiver. Plaintiff is currently unemployed but receives $378.00 per week in unemployment benefits and $611.00 in Social Security benefits. Plaintiff is alleged to have suffered a medical condition which prevents her from lifting anything greater than 25 pounds. During the marriage, Defendant started a business, Dale's Heating and Air Conditioning, which he incorporated in 2004. Defendant paid himself an annual salary of approximately $30,000.00. He currently has pension benefits of $450.46 and $103,044.85 in a 401(k)-retirement plan. Defendant continues to work in a limited capacity since suffering a heart attack in 2019.

While the parties were married, they purchased property together on 17 November 2005, and the property was jointly deeded in both parties' names as tenants by the entirety. The parties later constructed a home on the property ("former marital residence"), located at 2323 Persnickety Lane in Grifton, North Carolina, and lived there together until their separation in 2018. To pay for the purchase of the former marital residence lot, Defendant liquidated personal property, namely stock inherited from his grandmother. Later, Defendant obtained a $70,000.00 line of equity secured by his separate property located at 4080 Racetrack Road ("Racetrack Road") in Grifton, North Carolina, in order to construct a barn and home on the former marital residence lot. The property at Racetrack Road was purchased by Defendant before his marriage to Plaintiff. A shop building was later constructed on the former marital residence lot. The cost of its construction was funded by the further liquidation of Defendant's inherited stock. Additionally, Defendant entered into a personal $10,050.00 promissory note on 9 May 2008 to complete the building of the former marital residence. The note was paid off on 15 September 2016, prior to the parties' separation.

During their marriage, Defendant paid the expenses on the former marital residence, including the homeowners' insurance, mortgage, utilities, and taxes. Defendant also paid the parties' automobile insurance. Plaintiff paid the cable bill and bought groceries.

On 21 September 2016, the parties obtained an equity line of credit ("HELOC") in the amount of $49,000.00 secured by the former marital residence. However, the parties did not borrow money from the HELOC at the time it was created. In December 2017, Defendant withdrew $49,000.00 from the HELOC and deposited the funds into his personal bank account. Defendant testified that he accessed the line of credit in case the marriage failed and to prevent Plaintiff from taking the money and disappearing with it.

When the parties separated on 28 January 2018, Defendant left the former marital residence while Plaintiff remained in the home. On 23 February 2018, Plaintiff filed a complaint against Defendant for Divorce from Bed and Board, Post-Separation Support, Alimony, Equitable Distribution, and Attorney's Fees. Defendant filed a response and counterclaims for Divorce from Bed and Board, Equitable Distribution, and Motion to Return Separate Property on 4 May 2018.

From 28 January 2018 until 15 May 2018, Plaintiff lived at the former marital residence. During this period of time, Defendant continued to pay expenses on the former marital residence, including insurance, mortgage, utilities, payments on the line of credit, and taxes. After Plaintiff moved out, Defendant returned to the former marital residence.

On 14 January 2019, both parties made stipulations addressing the two mentioned properties in a written and filed agreement. First, the parties stipulated that the former marital residence at Persnickety Lane be classified as marital property with a property value of $247,011.00. Second, the parties stipulated that "Plaintiff and Defendant own marital property located at . . . 4080 Racetrack Road, Grifton, North Carolina," and that the "value of the marital property . . . is valued at $46,563.00."

On 2 August 2022, Defendant filed a motion to strike and set aside the 14 January 2019 stipulation. In his motion, Defendant alleged that at all relevant times, (1) he was the sole owner of the 4080 Racetrack Road, Grifton, North Carolina property; (2) he owned the property prior to his marriage to Plaintiff; (3) the parties mortgaged the Racetrack Road property during the marriage in order to finance the purchase of the former marital residence; (4) he "at no time ever conveyed any part of said Racetrack Road to Plaintiff"; (5) he "mistakenly signed a stipulation on January 14, 2019" stating Racetrack Road was marital property; and (6) "it would be inequitable to allow the mistaken stipulations of Defendant's separate property to be classified as marital."

On 29 August 2022, before the hearing on equitable distribution, the parties entered a set of stipulations via a pre-trial order, which the parties

then filed with the trial court. In the pre-trial order, the parties stipulated to their disagreement as to the classification of the Racetrack Road property, but agreed the property should be distributed to Defendant. Furthermore, the parties disagreed as to the classification of the HELOC debt on the Racetrack Road property. Plaintiff contends the debt should be classified as mixed and assigned to Defendant; Defendant contends the debt should be classified as marital and be assigned to him. During opening statements at the hearing, Plaintiff's attorney explained that Defendant's trial counsel "recently filed a motion to strike and set aside the stipulations" and stated counsel was "fine with the Court just hearing the evidence and considering those motions or that motion in relation to those stipulations during this trial."

In the judgment and order for equitable distribution entered 31 August 2022, the trial court incorporated by reference the parties' pre-trial order and noted that the parties had made stipulations regarding their property in the pre-trial order. The trial court classified the Racetrack Road property as the separate property of Defendant. However, the trial court found the parties incurred marital debt when the Racetrack Road property was used as collateral for an equity line of credit to pay for the construction of the former marital residence. The trial court assigned the HELOC debt taken out on the Racetrack Road property to Defendant.

The trial court also found the parties agreed to marital debt in the form of a HELOC taken out on the former marital residence in 2016. The court found that Defendant withdrew "all $49,000 just a few months before the parties separated," so that the debt is classified as marital debt, "but there would [not] have been any debt but for the action of Defendant at the time of the impending separation." As such, while Defendant used proceeds from the sale of the Racetrack Road home to "pay back the loan postseparation, he will receive no credit for these payments because he unnecessarily created the marital debt."

The trial court determined Defendant had separate property valued at $179,239.27, and Plaintiff had separate property valued at -$195.00. The trial court determined that the total net value of the marital estate was $209,690.24. The trial court distributed the Persnickety Lane former marital residence to Defendant after finding that Defendant had paid for the residence with his separate property and a loan taken out on his separate property while Plaintiff had contributed none of her own monies towards the marital home and that Defendant had preserved the estate after the parties separated. After consideration of the relevant equitable distribution factors, the trial court determined an unequal division of marital property, marital debt, and divisible property would be

equitable. The trial court further found that "[i]f the former marital residence is removed, then both parties have a negative estate." The trial court based its determination for unequal distribution on several factors including: (1) the former marital residence as non-liquid real property is "the biggest asset" and the "other more liquid accounts that are being distributed to Defendant have been liquidated to pay off marital debt"; (2) while Plaintiff lived in the former marital home for approximately three and a half months post-separation, Defendant continued to pay the expenses related to the home, and after Plaintiff moved out, Defendant moved back in and continued to pay all related expenses; (3) Defendant sold his inherited stocks to pay for the former marital residence, took out a HELOC on his separate property at Racetrack Road to pay for the marital home, and eventually sold that property to pay off the loan, and Plaintiff did not contribute her own monies towards the marital residence.

The trial court awarded Defendant marital property and debt in the net amount of $217,189.44 and Plaintiff was awarded a net amount of -$7,499.20. The trial court distributed all the property and debt as was stipulated by the parties in the pre-trial order but did not make any other distributive award. Other than finding the parties had entered into stipulations in the pre-trial order, the trial court did not otherwise make a ruling concerning whether to grant Defendant's motion to strike the stipulation entered into by the parties in January 2019. On 28 September 2022, Plaintiff filed a notice of appeal with this Court from the equitable distribution judgment and order.

II. Analysis

On appeal, Plaintiff contests a number of issues. We address each in turn.

A. Stipulation regarding the classification of the Racetrack Road property.

[1] First, Plaintiff argues that the trial court erred in disregarding the parties' stipulation on 14 January 2019 classifying the property at Racetrack Road as marital property and assessing its value at $46,563.00 because the stipulation was never set aside by the trial court. Plaintiff further argues the trial court failed to make findings of fact in its order setting aside the 2019 stipulation order, so that the stipulation remained binding on the parties and the trial court.

In response, Defendant contends the trial court properly addressed the three statements made in the stipulation and did not need to set

aside any stipulation. Additionally, Defendant argues that Plaintiff "focuses solely on the stipulation made in 2019 and completely disregards the later stipulation made in the Pre-Trial Order that displayed disagreement between the parties regarding classification of the Racetrack Rd. property."

As a general rule, this Court has noted that "[a]ny material fact that has been in controversy between the parties may be established by stipulation." *Estate of Carlsen v. Carlsen*, 165 N.C. App. 674, 678, 599 S.E.2d 581, 584 (2004). We analyze stipulations between parties as if they were contracts and consider the intent of the parties at the time of contracting. *Stovall v. Stovall*, 205 N.C. App. 405, 409–10, 698 S.E.2d 680, 684 (2010). Additionally, stipulations must be written in terms that are "definite and certain." *State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961).

Pursuant to a 29 August 2022 pre-trial order, the parties entered into an additional set of stipulations days before the equitable distribution hearing which the parties then filed with the trial court. The trial court correctly stated in its Judgment and Order that "[o]n Schedule E of the Pre-trial Order, the parties disagree as to the classification of this item [Racetrack Road property] but agree on the value and distribution." This subsequent stipulation reflects that the parties do not agree the Racetrack Road property is marital. In the pre-trial order, Plaintiff contends the said property is a mixed (not marital) asset while Defendant contends it is his separate property. Both stipulations, however, reflect the parties' intent to stipulate the value of the Racetrack Road property. In fact, the trial court's order lists the value of the Racetrack Road property as the value amount listed in the parties' January 2019 stipulation and in the pre-trial order. Therefore, the trial court properly applied all stipulations to its equitable distribution judgment.

B. Trial court's finding that an equal division of marital property was not equitable.

[2] Plaintiff next argues that the trial court's findings of fact do not support an unequal division of the marital assets and specifically contests conclusion of law 4. Conclusion of law 4 states: "Based on the consideration of the distributional factors in Equitable Distribution as described in the above Findings of Fact and arising from the evidence, an unequal division of marital property, marital debt, and divisible property is equitable." Specifically, Plaintiff contends the trial court erred in failing to include specific language pursuant to N.C. Gen. Stat. § 50-20(c), which states, "There shall be an equal division by using net value of marital

property and net value of divisible property *unless the court determines that an equal division is not equitable.*" (Emphasis added). We disagree.

"Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion." *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992). In an equitable distribution order, the findings of fact "must support the determination that the marital property has been equitably divided." *McIver v. McIver*, 92 N.C. App. 116, 127, 374 S.E.2d 144, 151 (1988) (quotation marks omitted).

By law, there must be an "equal division" of marital property in an equitable distribution proceeding "unless the court determines that an equal division is not equitable." N.C. Gen. Stat. § 50-20(c); *White v. White*, 312 N.C. 770, 775, 324 S.E.2d 829, 832 (1985). "[T]he statute is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made *mandatory* 'unless the court determines that an equal division is not equitable.' " *White*, 312 N.C. at 776, 324 S.E.2d at 832 (citing N.C. Gen. Stat. § 50-20(c)) (emphasis in original).

Thus, if the trial court makes the determination "to divide a marital estate other than equally, the trial court must first find that an equal division is not equitable and explain why." *Lucas v. Lucas*, 209 N.C. App. 492, 504, 706 S.E.2d 270, 278 (2011). This Court has made clear, however, that "there is no case law requiring a trial court to use 'magic words' indicating that an equal distribution is not equitable." *Carpenter v. Carpenter*, 245 N.C. App. 1, 14, 781 S.E.2d 828, 838 (2016).

In the present case, although the trial court did not use verbatim language from N.C. Gen. Stat. § 50-20(c) to indicate that an equal division of the marital property is not equitable, the trial court addressed and applied the factors from N.C. Gen. Stat. § 50-20(c) to the evidence presented. The trial court found eight factors did not support unequal distribution, then determined that three factors indicated the need for an unequal distribution. Therefore, the trial court abided by the provisions of N.C. Gen. Stat. § 50-20(c) in providing explanations for the court's unequitable division of marital property and liabilities.

C. Trial court's findings related to the evidence of distributional factors presented at the hearing.

[3] Next, Plaintiff argues the trial court erred in several findings of fact relating to the evidence presented at the hearing of the distributional factors pursuant to N.C. Gen. Stat. § 50-20(c). Plaintiff contends competent

evidence was not presented at the hearing to support the trial court's findings of fact 30, 33, and 34. We address each finding in turn.

Pursuant to N.C. Gen. Stat. § 50-20(c), the trial court is to distribute the property equally unless the court determines that an equal division is not equitable. *Daetwyler v. Daetwyler*, 130 N.C. App. 246, 249, 502 S.E.2d 662, 664 (1998). The distributional factors are:

> (1) The income, property, and liabilities of each party at the time the division of property is to become effective.
>
> (2) Any obligation for support arising out of a prior marriage.
>
> (3) The duration of the marriage and the age and physical and mental health of both parties.
>
> (4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects.
>
> (5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property.
>
> (6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.
>
> (7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.
>
> (8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.
>
> (9) The liquid or nonliquid character of all marital property and divisible property.
>
> (10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party.
>
> (11) The tax consequences to each party, including those federal and State tax consequences that would have been

> incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.
>
> (11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.
>
> (11b) In the event of the death of either party prior to the entry of any order for the distribution of property made pursuant to this subsection:
>
> > a. Property passing to the surviving spouse by will or through intestacy due to the death of a spouse.
> >
> > b. Property held as tenants by the entirety or as joint tenants with rights of survivorship passing to the surviving spouse due to the death of a spouse.
> >
> > c. Property passing to the surviving spouse from life insurance, individual retirement accounts, pension or profit-sharing plans, any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary (excluding any benefits under the federal social security system), or any other retirement accounts or contracts, due to the death of a spouse.
> >
> > d. The surviving spouse's right to claim an "elective share" pursuant to G.S. 30-3.1 through G.S. 30-33, unless otherwise waived.
>
> (12) Any other factor which the court finds to be just and proper.

N.C. Gen. Stat. § 50-20(c). Only one of those factors is required for a final judgment and order of unequal distribution. *Judkins v. Judkins*, 113 N.C. App. 734, 741, 441 S.E.2d 139, 143 (1994). Further, a trial court must make written findings of fact as to the evidence used in support of each distributional factor. *Daetwyler*, 130 N.C. App. at 249, 502 S.E.2d at 665. The trial court's findings need not be "exhaustive," and simply must include the "ultimate" facts considered. *Id.*

The standard of review is whether there is competent evidence to support the findings of fact and, subsequently, whether the conclusions of law are supported by the findings. *Dechkovskaia v. Dechkovskaia*, 232 N.C. App. 350, 352, 754 S.E.2d 831, 834 (2014). "[O]n appeal, findings of fact supported by competent evidence are binding." *Glaspy v. Glaspy*, 143 N.C. App. 435, 443 (2001). Further, we give great discretion to the trial court's consideration of facts, as the trial court is the fact finder in equitable distribution cases and has the "right to believe all, none, or some of a witness' testimony." *Zurosky v. Shaffer*, 236 N.C. App. 219, 240, 763 S.E.2d 755, 768 (2014).

First, Plaintiff challenges the court's finding of fact 30 which states:

> NCGS 50-20(c)(9) - . . . [T]he evidence shows that the biggest asset is non-liquid real property, the former marital residence. The other more liquid accounts that are being distributed to Defendant have been liquidated to pay off marital debt. Therefore, the Court finds this factor indicates the need for an unequal distribution.

Plaintiff argues that no evidence was presented at the hearing that the "more liquid accounts" distributed to Defendant "had been liquidated to pay off marital debt." We disagree.

The evidence shows that Defendant contributed large sums of his separate property to benefit the marriage and to obtain the former marital residence. The trial court found that during the course of the parties' marriage, Defendant sold his inherited stock, took out a personal loan, and took out a HELOC on his separate property in order to purchase and pay for the upkeep of the former marital residence. These resources were continually accessed in order to pay off the marital debt accrued by the parties. Therefore, the trial court's finding of fact 30 is sufficiently supported by evidence.

Next, Plaintiff challenges finding of fact 33 which states:

> NCGS 50-20(c)(11a) - Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue, or convert the marital property or divisible, or both, during the period after separation of the parties and before the time of distribution. The Plaintiff lived in the marital home for about three and one-half months after separation. During that time Defendant paid all the taxes, mortgage payments, insurance, utility bills, and all other expenses related to the home while Plaintiff lived in the home. In May 2018, Plaintiff moved out of the home and Defendant

> moved in. Defendant has resided in the home to present and has paid all related expenses. The Court finds this factor indicates the need for an unequal distribution.

Plaintiff contends the only indebtedness on the property was a $49,000 advance on the HELOC taken out by Defendant in December 2017. Further, Plaintiff argues "no evidence was presented that [Defendant] paid" all the expenses associated with the former marital residence for the three and a half months Plaintiff lived in the residence after the parties separated.

Plaintiff objects to the trial court's determination that Defendant paid "all other expenses related to the home." However, the trial court heard evidence that Defendant paid the necessary expenses to upkeep the former marital residence including paying the home's mortgage, insurance, taxes, and utilities even while he was not living there. In fact, Plaintiff testified that Defendant paid the mortgage, line of credit, insurance, "and those types of things" on the former marital residence. Defendant argues that Plaintiff's contention that the entire application of the (11a) distributional factor should be disregarded "simply because there was not enough evidence to support *all* expenses were paid by [Defendant] ignores the fact that there was evidence of the large, necessary expenses required to keep the property from being taken or foreclosed." We agree. The trial court compiled a list from the evidence presented of the necessary expenses for the property sufficient to support its finding of distributional factor (c)(11a).

Next, Plaintiff challenges finding of fact 34 which states:

> NCGS 50-20(c)(12) - Any other factor which the court finds to be just and proper. Defendant inherited stock from his grandmother when she died. Shortly after the marriage, he sold this stock to pay for the marital home. It is clear to the Court that this was a gift to the marriage and the marital residence and is marital property. Defendant also took out a HELOC on his separate property to help pay for the marital home and eventually had to sell that property to pay off the loan. Plaintiff contributed none of her own monies toward the marital home. The Court finds this factor indicates the need for an unequal distribution.

Plaintiff argues the evidence established "that the parties contributed substantial marital monies towards the marital residence and the shop" and that in this finding, the court "attributed the HELOC loan used for the construction of the house and shop as being [Defendant's] contribution

of his separate monies but then classified it as a marital debt." In short, Plaintiff suggests the trial court erred in finding the Racetrack Road home to be Defendant's separate property while classifying the equity loan taken on the home to be marital debt.

N.C. Gen. Stat. § 50-20(b)(2) defines separate property as all real or personal property acquired by a spouse prior to marriage. Because Defendant acquired the Racetrack Road property prior to marriage, it is separate property. Additionally, the evidence shows that Defendant never placed Plaintiff's name on the deed to the property during their marriage and never transferred any interest in the property to her, so that Defendant continued to be the sole owner of the property. Marital property is defined as all real or personal property acquired by either or both spouses during the marriage and prior to the date of separation. N.C. Gen. Stat. § 50-20(b)(1). Additionally, a marital debt is one incurred during the marriage and before the date of separation, by either spouse or both spouses, for the joint benefit of the parties. *Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210 (1994). Here, the parties used the Racetrack Road property as a means of collateral to acquire a loan and incur debt during the marriage and prior to separation for the benefit of both parties, thus making the debt marital. Furthermore, the loan was acquired in order to make improvements to the parties' former marital residence. Therefore, it was not error for the trial court to find that Defendant used his separate property as collateral to obtain marital debt.

Furthermore, the evidence presented during the hearing shows that Defendant used much of his separate property to pay for the construction of and improvements to the former marital residence: (1) the separate property of stocks gifted to him by his grandparent, and (2) the separate Racetrack Road property as collateral for a loan to be used to construct the \former marital residence and property. There was no evidence presented that Plaintiff contributed her own money towards the former marital residence. Thus, there was evidence to support the trial court's finding of fact 34, and the trial court properly determined unequal distribution of property was equitable through consideration of the distribution factors in N.C. Gen. Stat. § 50-20(c).

D. Trial court's distribution of the parties' marital property.

[4] Finally, Plaintiff contends the trial court abused its discretion in making an unequal distribution of the parties' marital estate and points us to aforementioned arguments. Plaintiff acknowledges that equitable distribution of property is an area of law in which the trial court has

"sound discretion," and appellate courts give great deference to the trial court's findings and conclusions. *Cunningham v. Cunningham*, 171 N.C. App. 550, 555, 615 S.E.2d 675, 680 (2005). After careful consideration of Plaintiff's arguments, we conclude the trial court did not abuse its discretion in (1) failing to enter an order to set aside the 2019 stipulation; (2) not using verbatim statutory language in its finding that equal distribution is not equitable; and (3) finding three distributional factors supported the need for an unequal distribution of the parties' marital estate. We conclude the evidence supported the trial court's findings of fact and conclusions of law, and the trial court's unequal distribution is supported by sound and logical reasoning.

III. Conclusion

For the reasons set forth above, we affirm the trial court's equitable distribution judgment and order.

AFFIRMED.

Judge THOMPSON concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

For the reasons set forth below, I dissent from the majority's opinion because I believe the parties and the trial court are bound by the 14 January 2019 stipulations, which established the Racetrack Road property as marital property. This stipulation undercuts the reasons given by the trial court with respect to the basis for an unequal distribution and necessitates the reversal of the trial court's order. Thus, I would reverse the trial court's order and remand for further proceedings.

"Parties may establish by stipulation any material fact that has been in controversy between them. Where the stipulations of plaintiff and defendant have been entered of record . . . the parties are bound and cannot take a position inconsistent with the stipulations." *Thomas v. Poole*, 54 N.C. App. 239, 241 (1981) (citations omitted). "Where facts are stipulated, they are deemed established as fully as if determined by a jury verdict." *Id.* In other words, a stipulation is "binding in every sense" and prevents the party who agreed to it "from introducing evidence to dispute it and relieving the other party of the necessity of producing

evidence to establish [it]." *Id*. Although a party may wish to have a stipulation set aside, they must " 'do so by some direct proceeding, and, ordinarily, such relief may or should be sought by a motion to set aside the stipulation . . . .' " *Moore v. Richard W. Farms, Inc.*, 113 N.C. App. 137, 141 (1993) (quoting *Norfolk Southern Railway Co. v. Horton*, 3 N.C. App. 383, 389 (1969)).

"While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision[.]" *Id.* (cleaned up). When construing stipulated facts, this Court "must attempt to effectuate the intention of the party making the stipulation as to what facts were to be stipulated without making a construction giving the stipulation the effect of admitting a fact the party intended to contest." *In re I.S.*, 170 N.C. App. 78, 87 (2005) (citation omitted).

Here, defendant and plaintiff made a clear and definite agreement regarding the classification of the Racetrack Road property in their 14 January 2019 stipulations filed with the trial court. Specifically, the first stipulation plainly stated, "*Plaintiff and Defendant own marital property located at* 2323 Persnickety Lane, Grifton, North Carolina *and 4080 Racetrack Road, Grifton[,] North Carolina*." (emphasis added). This statement clearly shows that the Racetrack Road property was, in fact, marital property as stipulated. The third stipulation in the filing further reinforces this agreement as to the property's classification by stating that "the value of *the marital property located at 4080 Racetrack Road* . . . is valued at $46,563.00"—thus again referring to it expressly as marital property. (emphasis added).

In my view, the subsequent pre-trial order stipulations were in direct conflict with the 14 January 2023 stipulations. The pre-trial order's Schedule E indicates that the parties disagreed on the classification of the Racetrack Road property, with plaintiff contending that it was marital property and defendant claiming it was his separate property. Such a statement directly conflicts with the 14 January 2019 stipulation that, as discussed above, indisputably classified the property as marital.

Although defendant later moved to set aside the 14 January 2019 stipulations on 2 August 2022, the trial court never entered an order ruling on the motion, nor did the trial court make any findings or conclusions regarding the motion in its 31 August 2022 judgment and order. Had the trial court ruled on this motion and set aside the earlier stipulations, the latter stipulations could have appropriately been considered competent evidence. However, without such a ruling, I cannot agree with the majority that the trial court properly applied all stipulations

when it, in fact, disregarded one. *See Despathy v. Despathy*, 149 N.C. App. 660, 662 (2002) (explaining that stipulations are considered judicial admissions and that judicial admissions are binding on the court); *Crowder v. Jenkins*, 11 N.C. App. 57, 63 (1971) ("[Stipulations] are conclusive and binding upon the parties and the trial judge." (citations omitted)). I am concerned this result undercuts our case law with respect to setting aside stipulations through a "direct proceeding" and permits lower courts to relieve parties of binding stipulations without following proper procedures. *See Moore*, 113 N.C. App. at 141.

Further, because the parties stipulated that the Racetrack Road property was marital, I also agree with plaintiff's contention that there was no competent evidence to support the trial court's Finding of Fact 34. Specifically, Finding of Fact 34 states that

> Defendant also took out a HELOC *on his separate property* to help pay for the marital home and eventually had to sell that property to pay off that loan. *Plaintiff contributed none of her own monies toward the marital home*. The Court finds this factor indicates the need for an unequal distribution. (emphasis added).

Such a finding substantially conflicts with the evidence. As stipulated in the 14 January 2019 filing, the HELOC was taken out on marital property—not defendant's separate property—to help pay for the marital home. Additionally, the Racetrack Road property was later sold to help pay off the marital home; thus, marital property was again used to help pay for the marital home. Consequently, the trial court's finding that plaintiff contributed none of her own money to the marital home is not supported by competent evidence.

Even assuming that the trial court would have still concluded an unequal division of the marital property was equitable in favor of defendant, *see Mugno v. Mugno*, 205 N.C. App. 273, 288 (2010) ("A single distributional factor may support an unequal division."), I believe the trial court's calculation of the division of marital property is incorrect due to the failure to account for the Racetrack Road property as marital property. Accordingly, I would reverse the trial court's order and remand for re-hearing on equitable distribution.

STATE OF NORTH CAROLINA
v.
ERIC RAMOND CHAMBERS, DEFENDANT

No. COA22-1063

Filed 20 February 2024

Constitutional Law—North Carolina—right to properly constituted jury—alternate juror—substituted after deliberations began—new trial granted

Defendant's convictions for first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury were vacated and a new trial granted where his right under the North Carolina Constitution to a properly constituted jury was violated when the trial court substituted a juror for an alternate juror after the jury deliberations had commenced. Although the trial court instructed the newly constituted jury to begin its deliberations anew in accordance with a 2021 statutory amendment (N.C.G.S. § 15A-1215(a)), a prior decision of the Supreme Court of North Carolina interpreting the state constitution was controlling on this issue.

Appeal by defendant from judgment entered 8 April 2022 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 10 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden W. Hayes, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for defendant-appellant.

DILLON, Chief Judge.

Defendant Eric Ramond Chambers appeals from judgments entered following jury verdicts convicting him of certain felonies. Based on precedent from our Supreme Court, we conclude that Defendant's right under our state constitution to a properly constituted jury was violated. Therefore, we vacate Defendant's convictions and remand this case for a new trial.

I. Background

Defendant was tried for various crimes in connection with a 21 August 2018 shooting at a Raleigh motel which left a man dead and a woman injured. Defendant represented himself at trial.

After jury deliberations began, Juror #5 informed the trial judge that he could not return the next day because of a scheduled doctor's appointment. The trial court dismissed Juror #5, replaced him with an alternate juror, and instructed the jury to begin its deliberations anew with the alternate juror. Defendant was not in the courtroom at the time of the substitution.

The jury found Defendant guilty of first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. He was sentenced to life in prison without the possibility of parole for the murder conviction and 110 to 144 months for the assault conviction.

II. Appellate Jurisdiction

Defendant filed a petition for writ of *certiorari*. The State filed a motion to dismiss the appeal. In our discretion, we allow Defendant's petition for writ of *certiorari* to consider the merits of the case and deny the State's motion to dismiss.

III. Analysis

Defendant makes several arguments on appeal. We, however, address only his argument that his right to a properly constituted jury was violated, as our resolution of that issue is dispositive. Specifically, for the reasoning below, we agree with Defendant's argument that the trial court's substitution of an alternate juror after jury deliberations had begun constitutes reversible error.

Our North Carolina Constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]" N.C. Const. art. I, § 24. Our Supreme Court has interpreted this provision to preclude juror substitution during a trial after the commencement of jury deliberations. *State v. Bunning*, 346 N.C. 253, 255–57, 485 S.E.2d 290, 291–93 (1997).

In *Bunning*, shortly after jury deliberations had begun, a juror informed the court that she could not continue with jury deliberations due to a medical issue; she was, therefore, excused and replaced with an alternate juror. *Id.* at 255, 485 S.E.2d at 291. The trial court then instructed the jury to begin deliberations anew. *Id.* On appeal, our Supreme Court held that the defendant's right under our state constitution to a properly constituted jury was violated by this substitution:

> In this case, the jury verdict was reached by more than twelve persons. The juror who was excused participated in the deliberations for half a day. We cannot say what influence she had on the other jurors, but we have to assume she made some contribution to the verdict. The alternate juror did not have the benefit of the discussion by the other jurors which occurred before he was put on the jury. We cannot say he fully participated in reaching a verdict. In this case, eleven jurors fully participated in reaching a verdict, and two jurors participated partially in reaching a verdict. This is not the twelve jurors required to reach a valid verdict in a criminal case.

Id. at 256, 485 S.E.2d at 292.

The present case is strikingly similar to *Bunning*. Here, like in *Bunning*, a juror was excused and replaced with an alternate, after which the trial court instructed the jury to restart its deliberations. Consequently, following the reasoning in *Bunning*, the verdict here was also impermissibly reached by thirteen people.

The State argues, though, that Defendant failed to preserve any argument concerning the constitutional deficiency, as he failed to object when the juror substitution occurred. But we are bound by a 2003 case in which our Court held that a defendant's failure to object to the alternate juror's substitution after the commencement of jury deliberations does not preclude appellate review, as this error is not waivable. *State v. Hardin*, 161 N.C. App. 530, 533, 588 S.E.2d 569, 571 (2003).[1] This holding is consistent with our Supreme Court's holding in *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971). In that case, the defendant consented to be tried by only eleven jurors after one of the jurors could not continue, and the defendant made no argument regarding this deficiency on appeal. *Id.* at 78, 185 S.E.2d at 192. Notwithstanding, our Supreme Court ordered a new trial *ex mero motu*, stating:

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1. We note that our Court recently held that a defendant who fails to object on state constitutional grounds to a juror substitution after the beginning of deliberations fails to preserve the issue for appellate review. *State v. Lynn*, 290 N.C. App. 532, 536–37, 892 S.E.2d 883, 886 (2023). Notwithstanding, we are bound to follow *Hardin*, as it is older than *Lynn* and was not referenced in *Lynn*. *See State v. Gonzalez*, 263 N.C. App. 527, 531, 823 S.E.2d 886, 889 (2019) (relying on *In re R.T.W.*, 359 N.C. 539, 542, n.3, 614 S.E.2d 489, 491, n.3 (2005) to hold that, where there are two irreconcilable precedents which "develop independently[,]" we must " 'follow[ ] … the older of the two cases' and reject the more recent precedent").

> It is elementary that the jury provided by law for the trial of indictments is composed of twelve persons; a less number is not a jury. It is equally rudimentary that a trial in a criminal action cannot be waived by the accused in the Superior Court as long as his plea remains "not guilty."

Id. at 79, 185 S.E.2d at 192.

We note that, in 2021, our General Assembly amended a statute to provide that "[i]f an alternate juror replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. In no event shall more than 12 jurors participate in the jury's deliberations." N.C. Gen. Stat. § 15A-1215(a). However, where a statute conflicts with our state constitution, we must follow our state constitution. *Bayard v. Singleton*, 1 N.C. 5 (1787). Our General Assembly cannot overrule a decision by our Supreme Court which interprets our state constitution. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989) ("[I]ssues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina can only be answered with finality by [our Supreme] Court.").[2]

IV. Conclusion

Under existing precedent, we are compelled to conclude that Defendant's right to a properly constituted jury under our state constitution was violated and that this issue is preserved, notwithstanding Defendant's failure to object at trial. Accordingly, Defendant is entitled to a new trial. We need not address Defendant's remaining arguments.

NEW TRIAL.

Judges MURPHY and CARPENTER concur.

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2. Although not raised by Defendant, we note that federal courts have held that substitution of a juror with an instruction for the jury to begin deliberations anew does not violate the *federal* constitution. *See Claudio v. Snyder*, 68 F.3d 1573, 1575–76 (3d Cir. 1995) (collecting cases). However, our Supreme Court is free to construe our state constitution in a manner which affords rights greater than those afforded under the federal constitution. *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101,103–104 (1998) ("States remain free to interpret their own constitutions in any way they see fit, including constructions which grant citizen rights where none exist under the federal Constitution.").

STATE OF NORTH CAROLINA
v.
CHAD COFFEY

No. COA22-883

Filed 20 February 2024

1. Obstruction of Justice—common law—cognizable offense in North Carolina—falsification of firearm qualifications by deputy sheriff

In a matter in which defendant, a deputy sheriff, was alleged to have committed felony common law obstruction of justice based on his falsification of documents, in which he falsely verified firearm qualifications for two members of law enforcement who had not met their mandatory annual requirements, the Court of Appeals reaffirmed that common law obstruction of justice is a cognizable offense in North Carolina.

2. Indictment and Information—sufficiency—common law obstruction of justice—falsification of records—not done to impede legal proceeding

In a matter in which defendant, a deputy sheriff, was alleged to have committed felony common law obstruction of justice based on his falsification of documents, in which he falsely verified firearm qualifications for two members of law enforcement who had not met their mandatory annual requirements, the indictments charging common law obstruction of justice were fatally defective for failing to allege facts to support the essential element that defendant's acts were done for the purpose of obstructing justice, whether to impede or subvert a legal proceeding or potential subsequent investigation.

Chief Judge DILLON concurring in separate opinion.

Judge STADING joins in this separate concurring opinion.

Appeal by Defendant from Judgments rendered 10 February 2022 by Judge R. Allen Baddour, Jr. in Wake County Superior Court. Heard in the Court of Appeals 19 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden W. Hayes, for the State.

Cheshire Parker Schneider, PLLC, by Elliot S. Abrams, for Defendant-Appellant.

Samuel J. Davis, Daniel K. Siegel and Kristi L. Graunke, for amicus curiae American Civil Liberties Union of North Carolina Legal Foundation.

Essex Richards, P.A., by Norris A. Adams, II, for amicus curiae North Carolina Fraternal Order of Police.

HAMPSON, Judge.

Factual and Procedural Background

Chad Coffey (Defendant) appeals from Judgments rendered pursuant to jury verdicts finding Defendant guilty of twelve counts of felony obstruction of justice. The Record before us, including the evidence presented at trial, tends to show the following:

Defendant was a deputy sheriff in Granville County, North Carolina for over two decades. In 2007, Defendant received his firearm instructor certification and obtained additional specialized instructor certifications. These instructor certifications allowed Defendant to teach in-service courses for law enforcement officers to satisfy requirements set by the North Carolina Sheriffs' Education and Training Standards Commission (the Commission). The Commission establishes minimum education and training standards for justice officers, monitors compliance, and certifies all justice officers have satisfied those standards, including firearm training. N.C. Gen. Stat. § 17E-4(a) (2023). All active deputies who carry a firearm must annually complete in-service training, including a classroom portion and firearm qualification to maintain their law enforcement certification.

At the urging of Sheriff Brindel Wilkins and Chief Deputy Sherwood Boyd, Defendant certified Wilkins' and Boyd's attendance at mandated trainings neither had attended. Although neither Wilkins nor Boyd qualified at a shooting range, Defendant filled out forms indicating firearms scores neither had attained. Defendant acknowledged at trial he had falsified these documents.

On 26 October 2021, Defendant was indicted on fourteen counts of felony common law obstruction of justice, two of which were later dismissed, and fourteen counts of felony obtaining property by false pretenses, two of which were also later dismissed. Each of the

indictments for obstruction of justice alleged Defendant had "unlawfully, willfully and feloniously with deceit and intent to defraud, did commit the infamous offense of obstruction of justice by knowingly providing false and misleading information in training records[.]" The indictments then specified Defendant had indicated in documents mandatory in-service training and firearm qualifications had been completed by Sheriff Wilkins and Chief Deputy Boyd "knowing that [the trainings] had in fact not been completed, and knowing that these records and/or the information contained in these records would be and were submitted to [the Commission] thereby allowing" Wilkins and Boyd to maintain their law enforcement certifications when they had failed to meet the requirements.

Defendant's trial began on 7 February 2022. On 10 February 2022, the jury delivered its verdict finding Defendant guilty of all twelve counts of obstruction of justice and not guilty of each count of obtaining property by false pretenses. The trial court sentenced Defendant to five to fifteen months of imprisonment on the first count of obstruction of justice. The remaining counts were consolidated into two class H felony Judgments with suspended sentences of five to fifteen months of imprisonment. Defendant timely filed written Notice of Appeal on 14 February 2022.

Appellate Jurisdiction

The trial court rendered Judgment and sentenced Defendant on 10 February 2022. The Record also reflects written Judgments signed by the trial court on 10 February 2022, but these Judgments are neither file-stamped nor certified by the Clerk. Rule 4 of the North Carolina Rules of Appellate Procedure provides appeal from a judgment *rendered* in a criminal case must be given either orally at trial or by filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment. N.C. R. App. P. 4 (2023). Here, the Record reflects the written Judgments were signed by Judge R. Allen Baddour, Jr. on 10 February 2022, and Defendant's written Notice of Appeal was file-stamped on 14 February 2022. There is no dispute between the parties that Judgments were in fact entered and Defendant's written Notice of Appeal was timely. Therefore, this Court has appellate jurisdiction over this appeal.

Issue

The dispositive issues before us are whether: (I) obstruction of justice is a cognizable common law offense in North Carolina; and (II) the indictments in this case were sufficient to allege common law obstruction of justice.

Analysis

I. Common Law Obstruction of Justice

[1] As a threshold matter, Defendant contends obstruction of justice is not an offense at common law in North Carolina. Thus, Defendant asserts the indictments fail to allege a valid offense. We disagree.

Our legislature adopted the common law by statute, providing: "All such parts of the common law as were heretofore in force and use within this State . . . are hereby declared to be in full force within this State." N.C. Gen. Stat. § 4-1 (2023). Contrary to Defendant's assertions, obstruction of justice was historically an offense at common law, and our courts have consistently recognized it as a common law offense. Blackstone described a series of "offenses against public justice" in his treatise on English common law. 4 William Blackstone, *Commentaries on the Laws of England* 127-41.

Moreover, our courts have consistently recognized common law obstruction of justice as a cognizable offense. *See, e.g.*, *State v. Bradsher*, 382 N.C. 656, 659, 879 S.E.2d 567, 570 (2022); *State v. Ditenhafer*, 373 N.C. 116, 128, 834 S.E.2d 392, 400 (2019); *State v. Mitchell*, 259 N.C. App. 866, 878, 817 S.E.2d 455, 462-63, *disc. review denied*, 371 N.C. 478, 818 S.E.2d 278 (2018). Our Supreme Court has even expressed that the existence of statutory forms of obstruction of justice did not serve to abrogate the common law offense. *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983) ("Obstruction of justice is a common law offense in North Carolina. Article 30 of Chapter 14 of the General Statutes does not abrogate this offense."). Thus, common law obstruction of justice is a cognizable offense in North Carolina.

II. Sufficiency of the Indictments to Allege Common Law Obstruction of Justice

[2] Defendant further argues the trial court erred by denying his Motion to Dismiss the indictments because they fail to allege facts supporting the elements of obstruction of justice. In particular, Defendant contends, among other things, that while the indictments allege Defendant committed "the infamous offense of obstruction of justice" they do not allege facts to support the element that Defendant acted to obstruct justice. The State contends this is "a mere semantic complaint[.]" The State argues there is no material difference between the essential element of the offense and the description of the alleged misconduct in the indictment.

"An indictment need not conform to any technical rules of pleading but instead must satisfy both statutory strictures and the constitutional purposes for which indictments are designed to satisfy, i.e., notice sufficient to prepare a defense and to protect against double jeopardy." *State v. Lancaster*, 385 N.C. 459, 462, 895 S.E.2d 337, 340 (2023) (quoting *In re J.U.*, 384 N.C. 618, 623, 887 S.E.2d 859, 863 (2023) (citations omitted)). A recent decision of our Supreme Court chronicles the General Assembly's adoption of the Criminal Procedure Act and the consequent shift away "from the highly technical, archaic common law pleading requirements which promoted form over substance." *Lancaster*, 385 N.C. at 462, 895 S.E.2d at 340 (quoting *In re J.U.*, 384 N.C. at 622, 887 S.E.2d at 863). Rather, indictments and other criminal pleadings are:

> sufficient in form for all intents and purposes if [they] express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

N.C. Gen. Stat. § 15-153 (2023).

Still, an indictment must, however, contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2023). "The sufficiency of an indictment is a question of law reviewed de novo." *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019) (citation omitted).

Here, the indictments allege:

> [Defendant] unlawfully, willfully and feloniously with deceit and intent to defraud, did commit the infamous offense of obstruction of justice by knowingly providing false and misleading information in training records indicating that mandatory in-service training and annual firearm qualification had been completed by [Sheriff Wilkins/Chief Deputy Boyd] . . . knowing that it had in fact not been completed, and knowing that these records and/or the information contained in these records would be and were submitted to the North Carolina Sheriffs' Education and Training Standards Division thereby allowing [Sheriff

> Wilkins/Chief Deputy Boyd] to maintain his law enforcement certification when he had failed to meet the mandated requirements.

Our Supreme Court has held the elements of felony common law obstruction of justice are: "(1) the defendant unlawfully and willfully; (2) obstructed justice; (3) with deceit and intent to defraud." *Ditenhafer*, 373 N.C. at 128, 834 S.E.2d at 400 (quoting *State v. Cousin*, 233 N.C. App. 523, 537, 757 S.E.2d 332, 342-43 (2014)).[1] Our courts have defined common law obstruction of justice as "any act which prevents, obstructs, impedes or hinders public or legal justice." *Kivett*, 309 N.C. at 670, 309 S.E.2d at 462 (citation and quotation marks omitted).

The issue arises in determining what constitutes an "act which prevents, obstructs, impedes or hinders public or legal justice." It seems clear in our case law that false statements made in the course of a criminal investigation for the purpose of misleading or hindering law enforcement fall within the ambit of obstruction of justice. *E.g.*, *State v. Bradsher*, 382 N.C. 656, 669, 879 S.E.2d 567, 575-76 (2022) (false statements to State Bureau of Investigation in course of investigation); *Ditenhafer*, 373 N.C. at 123, 834 S.E.2d at 397 (indictment alleged "defendant . . . unlawfully, willfully and feloniously obstructed justice with deceit and intent to defraud and obstruct an investigation into the sexual abuse of a minor to wit: the defendant denied Wake County Sheriff's Department and Child Protective Services access to her daughter . . . throughout the course of the investigation."); *Cousin*, 233 N.C. App. at 531, 757 S.E.2d at 339 (false statements to law enforcement in a murder investigation resulting in a "significant burden imposed on the investigation . . . resulting from Defendant's various conflicting statements.").

Likewise, obstructing a judicial proceeding would also fall within obstruction of justice. *See Kivett*, 309 N.C. at 670, 309 S.E.2d at 462 ("Respondent's conduct with respect to the attempt to prevent the convening of the grand jury would support a charge of common law obstruction of justice."); *Preston*, 73 N.C. App. at 176, 325 S.E.2d at 688 (concluding indictment was sufficient to allege common law misdemeanor obstruction of justice based on a scheme to pay court costs and

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1. At common law, obstruction of justice was a misdemeanor. *State v. Preston*, 73 N.C. App. 174, 175, 325 S.E.2d 686, 688 (1985). N.C. Gen. Stat. § 14-3(b) provides, however, "a misdemeanor offense as to which no specific punishment is prescribed to be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony." N.C. Gen. Stat. § 14-3(b) (2023). Here, the State proceeded on a felony indictment alleging Defendant acted with deceit or intent to defraud.

fine for a person impersonating a defendant to hide the real defendant's identity but failed to include allegations sufficient to support the felony charge); *Mitchell*, 259 N.C. App. at 876-77, 817 S.E.2d at 462 (sending falsified letters purporting to be defendant's victim recanting prior statements and making bomb threats to courthouses).

In addition to impeding criminal investigations and judicial proceedings, common law obstruction of justice has also been applied in the civil context. For example, in *Burgess v. Busby*, this Court held a complaint alleged a claim for common law obstruction of justice based on allegations "(1) defendant alerted health care providers to the names of the jurors in retaliation for their verdict; (2) this retaliation was designed to harass plaintiffs; and (3) defendant's conduct was meant to obstruct the administration of justice in Rowan County." 142 N.C. App. 393, 409, 544 S.E.2d 4, 13 (2001). Similarly, in *Grant v. High Point Regional Health System*, we also held a complaint stated a civil common law obstruction of justice claim, where medical defendants destroyed documents after being placed on notice of a potential malpractice claim based on allegations defendants "obstructed, impeded and hindered public or legal justice [ ] in that the failure of . . . Defendant . . . to preserve, keep and maintain the x-ray film described above has effectively precluded . . . Plaintiff from being able to successfully prosecute a medical malpractice action against . . . Defendant . . . and others." 184 N.C. App. 250, 255, 645 S.E.2d 851, 855 (2007). This was true even though no investigation or lawsuit was actually pending. *Id.* at 256-57, 645 S.E.2d at 856.

As the State aptly notes, obstruction of justice is not limited to just criminal and civil judicial proceedings. For example, in *State v. Wright*, the defendant, a member of the North Carolina House of Representatives, was convicted of common law obstruction of justice based on his failure to disclose contributions and transfers from his campaign accounts to his personal accounts to the State Board of Elections in violation of campaign finance disclosure laws. 206 N.C. App. 239, 240, 696 S.E.2d 832, 834 (2010). This Court held the defendant's false reports "deliberately hindered the ability of the SBOE and the public to investigate and uncover information to which they were entitled by law: whether defendant was complying with campaign finance laws, the sources of his contributions, and the nature of his expenditures. Further, his false reports concealed illegal campaign activity from public exposure and possible investigation." *Id.* at 243, 696 S.E.2d at 835-36. Additionally, the court in *Wright* relied on our Supreme Court's precedent holding "that '[w]here, as alleged here, a party deliberately destroys, alters or creates a false document *to subvert an adverse party's investigation* of his right to

seek a legal remedy,' a claim for obstruction of justice arises." *Id*. at 242, 696 S.E.2d at 835 (quoting *Henry v. Deen*, 310 N.C. 75, 88, 310 S.E.2d 326, 334-35 (1984)) (emphasis added). Central to the analysis in *Wright* was that the State Board of Elections had a statutory obligation to investigate campaign finance reports. *Id*. at 243, 696 S.E.2d at 836. "Thus, when defendant filed his reports with the SBOE, he knew that his misinformation was blocking the SBOE and the public from uncovering and further investigating any improper campaign activity[.]" *Id*.

Our case law in both the civil and criminal contexts also makes clear, however, that not every misstatement or fabrication arises to an act obstructing, impeding or hindering public or legal justice. For example, in *State v. Eastman*, this Court acknowledged:

> At common law, it is an obstruction of justice to suppress, fabricate, or destroy physical evidence. *Wharton's Criminal Law* § 588 (14th ed. 1981). *Wharton* illustrates the elements of the crime by citing various states' statutory definitions. All these statutes reflect the common law principal that when a person, "believing that an official proceeding is pending or about to be instituted and acting without legal right or authority . . . alters, destroys, conceals, or removes any record, document, or thing with purpose to impair its veracity or availability in such proceeding," he is guilty of obstruction of justice. *Wharton*, *supra*, quoting Colo.Rev.Stat. § 18-8-610(1) and Conn.Gen. Stat.Ann. § 53a-155(a).

113 N.C. App. 347, 353, 438 S.E.2d 460, 463 (1994). There, we held there was insufficient evidence the defendant had intentionally destroyed documents detailing an alleged sexual assault at a school or that the documents had been destroyed prior to an SBI investigation "in order to obstruct a criminal investigation[.]" *Id*. at 353, 438 S.E.2d at 464. In the civil context, we have likewise observed: "Simply put, we are not aware of any authority establishing that a mere witness . . . could be held liable for common law obstruction of justice on the basis of a failure to provide an accurate report or a failure to correct an allegedly inaccurate report requested by a party to litigation." *Blackburn v. Carbone*, 208 N.C. App. 519, 529, 703 S.E.2d 788, 796 (2010). We further determined summary judgment for the defendant was proper where:

> Plaintiff has neither alleged nor forecast any factual basis for believing that the alleged error in the report that [the defendant] provided to Plaintiff's counsel or any failure

> on the part of [the defendant] to correct that error at the request of Plaintiff's counsel represented an intentional act on the part of [the defendant] *undertaken for the purpose of deliberately obstructing, impeding or hindering* the prosecution of Plaintiff's automobile accident case.

Id. (emphasis added).

The consistent and clear teaching of these cases is that for an act to meet the elements of obstruction of justice—that is, an "act which prevents, obstructs, impedes or hinders public or legal justice"—the act—even one done intentionally, knowingly, or fraudulently—must nevertheless be one that is done for the purpose of hindering or impeding a judicial or official proceeding or investigation or potential investigation, which might lead to a judicial or official proceeding. *Cf. Eastman*, 113 N.C. App. at 353-54, 438 S.E.2d at 463-64 (where documentary evidence of sexual assault was discarded or destroyed, evidence was insufficient to show obstruction of justice where evidence did not support finding defendant acted to subvert an SBI investigation).

Here, the indictments allege Defendant willfully and knowingly provided false and misleading information in training records knowing those records would be submitted to the North Carolina Sheriffs' Education and Training Standards Division for the purpose of allowing Sheriff Wilkins and Chief Deputy Boyd to maintain their law enforcement certification. While these alleged actions are wrongful, there are no facts asserted in the indictment to support the assertion Defendant's actions were done to subvert a potential subsequent investigation or legal proceeding.[2] For example, there is no indication in the indictment that Defendant acted purposely to hinder any investigation by the Education and Training Standards Division or to attempt to impair their ability to seek any injunctive relief against Sheriff Wilkins or Chief Deputy Boyd under N.C. Gen. Stat. § 17C-11(c). To the contrary, the indictments assert Defendant's acts were allegedly done for the sole purpose of allowing his supervisors to maintain their certifications.

As such, the indictments in this case fail to allege facts supporting an element of the offense: that Defendant obstructed justice defined as an act obstructing, impeding or hindering public or legal justice. *Kivett*, 309 N.C. at 670, 309 S.E.2d at 462; N.C. Gen. Stat. § 15A-924(a)(5) (2023). "A criminal pleading . . . is fatally defective if it 'fails to state some

2. This is also not to suggest Defendant's actions might not constitute some other offense under our common or statutory law. We do not decide that issue here.

essential and necessary element of the offense of which the defendant is found guilty.' " *State v. Brice*, 370 N.C. 244, 249, 806 S.E.2d 32, 36 (2017) (quoting *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (citations omitted)).

Thus, here, the indictments were insufficient by failing to state an essential and necessary element of the offense of common law obstruction of justice. Therefore, the indictments were fatally defective. Consequently, the trial court erred in denying Defendant's Motion to Dismiss the indictments in this case.[3]

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court's Judgments.[4]

VACATED.

Chief Judge DILLON concurs in separate opinion.

Judge STADING joins in the concurring opinion.

DILLON, Chief Judge, concurring.

I fully concur with the majority opinion. The actions of Defendant as alleged and proven do not constitute obstructions of justice. I write separately to note that Defendant's actions *may have* constituted another crime recognized under England's common law, such as "misconduct in public office." *See Clayton v. Willis*, 489 So.2d 813, 818 (1986) (Florida court recognizing "misconduct in public office" as an offense under the common law of England); *People v. Thomas*, 475 N.W.2d 288, 293 (1991) (defining common law misconduct in office as "corrupt behavior by an

3. As an additional matter, it is unclear whether the Judgments could stand with respect to the charges based on falsifying records as they relate to Sheriff Wilkins. The article establishing the Commission explicitly states: "Nothing in this Article shall apply to the sheriff elected by the people." N.C. Gen. Stat. § 17E-11(a) (2023). Further, at trial, the director of the Commission testified the Commission does not have the authority to revoke a sheriff's law enforcement certification. Thus, it is not clear Defendant could have obstructed justice by falsely verifying Sheriff Wilkins' qualifications.

4. Because of our determination on this issue, we do not reach the remaining issues asserted by Defendant in his briefing to this Court.

officer in the exercise of the duties of his office") (Michigan Supreme Court Justice concurring, contrasting common law misconduct in office with common law obstruction of justice). It may be that the common law offense has been abrogated by N.C. Gen. Stat. § 14-232, which is part Article 31 of Chapter 14, entitled "Misconduct in Public Office," and which makes it a misdemeanor for any "county officer" from "willfully swear[ing] falsely to any report or statement required by law to be made or filed, concerning or touching the county[.]" In any event, the indictments in the present case fail to allege that Defendant is a public officer or that he "swore" to any false information that he may have provided.

STATE OF NORTH CAROLINA
v.
DAVID NEAL COX

No. COA23-260

Filed 20 February 2024

1. **Evidence—prior bad acts—prosecution for sexual offenses with a child—inappropriate behavior toward victim's cousin—plain error analysis**

   In a prosecution for multiple sexual offenses with a child, where defendant was accused of sexually abusing his minor stepdaughter over a span of five years, the trial court did not commit plain error by failing to exclude testimony from the victim's cousin, who described two incidents where, when she was fourteen years old, defendant moved her clothing aside to comment on her "nice tan line." Even if the cousin's testimony had been inadmissible under Evidence Rule 404(b)(on the ground that the incidents she described were not sufficiently similar to the conduct alleged in the case), because of the substantial evidence of defendant's guilt—including the victim's detailed testimony regarding the alleged abuse and the corroborative testimonies of other witnesses—defendant could not show that the jury probably would have reached a different verdict had the cousin's testimony been excluded.

2. **Evidence—expert witness—qualification—areas not stipulated to by defendant—no improper opinion expressed by court**

   In a prosecution for multiple sexual offenses with a child, where the State tendered a witness as an expert in multiple areas—including

how to interpret interviews of children who are suspected victims of sexual abuse, delayed reporting of sexual abuse, and what constitutes grooming—but where defendant stipulated to the witness being an expert solely in forensic interviewing, the trial court did not express an impermissible opinion to the jury when it qualified the witness as an expert in forensic interviewing and all of the other areas that the State had listed. Firstly, the court, in its gatekeeping role, was making an ordinary ruling during the course of the trial and had discretion to qualify the expert in any of the areas defendant did not stipulate to. Secondly, while the expert was qualified in areas relevant to the case, her expertise did not determine the ultimate question for the jury—whether defendant had sexually abused his minor stepdaughter. In fact, the expert's testimony—which did not include opinions regarding the victim's credibility or whether she was abused—demonstrated that its purpose was to give the jury context for evaluating the victim's account in the case, not to suggest what the jury should find.

3. Evidence—expert witness—general testimony—concepts relevant to the case

In a prosecution for multiple sexual offenses with a child, the trial court did not commit plain error by allowing the State's expert to testify generally about the clinical meaning of the term "grooming," common grooming practices, and delayed reporting of abuse rather than apply her expertise to the specific facts of the case. The expert testified about concepts that were relevant to the case and gave the jury necessary information to evaluate the other testimony offered at trial, especially given how the victim repeatedly described defendant's abusive behaviors toward her as "grooming" and how defense counsel cross-examined the victim regarding her delay in reporting defendant.

4. Criminal Law—defense counsel—closing argument—mention of possible punishment—improper framing

In a prosecution for multiple sexual offenses with a child, the trial court did not abuse its discretion in sustaining the State's objection when defense counsel told the jury during closing argument that a conviction on any of defendant's charges would "practically be a life sentence." Rather than inform the jury of the precise statutory sentence ranges associated with each charge, defense counsel framed defendant's potential punishment in terms of how severe its overall impact on defendant would be in an attempt to sway the jury's sympathies. In doing so, defense counsel improperly asked

the jury to consider the potential punishment as part of its substantive deliberations.

Appeal by Defendant from Judgments rendered 15 July 2022 by Judge L. Lamont Wiggins in Edgecombe County Superior Court. Heard in the Court of Appeals 29 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara S. Zmuda, for the State.

Thomas, Ferguson & Beskind, LLP, by Kellie Mannette, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

David Cox (Defendant) appeals from Judgments rendered upon convictions for three counts of statutory sex offense with a child under 15, five counts of sex offense by a parent, and two counts of statutory sex offense with a child by an adult. The Record before us, including evidence presented at trial, shows the following:

The alleged victim in this case is Margaret.[1] Defendant moved in with Margaret's mother in 2007. They married in 2008. At that time, Margaret was eight years old, and her four siblings also resided in the house. At trial, Margaret testified Defendant sexually abused her on numerous occasions between 2011 and 2016, when she was between the ages of eleven and sixteen years old. According to Margaret, when she was sixteen years old and began dating, Defendant stopped sexually abusing her, but he continued to molest and grope her until she was 19. Throughout this time, Margaret did not report the abuse to anyone.

Margaret's grandmother testified she was suspicious of Defendant's behavior when Margaret was young based on her observations of Defendant with Margaret at the grandmother's pool. After observing Defendant forcibly kiss Margaret several times, her grandmother privately brought up the incident and asked her if everything was alright. Margaret responded that everything was alright.

At trial, Margaret testified she first reported Defendant's abuse after witnessing what she believed was grooming behavior by Defendant

1. A pseudonym chosen by the parties pursuant to N.C. R. App. P. 42(b).

toward Defendant's granddaughter who was three or four years old at the time. At that point, it had been eight years since Defendant's abuse began. Margaret testified she first disclosed Defendant's abuse to her grandmother, grandfather, and then-boyfriend. Margaret's grandmother then called the police. The following day, Margaret reported the abuse to her mother. To corroborate her account, Margaret then showed her mother where Defendant kept a penis pump and lubricant, which only he and Margaret knew about.

On 26 September 2019, Defendant was indicted for three counts of statutory sex offense with a child under fifteen, five counts of sex offense by a parent, and two counts of statutory sex offense with a child by an adult. Defendant's trial began 11 July 2022. In addition to Margaret's testimony, Margaret's cousin, Reagan,[2] testified about two prior encounters she had with Defendant. According to Reagan, when she was approximately fourteen years old, Defendant had stopped her from going up the stairs at Margaret's house. Defendant then moved her tank top and told Reagan she had a "nice tan line." Reagan did not report this incident at the time. A few months later, Reagan was swimming at Margaret's grandmother's house and was wearing a two-piece bathing suit. Reagan testified she was on her way to the bathroom when Defendant blocked her from entering. Defendant then moved Reagan's swimsuit bottom to a point where she felt uncomfortable and again commented she had a "nice tan line." According to Reagan's testimony, she reported this incident and the previous one to her parents later that day.

The State presented Beth Bruder Dagenhart, the Children's Advocacy Center Program Director at Southmountain Children and Family Services, as an expert witness. The State asked to tender Dagenhart as an expert in the following fields:

> "[i]nterpretations of interviews of children who are suspected victims of sexual abuse. Profiles of sexually abused children. . . delayed reporting or delayed disclosure. What those reasons are based on her knowledge, training, and experience for a delay in disclosure. . . Denials of sexual abuse. And then finally common grooming practices, what constitutes grooming, and common grooming practices employed by child abusers.

Defendant responded, "That's a complicated tender but we will go ahead and stipulate, Your Honor, to her being an expert in forensic

2. A pseudonym chosen by the parties.

interviewing." The trial court then ordered the witness tendered "in the areas as stated by counsel for the State and upon stipulation of the defendant." Dagenhart's testimony explained generally what constitutes grooming, common grooming practices, denials of abuse, triggering events for disclosure, and delayed disclosure. Dagenhart did not testify about Margaret or offer any opinion about the present case.

On 15 July 2022, the jury returned verdicts finding Defendant guilty on all counts. The trial court sentenced Defendant to 1176 to 1471 months of imprisonment. Defendant gave oral Notice of Appeal in open court.

Appellate Jurisdiction

The trial court rendered Judgment and sentenced Defendant on 15 July 2022. The Record also reflects written Judgments signed by the trial court on 15 July 2022, but these Judgments are neither file-stamped nor certified by the Clerk. Rule 4 of the North Carolina Rules of Appellate Procedure provides appeal from a judgment *rendered* in a criminal case must be given either orally at trial or by filing written notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of judgment. N.C. R. App. P. 4 (2023). Here, the Record reflects the written Judgments were signed by Judge L. Lamont Wiggins on 15 July 2022, and Defendant gave oral Notice of Appeal in open court on 15 July 2022. There is no dispute between the parties that Judgments were in fact entered and Defendant's oral Notice of Appeal was timely. Therefore, this Court has appellate jurisdiction over this appeal.[3]

Issues Presented

The issues are whether the trial court (I) plainly erred by failing to exclude evidence of Defendant's prior conduct; (II) expressed an impermissible opinion in its qualification of Dagenhart as an expert witness; (III) plainly erred by admitting Dagenhart's expert testimony; and (IV) erred by precluding defense counsel from arguing the possible penalty Defendant faced if convicted.

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3. Nevertheless, we urge all parties in future to comply with Rule 9(b)(3) of the North Carolina Rules of Appellate Procedure, which provides: "Every pleading, motion, affidavit, or other document included in the printed record should show the date on which it was filed and, if verified, the date of verification and the person who verified it. Every judgment, order, or other determination should show the date on which it was entered." N.C. R. App. P. 9(b)(3) (2023).

Analysis

I. Evidence of Prior Acts

[1] Defendant contends the trial court committed plain error by failing to exclude Reagan's testimony under Rule 404(b) because the incidents Reagan described were not sufficiently similar to the conduct alleged in this case. Because Defendant did not object to the challenged testimony at trial, our review is limited to plain error. N.C. R. App. P. 10(a)(4) (2023) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

"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). Further, "[t]o 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.* (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)). Thus, plain error is reserved for "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 . . . 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[.]' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original).

Here, even if we were to assume without deciding the trial court's admission of evidence regarding Defendant's prior conduct was error, in light of the substantial evidence of Defendant's guilt, Defendant failed to establish the jury would probably have reached a different result had the evidence not been admitted. Thus, any such error would not amount to plain error.

In this case, it was undisputed Defendant was Margaret's stepfather, they were not married, Defendant was in a parental role with respect to Margaret, and they lived in the same home at all relevant times in this case. Thus, the only element in dispute for each charge was the sexual act. At trial, Margaret testified with specificity about multiple instances of sexual abuse by Defendant from the time she was eleven to sixteen years old. Margaret's testimony recounted specific details about the time, place, and manner in which Defendant abused her.

Further, several witnesses corroborated Margaret's testimony, including Margaret's grandmother and boyfriend, both of whom offered specific instances of concerning behavior Defendant exhibited toward Margaret. Finally, Margaret recounted revealing Defendant's penis pump and lubricant hidden beneath a ceiling tile in the bathroom to her mother, which she testified only she and Defendant knew about. This too corroborated her testimony. Based on this substantial evidence, we cannot conclude the jury would have probably reached a different result absent the challenged testimony. As such, Defendant has failed to meet his burden under the plain error standard. Consequently, the trial court did not commit plain error by failing to exclude the challenged evidence in the absence of an objection by Defendant.

II. Expert Witness Qualification

[2] Defendant contends the trial court erred by expressing an impermissible opinion during its qualification of Dagenhart as an expert witness. "The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2023). Further, "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. § 15A-1232 (2023). "In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *State v. Jones*, 347 N.C. 193, 207, 491 S.E.2d 641, 649 (1997) (quoting *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995)). "[A] trial court generally is not impermissibly expressing an opinion when it makes ordinary rulings during the course of the trial." *State v. Jones*, 358 N.C. 330, 355, 595 S.E.2d 124, 140 (2004) (citation omitted). Additionally, "[t]rial courts act as a gatekeeper in determining admissibility of expert testimony[.]" *State v. Walston*, 369 N.C. 547, 551, 798 S.E.2d 741, 745 (2017).

Here, the State questioned Dagenhart regarding her background and qualifications before tendering her as an expert witness. The State offered Dagenhart as an expert in interpretation of interviews of children who are suspected victims of sexual abuse, profiles of sexually abused children, delayed reporting or delayed disclosure, denials of sexual abuse, common grooming practices, and what constitutes grooming. Defense counsel responded: "That's a complicated tender but we will go ahead and stipulate, Your Honor, to her being an expert in forensic interviewing." The trial court ordered the witness "tendered in the areas as stated by counsel for the State and upon stipulation of the defendant."

Contrary to the State's assertion, Defendant did not stipulate to Dagenhart's qualification as an expert in the full list of areas recited by the State. Defendant specified he stipulated only to Dagenhart's expertise in forensic interviewing. However, the trial court was still within its discretion to qualify Dagenhart as an expert in the remaining areas listed by the State. *See State v. King*, 366 N.C. 68, 74-75, 733 S.E.2d 535, 539-40 (2012). Still, the trial court made an ordinary ruling in the course of the trial in its gatekeeping role. *Walston*, 369 N.C. at 551, 798 S.E.2d at 745. The trial court made no extraneous statements or comments with respect to Dagenhart's qualifications.

We have distinguished between cases in which the defendant is herself qualified as an expert in the jury's presence, *Galloway v. Lawrence*, 266 N.C. 245, 250-51, 145 S.E.2d 861, 865-66 (1966), from cases in which the person tendered as an expert was not the defendant and the expert's testimony did not address the ultimate question to be decided by the factfinder. *In re Lee*, 69 N.C. App. 277, 289-91, 317 S.E.2d 75, 82-83 (1984). Here, Dagenhart was qualified in areas relevant to the case, but her expertise did not determine the ultimate question for the jury—whether Defendant had abused Margaret. Further, Dagenhart never testified as to her opinion on Margaret's credibility or whether Margaret had been abused. In fact, the State clarified at the outset of its direct examination of Dagenhart that she had not spoken with Margaret.

> [Counsel for the State]: Now, Ms. Dagenhart, this is a case where you didn't do a forensic interview in this case; is that correct?
>
> [Dagenhart]: That's correct.
>
> [Counsel for the State]: And you've never interviewed [Margaret] or talked to her or anything about this; right?
>
> [Dagenhart]: No. I have not.

This exchange underscores the purpose of Dagenhart's testimony was provided to give the jury context to understand and evaluate Margaret's account, not to suggest what the jury should find. Thus, the trial court did not express an impermissible opinion by qualifying the expert witness in the areas listed by the State. Accordingly, we conclude the trial court did not err.

III. Admission of Expert Witness Testimony

[3] Defendant contends the trial court plainly erred by allowing Dagenhart to testify generally rather than applying her expertise to the

facts of the case. The admission of expert testimony is governed by N.C. Gen. Stat. § 8C-1, Rule 702. In 2011, our General Assembly amended Rule 702(a) to mirror Federal Rule of Evidence 702(a) as amended at that time. *State v. Hunt*, 250 N.C. App. 238, 244, 792 S.E.2d 552, 558 (2016). "It follows that the meaning of North Carolina's Rule 702(a) now mirrors that of the amended federal rule." *Id.* (quoting *State v. McGrady*, 368 N.C. 880, 884, 787 S.E.2d 1, 5 (2016)). "And when the General Assembly adopts language or statutes from another jurisdiction, 'constructions placed on such language or statutes are presumed to be adopted as well.' " *McGrady*, 368 N.C. at 887, 787 S.E.2d at 7 (quoting *Sheffield v. Consol. Foods Corp.*, 302 N.C. 403, 427, 276 S.E.2d 422, 437 (1981)).

Rule 702(a) provides:

> 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) (2023). Federal and state jurisdictions alike allow an expert to testify generally. On this issue, the 2000 Advisory Committee Notes to Federal Rule of Evidence 702 state:

> Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. . . The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

Fed. R. Evid. 702 (2000 Advisory Committee Notes).

Here, the expert witness Dagenhart testified generally about the clinical meaning of the term "grooming" in the abuse process, delayed reporting of abuse, and common grooming practices, all of which were relevant to the jury's understanding of issues in the case. Under the above criteria in the 2000 Advisory Committee Notes, Dagenhart's general testimony on each of these issues was appropriate to give the jury necessary information to understand the testimony and evaluate it. First, Dagenhart was qualified by the trial court as an expert in grooming practices, delayed reporting, and forensic interviewing, among other things. These areas are outside of common knowledge, thus expertise can assist the factfinder. Based on the Record before us, there is no evidence Dagenhart's testimony was not reliable. Moreover, the Defendant did not object or call into question Dagenhart's testimony at trial. Finally, Dagenhart's testimony clearly fits the facts of the case. During the State's case in chief, Margaret repeatedly used the term "grooming" to describe Defendant's abusive behaviors toward her and identified specific behaviors she believed were grooming. She further testified she had learned about the term grooming and how to identify potential grooming when she was training to be a lifeguard, and that knowledge had helped her understand Defendant's abuse. Defendant questioned Margaret on cross-examination regarding her delay in disclosing the abuse. Thus, Dagenhart's testimony explained important general concepts of abuse to the jury that were relevant to the case. Therefore, consistent with Federal Rule of Evidence 702, Dagenhart's general testimony was admissible under N.C. Rule of Evidence 702(a). Consequently, the trial court did not err by admitting Dagenhart's testimony.

IV. Possible Penalty Argument

[4] Defendant argues the trial court erred by sustaining the State's objection to defense counsel stating a guilty verdict on any of the charges would be a life sentence for Defendant during closing argument. "Ordinarily, the control of jury arguments is left to the sound discretion of the trial court and the trial court's rulings thereon will not be disturbed on appeal absent a showing of abuse of discretion." *State v. Jones*, 339 N.C. 114, 158-59, 451 S.E.2d 826, 850 (1994), *cert. denied*, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873 (1995) (citations omitted). Abuse of discretion may be found "only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Jones*, 347 N.C. at 213, 491 S.E.2d at 653 (citation omitted).

"In jury trials the whole case as well of law as of fact may be argued to the jury." N.C. Gen. Stat. § 7A-97 (2023). Our Supreme Court has interpreted this provision to mean "[c]ounsel may. . . read or state

to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged." *State v. Lopez*, 363 N.C. 535, 539, 681 S.E.2d 271, 274 (2009) (quoting *State v. Britt*, 285 N.C. 256, 273, 204 S.E.2d 817, 829 (1974)). However, counsel may not do so in a way that asks the jury "to consider the punishment as part of its substantive deliberations[.]" *State v. Wilson*, 293 N.C. 47, 57, 235 S.E.2d 219, 225 (1977). These rules "are meant to assure that the evidence a jury hears and considers is reliable." *Lopez*, 363 N.C. at 541, 681 S.E.2d at 275.

Here, during closing argument, defense counsel told the jury "conviction of any of these charges will practically be a life sentence. . . You know, the judge can't give probation. These sentences are all—[.]" At that point, the State objected, and the trial court sustained the objection and struck the argument. Unlike the cases above and those relied on in the parties' briefs, in this case defense counsel did not read the statute nor attempt to give a precise sentence range for each offense for which Defendant was charged. In fact, defense counsel did not frame the potential punishment in terms of years, but rather in terms of its impact on Defendant—that, based on Defendant's age, a conviction on any of the charges would effectively mean he would spend the rest of his life in prison.

Rather than merely informing the jury of the statutory penalties associated with the charges, defense counsel implied Defendant should not be convicted because the punishment would be severe—in other words, "counsel was asking the jury to consider the punishment as part of its substantive deliberations and this he may not do." *Wilson*, 293 N.C. at 57, 235 S.E.2d at 225. Thus, defense counsel's statement improperly commented upon the statutory punishment to sway the jury's sympathies in its substantive deliberations. Therefore, the trial court did not abuse its discretion by sustaining the State's objection to the statement.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial.

NO ERROR.

Judges ARROWOOD and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
ALKEEM HAIR, DEFENDANT

No. COA22-987

Filed 20 February 2024

1. Jury—request for transcript of witness testimony—trial court's discretion

In defendant's murder and robbery trial, the trial court did not abuse its discretion by denying the jury's request to review transcripts of witness testimony without asking for more details about the request. The trial court complied with the requirements in N.C.G.S. § 15A-1233(a) by conducting all the jurors into the courtroom and exercising its discretion to consider and deny the request, as evidenced by the court's explanation to the jury of the reason for the denial.

2. Criminal Law—joinder—murder and robbery—witness intimidation—transactional connection—discretionary decision

The trial court did not abuse its discretion by granting the State's motion to join defendant's charges for murder and robbery with a witness intimidation charge based on multiple factors, including that, despite defendant's argument that the intimidation charge was not transactionally related to the murder and robbery charges, defendant assaulted the witness because he knew the witness was likely to testify against him on those charges and he was trying to prevent him from doing so. Further, evidence of the intimidation would have been admissible in the murder and robbery trial, and vice versa, if the charges had been tried separately. Similarly, the trial court did not abuse its discretion by denying defendant's motions to sever the charges where defendant failed to demonstrate that severance was required for a fair determination of his guilt or innocence of each offense.

3. Evidence—hearsay—murder and robbery trial—cell phone records—geo-tracking data—no plain error

There was no plain error in defendant's trial for first-degree murder and robbery with a dangerous weapon by the admission of cell phone records and geo-tracking evidence—which defendant contended did not fall within an applicable hearsay exception—where there was other evidence from two different witnesses linking defendant to the murder and robbery of the victim.

Appeal by defendant from judgment entered 24 March 2022 by Judge Claire V. Hill in Superior Court, Cumberland County. Heard in the Court of Appeals 9 May 2023.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for defendant-appellant.

STROUD, Judge.

Defendant appeals from a judgment for first-degree murder, robbery with a dangerous weapon, and intimidating a witness. Defendant alleges (1) the trial court abused its discretion in denying a jury request to review the trial transcript; (2) the trial court abused its discretion in joining the witness intimidation charge with his other two offenses; and (3) the trial court plainly erred in admitting cell phone and geo-tracking data evidence without proper authentication. We conclude there was no error.

I. Background

The State's evidence tended to show that on 16 July 2018, Ms. McArthur was outside when she heard gunshots. Ms. McArthur saw two men outside her daughter's house: Defendant, whom she had seen at her daughter's house before, and another man, Mr. McIver. Ms. McArthur saw Defendant going in and out of her daughter's house, wrapping something in a bandana, and Mr. McIver standing in the yard. Ms. McArthur heard Defendant tell Mr. McIver to "hurry up" because he thought she would call the police. Ms. McArthur then saw the men get into a white Charger driven by Mr. Johnson.

Ms. McArthur found her daughter dead on the sidewalk. Ms. McArthur knew her daughter sold drugs and kept marijuana in a glass mason jar, a plastic bag, and a little black and white purse. Ms. McArthur went into her daughter's house and took the plastic bag and the black and white purse containing drugs. Ms. McArthur also looked for, but did not see, her daughter's new iPhone bought two weeks earlier.

On 6 August 2019, Defendant was indicted for first-degree murder and robbery with a dangerous weapon. On 9 July 2021, Defendant and Mr. Johnson were both in custody and being transported. Mr. Johnson was in handcuffs and leg irons, but Defendant did not have handcuffs.

Defendant hit Mr. Johnson once in the jaw. When Defendant was questioned about hitting Mr. Johnson, he answered, "that's my co-defendant. He trying to testify on me and give me life in prison." On 11 October 2021, a superseding indictment combined a witness intimidation charge with the murder and robbery charges.[1]

Thereafter, the State made a motion to consolidate the witness intimidation charge with the murder and robbery charges. Defendant opposed the State's motion and made a motion to sever. The trial court ultimately granted the State's motion to join the charges and denied Defendant's motion to sever. Defendant renewed his motion to sever at the start of and during the trial.

During Defendant's trial, Mr. Johnson testified against Defendant as to all three charges. Mr. Johnson stated he drove Defendant and Mr. McIver to the victim's home to buy marijuana. Mr. Johnson said he heard gunshots about five minutes after Defendant entered the victim's house. Mr. Johnson testified that while in the car he saw Defendant pass a gun and a glass mason jar of marijuana to Mr. McIver. According to Mr. Johnson, after Defendant and Mr. McIver ran out of the victim's home, Mr. Johnson drove them to Defendant's girlfriend's trailer. Further, once at Defendant's girlfriend's trailer, Mr. Johnson shot at a dog with the same gun that Defendant had passed to Mr. McIver. The shell casings from the two shooting scenes matched.

A jury found Defendant guilty of all offenses, and the trial court sentenced him to life imprisonment without the possibility of parole for the robbery and murder charges and 14-26 months for witness intimidation to run at the end of his life sentence. Defendant appeals.

II. Defendant's Arguments

Defendant contends (1) the trial court abused its discretion in denying a jury request to review the trial transcript; (2) the trial court abused its discretion in joining a witness intimidation charge to his remaining offenses; and (3) the trial court plainly erred in admitting cell phone and geo-tracking data evidence that was improperly authenticated. We analyze each of these arguments in turn.

A. Jury Request to Review the Trial Transcript

[1] During deliberations, the jury asked for transcripts of testimony from the case. The trial court denied the request. Defendant contends

1. Ultimately, Mr. Johnson was not Defendant's co-defendant at trial as he pled guilty to accessory after the fact to first-degree murder and robbery with a dangerous weapon.

the trial court did not have the "knowledge and understanding of the material circumstances surrounding the jury's request" as the trial court did not ask which witness the jury was concerned about nor how long it would take to produce the transcript. Defendant further contends the trial court failed to realize how important the testimony may have been to the jury because there was only testimony from two witnesses.

Defendant provides no case law to support any specific requirement for the trial court to ask about details or the importance of the jury's request before deciding how to rule on the jury's request. Indeed, "[a] trial court's ruling in response to a request by the jury to review testimony or other evidence is a discretionary decision, ordinarily reviewable only for an abuse thereof." *State v. Long*, 196 N.C. App. 22, 27, 674 S.E.2d 696, 699 (2009) (citation omitted). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Walters*, 209 N.C. App. 158, 163, 703 S.E.2d 493, 496 (2011) (citation omitted).

North Carolina General Statute Section 15A-1233(a) sets the procedure for the trial court's handling of requests from the jury to review "certain testimony or other evidence." N.C. Gen. Stat. § 15A-1233(a) (2021). Section 15A-1233(a) states:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

Id.

In *State v. Ashe*, 314 N.C. 28, 33-34, 331 S.E.2d 652, 656 (1985), our Supreme Court summarized the duties of the trial judge when faced with this type of request from the jury:

> This statute imposes two duties upon the trial court when it receives a request from the jury to review evidence. First, the court must conduct all jurors to the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be

> read to or examined by the jury together with other evidence relating to the same factual issue.

Id.

Here, the trial court satisfied both of its duties under North Carolina General Statute Section 15A-1233(a) by bringing all jurors into the courtroom and using its discretion to deny the request. *See* N.C. Gen. Stat. § 15A-1233(a). When the jury made a request to review testimony, the judge brought the jury into the courtroom, answered the request, and explained the reason for her decision by saying:

> The jury has the responsibility of recalling all of the evidence. To begin rehearing particular parts of the testimony would tend to emphasize part of the evidence without it giving equal time to other parts of evidence in this case and for that reason it's best to not have one part of the evidence repeated for you.

We conclude the trial court did not abuse its discretion in denying the request.

B. Consolidation of Charges

[2] Defendant next contends that joining the witness intimidation charge with the murder and robbery charges for trial was improper because the witness intimidation charge is not transactionally related to the robbery or murder charges, and he suffered prejudice because of the joinder and the trial court's denial of his motion to sever.

1. Motion to Join

We review the issue of joinder in two steps. *State v. Montford*, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250 (2000). "First, the two offenses must have some sort of transactional connection. Whether such a connection exists is a question of law, fully reviewable on appeal." *Id.* (citation omitted). If, after *de novo* review, we determine the trial court did not err in finding a transactional connection between the charges, then in the second step we consider whether the trial court abused its discretion in consolidating the charges for trial. *See id.* In this step, we consider "whether the accused can receive a fair hearing on more than one charge at the same trial, i.e., whether consolidation hinders or deprives the accused of his ability to present his defense." *Id.* (citation and quotation marks omitted).

North Carolina General Statute Section 15A-926 allows the trial court to join offenses when they "are based on the same act or transaction

or on a series of acts *or* transactions connected together *or* constituting parts of a single scheme or plan." (emphasis added). N.C. Gen. Stat. § 15A-926(a) (2021). Courts favor consolidation because it "expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once." *State v. Boykin*, 307 N.C. 87, 91-92, 296 S.E.2d 258, 261 (1982). *State v. Montford* identifies four factors a court may consider in deciding whether the charges to be consolidated for trial are transactionally related:

> [S]imilarity of crimes alone is insufficient to create the requisite transactional connection. Rather, consideration must be given to several factors, no one of which is dispositive. These factors include: (1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case.

Montford, 137 N.C. App at 498-99, 529 S.E.2d at 250.

As to the first factor, "the nature of . . . [Defendant's] offense" was allegedly intimidating a witness in his robbery and murder trial. The intimidation was directly linked to the robbery and murder charges and Defendant was aware Mr. Johnson may testify against him on those charges. *Id.* at 498, 529 S.E.2d at 250. On the second factor, the "commonality of [the] facts[,]" the facts of the crimes are different, but Mr. Johnson testified about the robbery and murder and Defendant had assaulted him because Defendant did not want him to provide this testimony. *Id.* at 499, 529 S.E.2d at 250. As to the third factor, "the lapse of time[,]" about two years had elapsed between the initial charges and the intimidation of a witness charge. *Id.* As to the fourth factor, the "unique circumstances of each case[,]" Defendant's own words linked the intimidation of a witness charge to the robbery and murder charges. Defendant stated he struck Mr. Johnson because he believed him to be his co-defendant in the robbery and murder trial who would testify against him. *See id.* Ultimately, we conclude the charges were transactionally related as the intimidating a witness charge is predicated on Defendant's beliefs about his robbery and murder trial.

We must next consider whether the trial court abused its discretion in consolidating the charges for trial. *Id.* at 498, 529 S.E.2d at 250. Defendant contends that "[t]he witness intimidation charge caused the

jury to presume . . . [his] guilt as to the other offenses and gave Mr. Johnson's testimony significantly more weight." However, the evidence of Defendant's intimidation of Mr. Johnson would have been admissible in the murder and robbery trial even if the charges had been separately tried. *See generally State v. Brockett*, 185 N.C. App. 18, 26, 647 S.E.2d 628, 635 (2007) ("Generally, an attempt by a defendant to intimidate a witness to affect the witness's testimony is relevant and admissible to show the defendant's awareness of his guilt.").

In *State v. Brockett*, the State presented evidence of the defendant's statement to his brother about a witness who may testify against him. *See id.* at 26-27, 647 S.E.2d at 635. The

> Defendant told his brother that some things the witness had written "will almost f*** me. man[,]" and that his brother should "smack" the potential witness. Defendant's brother warned him not to "talk greasy on the phone" because their conversation was likely "tapped up." Finally, Defendant and his brother also discussed other individuals who were "trying to talk against" Defendant.

Id. This Court determined the evidence was admissible because the defendant's "suggestion that his brother should 'smack' a certain witness to deter him from testifying tend[ed] to show [the d]efendant's awareness of his guilt and [was] thus relevant and admissible." *Id.* The Court further determined "the probative value of the statements outweighed any prejudicial effect the profane language included on the tape may have had." *Id.* at 27, 647 S.E.2d at 636. Although the defendant's objections in *Brockett* were based on different legal arguments than here, *see id.* at 26, 647 S.E.2d at 635, the admissibility of evidence of threats to a witness regarding his testimony undercuts Defendant's arguments regarding prejudice or an abuse of discretion. The evidence of Defendant's assault upon Mr. Johnson and his own statement about the reason for this assault would have been admissible in his murder and robbery trial even if the intimidation of a witness charge had been tried separately, thus obviating Defendant's rationale for his argument against joinder of the charges for trial. *See generally Brockett*, 185 N.C. App. at 26, 647 S.E.2d at 635.

2. Motion to Sever

Once the charges were joined for trial, Defendant made a motion to sever the charges and the trial court denied this motion. As to Defendant's motion to sever, North Carolina General Statute Section 15A-927 requires the court to grant a severance motion before trial if "it

is found necessary to promote a fair determination of the defendant's guilt or innocence of each offense;" or "[i]f during trial . . . it is found necessary to achieve a fair determination of the defendant's guilt or innocence of each offense." N.C. Gen. Stat. § 15A-927(b) (2021). "The question before the court on a motion to sever is whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial." *State v. Bracey*, 303 N.C. 112, 117, 277 S.E.2d 390, 394 (1981). "The court must determine whether in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense." *Id.* The trial court's ruling on a motion to sever "will be overturned only upon a showing that [it] abused [its] discretion." *Id.* Here, Defendant makes no argument that the case was so complex that the witness intimidation charge made the evidence indistinguishable or that the jury could not intelligently apply the law.

Likewise, Defendant has not demonstrated that severance of the charges would be required for a "fair determination of . . . [his] guilt or innocence of each offense" since evidence of the intimidation would be admissible in a separate trial for the murder and robbery charges, and evidence of the murder and robbery charges would be admissible in a separate trial of the intimidation charges, since Defendant's stated reason for hitting Mr. Johnson was his potential testimony against Defendant on the murder and robbery changes. *See generally Brockett*, 185 N.C. App. at 26, 647 S.E.2d at 635. Thus, for similar reasons as we determined the joinder of charges was not an abuse of discretion, we conclude the trial court did not abuse its discretion in denying Defendant's motions to sever.

C. Hearsay

[3] Finally, Defendant contends the trial court erred in admitting "cell phone records, geo tracking evidence, and Investigator Potter's testimony about the tracking location of [the victim's] cell phone[.]" Specifically, Defendant argues the "State failed to lay any foundation demonstrating the records fell under an applicable hearsay exception."

Defendant admits he didn't object at trial, and thus is subject to plain error review. Under the "plain error rule"

> the defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result. This Court has often noted 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.

State v. Rourke, 143 N.C. App. 672, 675-76, 548 S.E.2d 188, 190 (2001) (emphasis in original) (citations, quotation marks, and alterations omitted).

Even generously assuming the trial court erred by allowing in the cell phone and geo-tracking evidence, Defendant has not shown plain error. *See id.* Ms. McArthur, a witness familiar with Defendant, heard gunshots and saw her daughter deceased on the ground. Ms. McArthur saw Defendant at the scene of the murder, and placing Defendant at the scene of the murder was the main purpose of the cell phone and geo-tracking data. Further, Mr. Johnson testified he drove Defendant to the victim's house, saw Defendant with a gun, and smoked marijuana from a jar that matched Ms. McArthur's description of a jar missing from her daughter's home. In addition, the shell casings at the victim's home and the residence where Defendant shot the dog matched. We conclude the trial court did not commit plain error in allowing the cell phone and geo-tracking evidence.

III. Conclusion

We conclude there was no error.

NO ERROR.

Judges WOOD and GRIFFIN concur.

STATE v. JONES

[292 N.C. App. 493 (2024)]

STATE OF NORTH CAROLINA
v.
MOSE COLEMAN JONES

No. COA23-647

Filed 20 February 2024

1. Constitutional Law—right to counsel—criminal trial—waiver—forfeiture

In defendant's trial for felony fleeing to elude arrest, defendant knowingly and voluntarily waived his right to counsel where, although the record did not contain a signed waiver and certification by the trial court, the transcript showed that while the trial court attempted to conduct the colloquy required by N.C.G.S. § 15A-1242—by asking defendant whether he wanted to waive counsel, addressing the seriousness of the charges and the maximum possible punishment, and informing defendant of the complexity of handling a jury trial and that he would have to comply with any rules of evidence or procedure—defendant refused to answer any questions and instead challenged the trial court's jurisdiction and demanded the trial judge's oath of office. Even assuming the waiver was not voluntary, defendant forfeited his right to counsel by committing serious misconduct, including by using tactics to delay the trial for over two years, being twice found to be in direct criminal contempt, and continuing to frivolously challenge the trial court's jurisdiction.

2. Evidence—expert testimony—defining "sovereign citizen"—no plain error

There was no plain error in defendant's trial for felony fleeing to elude arrest by the admission of expert testimony from a police officer who defined "sovereign citizen" during his testimony. The officer stated that he had received over 1,000 hours of instruction, including training on sovereign citizens, and there was no indication that the admission had a probable impact on the jury's finding that defendant was guilty of the offense.

Appeal by defendant from judgment entered 3 November 2022 by Judge Carla Archie in Davidson County Superior Court. Heard in the Court of Appeals 24 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Jodi P. Carpenter for the State.

Phoebe W. Dee for the defendant-appellant.

TYSON, Judge.

Mose Coleman Jones ("Defendant") appeals from judgment entered upon a jury's verdict of guilty of felony fleeing to elude arrest. Our review discerns no error.

I. Background

Thomasville Police Officer Ryan Amos was routinely patrolling in a marked patrol car while wearing his police uniform. Officer Amos observed Defendant driving a motorcycle and turning onto James Avenue. The motorcycle did not display a license plate.

Officer Amos activated his lights and siren and attempted to conduct a traffic stop. Instead of stopping, Defendant motioned with his hand for Officer Amos to pass him. Officer Amos stayed behind Defendant with his lights and siren activated. Defendant crossed the center line and attempted to speak with Officer Amos about going around him. When Defendant slowed to approximately five to ten miles per hour, Officer Amos rolled his window down and told Defendant to pull over. Defendant repeatedly asserted his "right of a traveler" to Officer Amos, and claimed he was not required to display a license plate.

When Defendant stopped at a stop sign, Officer Amos attempted to exit his patrol car and remove Defendant from the motorcycle. Defendant drove off before Officer Amos could stop him. Officer Jonathan Caldwell joined Officer Amos in pursuit. Officers Caldwell and Amos attempted a rolling roadblock, but Defendant went into the opposite lane of travel to avoid the roadblock. Defendant drove his motorcycle through a residential property on Pineywood Road. Officer Caldwell exited his vehicle and tried to restrain Defendant around his head and neck, but Defendant accelerated the motorcycle and sped off, knocking Officer Caldwell to the ground.

Sergeant Rusty Fritz joined the pursuit while Officer Amos attended to Officer Caldwell. Sergeant Fritz observed Defendant make a right hand turn at too great a speed, lose control, and flip the motorcycle. Following a struggle, officers handcuffed Defendant. Defendant was charged with felony fleeing to elude a law enforcement officer, assault on a law enforcement officer causing physical injury, and possession with intent to sell or deliver a schedule VI-controlled substance. The State dismissed the possession with intent to sell or deliver a schedule VI-controlled substance prior to trial.

Defendant was convicted of felony fleeing to elude arrest and was acquitted of assault on a law enforcement officer causing injury. Defendant was sentenced to an active sentence of 5 to 15 months of imprisonment. Defendant appeals.

II. Jurisdiction

Defendant gave his oral notice of appeal during the sentencing hearing prior to the trial court imposing sentence. Appellate entries were filed, and the Appellate Defender was appointed to represent Defendant on appeal.

Rule 4 of the North Carolina Rules of Appellate Procedure provides that notice of appeal from a criminal action may be taken by: "(1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]" N.C. R. App. P. 4(a). Defendant prematurely entered an oral notice of appeal before entry of the final judgment, in violation of Rule 4 of our Rules of Appellate Procedure. *See State v. Lopez*, 264 N.C. App. 496, 503, 826 S.E.2d 498, 503 (2019). Defendant recognizes this error and has filed a petition for writ of *certiorari*. In the exercise of our discretion, we allow Defendant's petition for writ of *certiorari* to reach the merits of his appeal.

III. Issues

Defendant argues the trial court erred by finding he had waived or forfeited his right to counsel and committed plain error by allowing the State to introduce foundationless expert testimony.

IV. Waiver of Counsel

[1] Defendant argues the trial court erred by finding Defendant had waived his right to counsel. This Court previously articulated two means by which a defendant may lose his right to be represented by counsel: (1) a knowing and voluntary waiver after being fully advised under N.C. Gen. Stat. § 15A-1242; and, (2) forfeiture of the right by serious misconduct in *State v. Blakeney*, 245 N.C. App. 452, 459-61, 782 S.E.2d 88, 93-94 (2016), holding:

> First, a defendant may voluntarily waive the right to be represented by counsel and instead proceed *pro se*. Waiver of the right to counsel and election to proceed *pro se* must be expressed clearly and unequivocally. Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court must determine whether

> the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel. A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242.
>
> . . . .
>
> The second circumstance under which a criminal defendant may no longer have the right to be represented by counsel occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel. Although the right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution, in some situations a defendant may lose this right:
>
> > Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right. A defendant who is abusive toward his attorney may forfeit his right to counsel.

Id. (internal citations, ellipses, alterations, and quotation marks omitted).

This Court in *Blakeney* also describes a third manner, a mixture of waiver and forfeiture, in which a defendant may lose the right to counsel:

> Finally, there is a hybrid situation (waiver by conduct) that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel. Recognizing the difference between forfeiture and waiver by conduct is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a waiver by conduct could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since a waiver

> by conduct requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se*. A defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed *pro se* cannot complain that a court is forfeiting his right to counsel.

Id. at 464-65, 782 S.E.2d at 96 (citation, ellipses, and quotation marks omitted).

A. Standard of Review

This Court "reviews conclusions of law pertaining to a constitutional matter de novo." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citation omitted); *see State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011) ("Prior cases addressing waiver of counsel under N.C. Gen. Stat. § 15A-1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*. We . . . review this ruling *de novo*.") (citations omitted)).

Whether a defendant was entitled to, waived, or forfeited counsel is also reviewed *de novo*. *State v. Poole*, 305 N.C. 308, 318, 289 S.E.2d 335, 341-42 (1982) (citations omitted); *Blakeney*, 245 N.C. App. at 459, 782 S.E.2d at 93.

B. Waiver of Counsel

Both the Constitution of the United States and the North Carolina Constitution expressly recognize criminal defendants have a right to assistance of counsel. U.S. Const. Amend. VI.; N.C. Const. Art I, §§ 19, 23; *see also Powell v. Alabama*, 287 U.S. 45, 66, 77 L. Ed. 158, 169 (1932); *State v. McFadden*, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977) (citations omitted); *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000).

Criminal defendants also have the absolute right to waive counsel, represent themselves, and make trial strategy decisions without the assistance of counsel. *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972).

Before a defendant is allowed to waive counsel, a trial court must conduct a statutorily-required colloquy to determine that "constitutional and statutory safeguards are satisfied." *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (citation omitted). Courts "must determine whether the defendant knowingly, intelligently and voluntarily waives the right to in-court representation by counsel." *Id.* (citation omitted).

The statutory procedure to waive counsel is codified in N.C. Gen. Stat. § 15A-1242 (2023). Courts may only enter an order to allow defendants to waive their right to counsel after being satisfied the movant: (1) has been clearly advised of his rights to the assistance of counsel, including his right to the assignment of appointed counsel when he is so entitled; (2) understands and appreciates the consequences of the decision; and, (3) comprehends the nature of the charges and proceedings and the range of permissible punishments. *Id.* (citation omitted). A "trial court must obtain a written waiver of the right to counsel." *State v. Thomas*, 331 N.C. 671, 675, 417 S.E.2d 473, 476 (1992) (citation omitted).

The record does not contain a signed waiver and certification by the superior court judge, which should provide whether a proper inquiry and disclosure was made to Defendant in compliance with N.C. Gen. Stat. § 15A-1242 (2023). This absence in the record does not *per se* invalidate Defendant's waiver. *See State v. Heatwole*, 344 N.C. 1, 18, 473 S.E.2d 310, 318 (1996) (holding *inter alia* the lack of a written waiver neither alters the conclusion that the waiver was knowing and voluntary, nor invalidates the defendant's waiver of counsel); *State v. Fulp*, 355 N.C. 171, 176, 558 S.E.2d 156, 159 (2002) (re-affirming the holding in *Heatwole* "that a waiver was not invalid simply because there was no written record of the waiver." (citation and internal quotation marks omitted)).

The transcript shows the trial court attempted to conduct a colloquy with Defendant to determine whether he desired or waived his right to counsel. Defendant refused to answer the questions presented to him and instead attempted to challenge the jurisdiction of the court, sought the oath of office for the presiding judge, and he refused to answer other questions regarding his level of education and age.

The trial court attempted to counsel Defendant on the complexity of handling his own jury trial and warned that she, as the judge, would neither offer legal advice to Defendant nor excuse non-compliance with any rules of evidence or procedure.

The transcript also shows the trial court addressed the seriousness of the charges and apprised him of the maximum possible punishment. Defendant clearly waived his right to further court-appointed counsel. *Blakeney*, 245 N.C. App. at 464-65, 782 S.E.2d at 96. Defendant's argument is overruled.

C. Forfeiture of Counsel

Presuming, without deciding, Defendant did not give a knowing and voluntary waiver of his right to counsel, we examine whether Defendant forfeited his right to counsel.

Our Supreme Court has long held "the right to be defended by chosen counsel is not absolute." *McFadden*, 292 N.C. at 612, 234 S.E.2d at 745 (citation omitted). "[A]n indigent defendant does not have the right to have counsel *of his choice* to represent him." *State v. Anderson*, 350 N.C. 152, 167, 513 S.E.2d 296, 305 (1999) (citing *State v. Thacker*, 301 N.C. 348, 351-52, 271 S.E.2d 252, 255 (1980)).

"Forfeiture of counsel is separate from waiver because waiver requires a knowing and intentional relinquishment of a known right[,] whereas forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *State v. Schumann*, 257 N.C. App. 866, 879, 810 S.E.2d 379, 388 (2018) (citation and quotation marks omitted).

This Court has held when a defendant has forfeited their right to counsel, then a "trial court is not required to determine, pursuant to N.C. Gen. Stat. § 15A-1242, that [the] defendant knowingly, understandingly, and voluntarily waived such right before requiring him to proceed *pro se*." *State v. Leyshon*, 211 N.C. App. 511, 518, 710 S.E.2d 282, 288 (2011) (citation omitted).

In *Montgomery*, this Court examined the issue of a criminal defendant forfeiting their right to counsel as an issue of first impression. *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69 ("Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture."). This Court held, *inter alia*, "a defendant who is abusive toward his attorney may forfeit his right to counsel." *Id.* at 525, 530 S.E.2d at 69 (citing *U.S. v. McLeod*, 53 F.3d 322, 325 (11th Cir. 1995)).

This Court further held "[a] forfeiture results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine[ ] to justify a forfeiture of defendant's right to counsel[.]" *Id.* at 524, 530 S.E.2d at 69 (citing LaFave, Israel, & King *Criminal Procedure*, § 11.3(c) at 548 (1999) (quotation marks omitted)). The defendant had been afforded "ample opportunity" to obtain counsel over a period of over a year; had twice fired appointed counsel and had retained a private attorney; had been disruptive in the courtroom, causing the trial to be delayed; had refused to cooperate with his counsel when his counsel was not allowed to withdraw; and, had physically assaulted his counsel. *Id.* at 525, 530 S.E.2d at 69. This Court ultimately held the defendant had forfeited his right to counsel and the trial court did not have to follow the waiver procedures outlined in N.C. Gen. Stat. § 15A-1242. *Id.*

Since the decision in *Montgomery*, this Court has upheld a forfeiture only in "situations involving egregious conduct by a defendant." *See Blakeney*, 245 N.C. App. at 460, 782 S.E.2d at 93. The Supreme Court of North Carolina first examined and recognized a defendant's forfeiture of counsel in *State v. Simpkins*, 373 N.C. 530, 535, 838 S.E.2d 439, 445-46 (2020) ("We have never previously held that a criminal defendant in North Carolina can forfeit the right to counsel."). Our Supreme Court recognized a defendant's forfeiture, holding: "in situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel." *Id.* at 535, 838 S.E.2d at 446.

While the Supreme Court's opinion in *Simpkins* recognized the ability of a criminal defendant to forfeit the right to counsel by "egregious misconduct," the Court held the defendant's conduct under the facts in that case did not rise to a forfeiture. *Id.* at 539, 838 S.E.2d at 448. The defendant did not employ counsel before appearing at trial and put forth "frivolous legal arguments about jurisdiction throughout the proceedings." *Id.* at 540, 838 S.E.2d at 448. The defendant had different counsels representing him previously during the pre-trial proceedings. *Id.*

The trial court did not conduct a colloquy to determine if the defendant was waiving his right to counsel under N.C. Gen. Stat. § 15A-1242. Our Supreme Court held this was error to fail to determine if the defendant desired to waive his right to counsel using the proper procedure and further held, under the facts in *Simpkins*, this defendant did not forfeit his right to counsel at trial. *Id.* at 540, 838 S.E.2d at 449. The record did not lead our Supreme Court to "conclude that h[is] failure to retain counsel was an attempt to delay the proceedings, and certainly not an attempt so egregious as to justify forfeiture of the right to counsel." *Id.*

In 2022, the Supreme Court of North Carolina further examined the forfeiture of counsel in both *State v. Harvin*, 382 N.C. 566, 879 S.E.2d 147 (2022) and *State v. Atwell*, 383 N.C. 437, 881 S.E.2d 124 (2022).

In *Harvin*, our Supreme Court analyzed over two decades of persuasive and consistent Court of Appeals' precedents and found two circumstances where forfeiture of counsel could occur:

> The first category includes a criminal defendant's display of aggressive, profane, or threatening behavior. *See, e.g.*, *id.* at 536-39 (first citing *State v. Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66 (2000) (finding forfeiture where a defendant, *inter alia*, disrupted court proceedings with profanity and assaulted his attorney in court); then citing *State v. Brown*, 239 N.C. App. 510, 519, 768 S.E.2d 896

> (2015) (finding forfeiture where a defendant "refus[ed] to answer whether he wanted assistance of counsel at three separate pretrial hearings [and] repeatedly and vigorously objected to the trial court's authority to proceed"); then citing *State v. Joiner*, 237 N.C. App. 513, 767 S.E.2d 557 (2014) (finding forfeiture where a defendant, *inter alia*, yelled obscenities in court, threatened the trial judge and a law enforcement officer, and otherwise behaved in a belligerent fashion); then citing *United States v. Leggett*, 162 F.3d 237 (3d Cir. 1998) (finding forfeiture where a defendant physically attacked and tried to seriously injure his counsel); and then citing *Gilchrist v. O'Keefe*, 260 F.3d 87 (2d Cir. 2001) (same)). . . .
>
> The second broad type of behavior which can result in a criminal defendant's forfeiture of the constitutional right to counsel is an accused's display of conduct which constitutes a "[s]erious obstruction of the proceedings." *Simpkins*, 373 N.C. at 538. Examples of obstreperous actions which may justify a trial court's determination that a criminal defendant has forfeited the constitutional right to counsel include the alleged offender's refusal to permit a trial court to comply with the mandatory waiver colloquy set forth in N.C.G.S. § 15A-1242, "refus[al] to obtain counsel after multiple opportunities to do so, refus[al] to say whether he or she wishes to proceed with counsel, refus[al] to participate in the proceedings, or [the] continual hir[ing] and fir[ing of] counsel and significantly delay[ing] the proceedings." *Id.* at 538. In *Simpkins*, we further cited the decisions of the Court of Appeals in *Montgomery* and *Brown*, *inter alia*, as additional illustrations of this second mode of misconduct which can result in the forfeiture of counsel.

Id. at 587, 879 S.E.2d at 161.

In *Harvin*, the court had appointed five attorneys to represent Defendant prior to trial. *Id.* at 590, 879 S.E.2d at 163. Two of the defendant's attorneys withdrew due to no fault of the defendant, and two others withdrew as a result of "respective incompatible attorney-client relationships with [the] defendant [and] did so *not* because of [the] defendant's willful tactics of obstruction and delay" but "due to differences related to the *preparation* of [the] [d]efendant's defense" not a "refus[al] to *participate* in preparing a defense." *Id.* (citation omitted).

The defendant in *Harvin*, at a hearing held approximately one month before trial, had indicated his intent to not represent himself at trial. *Id.* at 574, 879 S.E.2d at 154. At a pre-trial hearing held three weeks prior to trial, the defendant's stand-by-counsel stated he was prepared to serve as standby counsel, but counsel was not prepared to assume full representation of the defendant. *Id.* On the morning of trial, the defendant also indicated his intent to not represent himself during a colloquy with the court to comply with N.C. Gen. Stat. § 15A-1242. *Id.* at 575, 879 S.E.2d at 154. The trial court took a recess and attempted to locate any of the prior counsel who could come in to represent him, but none could. *Id.* at 579, 879 S.E.2d at 156.

The Supreme Court of North Carolina held the trial court erred by finding the defendant had forfeited his right to counsel and requiring the defendant to proceed *pro se*. *Id.* at 592, 879 S.E.2d at 164. The Supreme Court further held the defendant's behavior in requesting two of his counsel to be removed, seeking to proceed *pro se*, and then deciding he needed the help of counsel before proceeding at trial, while remaining polite, cooperative, and constructively engaged in the proceedings, was not "the type or level of obstructive and dilatory behavior which [would] allow[ ] the trial court . . . to permissibly conclude that [the] defendant had forfeited the right to counsel." *Id.*

The Supreme Court further examined forfeiture of counsel and applied reasonings from both *Simpkins* and *Harwin* in *State v. Atwell*. During a pretrial hearing, the State had requested the case to proceed, after previously agreeing to a continuance to allow more time for the defendant to hire a private attorney. *Atwell*, 383 N.C. at 448-54, 881 S.E.2d at 132-35. The defendant, appearing *pro se*, told the trial court "she had made payments to a private attorney," but could not afford to continue to make payments and wanted another court-appointed attorney. *Id.* at 440, 881 S.E.2d at 127. The trial court then responded with a history of her firing two prior attorneys, signing four waivers of appointed counsel, and asking why she now wanted another continuance to hire yet another attorney. *Id.*

The trial court, in *Atwell*, did not conduct an N.C. Gen. Stat. § 15A-1242 colloquy and entered an order stating the defendant had forfeited her right to counsel through her delay tactics prior to trial. *Id.* at 454, 881 S.E.2d at 135. The Supreme Court held this was reversible error.

Relying on the analysis of *Harvin*, the Supreme Court of North Carolina held "the record likewise does not permit an inference, much less a legal conclusion, by the trial court or a reviewing court that defendant engage[d] in the type of egregious misconduct that would permit

the trial court to deprive defendant of [her] constitutional right to counsel." *Id.* at 453, 881 S.E.2d at 135 (internal quotation marks omitted). The defendant had not forfeited her right because she had "ongoing, nonfrivolous concerns about her case." *Id.* at 454, 881 S.E.2d at 135. The defendant could not waive her right to counsel without expressing "*the express*[ ] *desire to proceed without counsel*" through the statutory colloquy of N.C. Gen. Stat. § 15A-1242. *Id.*

A defendant may also forfeit their right to counsel by engaging in "serious misconduct." *Blakeney*, 245 N.C. App. at 460, 782 S.E.2d at 93. This Court has recognized forfeiture by misconduct when a defendant (1) engages in "flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys"; (2) employs "offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court"; or (3) "refus[es] to acknowledge the trial court's jurisdiction or participate in the judicial process, or insist[s] on nonsensical and nonexistent legal 'rights.' " *Id.* at 461-62, 782 S.E.2d at 94.

This Court recently examined this issue and held a defendant's conduct before trial and during trial to threaten his attorney with harm, intimidating his attorney and the district attorneys prosecuting the case with filing frivolous bar complaints, and dilatory conduct to delay proceedings constituted both a waiver and forfeiture of counsel. *State v. Moore*, 290 N.C. App. 610, 649, 893 S.E.2d 231, 256 (2023).

Here, Defendant engaged in serious delaying tactics to stall the trial for over two years. Defendant was twice found by the court to be in direct criminal contempt. Defendant continued to frivolously challenge the trial court's jurisdiction over him. Defendant's conduct attempted to delay, disrupt, and obstruct the proceedings. In addition to a waiver, Defendant forfeited his right to counsel. *Id.* Defendant's argument is overruled.

V. Expert Testimony

[2] Defendant argues the trial court committed plain error in admitting the testimony of Officer Amos defining a "sovereign citizen" in violation of Rule 702. N.C. Gen. Stat. § 8B-1, Rule 702 (2023). Defendant failed to object at trial.

A. Standard of Review

"Unpreserved error in criminal cases . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). In order for a defendant to prove plain error, he must show a fundamental error occurred and establish prejudice. *Id.* at 518, 723 S.E.2d at 334.

Defendant bears the burden of showing that the unpreserved error "rises to the level of plain error." *Id.* at 516, 723 S.E.2d at 333. Defendant must show "the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (citations and quotation marks omitted).

B. Analysis

Officer Amos testified he had received over 1,000 hours of instruction including handling alleged sovereign citizens. The State asked Officer Amos to define a sovereign citizen:

> THE STATE: You mentioned sovereign citizen training. What is a sovereign citizen, to your knowledge.
>
> OFFICER AMOS: Brief description is they kind of believe laws don't apply to them. They have an idea that there's another set of laws out there they can abide by.

In the absence of an objection and preservation, Defendant alleges the admission of this testimony constitutes plain error. Presuming error, Defendant has failed to show "the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* Defendant's argument is overruled.

VI. Conclusion

Defendant knowingly and voluntarily waived his right to counsel by his answers and conduct before trial after being repeatedly advised and informed of the consequences of this decision. Defendant's conduct during pre-trial and throughout trial also supports a finding and conclusion he forfeited his right to counsel.

Defendant failed to show the trial court plainly erred in allowing Officer Amos to define "sovereign citizen." Defendant received a fair trial, free from preserved or prejudicial errors. We discern no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges WOOD and STADING concur.

STATE OF NORTH CAROLINA
v.
MITCHELL JOSEPH MARTIN

No. COA23-190

Filed 20 February 2024

1. Assault—motion to dismiss—multiple assault charges—distinct interruption between assaults—sufficiency of evidence

In a prosecution for assault by strangulation inflicting serious bodily injury, assault with a deadly weapon inflicting serious bodily injury, and assault on a female, the trial court properly denied defendant's motion to dismiss, in which he argued that he should have only been charged with one continuous assault instead of three separate ones. The evidence showed that, over a twelve-hour period, defendant assaulted his girlfriend inside their trailer by hitting her in the head with a metal flashlight, punching her under the chin, and strangling her with his hands until she blacked out. All three assaults occurred at different locations inside the trailer and were separated by distinct interruptions of time, with the second assault happening about four hours after the first and the third assault happening about three hours after the second.

2. Assault—with a deadly weapon—serious bodily injury—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of assault with a deadly weapon inflicting serious bodily injury, where the State presented sufficient evidence that defendant's girlfriend suffered a serious bodily injury after defendant hit her in the head with a metal flashlight in their living room. Specifically, the evidence showed that the victim began to feel "woozy" and bleed profusely after defendant hit her with the flashlight; the blood from her head soaked through a t-shirt and heavily stained the carpet where she stood; while speaking to law enforcement hours after the assault, the victim was unsteady on her feet and her forehead was swelling; and the symptoms observed by one of the police officers were severe enough for the officer to send the victim to the hospital for treatment.

3. Assault—by strangulation—nature of injuries—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of assault by strangulation inflicting serious bodily injury,

where the State presented sufficient evidence showing that the victim's physical injuries were caused by strangulation. Notably, the victim—defendant's girlfriend—testified that defendant wrapped his hands around her neck, choked her at least twice, and strangled her until she began losing vision and eventually lost consciousness. Further, law enforcement officers at the scene documented injuries consistent with strangulation (such as throat pain, and bruising around the victim's neck and ears), with one officer testifying that the victim was in so much pain that she could barely open her mouth and had trouble swallowing.

4. Kidnapping—first-degree—confinement—for the purpose of facilitating a felony—assaults—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of first-degree kidnapping where substantial evidence showed that defendant confined, restrained, and removed his girlfriend for the purpose of facilitating two felony assaults. Specifically, the evidence showed that defendant confined his girlfriend to their trailer with the back and front doors "screwed shut" and used both physical violence and threats to keep her inside the trailer, where he hit her with a metal flashlight in the living room, moved her to the bathroom stall and struck her with his fist, and then moved her back to the living room and strangled her.

5. Appeal and Error—ineffective assistance of counsel—criminal case—trial record insufficient to permit appellate review

In an appeal from multiple convictions arising from a domestic violence incident, where defense counsel asked the jury during closing argument to find defendant not guilty of the felony assault and kidnapping charges but to find him guilty of related misdemeanor charges because defendant had "admitted" to committing those crimes, the Court of Appeals declined to address defendant's ineffective assistance of counsel claim and dismissed it without prejudice, because the trial record was not sufficiently developed to permit review of the matter on direct appeal.

6. Criminal Law—prosecutor—opening statement—closing argument—not grossly improper

In a prosecution for multiple crimes arising from a domestic violence incident, the trial court did not err by failing to intervene ex mero motu during the State's opening statement and closing argument, during which the prosecutor spoke passionately but neither disparaged defendant personally nor spoke to matters or events unrelated to the trial.

7. Evidence—prior bad acts—prosecution for assault and kidnapping—prior assaults of same victim—intent, motive, manner, and common scheme

In a prosecution for multiple assault charges, first-degree kidnapping, and other crimes arising from a domestic violence incident, during which defendant used physical force and threats to confine his girlfriend to their trailer and then repeatedly assaulted her, the trial court did not err in admitting—under Evidence Rules 403 and 404(b)—evidence of defendant's alleged prior assaults against his girlfriend. The prior assaults showed a pattern of defendant engaging in violent, threatening, and controlling behavior toward his girlfriend whenever she made him feel jealous or angry; thus, evidence of those assaults was admissible as proof of intent and motive. Further, the prior assaults illustrated the manner and common scheme defendant used to confine and abuse his girlfriend, and they negated any inference that defendant acted in self-defense or that his girlfriend somehow caused her own injuries.

Appeal by Defendant from judgments entered 10 June 2022 by Judge Forrest D. Bridges in Rutherford County Superior Court. Heard in the Court of Appeals 28 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Chris D. Agosto Carreiro, for the State-Appellee.

Blass Law, PLLC, by Danielle Blass, for Defendant-Appellant.

COLLINS, Judge.

Defendant Mitchell Joseph Martin appeals from judgments entered on jury verdicts of guilty of assault by strangulation inflicting serious bodily injury, assault with a deadly weapon inflicting serious injury, assault on a female, first-degree kidnapping, five counts of obstructing justice, and eight violations of a domestic violence protective order, and on Defendant's guilty plea to having attained habitual felon status. Defendant argues that the trial court erred by failing to dismiss certain charges for insufficient evidence, admitting certain evidence, and failing to intervene ex mero motu in the State's opening statement and closing argument. Defendant also argues that he received ineffective assistance of counsel. We dismiss Defendant's ineffective assistance of counsel claim without prejudice and find no merit in his remaining arguments.

I. Background

Defendant and Brandy Humphries started dating in November of 2019. Defendant picked up Brandy from her grandmother's house at around 8:30 p.m. or 9:00 p.m. on 13 January 2021 and took her to the trailer that they were fixing up. Shortly after returning to the trailer and smoking methamphetamine, at around 10 p.m., Defendant began "hearing somebody talking" and accused Brandy of wearing a wire to "get him in trouble" and of hiding someone under the couch.

Defendant tried to rip her hoodie off to see if she was wired. When this was unsuccessful, he used a DeWalt Sawzall to cut it off. Brandy was "scared to death[.]" Defendant had a look in his eye like "a demon" and hit Brandy in the head with a medium-sized metal flashlight. The flashlight "busted [her] head open" and she "started bleeding everywhere . . . ."

Brandy's head began to swell and she "was real woozy feeling" as "it was a lot of blood that was coming out of [her] head." Defendant told her she had "better not be getting any blood on the carpet" and attempted to stop the bleeding from her head using a white t-shirt. Because there was "a lot of blood . . . coming out of [Brandy's] head," the blood soaked "right through" the t-shirt. Defendant began berating Brandy because her blood was on the carpet and the couch. Defendant tried to clean the blood off the carpet with the white t-shirt. When the t-shirt became saturated, Defendant ripped the sleeve from his hoodie and tried to use it to clean the blood.

After trying to clean the blood from the carpet, Defendant turned back to Brandy. He grabbed her and dragged her by the arm into the bathroom. He threw her into the freezing cold shower and sprayed her with water to clean the blood off. This occurred around 2:00 a.m. on 14 January 2021, several hours after he assaulted her with the metal flashlight.

While forcing Brandy to take a shower, Defendant hit her with the showerhead. Defendant dropped his cell phone. He blamed Brandy and punched her underneath her chin, in an upward motion, causing her tooth to cut through her lip.

Defendant pulled Brandy from the shower and forced her to sit naked in the middle of the living room floor. When she moved to try and warm herself with the blanket on the floor, Defendant kicked her and hit her with a metal chain.

Defendant thought she was trying to hide something with the blanket, so he got on top of her, wrapped his hand around her neck, and choked her. When she fought back by kicking him, he kicked her "with

his boots on in the head and in the shoulder" and swung at her with his fists. At some point, Defendant choked Brandy until she passed out.

At around 9:30 a.m. or 10:00 a.m., Brandy's best friend, who was also Defendant's cousin, came to the house. Defendant let her in and left. The friend took Brandy to the courthouse to get a protective order and then to the hospital.

A domestic violence protective order was put in place on 21 January 2021 and was extended for a year to 10 February 2022. While Defendant was in custody and the protective order was in place, Brandy contacted Defendant's sister to get half of Defendant's stimulus check, which amounted to $300. On 10 May 2021, while Brandy was at Defendant's sister's house getting the stimulus money, Defendant called and she spoke on the phone with him; she took the money, decided not to come to court, and apologized to him. They told each other they loved each other. However, she later accused him of violating the protective order based on their 10 May 2021 phone call as well as a letter sent to her on 1 July 2021. Defendant was also accused of violating the order (and in some cases, obstructing justice) by sending letters to other people, including his own mother, expressing fear of being imprisoned for the rest of his life and asking for help.

The jury found Defendant guilty of assault by strangulation inflicting serious bodily injury, assault with a deadly weapon inflicting serious injury, assault on a female, first-degree kidnapping, five counts of obstructing justice, and eight violations of a domestic violence protective order. He subsequently admitted to having attained the status of habitual felon.

He was sentenced to 105 to 138 months' imprisonment for assault by strangulation and assault on a female. He was also sentenced to the following two consecutive sentences: 140 to 180 months' imprisonment for assault with a deadly weapon inflicting serious injury with habitual felon status, and 140 to 180 months' imprisonment for first-degree kidnapping. Lastly, he was sentenced to 105 to 138 months' imprisonment for obstructing justice and violation of a domestic violence protective order with habitual felon status, with all remaining convictions consolidated into that sentence.

Defendant gave oral notice of appeal on 10 June 2022.

II. Discussion

A. Motions to Dismiss

Defendant argues that the trial court erred by failing to dismiss the various charges of which he was found guilty. In his brief, Defendant

presents the evidence not in the light most favorable to the State, as required, but instead in the light most favorable to him. Based on our review of the evidence under the proper standard, we find no merit in his contentions. We will address each charge in turn.

A trial court's denial of a motion to dismiss is reviewed de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Upon a defendant's motion to dismiss, the question for the trial court is whether there is substantial evidence of each essential element of the offense charged and whether defendant was the perpetrator of the charged offense. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

"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, 192-93, 451 S.E.2d 211, 223 (1994) (citation omitted). Where substantial evidence exists, the trial court must deny a motion to dismiss. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982).

1. Assault

[1] The jury found Defendant guilty of three assault charges: assault by strangulation, for use of his hands around Brandy's throat; assault with a deadly weapon inflicting serious injury, for use of a metal flashlight; and assault on a female, for use of his open and closed fists. Defendant argues that all but one of these assault charges should have been dismissed because there was insufficient evidence of a distinct interruption between the assaults.

The common law offense of assault is defined as

> an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

State v. Dew, 379 N.C. 64, 70, 864 S.E.2d 268, 273-74 (2021) (quotation marks and citation omitted). "[A]ssault is a broad concept that can include more than one contact with another person." *Id.* at 70, 864 S.E.2d at 274. "[T]he State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred

between assaults." *Id.* at 72, 864 S.E.2d at 275. Examples of a distinct interruption include "an intervening event, a lapse of time in which a reasonable person could 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." *Id.*

Here, Defendant abused and terrorized Brandy over a twelve-hour period. During that time, Defendant (1) hit her in the head with a metal flashlight in the living room around 10:00 p.m., (2) punched her under the chin in the bathroom shower stall close to 2:00 a.m., and (3) put his hands on her neck and strangled her until she blacked out in the living room before dawn at approximately 5:30 a.m.

Each of these assaults is separated by distinct interruptions of time and location. The first assault at 10:00 p.m. and the second assault at 2:00 a.m. were separated by approximately four hours. The third assault occurred approximately three hours later, around 5:30 a.m. While all three assaults occurred in the trailer, they were at different and distinct locations: in the living room near the couch, in the bathroom shower stall, and finally pinned down on the living room floor.

This evidence, viewed in the light most favorable to the State, shows a "distinct interruption" between the three assaults. Thus, the trial court did not err by denying Defendant's motion to dismiss.

2. Assault with a deadly weapon inflicting serious injury

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury as there was insufficient evidence of a serious injury being caused by a metal flashlight.

The elements of assault with a deadly weapon inflicting serious injury "are (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) (2021). This Court has defined "serious injury" as an injury which is serious but falls short of causing death. *State v. Carpenter*, 155 N.C. App. 35, 42, 573 S.E.2d 668, 673 (2002). "Whether a serious injury has been inflicted depends upon the facts of each case and is generally for the jury to decide under appropriate instructions." *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991) (citation omitted). "Pertinent factors for jury consideration include hospitalization, pain, blood loss, and time lost at work." *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997) (citation omitted).

Here, the evidence, including testimony and photographs taken by law enforcement, showed that when Defendant hit Brandy in the head with the metal flashlight, she began to bleed profusely and to feel "woozy" while standing. The blood from her head soaked through a t-shirt and required additional fabric to clean it from the carpet. When Brandy was speaking with law enforcement officers several hours after she was struck, she had swelling on her forehead and was unsteady on her feet. Furthermore, the symptoms observed by one of the officers were severe enough for the officer to send Brandy to the hospital for treatment.

This evidence, viewed in the light most favorable to the State, was sufficient evidence of a serious injury. Thus, the trial court did not err by denying Defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury.

3. Assault by strangulation inflicting serious bodily injury

[3] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of assault by strangulation inflicting serious bodily injury.

"[T]he offense of assault by strangulation requires only that an individual assault another person and inflict physical injury by strangulation." *State v. Brunson*, 187 N.C. App. 472, 478, 653 S.E.2d 552, 556 (2007) (citations omitted); *see also* N.C. Gen. Stat. § 14-32.4(b) (2021).

Here, Brandy testified that Defendant wrapped his hands around her neck and choked her at least twice. She further testified that Defendant strangled her until she began losing her vision and lost consciousness. Law enforcement officers at the scene documented injuries consistent with strangulation, including bruising on Brandy's neck, pain around her throat, and bruising around her ears. Subsequently, a detective observed bruising and marks on Brandy's neck and ears, and the detective testified that Brandy could "barely open her mouth very far because of the significant pain that she was experiencing from" the strangulation. Brandy also told that detective that "she was having trouble swallowing and [had] a tender throat as a result of the strangulation."

This evidence was sufficient to establish physical injury caused by strangulation. *See State v. Little*, 188 N.C. App. 152, 157, 654 S.E.2d 760, 764 (2008) (holding that "cuts and bruises on [the victim's] neck" confirmed by photographic evidence was sufficient evidence to satisfy the physical injury element of assault by strangulation); *State v. Braxton*, 183 N.C. App. 36, 43, 643 S.E.2d 637, 642 (2007) (holding that "evidence that

defendant applied sufficient pressure to [the victim's] throat such that she had difficulty breathing" was sufficient to constitute strangulation).

Accordingly, the trial court did not err by denying Defendant's motion to dismiss the charge of assault by strangulation inflicting serious bodily injury.

4. First-degree kidnapping

[4] Defendant argues that the charge of first-degree kidnapping should have been dismissed because the State failed to offer sufficient evidence that Defendant confined Brandy or that he did so for the purpose of facilitating a felony.

The elements of kidnapping are: (1) confining, restraining, or removing from one place to another; (2) any person sixteen years or older; (3) without such person's consent; (4) if such act was for the purpose of facilitating the commission of a felony. *See* N.C. Gen. Stat. § 14-39(a)(2) (2021). Kidnapping in the first-degree occurs when, among other things, the victim is seriously injured. *See id.* § 14-39(b) (2021). Confining, restraining, or removing someone need not be accomplished through the use of "actual physical force or violence[;] . . . [t]hreats and intimidation are equivalent to the use of actual force or violence." *State v. Sexton*, 336 N.C. 321, 361, 444 S.E.2d 879, 901 (1994) (quotation marks and citations omitted).

In this case, there is substantial evidence that Defendant confined, restrained, and removed Brandy for the purpose of assaulting her with a deadly weapon inflicting serious injury and assaulting her by strangulation inflicting serious bodily injury. During the evening of 13 January 2021 and into the morning of 14 January 2021, Defendant physically confined and restrained Brandy to the trailer. Brandy testified that the back and front doors were both "screwed shut." She was terrified of Defendant based upon the physical abuse and threatening behavior he exhibited throughout the night. Within the closed trailer, Defendant first assaulted her with a metal flashlight inflicting serious injury. He then removed Brandy from the living room to the bathroom shower stall, where he assaulted her with his fist, and then removed her from the bathroom shower stall to the living room floor where he assaulted her by strangulation. Defendant then confined Brandy to sitting naked on the floor. Defendant used actual physical force and violence, as well as threats and intimidation, to restrain and confine Brandy inside the trailer.

Accordingly, the State presented substantial evidence to support the conclusion that Defendant confined, restrained, and removed Brandy

by use of physical violence and threats for the purpose of facilitating a felony. The trial court thus properly denied Defendant's motion to dismiss the charge of first-degree kidnapping.

5. Ineffective assistance of counsel

[5] Defendant contends that he was deprived of his Sixth Amendment right to effective assistance of counsel because, during closing argument, his trial counsel conceded Defendant's guilt. Defendant specifically contends that his defense counsel's remarks amounted to per se ineffective assistance of counsel under *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985) (holding that a defendant receives per se ineffective assistance of counsel when "the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent").

We review de novo whether a defendant was denied effective assistance of counsel. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014).

> Generally, th[e] Court indulges the presumption that trial counsel's representation is within the boundaries of acceptable professional conduct, giving counsel wide latitude in matters of strategy. To prevail on an ineffective assistance of counsel claim, a defendant must show that trial counsel's conduct fell below an objective standard of reasonableness. This requires a showing that, first, trial counsel's performance was so deficient that he or she was not functioning as the counsel guaranteed the defendant by the Sixth Amendment, and second, this deficient performance prejudiced the defense, such that the errors committed by trial counsel deprived the defendant of a fair trial.

State v. Goss, 361 N.C. 610, 623, 651 S.E.2d 867, 875 (2007) (quotation marks and internal citations omitted). However, under *Harbison*, "a defendant receives ineffective assistance of counsel *per se* when counsel concedes the defendant's guilt to the offense or a lesser included offense without the defendant's consent." *State v. Berry*, 356 N.C. 490, 512, 573 S.E.2d 132, 147 (2002) (citing *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-08).

Here, Defendant testified in his defense and admitted to various actions. During closing argument, Defendant's trial counsel stated:

> We ask that you find him not guilty on all the felonies, the first-degree kidnapping, the assault with a deadly weapon

> inflicting serious injury, the assault with a deadly weapon, and assault by strangulations. He's admitted to doing the other stuff.
>
> We ask you to find him guilty on the misdemeanor assault on a female, misdemeanor Domestic Violence Protective Order violation, and misdemeanor obstruction of justice. Thank you.

Because the record is insufficiently developed to consider Defendant's ineffective assistance of counsel claim on this direct appeal, we decline to address this claim and dismiss it without prejudice. *See State v. Al-Bayyinah*, 359 N.C. 741, 753, 616 S.E.2d 500, 509-10 (2005) (dismissing ineffective assistance of counsel claim brought on direct appeal without prejudice to pursue collateral relief where "[t]rial counsel's strategy and the reasons therefor[e] are not readily apparent from the record, and more information must be developed to determine if defendant's claim satisfies the *Strickland* test"); *see also State v. House*, 340 N.C. 187, 196, 456 S.E.2d 292, 297 (1995) (dismissing *Harbison* claim brought on direct appeal without prejudice to pursue collateral relief where record was "silent as to whether defendant did or did not consent to his attorney's concession of guilt").

6. Opening statement and closing argument

[6] Defendant argues that the trial court erred by failing to intervene ex mero motu during the State's opening statement and closing argument. Specifically, Defendant argues that intervention was required because the "State was deliberately appealing to the jurors' sense of passion and prejudice, in an improper attempt to lead them away from the evidence towards facts outside the record."

"Counsel are entitled to wide latitude during jury arguments; however, the scope of that latitude is within the discretion of the court." *State v. Trull*, 349 N.C. 428, 452, 509 S.E.2d 178, 194 (1998) (citation omitted). The standard of review is whether the statements made by the prosecution were so grossly improper that the judge is expected to intervene ex mero motu. *Id.* at 451, 509 S.E.2d at 193.

Defendant challenges as "grossly improper" several statements made by the State in both the opening statement and closing argument. We disagree with Defendant's characterization of the challenged statements. While the State argued passionately, it was within the bounds of decorum and propriety. The statements did not disparage Defendant personally nor did they speak to matters or events outside of the trial.

Accordingly, the trial court did not err by not intervening ex mero motu.

7. Admission of 404(b) evidence

[7] Defendant finally argues that the trial court erred by improperly admitting evidence of alleged prior assaults against Brandy under Rules of Evidence 404(b) and 403.

This Court reviews a trial court's decision to admit evidence under Rules 404(b) and 403 by conducting distinct inquiries with different standards of review. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). The trial court's Rule 404(b) determination is reviewed de novo. *Id.* The trial court's Rule 403 determination is reviewed for abuse of discretion. *Id.*

Pursuant to Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021). Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* This list "is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (1995) (citation omitted). Rule 404(b) is "a clear general rule of inclusion . . . ." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Additionally:

> [e]vidence of prior assaults against the victim hold a special place in the context of domestic violence:
>
> > In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful are they to show the state of the defendant's feelings. Specifically, evidence of frequent quarrels, separations, reconciliations, and ill-treatment is admissible as bearing on intent, malice, motive, premeditation, and deliberation.

State v. Latham, 157 N.C. App. 480, 484, 579 S.E.2d 443, 447 (2003) (quotation marks, brackets, and citations omitted).

Defendant challenges the admission of Brandy's testimony regarding the following acts:

On 1 July 2020, Defendant accused her of cheating on him while they were at his aunt's home. He beat her up "real bad"; he punched her so hard in the face that he broke her eye socket. He threw her in the shower because she was bleeding from where he had been beating her. She locked herself in the bathroom until his aunt arrived. The incident lasted from about 5:30 p.m. until about 10:00 p.m.

At the end of July 2020, Brandy and Defendant argued with each other in front of his mother, and his mother called the police. The police approached them as they were walking down the side of a road; Brandy lied and told them she was fine. After the police left, Defendant and Brandy resumed arguing. He told her to sit on a log and threatened to cut her arms off with a hatchet he was holding. When she accidentally caused a motion-activated light to illuminate, he hit her because he thought she did it on purpose.

In October 2020, while Defendant was trying to fix his aunt's truck, he accused Brandy of trying to get his cousin's phone number so she could cheat on him. They got in the truck together and drove off, but the truck broke down. He then dragged her through a field by her hair. They drove to a friend's house where he threw a coke bottle at her; the friend made him leave. When Defendant came back the next day, he accused Brandy of cheating with the friend because she was charging her phone in his truck. Defendant threw a phone at her face, hitting her, which caused the side of her face to turn black.

Brandy further testified that just before Christmas in 2020, Defendant beat her up again right after they got back together after having taken a break.

Defendant was charged with assault, which requires a "show of force or menace of violence . . . sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *Dew*, 379 N.C. at 70, 864 S.E.2d at 274 (quotation marks and citation omitted). Defendant was also charged with first-degree kidnapping, which requires "confining, restraining, or removing [a person] from one place to another," N.C. Gen. Stat. § 14-39(a)(2), which can be accomplished through "[t]hreats and intimidation[,]" *Sexton*, 336 N.C. at 361, 444 S.E.2d at 901 (citation omitted). The prior bad acts illustrate that, over the course of roughly seven months, Defendant engaged in a pattern of violent, threatening, and controlling behavior when Brandy made him feel jealous or angry.

Defendant argues that "while intent is an element of each assault, [Defendant] did not argue that he did not intend to assault her[.]" However, it was the State's burden to show intent and the State's

evidence of Defendant's prior bad acts is directly relevant to this element. The prior bad acts also illustrate the manner and common scheme Defendant used to confine and abuse Brandy, and they negate any inference that Defendant acted in self-defense or that Brandy was somehow responsible for her own injuries based on Defendant's testimony that "it was both of us fighting." Because Defendant's conduct was admissible as proof of motive, intent, manner, and common scheme, Brandy's testimony was relevant for a purpose other than showing Defendant's propensity for violence. *See State v. Scott*, 343 N.C. 313, 331, 471 S.E.2d 605, 616 (1996) (holding that testimony regarding prior violent acts towards wife was admissible under Rule 404(b) to prove issues in dispute such as malice, intent, premeditation, and deliberation). Accordingly, the trial court did not err by admitting the evidence under Rule 404(b).

Furthermore, the trial court did not abuse its discretion by admitting the evidence under Rule 403. The record shows that the trial court carefully deliberated and made a well-reasoned decision. The 404(b) evidence was proffered outside of the jury's presence. The judge also asked to hear the evidence of the pending charges first before deciding the admissibility of the prior acts. The trial court gave a detailed explanation of how the 404(b) evidence would be admitted to show that all of the assaults were between Defendant and Brandy, a pattern of escalating behavior, intent, and to rebut Defendant's self-defense claim.

Accordingly, the trial court properly admitted the challenged evidence under Rules 404(b) and 403.

III. Conclusion

The trial court did not err by failing to dismiss certain charges for insufficient evidence, admitting certain 404(b) evidence, and failing to intervene ex mero motu in the State's opening statement and closing argument. We dismiss Defendant's ineffective assistance of counsel claim without prejudice.

NO ERROR IN PART; DISMISSED IN PART.

Judges CARPENTER and WOOD concur.

STATE v. MILLER

[292 N.C. App. 519 (2024)]

STATE OF NORTH CAROLINA
v.
MARK ALAN MILLER, DEFENDANT

No. COA22-689

Filed 20 February 2024

1. Drugs—trafficking in opium by possession—statutory definition of "opium or opiate"—inclusive of opioids—stare decisis

The State presented substantial evidence that defendant committed the offense of trafficking in opium by possession in violation of N.C.G.S. § 90-95(h)(4) where hydrocodone, an opioid, was found during a lawful search of his home. Under principles of stare decisis, where a prior appellate decision interpreted the 2016 version of the statute to include opioids in the definition of "opium or opiate" for purposes of the offense, since the 2017 version of the same statute, under which defendant was charged, kept the same language, the same interpretation applied. The legislature's addition in 2017 of a new, separate definition of "opioids" in N.C.G.S. § 90-87(18a) did not materially alter the meaning of section 90-95(h)(4) where there was no explicit change to the latter statute or to the definition of "opiate."

2. Drugs—trafficking in opium by possession—jury instructions—opioids included in "opium or opiate" definition—accurate statement of law

The trial court did not err by instructing the jury in defendant's trial for trafficking in opium by possession—based on the discovery of hydrocodone, an opioid, during a lawful search of defendant's home—that opioids were included in the definition of "opium or opiate" pursuant to N.C.G.S. § 90-95(h)(4), which was an accurate statement of law according to a prior judicial interpretation of "opium or opiate" under that statute.

3. Sentencing—drug trafficking—consideration of improper factors—rejection of plea offer—additional drug activity—statements not attributed to trial court

After a jury convicted defendant of trafficking in methamphetamine by possession and trafficking in opium by possession and the trial court imposed a sentence of two consecutive terms of imprisonment, defendant failed to rebut the presumption that the sentence was valid. There was no evidence in the record that the trial court considered irrelevant or improper factors during sentencing where, although the State mentioned defendant's failure to accept a plea

offer as well as additional drug activity committed by defendant, the trial court did not specifically comment on those events except to ask a clarifying question about when the alleged drug activity took place.

Judge MURPHY dissenting.

Appeal by Defendant from judgment entered 19 November 2021 by Judge Peter B. Knight in Henderson County Superior Court. Heard in the Court of Appeals 11 April 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Jodi Privette Carpenter, for the State.

Carolina Law Group, by Kirby H. Smith, III, for Defendant-Appellant.

CARPENTER, Judge.

Mark Alan Miller ("Defendant") appeals from judgment entered after a Henderson County jury convicted him of trafficking in methamphetamine by possession, in violation of subsection 90-95(h)(3b), and trafficking in opium by possession, in violation of subsection 90-95(h)(4). *See* N.C. Gen. Stat. § 90-95(h)(3b), (4). On appeal, Defendant argues the trial court erred by: (1) denying his motion to dismiss the subsection 90-95(h)(4) charge; (2) instructing the jury that opioids were included in the definition of "opium or opiate" at the time of the offense; and (3) considering evidence of improper factors at sentencing. After careful review, we disagree and discern no error.

I. Factual & Procedural Background

On 16 September 2019, a Henderson County grand jury indicted Defendant for, among other crimes, "trafficking opium/heroin" under subsection 90-95(h)(4). On 8 November 2021, the State tried Defendant in Henderson County Superior Court.

Trial evidence relevant to this appeal tended to show the following. On 7 November 2018, the Henderson County Sheriff's Drug Enforcement Unit executed a valid search warrant at Defendant's home, where they found a pill bottle containing thirteen white pills. Miguel Cruz-Quinones, a forensic scientist with the North Carolina State Crime Lab, tested the pills and found that they contained hydrocodone.

At the close of the State's case, Defendant moved to dismiss all the charges, which the trial court denied. Defendant elected not to put on any evidence, but he renewed his motion to dismiss the charges, which the trial court again denied. During its jury instructions, the trial court explained, over Defendant's objection, that opioids were included in the definition of "opium or opiate" under subsection 90-95(h)(4).

On 19 November 2021, the jury found Defendant guilty of "trafficking in methamphetamine by possession," in violation of subsection 90-95(h)(3b), and "trafficking in opium by possession," in violation of subsection 90-95(h)(4). The trial court then conducted a sentencing hearing, where the State mentioned Defendant's rejection of a plea deal and additional drug activity at Defendant's home. The trial court sentenced Defendant to two consecutive sentences of imprisonment, both for between seventy and ninety-three months. Also on 19 November 2021, Defendant gave timely notice of appeal.

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) denying Defendant's motion to dismiss his subsection 90-95(h)(4) charge; (2) instructing the jury that opioids were included in the definition of "opium or opiate" at the time of the offense; and (3) considering evidence of improper factors at sentencing.

IV. Analysis

A. Motion to Dismiss

[1] First, Defendant argues the trial court erred in denying his motion to dismiss the subsection 90-95(h)(4) charge because hydrocodone is an opioid and was not prohibited by subsection 90-95(h)(4) at the time of the offense. We disagree.

We review a 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, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"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 reviewing Defendant's motion to dismiss, we must interpret subsection 90-95(h)(4). *See* N.C. Gen. Stat. § 90-95(h)(4). And when interpreting statutes, we must "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).

But our greatest guiding principle is stare decisis. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993). Stare decisis means once a principle of law has been settled, "it is binding on the courts and should be followed in similar cases." *State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949). Stare decisis stands for the age-old axiom: "the law must be characterized by stability if men are to resort to it for rules of conduct." *Id.* at 767, 51 S.E.2d at 733. We are bound by previous cases decided by this Court, "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). And we must adhere to stare decisis—even if the prior decision is not faithful to the text of a statute. *See id.* at 384, 379 S.E.2d at 37.

In *State v. Garrett*, we interpreted the 2016 version of subsection 90-95(h)(4) and determined whether the subsection proscribed the transportation or possession of "opioids." 277 N.C. App. 493, 497, 860 S.E.2d 282, 286 (2021). As we said then, subsection 90-95(h)(4) "made it unlawful to possess or transport 'four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate . . . , including heroin, or any mixture containing such substance.' " *Id.* at 497, 860 S.E.2d at 286 (quoting N.C. Gen. Stat. § 90-95(h)(4) (2016)).

Recognizing the word "opioid" was not included in the text of the subsection, we nonetheless concluded that opioids, like fentanyl, "indeed qualify as an opiate within the meaning of the statute." *Id.* at 497–98, 860 S.E.2d at 286. We reasoned that an opioid is "a highly addictive substance that produces effects that are similar to those of morphine by acting on the opiate cell receptors in the brain." *Id.* at 499–500, 860 S.E.2d at 287. In other words, we held that possession of opioids violates subsection 90-95(h)(4). *See id.* at 500, 860 S.E.2d at 288; N.C. Gen. Stat. § 90-95(h)(4).

The 2017 version of subsection 90-95(h)(4) preserved the same language as the 2016 version: The 2017 version prohibited the possession or transportation of "four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate . . . , including heroin, or any mixture containing such substance." N.C. Gen. Stat. § 90-95(h)(4) (2017) (applying to possession occurring on 8 November 2018, the date of Defendant's alleged possession). Because the 2017 statute is the same statute interpreted by the *Garrett* Court, the 2017 statute includes opioids. *See Garrett*, 277 N.C. App. at 499–500, 860 S.E.2d at 287; *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

Here, the State charged Defendant with violating the 2017 version of subsection 90-95(h)(4), and the State provided expert testimony that Defendant possessed hydrocodone, an opioid. This evidence is substantial because it "is such relevant evidence as a reasonable mind might accept as adequate" to show that Defendant possessed opioids. *See Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

Because opioids like hydrocodone "qualify as an opiate within the meaning of the statute," *see Garrett*, 277 N.C. App. at 497, 860 S.E.2d at 286, the State presented "substantial evidence (1) of each essential element of the offense charged . . . , and (2) of defendant's being the perpetrator of such offense." *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455; N.C. Gen. Stat. § 90-95(h)(4). Therefore, the trial court did not err in denying Defendant's motion to dismiss concerning subsection 90-95(h)(4).

The Dissent, however, argues that we are not bound by *Garrett* because there, we interpreted the 2016 version of subsection 90-95(h)(4), and here, Defendant was convicted under the 2017 version of subsection 90-95(h)(4). Accordingly, the Dissent states that "additional consideration of legislative intent would be inappropriate."

First, we agree with the Dissent concerning legislative intent, and we do not consider it. *See Conroy v. Aniskoff*, 507 U.S. 511, 519, 113 S. Ct. 1562, 1567, 123 L. Ed. 2d 229, 238 (1993) (Scalia, J., concurring) ("We are governed by laws, not by the intentions of legislators.").

But we disagree with the Dissent's position on *Garrett* and stare decisis. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. According to the Dissent, we are not bound by *Garrett* because we have yet to interpret the 2017 version of subsection 90-95(h)(4). Not so. The date of the statute is not dispositive because, as the Dissent notes, the 2016 language of subsection 90-95(h)(4) is identical to the 2017 language of subsection 90-95(h)(4). And when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the

same language in a new statute indicates" that the same interpretation applies. *See Bragdon v. Abbott*, 524 U.S. 624, 645, 118 S. Ct. 2196, 2208, 141 L. Ed. 2d 540, 562 (1998).

Nonetheless, the Dissent would hold contrary to *Garrett* because other statutes "read in concert with N.C.G.S. § 90-95(h)(4), materially alter the meaning of the 2017 statute from the 2016 statute." If this was a case of first impression, we could agree. *See W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 100, 111 S. Ct. 1138, 1148, 113 L. Ed. 2d 68, 84 (1991) ("Where a statutory term *presented to us for the first time* is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.") (emphasis added). But this is not a case of first impression. *See Garrett*, 277 N.C. App. at 497, 860 S.E.2d at 286.

We could also agree with the Dissent if the General Assembly changed the actual language of subsection 90-95(h)(4), or if the General Assembly changed the definition of opiate to include language like "does not include opioids" or "does not include hydrocodone." The General Assembly did neither. So instead, we follow the lead of Scalia and Garner:

> A clear, authoritative judicial holding on the meaning of a particular provision should not be cast in doubt and subjected to challenge whenever a related though not utterly inconsistent provision is adopted in the same statute or even in an affiliated statute. Legislative revision of law clearly established by judicial opinion ought to be by express language or by unavoidably implied contradiction.

Antonin Scalia & Bryan A. Garner, Reading Law 331 (2012).

There is no express revision of subsection 90-95(h)(4). *See* N.C. Gen. Stat. § 90-95(h)(4). And while the *Garrett* Court's interpretation of subsection 90-95(h)(4) is broad, it does not create an unavoidable contradiction with the added definition of opioid. *See* N.C. Gen. Stat. § 90-87(18a) (defining "opioid" in 2017). Under *Garrett*, "opiate" includes opioids, *see Garrett*, 277 N.C. App. at 497, 860 S.E.2d at 286, and the only difference between 2016 and 2017 is that the General Assembly defined opioid, *see* N.C. Gen. Stat. § 90-87(18a). But the General Assembly did not change, let alone narrow, the definition of opiate. *See id.* § 90-87(18). Therefore, "opiate" continues to encompass opioids, *see Garrett*, 277 N.C. App. at 499–500, 860 S.E.2d at 287; only now, opioids are statutorily defined, *see* N.C. Gen. Stat. § 90-87(18a).

We echo the Dissent's proposition: "additional consideration of legislative intent would be inappropriate." The Dissent, however, proceeds to consider the legislature's intent. The Dissent argues that by defining "opioid," the General Assembly *intended* for "opiate" to no longer encompass opioids. If we were operating on a clean slate, maybe so. But again, we are not. *See Garrett*, 277 N.C. App. at 497, 860 S.E.2d at 286. In our view, if the General Assembly wanted to override the *Garrett* Court's interpretation of subsection 90-95(h)(4), it needed to do so explicitly. *See* Scalia & Garner, *supra*. Otherwise, we are merely grasping for legislative intent—and ignoring binding precedent. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37; *Garrett*, 277 N.C. App. at 497, 860 S.E.2d at 286.

If we follow the Dissent's approach, each year is a clean slate for statutory interpretation—even if a statute's language remains the same. *See* N.C. Gen. Stat. § 90-95(h)(4). This would reduce stare decisis to a nullity. We think that until the General Assembly explicitly amends subsection 90-95(h)(4) or the definition of opiate, or until our state Supreme Court overrules *Garrett*, we are bound by *Garrett*. Accordingly, the trial court did not err in denying Defendant's motion to dismiss concerning subsection 90-95(h)(4).

B. Jury Instruction

[2] Defendant next argues the trial court erred when, over Defendant's objection, it instructed the jury that opioids were included in the definition of "opium or opiate" under subsection 90-95(h)(4). We disagree.

This Court reviews the legality of jury instructions de novo. *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010). Again, under a de novo review, this 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). And concerning jury instructions, "[i]t 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).

Here, the trial court did not err by instructing the jury that opioids were included in the definition of "opium or opiates" because, as detailed above, this Court has so held. *See Garrett*, 277 N.C. App. at 497, 860 S.E.2d at 286; N.C. Gen. Stat. § 90-95(h)(4). Accordingly, the trial court did not err in its jury instruction because it accurately instructed the

jury on the applicable law. *See Robbins*, 309 N.C. at 776–77, 309 S.E.2d at 191.

C. Sentencing

[3] Lastly, Defendant argues the trial court improperly considered his rejection of the State's plea offer and additional drug activity during sentencing, violating his constitutional rights. Again, we disagree.

" '[A]n error at sentencing is not considered an error for the purpose of N.C. Rule 10 (b)(1) of the North Carolina Rules of Appellate Procedure' and therefore no objection is required to preserve the issue for appellate review." *State v. Jeffrey*, 167 N.C. App 575, 579, 605 S.E.2d 672, 674 (2004) (quoting *State v. Hargett*, 157 N.C. App. 90, 92, 577 S.E.2d 703, 705 (2003)). So, we review constitutional sentencing issues de novo, regardless of whether the defendant objected at trial. *See State v. Harris*, 242 N.C. App. 162, 164, 775 S.E.2d 31, 33 (2015). And under a de novo review, this 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).

"A sentence within the statutory limit will be presumed regular and valid." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). This presumption, however, is not conclusive. *Id.* at 712, 239 S.E.2d at 465. "If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights." *Id.* at 712, 239 S.E.2d at 465.

In *Boone*, the trial court "indicated that the sentence imposed was in part induced by defendant's exercise of his constitutional right to plead not guilty and demand a trial by jury." *Id.* at 712, 239 S.E.2d at 465. And as a result, the *Boone* Court "remanded for entry of a proper judgment, without consideration of defendant's refusal to plead guilty to a lesser offense." *Id.* at 713, 239 S.E.2d at 465. Similarly, this Court has held that a sentence violates a defendant's rights if the trial court specifically comments on the refusal of a plea deal. *See, e.g.*, *State v. Cannon*, 326 N.C. 37, 39–40, 387 S.E.2d 450, 451 (1990) (reversing the trial court's sentence because "the trial judge stated his intended sentence even before the evidence was presented to the jury on the issue of guilt").

By contrast, if "the record reveals no such express indication of improper motivation," and the trial court instead "merely prefaced its pronouncement of defendant's sentences with the statement, routinely

made at sentencing, that it had, *inter alia*, considered the arguments of counsel," then the sentence imposed will not violate a defendant's rights. *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987).

Here, Defendant failed to overcome the presumption of regularity and validity in the trial court's sentencing. *See Boone*, 293 N.C. at 712, 239 S.E.2d at 465. Although the State mentioned Defendant's failure to accept a plea offer, there is no evidence in the record that the trial court specifically commented on or considered the refusal. Accordingly, there is no evidence that the trial court improperly considered Defendant's rejection of the plea offer, so the trial court's sentencing was valid. *See Johnson*, 320 N.C. at 753, 360 S.E.2d at 681.

Moreover, the record reflects the trial court's comment concerning the additional drug activity during sentencing was only in immediate response to the State, which mentioned the event. The trial court's only comment on the additional drug activity was a clarifying question about the date of the alleged activity.

This exchange does not support Defendant's argument that the trial court considered irrelevant and improper matter in determining the severity of the sentence. *See id.* at 753, 360 S.E.2d at 681. As no evidence suggests that the trial court considered the additional drug activity when it sentenced Defendant, the trial court did not err in sentencing Defendant to two consecutive sentences for his multiple offenses. *See id.* at 753, 360 S.E.2d at 681.

V. Conclusion

We hold that the trial court did not err by denying Defendant's motion to dismiss his charge under subsection 90-95(h)(4), instructing the jury that opioids were included in the definition of "opium or opiate" at the time of the offense, or by considering evidence of improper factors at sentencing.

NO ERROR.

Judge ZACHARY concurs.

Judge MURPHY dissents in a separate opinion.

MURPHY, Judge, dissenting.

I dissent from the Majority's holding that our interpretation of N.C.G.S. § 90-95(h)(4) (2017) is bound by our earlier interpretation of N.C.G.S. § 90-95(h)(4) (2016) in *State v. Garrett*.

The Majority holds that "the 2017 statute is the same statute interpreted by *Garrett* Court," and, accordingly, "the 2017 statute includes opioids." It is true that both N.C.G.S. § 90-95(h)(4) (2016) and N.C.G.S. § 90-95(h)(4) (2017) read, in pertinent part, as follows:

> Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin. . . ."

N.C.G.S. § 90-95(h)(4) (2017). However, the 2016 and 2017 versions of the statute differ substantially in meaning, as a plain reading of N.C.G.S. § 90-87 (2017), defining terms "[a]s used in this Article[,]" provides different definitions for "opiates" and "opioids," which are not present in N.C.G.S. § 90-87 (2016).

"Where . . . the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219 (1974). Despite the clear application of the "definitions" in N.C.G.S. § 90-87 to the whole Article, and despite the clear change between the 2016 and 2017 statutes' definitions, the Majority characterizes the 2017 statute as nothing more than a "repetition of the same language" used in the 2016 statute.

For the purposes of the 2016 statute, the following definition applied to the term "opiate":

> (18) "Opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under G.S. 90-88, the dextrorotatory isomer of

> 3-methoxy-n-methyl-morphinan and its salts (dextromethorphan). It does include its racemic and levorotatory forms.

N.C.G.S. § 90-87(18) (2016).

However, for the purposes of the 2017 statute, the following definitions applied to the terms "opiate" and "opioid":

> (18) "Opiate" means any substance having an addiction-orming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under G.S. 90-88, the dextrorotatory isomer of 3-methoxy-n-methyl-morphinan and its salts (dextromethorphan). It does include its racemic and levorotatory forms.
>
> (18a) "Opioid" means any synthetic narcotic drug having opiate-like activities but is not derived from opium.

N.C.G.S. § 90-87(18), (18a) (2017).

These definitions, read in concert with N.C.G.S. § 90-95(h)(4), materially alter the meaning of the 2017 statute from the 2016 statute. As we have not yet interpreted how the altered definitions which apply to the 2017 version of the statute may impact the meaning of that statute, *stare decisis* does not apply to our decision in *Garrett*, and we must give effect to the statute's plain meaning. *Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 18 (2017) ("When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required."); *see also State v. Camp*, 286 N.C. 148, 152 (1974).

Unlike the 2017 statute, the 2016 statute, which governed the meaning of "opiate" in *Garrett*, did *not* distinguish between the definitions of "opiates" and "opioids." *See* N.C.G.S. §§ 90-87(17)-(19) (2016). In fact, the statute in effect on the date of the commission of the offense in *Garrett* did not mention the word "opioids" at all. *Id*. In the absence of any mention of "opioids" in the statute defining categories of controlled substances, it was unclear whether the term "opiate" in N.C.G.S. § 90-95(h)(4) was intended to be inclusive of "opioids." Consequently, we determined that the statute was ambiguous as to the meaning of "opiate." *Garrett*, 277 N.C. App. at 500 ("Here, the meaning of the term 'opiate' as used in [N.C.G.S.] § 90-95(h)(4) in 2016 was ambiguous, as it

was susceptible to more than one reasonable interpretation."). When interpreting an ambiguous statute, we look not only to the language, but also to the "purpose of the statute and the intent of the legislature in its enactment" to give the statute its appropriate meaning. *Fid. Bank*, 370 N.C. at 18. In *Garrett*, we looked outside of the statutory text to determine the General Assembly's intended meaning of the term "opiate" and ultimately concluded that fentanyl qualified as an opiate, despite being a synthetic opi*oid* within the meaning of N.C.G.S. § 90-95(h)(4) (2016), because the General Assembly intended for the definition of "opiate" to be construed broadly. *Garrett*, 277 N.C. App. at 497-500.

Here, however, two distinct definitions unambiguously separate "opioids" from "opiates," and additional consideration of legislative intent would be inappropriate. According to the plain language of N.C.G.S. § 90-87 and N.C.G.S. § 90-95 in 2017, it is unambiguous that Defendant's alleged conduct did not constitute a violation of the trafficking statute under which he was charged and convicted. Our General Assembly's distinction in N.C.G.S. § 90-87 between these two categories of substances indicates that "opioids" such as the hydrocodone tablets are not synonymous with the "opiates" or "opium" then encompassed by N.C.G.S. § 90-95(h)(4).

When the "plain reading of [a] statute creates a [perceived] loophole" that seems to contradict the legislature's intended purpose, it is not this Court's role to remedy this loophole. *Wake Radiology Diagnostic Imaging LLC v. N.C. Dep't of Health & Human Servs.*, 279 N.C. App. 673, 675 (2021). In *Wake Radiology*, we held such a loophole "is not a concern for this Court. We interpret the law as it [was] written. If that interpretation results in an unintended loophole, it is the legislature's role to address it." *Id.*

The 2016 statute we interpreted in *Garrett* is not identical to the 2017 statute which we are called upon to interpret in this case. Accordingly, the principle of *stare decisis* does not apply, and our holding in *Garrett* does not bind our holding here. It is clear from the plain statutory language in the 2017 statute that "opioids" were to be differentiated from "opiates." Although the State does not raise any argument as to the public policy impact of interpreting N.C.G.S. § 90-95(h)(4) not to encompass Defendant's conduct between 1 December 2017 and 30 November 2018, to the extent that such impact might be present, it is not our role to remedy this loophole.

I would reverse the trial court's denial of Defendant's motion to dismiss the trafficking in opium by possession charge and vacate

Defendant's conviction for this offense based on the State's failure to provide substantial evidence that the acetaminophen-hydrocodone tablets seized from Defendant's house constituted "opium" or "opiates." Accordingly, I would dismiss Defendant's argument regarding the trial court's jury instruction on the trafficking in opium by possession charge as moot. *See State v. Angram*, 270 N.C. App. 82, 88 (2020) ("Because we must reverse the judgment, we need not address [the] defendant's other issue on appeal.").

Finally, Defendant only raises prejudicial concerns regarding the trial court's alleged consideration of improper sentencing factors based on its decision not to consolidate Defendant's trafficking judgments and to run Defendant's sentences consecutively rather than concurrently. Defendant does not claim to have suffered any other prejudice at sentencing. Reversal of Defendant's conviction for trafficking in opium by possession would resolve any alleged prejudice caused by running his sentences consecutively or by declining to consolidate his judgments, as Defendant would remain sentenced on a single conviction. Therefore, I would dismiss this argument as moot. *Cf. State v. Wright*, 342 N.C. 179, 181 (1995) (holding that a defendant sentenced to life imprisonment could not have been prejudiced by any alleged errors for which the only prejudicial impact would be to render capital punishment inappropriate).

I respectfully dissent.

STATE OF NORTH CAROLINA
v.
TIMOTHY LEE SIMPSON, II

No. COA23-562

Filed 20 February 2024

1. Jury—selection—excusal for cause—concerns about law enforcement—trial court's discretion

In defendant's trial for driving while impaired, resisting a public officer, and being intoxicated and disruptive, the trial court did not err by excusing two prospective jurors for cause after each juror reported having strong negative opinions about law enforcement based on personal experiences, where the individuals' responses to voir dire indicated a bias that would affect their ability to render a fair and impartial verdict. Notably, defendant did not object to the dismissals, he had every opportunity to question and challenge the prospective jurors, he did not use all of his available peremptory challenges, and he expressed satisfaction with the empaneled jury to the trial court.

2. Motor Vehicles—driving while impaired—impairment at time of vehicle operation—defendant as driver—circumstantial evidence

The State presented substantial evidence from which a jury could conclude that defendant was the driver of a vehicle that law enforcement discovered wrecked in the middle of a road and that defendant was impaired at the time he drove it, including that defendant was found hiding behind a building about thirty yards away from the vehicle with no other individuals nearby; the wreck appeared to be recent based on "fresh" rut marks in the road and damage to a nearby tree; defendant smelled of alcohol, had red and glassy eyes, slurred his speech, and was unsteady on his feet when officers approached; defendant had a bump and cut on his forehead consistent with a car crash; and the keys to the vehicle were found in defendant's pocket.

3. Sentencing—two misdemeanor charges—sentence exceeded maximum allowable combined

Defendant was entitled to resentencing on two misdemeanor charges of resisting a public officer and being intoxicated and disruptive, for which the trial court's imposed period of confinement—

120 days—exceeded the maximum, combined allowable sentence under law of 80 days.

Appeal by Defendant from judgment entered 1 November 2022 by Judge Andrew Hanford in Alamance County Superior Court. Heard in the Court of Appeals 9 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the State.

Jackie Willingham, for Defendant.

WOOD, Judge.

Timothy Simpson ("Defendant") appeals a judgment entered against him for convictions of driving while impaired ("DWI"), resisting a public officer, and being intoxicated and disruptive. After careful review, we hold the trial court committed no error in excusing potential jurors for cause and in denying Defendant's motion to dismiss his DWI charge. However, the trial court miscalculated Defendant's sentence for the resisting a public officer and intoxicated and disruptive offenses. We remand only for re-sentencing on those two charges.

I. Factual and Procedural Background

At 2:30 a.m., on the morning of 18 April 2021, Corporals Strader and Acosta of the Graham Police Department observed Defendant ducking behind a building as they patrolled Main Street. The Officers noticed a wrecked vehicle in the middle of the road, about thirty yards from where Defendant was attempting to hide. The officers approached the vehicle and found the car abandoned with no one inside. The car appeared to have significant damage to the front left quarter panel. After observing a damaged tree in a nearby McDonald's parking lot and noting dirt and fresh gouges in the road, Officers deduced the vehicle had hit the tree and the driver had attempted to drive away after the collision. During their investigation, they observed Defendant quickly walking away from the crash site and noted that there was no one else in the vicinity other than Defendant. Believing Defendant was involved in the collision, Corporal Dunnigan followed Defendant.

Corporal Dunnigan pulled up to Cook Out as Defendant waited in the walk-up line to order. Before approaching Defendant, Corporal Dunnigan determined the registered owner of the crashed vehicle was Kelvin Washington. Corporal Dunnigan approached Defendant and said

the name of the registered owner aloud, to which Defendant replied that was not his name. While speaking with Corporal Dunnigan, Defendant denied driving the wrecked vehicle and shouted profanities at the officer. When other officers approached Defendant, they noticed he smelled of alcohol, he slurred his words, his eyes were red and glassy, and he was unsteady on his feet. Officers also noticed Defendant had a bump and cut on his forehead which they believed to be consistent with the car crash. After Defendant became uncooperative and would not provide information about his movements, the officers placed him under arrest. Defendant resisted being placed in the patrol car and it required several officers to make him comply. At the jail, Defendant refused to exit the patrol car for several minutes and was ultimately found in contempt by the magistrate.

While searching Defendant at the jail, officers located a car key fob in his pocket. Officer Pollock took the key, went back to the damaged vehicle, used the fob to open the vehicle doors, and determined that the key belonged to the wrecked vehicle. At the police station, Defendant refused to submit to a breathalyzer.

On 18 April 2021 Defendant was charged with driving while impaired, resisting a public officer, being intoxicated and disruptive, and hit and run from the scene of an accident. On 2 June 2022, Defendant was found guilty during a District Court bench trial. Defendant entered a notice of appeal to superior court where he requested a jury trial.

On 31 October 2022, jury selection began. The trial court, on its own initiative, excused two jurors for cause during *voir dire*.

In the first *voir dire*, the following exchange occurred:

> [Prosecutor]: Okay. And Ms. Hornbuckle, you raised your hand. What can you tell me about your interactions you've had with law enforcement?
>
> PROSPECTIVE JUROR HORNBUCKLE: Just recently, two weeks ago maybe, we had to call the Sheriff's Department out there because where we live is in -- it's basically nowhere in Snow Camp. The neighbor across the street, he has a lot of mental issues going on. He threw a hammer at the neighbor and was threatening to kill her. So, of course, me and my husband, we run up there to kind of protect her from him. And in turn, this guy threatens to kill all of us, including our families and our small children. Grandkids. So instead of the sheriff arresting this guy,

> even though there's like four witnesses to this incident, they told us that they couldn't do anything about it. They left this man in his trailer. Who also -- we had to call the sheriffs back out there a second time that night because we didn't have video of the incident. So I'm not real partial to the Sheriff's Department.
>
> [Prosecutor]: Okay. Do you feel that -- now, the case here involves the Graham Police Department. Do you feel that your feelings with the Sheriff's Department are going to effect [*sic*] the way you feel about all police?
>
> PROSPECTIVE JUROR HORNBUCKLE: Honesty, sadly, yes, I do. MS. JENNINGS: Can you tell me –
>
> PROSPECTIVE JUROR HORNBUCKLE: Because this man threatened to kill my entire family that night, along with my elderly neighbor who we are all on guard now there where we live. All the time.
>
> THE COURT: Ms. Hornbuckle, with the thanks of the Court, in my discretion I'm going to excuse you from this case and you're free to go.
>
> PROSPECTIVE JUROR HORNBUCKLE: Sorry. That is how I feel.
>
> THE COURT: It's okay. This is exactly the purpose of this process and you have done nothing wrong and thank you for telling us how you feel.

Later, the prosecutor asked potential jurors to consider if they had ever "had a close friend or relative that has been charged with a driving while impaired" and whether they felt the individual "was treated fairly through that process." Prospective Juror Diggs raised his hand to answer the questions and the following *voir dire* took place:

> PROSPECTIVE JUROR DIGGS: Yeah. I had a couple of friends get DUIs. We all played football and we go to the stadium on the weekend and tail gate. So one got a DUI one week. One got a DUI on the next week. Not saying that he was drunk but I wasn't there. I didn't do a test on him. But at the same time, where I live in Alamance County you see it from two different perspectives. All right. You going to one neighborhood every weekend but you're not going to the other neighborhood. So, you know -- and

I've always told my kids when they were growing up and they were in high school, if you driving back in Alamance County, if you outside Alamance County after 11:00 or 12:00, stay where you at. Because nine times out of ten you going to get pulled over. Whether you're doing something right or wrong, stay w[h]ere you at. Call me and let me know. So I got a different perspective on it.

[Prosecutor]: Okay.

PROSPECTIVE JUROR DIGGS: And I see it every weekend where I live at.

[Prosecutor]: So where do you live? You don't have to tell me exact address but what part of the county?

PROSPECTIVE JUROR DIGGS: I live in Burlington.

[Prosecutor]: In Burlington. Okay. And it seems that you have some pretty strong feelings with that.

PROSPECTIVE JUROR DIGGS: I got strong feelings because I work on the job for 18 and a half years. I had perfect attendance for 16 years. I go to work at 3:00 in the morning. My supervisor said, oh, Billy, we don't need you. Come back at 7:00. So I'm coming back through Graham and I get pulled over. I didn't do anything. I just went to work, on the way back home. Got to be back at 7:00. So, you know, I asked the officer, what did I do wrong. I didn't rape, rob, shoot anybody. What is the problem?

[Prosecutor]: If you don't mind my asking how –

PROSPECTIVE JUROR DIGGS: Come to find out, he gonna tell me my license plate light was out. I stopped going to work. That was the extra money for me and my family. I stopped going to work at 3:00 in the morning because I didn't want to be harassed anymore.

[Prosecutor]: So it sounds like you have some strong feelings towards law enforcement?

PROSPECTIVE JUROR DIGGS: Oh, yeah.

[Prosecutor]: So it sounds like, would you find it difficult to be fair and impartial to –

PROSPECTIVE JUROR DIGGS: I got strong feelings because where I live at the law is not applied equally.

> THE COURT: Mr. Diggs, with the thanks of the Court, I appreciate your willingness to share that with us and I'm going to excuse you off this jury. You're free to go.

Defendant's trial counsel did not object to either one of these dismissals during jury selection. Neither Defendant nor the State used all of their peremptory challenges, and both parties were satisfied with the empaneled jury.

Prior to the jury trial, Defendant pleaded guilty to the charges of resisting an officer and being intoxicated and disruptive. Sentencing for those charges was deferred until after the jury trial. At the close of the State's evidence, the trial court dismissed the charge of hit and run for insufficient evidence. On 1 November 2022, the jury found Defendant guilty of driving while impaired. The trial court sentenced Defendant to an aggravated Level I DWI for a term of 36 months' imprisonment and imposed a 120-day active sentence for the resisting an officer and intoxicated and disruptive charges which were to run concurrently with the DWI sentence. Defendant filed a notice of appeal on 9 November 2022.

II. Analysis

Defendant raises three issues on appeal. Each will be addressed in turn.

A. Jury Selection

[1] Defendant first argues the trial court erred by excusing two jurors who "expressed concerns about police activity without cause when potential jurors did not say they could not be fair and impartial, without a challenge for cause by either party, or without giving either party the opportunity to rehabilitate the jurors." Defendant concedes his trial counsel did not object to the trial court's dismissal of the jurors or their answers to the prosecutor's questions concerning law enforcement. Defendant requests this Court to exercise its inherent authority pursuant to N.C. R. App. P. 2. Under Rule 2 this Court can suspend the rules of Appellate Procedure "[t]o prevent manifest injustice to a party, or to expedite decision in the public interests." N.C. R. App. P. 2. Defendant directs our attention to *State v. Campbell* where our Supreme Court invoked Rule 2 to review issues arising during *voir dire*. 280 N.C. App. 83, 87, 866 S.E.2d 325, 328 (2021). We are persuaded by this argument and invoke Rule 2 to review the merits of this issue.

"Under both the Federal Constitution and the North Carolina Constitution, every criminal defendant has the right to be tried by a fair and impartial jury." *State v. Crump*, 376 N.C. 375, 381, 851 S.E.2d 904,

910 (2020); U.S. Const. amend VI; N.C. Const. art. I, § 24. A right to a fair trial protects the rights of an accused person to be "entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951). "The responsibility for enforcing this right necessarily rests upon the trial judge. He should conduct himself with the utmost caution in order that the right of the accused to a fair trial may not be nullified by an act of his." *Id.*

"The trial judge has broad discretion to see that a competent, fair and impartial jury is impaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion." *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980) (citation omitted). An abuse of discretion is established upon a showing that the trial court's actions were "manifestly unsupported by reason" and "so arbitrary that [they] could not have been the result of a reasoned decision." *State v. Cummings*, 361 N.C. 438, 490, 648 S.E.2d 788, 794 (2007). "The duty of the appellate court is not to micromanage the jury selection process. Indeed, an appellate court should reverse only in the event that the decision of the trial court is so arbitrary that it is void of reason." *Cummings*, 361 N.C. at 449, 648 S.E.2d at 795. Furthermore, "[d]eterminations of whether a juror would follow the law as instructed are best left to the trial judge, who is actually present during *voir dire* and has an opportunity to question the prospective juror." *Id.* at 450, 648 S.E.2d at 796. On this issue, our United States Supreme Court noted "[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Uttecht v. Brown*, 551 U.S. 1, 9, 127 S. Ct. 2218, 2224 (2007) (citations omitted).

A trial court, in exercising its discretion, "may excuse a juror without challenge by any party if he determines that grounds for challenge for cause are present." N.C. Gen. Stat. § 15A-1211(d). As such, a trial court may excuse for cause any prospective juror who the court believes "is unable to render a fair and impartial verdict" regardless of whether one of the parties challenges the juror. *State v. Carter*, 338 N.C. 569, 583, 451 S.E.2d 157, 165 (1994); *see also* N.C. Gen. Stat. § 15A-1212(9).

According to Defendant, the trial court erred in dismissing the two jurors during *voir dire* because by their dismissals, the trial court "set a tone of intolerance for jurors to express and hold their own beliefs." Defendant argues while both jurors' answers may have "demonstrated negative feelings about prior interactions with law enforcement," there

was no indication their prior negative experiences with law enforcement would have prevented or substantially impaired the performance of their duties as jurors. Furthermore, Defendant argues the court sheltered the jurors "who had positive, personal relationships with or expressed positive opinions of law enforcement officers" by asking rehabilitating questions and allowing "the district attorney to rehabilitate these jurors, whereas the defense was not allowed to question prospective jurors regarding their ability to set aside any prior negative experiences or opinions of law enforcement." We disagree.

During questioning, prospective jurors Hornbuckle and Diggs both expressed strong emotions against law enforcement based upon their personal experiences with officers. When asked by the prosecutor if prospective juror Hornbuckle's negative interaction with a Sheriff's department would affect her feelings "about all police," Juror Hornbuckle responded "[h]onesty, sadly, yes, I do." Similarly, when Prospective Juror Diggs was asked about prior experiences regarding driving while impaired, he discussed his negative prior experience with local law enforcement and stated he had strong feelings towards law enforcement. When asked by the prosecutor if it would be difficult to be fair and impartial in the case, Prospective Juror Diggs interjected in the middle of her question, "I got strong feelings because where I live at the law is not applied equally." After *voir dire*, the trial court, in its discretion, excused for cause the two individuals because of strong feelings and bias against law enforcement which would affect their ability "to render a fair and impartial verdict." *Carter*, 338 N.C. at 583, 451 S.E.2d at 165.

We also agree with the State that Defendant "fails to show that an unfair jury was empaneled in this case." As it is the right and duty of the court to see that a fair and impartial jury is empaneled, "even the erroneous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case." *State v. Harris*, 283 N.C. 46, 48, 194 S.E.2d 796, 798 (1973) (citation omitted).

Here, Defendant expressed his satisfaction with the empaneled jury to the trial court. Both Defendant and the State were granted every opportunity to *voir dire* the prospective jurors and exercise peremptory challenges. Defendant used four of his six peremptory challenges, while the State used two of its six peremptory challenges. Because Defendant did not use all of his peremptory challenges, "he cannot say he was forced to accept an undesirable juror." *State v. Hood*, 273 N.C. App. 348, 352, 848 S.E.2d 515, 519 (2020). The trial court did not abuse its

discretion in excusing the two prospective jurors for cause. Defendant's argument is overruled.

B. Motion to Dismiss

[2] Next, Defendant argues the trial court erred in denying his motion to dismiss the DWI charge. According to Defendant, there is insufficient evidence to support the DWI conviction because "there is no evidence when the car was operated or that [he] operated the vehicle." We are unpersuaded by Defendant's argument.

The denial of a motion to dismiss for insufficient evidence is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Upon a motion to dismiss, the question for the Court is whether "there is substantial evidence (1) of each element of the offense charged, and (2) that defendant is the perpetrator of the offense." *State v. Jones*, 110 N.C. App. 169, 177, 429 S.E.2d 597, 602 (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 ruling on a motion to dismiss, the trial court considers all admitted evidence, whether competent or incompetent, "in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). It is immaterial whether the evidence is direct, circumstantial, or both. *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). If substantial evidence exists supporting a finding that the offense charged was committed by the defendant, the case must be left for the jury. *State v. Davis*, 325 N.C. 693, 696–97, 386 S.E.2d 187, 189 (1989).

To be found guilty of DWI, the State must produce proof beyond a reasonable doubt of three elements: (1) that an individual drove a vehicle (2) upon any highway, street or public vehicular area, (3) while under the influence of an impairing substance. *See* N.C. Gen. Stat. § 20-138.1(a)(1). The issue in this matter is whether the State provided substantial evidence that Defendant drove the vehicle in question while under the influence of an impairing substance.

Although there was no eyewitness testimony that Defendant was seen driving the vehicle at 2:30 a.m. on the day in question, there was circumstantial evidence that Defendant was the driver of the vehicle. Officers came upon Defendant hiding behind a building about thirty yards away from the crashed vehicle. No other individuals were located by police near the collision scene. Officers also observed that the vehicle

had been abandoned in the middle of the road and determined that the crash had occurred recently since the damage to the nearby tree and the rut marks in the road were described as "fresh." The State argues "[i]t is certainly reasonable to infer that a vehicle sitting in the middle of the road was recently wrecked as it would impede traffic or law enforcement would have otherwise been informed." We agree.

Additionally, circumstantial evidence indicates Defendant was impaired at the time the vehicle crashed. Suspecting his involvement, officers followed Defendant as he walked away from the wrecked vehicle. Defendant was approached at Cook Out and spoke with several officers who observed that he smelled of alcohol, had red glassy eyes, had slurred speech, was unsteady on his feet, and became combative and belligerent during their exchange. Furthermore, Defendant continued to be disruptive as he was being placed into the patrol vehicle and later was held in contempt by the magistrate due to his belligerent behavior.

Finally, there was evidence that Defendant drove the wrecked vehicle as officers discovered the keys to the car in his pocket when he was searched at the jail. Although Defendant denied driving the vehicle, the keys to the wrecked vehicle were found in his pocket; Defendant was the only person located near the vehicle when officers discovered the wreckage at 2:30 a.m.; officers noted Defendant was trying to avoid being seen; officers observed a fresh cut on his forehead; and officers observed Defendant exhibiting symptoms of intoxication. Considered in the light most favorable to the State, there was substantial evidence to support the trial court's denial of Defendant's motion to dismiss the DWI charge.

C. Sentencing

[3] Defendant argues the trial court erred in sentencing Defendant to 120 days' confinement on the (1) resisting a public officer and (2) intoxicated and disruptive charges when the maximum, combined sentence allowed by law is 80 days. The State concedes the trial court erred and that Defendant should have been sentenced to 80 days for the two misdemeanor charges.

Resisting a public officer is a class 2 misdemeanor and carries a maximum possible sentence of 60 days active. N.C. Gen. Stat. § 15A-1340.23(c). Intoxicated and disruptive behavior is a class 3 misdemeanor with a maximum possible sentence of 20 days active. N.C. Gen. Stat. § 14-444; § 15A-1340.23(c). Together, the maximum combined sentence for both charges is 80 days. Additionally, Defendant's plea transcript acknowledges the maximum sentence for the charges

is 80 days. During sentencing, the trial court miscalculated the maximum sentence and mistakenly sentenced Defendant to 120 days to run concurrently with the 36-month active sentence for the DWI charge. Therefore, we remand to the trial court for resentencing on the two misdemeanor charges.

III. Conclusion

For the foregoing reasons, we hold the trial court did not err in excusing potential jurors for cause and in denying Defendant's motion to dismiss the DWI charge. We remand to the trial court for the sole purpose of resentencing on the two misdemeanor charges.

NO ERROR; REMANDED FOR RESENTENCING.

Judges FLOOD and STADING concur.

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

No. COA22-893-2

Filed 20 February 2024

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

In a Tort Claims Act involving a school bus accident, the Industrial Commission's interlocutory order denying a county board of education's motion for summary judgment based on sovereign immunity was immediately appealable as affecting a substantial right.

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

The Industrial Commission erred by denying a county school board of education's motion for summary judgment on plaintiff's property-damages claim under the Tort Claims Act (TCA) after determining that the board had waived sovereign immunity. Although the TCA waived immunity for school-bus accidents, in the instant case, where a school bus driver was delivering food to students learning remotely during the Covid-19 pandemic when he accidentally crashed his bus into plaintiff's parked car, the driver's use of the bus

fell within the "emergency management" exception created by the Emergency Management Act and, therefore, the board was immune from suit.

Appeal by Defendant from order entered 14 July 2022 by the North Carolina Industrial Commission. Originally heard in the Court of Appeals 11 April 2023. Petition for rehearing granted 18 December 2023.

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

Jermond Williams, Pro Se Plaintiff-Appellee.

CARPENTER, Judge.

The Charlotte-Mecklenburg Schools Board of Education (the "Board") appealed from the North Carolina Industrial Commission's (the "Commission's") denial of the Board's motion for summary judgment. On appeal, the Board argued that the Commission erred by finding waiver of sovereign immunity and denying the Board's motion for summary judgment. In a published opinion, we affirmed the Commission's denial of summary judgment. After granting the Board's petition for rehearing and upon additional review, we agree with the Board. Accordingly, we reverse 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 public-school bus for the sole purpose of delivering meals to remote-learning students. That day, Rand's school 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 before the Commission against the Board. After discovery, the Board moved for summary judgment

based on sovereign or governmental immunity.[1] Specifically, the Board argued that it maintained immunity because Rand, under the North Carolina Emergency Management Act (the "EMA"), was performing an emergency-management activity during the incident. The Board 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 controls.

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 school-bus claims. Nevertheless, the full Commission denied the Board's request for a full-panel review because the Board did not meet "its burden of showing that it would be deprived of a substantial right." On 15 August 2022, the Board timely appealed to this Court.

On 17 October 2023, we issued an opinion, *Williams v. Charlotte-Mecklenburg Schools Board of Education*, 291 N.C. App. 126, 129–33, 893 S.E.2d 885, 888–90 (2023), affirming the Commission's denial of summary judgment because a material question of fact remained. On 21 November 2023, the Board filed a petition for rehearing, arguing that we should reconsider our holding. On 18 December 2023, we granted the Board's petition for rehearing.

II. Jurisdiction

[1] As an initial matter, we must consider whether this Court has jurisdiction over an interlocutory order from the Commission. Under section 143-293, we conclude that we do. *See* N.C. Gen. Stat. § 143-293 (2021); *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 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.

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1. 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). The distinction, though, 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.

Appeals from the Commission 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) (citing N.C. Gen. Stat. § 7A-29) ("No appeal lies from an interlocutory order of the Industrial Commission.").

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.

Here, 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; 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 section 143-293.

III. Issue

The issue is whether the Commission erred in denying the Board's motion for summary judgment.

IV. Standard of Review

We review summary judgment denials de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

V. Analysis

[2] The Board argues that the Commission erred in finding waiver of sovereign immunity and denying the Board's motion for summary judgment. After careful review, we agree.

Summary judgment is appropriate when "there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (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).

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) (citing *Gammons v. N.C. Dep't of Hum. Res.*, 344 N.C. 51, 54, 472 S.E.2d 722, 723 (1996)). "The State and its governmental units cannot be deprived of the sovereign attributes of immunity except by a plain, unmistakable mandate of the [General Assembly]." *Orange Cnty. 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); *see also Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 610–11, 781 S.E.2d 282, 283–84 (2016) (holding that, although the TCA applies to school buses, activity buses are "not incorporated into the waiver of immunity contemplated by the [TCA]").

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 public-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, which includes the never-ending preparedness cycle of planning, prevention, mitigation, warning, movement, shelter, emergency assistance, and recovery." *Id.* § 166A-19.3(8). School buses may be used for "emergency management" purposes. N.C. Gen. Stat. § 115C-242(6) (2021).

Here, Rand, as a state employee during a state of emergency, drove a public-school bus to deliver food to students during the Covid-19 pandemic. During his delivery route, Rand collided with Plaintiff's parked vehicle, and under the TCA, Plaintiff sued the Board, the owner of the school bus. These are the material facts, and the parties do not dispute them. Therefore, either Plaintiff or the Board is entitled to judgment as a matter of law.[2] *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

School buses may be used for "emergency management" purposes, and delivering meals to remote students during the pandemic was such a purpose because doing so "minimize[d] the adverse effects" of the emergency by providing food to students who might otherwise go hungry. *See* N.C. Gen. Stat. § 166A-19.3(8).

The question now before us is whether the Board is immune to suits stemming from Rand's alleged negligence during the emergency-management activity. 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 that the TCA clearly waived immunity for school-bus accidents. *See* N.C. Gen. Stat. § 143-300.1(a). That clarity, however, faded with the passage of the EMA. *See* N.C. Gen. Stat. § 166A-19.60(a) (conflicting with the TCA by stating that "[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").

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2. In our initial opinion, we affirmed the Commission's denial of summary judgment because a material question of fact remained: whether the "bus" driven by Rand was actually a "school bus." *See Williams*, 291 N.C. App. at 130–33, 893 S.E.2d at 888–89. Upon further review, we conclude that "there is no genuine issue as to" whether Rand's bus was a school bus. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c). Any dispute over the label of the bus is immaterial because if the bus was something other than a school bus, like an activity bus, the Commission lacked jurisdiction to hear this case. *See Irving*, 368 N.C. at 610–11, 781 S.E.2d at 283–84. Therefore, either the Commission had jurisdiction, and the Board was immune to suit, *see Heath*, 282 N.C. at 296, 192 S.E.2d at 310; N.C. Gen. Stat. § 166A-19.60(a), or the Commission lacked jurisdiction, *see Irving*, 368 N.C. at 610–11, 781 S.E.2d at 283–84. Either way, summary judgment was appropriate. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

The TCA waived sovereign immunity, *see Heath*, 282 N.C. at 296, 192 S.E.2d at 310, but the EMA created a caveat concerning emergency-management activity, *see* N.C. Gen. Stat. § 166A-19.60(a). In other words, school boards may be sued in tort concerning school-bus accidents, generally, but school boards may not be sued concerning school-bus accidents if the bus is being used for an emergency-management purpose at the time of the accident. *See Heath*, 282 N.C. at 296, 192 S.E.2d at 310; *Guthrie*, 307 N.C. at 537–38, 299 S.E.2d at 627; N.C. Gen. Stat. § 166A-19.60(a). We so hold because waiver of sovereign immunity requires an "unmistakable mandate," and the EMA erases such a mandate in cases like this. *See Heath*, 282 N.C. at 296, 192 S.E.2d at 310; *Guthrie*, 307 N.C. at 537–38, 299 S.E.2d at 627; N.C. Gen. Stat. § 166A-19.60(a).

Therefore, the Commission erred by denying the Board's motion for summary judgment because the Board is immune from suit in this case. *See Heath*, 282 N.C. at 296, 192 S.E.2d at 310; *Guthrie*, 307 N.C. at 537–38, 299 S.E.2d at 627; N.C. Gen. Stat. § 166A-19.60(a).

VI. Conclusion

We hold the Commission erred in denying the Board's motion for summary judgment because the Board is immune from suit from school-bus accidents when the bus is used for emergency-management purposes. *See* N.C. Gen. Stat. § 166A-19.60(a). Accordingly, we reverse.

REVERSED.

Judges ZACHARY and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 FEBRUARY 2024)

C.P. v. PARKER No. 23-170	Mecklenburg (22CVD601209)	Affirmed
DAVIS v. CREWS No. 23-571	Lenoir (17SP195)	Reversed and Remanded
GLINSKY v. KUESTER MGMT. GRP., LLC No. 23-208	Pender (21CVS503)	Dismissed
IN RE I.S. No. 23-519	Beaufort (20JT57) (20JT58) (20JT59)	Affirmed
IN RE N.L.N. No. 23-630	Buncombe (07JT299) (17JT85) (17JT86)	Affirmed
JHANG v. TEMPLETON UNIV. No. 22-869	Gaston (21CVS4269)	Affirmed
MAYMEAD, INC. v. ALEXANDER CNTY. BD. OF EDUC. No. 22-953-2	N.C. Industrial Commission (TA-29127)	Reversed
MILEVIEW LLC v. RSRV. II AT SUGAR MOUNTAIN CONDO. OWNER'S ASS'N No. 23-603	Avery (21CVS256)	Affirmed in Part; Vacated and Remanded in Part.
NELSON v. OAKLEY No. 23-840	Wake (19CVS7484)	Affirmed
PHILLIPS v. PHILLIPS No. 23-504	Durham (19CVD901)	Affirmed
STATE v. BLACKSHEARE No. 23-572	Johnston (20CRS50130-31)	No Error
STATE v. CALDWELL No. 23-126	Johnston (21CRS52611)	No Error
STATE v. CLINTON No. 23-463	Mecklenburg (21CRS209113-14)	NO ERROR IN PART; REMANDED IN PART.

STATE v. DAVIS No. 23-557	Vance (13CRS52640-43)	Affirmed in Part Reversed in Part, and Remanded
STATE v. HARRIS No. 23-607	Beaufort (16CRS260)	No Error
STATE v. HOLMES No. 23-601	Forsyth (20CRS60488-89)	No Error in Part; Remanded for Resentencing.
STATE v. LIPSCOMB No. 23-407	Mecklenburg (20CRS3904) (20CRS3906)	No Error
STATE v. LOCKETT No. 23-713	Cleveland (21CRS54097)	No Error
STATE v. MARROQUIN No. 23-111	Forsyth (20CRS57269-72) (20CRS57330)	No Error
STATE v. MARTIN No. 23-47	Mecklenburg (18CRS232462) (18CRS232464)	No Error
STATE v. MOORE No. 23-380	Mecklenburg (19CRS229733) (19CRS229735)	No Error.
STATE v. PERRY No. 23-375	Cabarrus (21CRS412) (21CRS51890)	Reversed
STATE v. STEWART No. 23-291	Moore (20CRS51858)	No Error
STATE v. TATE No. 23-11	Randolph (20CRS53445)	No Error
STATE v. WALKER No. 23-585	New Hanover (20CRS55384-87) (22CRS1397)	No Error
TORRES v. KIDD No. 23-209	Wake (19CVD14937)	Affirmed in Part, Vacated in Part, and Remanded

CAUSEY v. SOUTHLAND NAT'L INS. CORP.

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

MIKE CAUSEY, COMMISSIONER OF INSURANCE
OF NORTH CAROLINA, PETITIONER
v.
SOUTHLAND NATIONAL INSURANCE CORPORATION, SOUTHLAND NATIONAL REINSURANCE CORPORATION, BANKERS LIFE INSURANCE COMPANY, COLORADO BANKERS LIFE INSURANCE COMPANY,
NORTH CAROLINA DOMICILED INSURANCE COMPANIES, RESPONDENTS

No. COA23-725

Filed 5 March 2024

1. Insurance—petition for liquidation—non-party motion to intervene—Rules of Civil Procedure not applicable—intervention allowed in error

In liquidation proceedings arising from the insolvency of several insurance companies—in which the petition for liquidation filed by the Commissioner of Insurance was objected to by a separate entity, GBIG Holdings, Inc., which described itself as the sole shareholder or "parent company" of the insolvent companies—the trial court erred by allowing GBIG Holdings, Inc. to intervene in the matter pursuant to Civil Procedure Rule 24(a) and (b). Where the plain language of N.C.G.S. § 58-30-95 provided for a proceeding of a civil nature with its own specialized procedure and evinced the legislature's intent to limit the ability to defend against a liquidation petition to directors only, and where the Rules of Civil Procedure were not specifically engrafted into that statutory provision, Rule 24 did not apply to allow intervention of a non-director.

2. Insurance—petition for liquidation—motion for continuance denied—no abuse of discretion

In a liquidation proceeding arising from the insolvency of several insurance companies, the trial court did not abuse its discretion by denying a motion to continue to allow discovery that was filed by a separate entity—which described itself as the sole shareholder or "parent company" of the insolvent companies but, not being a director, was erroneously allowed to intervene in the matter—where the insolvent companies had been making detailed quarterly disclosures since being placed in rehabilitation and where any delay in the parent entity's participation was self-imposed because it waited two weeks after being noticed of the liquidation hearing to file its motion.

3. Insurance—petition for liquidation—determination of insolvency—sufficiency of evidence

In a liquidation proceeding arising from the insolvency of several insurance companies, the trial court's decision ordering the companies into liquidation was affirmed where ample record evidence supported the court's conclusion that the companies were insolvent under N.C.G.S. § 58-30-10(13) and that liquidation was necessary to protect policyholders. The orders of the trial court were modified to clarify that a separate entity—which described itself as the sole shareholder or "parent company" of the insolvent companies—was erroneously allowed to intervene in the matter to defend against the liquidation petition because it was not a director and therefore was not a proper party to the action.

Appeal by intervenor-appellant from orders entered 30 December 2022 by Judge A. Graham Shirley II in Wake County Superior Court. Heard in the Court of Appeals 23 January 2024.

Attorney General Joshua H. Stein, by Deputy Solicitor General James W. Doggett, Special Deputy Attorney General Daniel S. Johnson, and Special Deputy Attorney General M. Denise Stanford, for petitioner-appellee.

Williams Mullen, by Wes J. Camden, Caitlin M. Poe, and Lauren E. Fussell, for respondents-appellees.

Fox Rothschild LLP, by Matthew Nis Leerberg and Condon Tobin Sladek Thornton Nerenberg PLLC, by Aaron Z. Tobin, for intervenor-appellant.

FLOOD, Judge.

Intervenor-Appellant GBIG Holdings, LLC ("GBIG") appeals from two orders entered 30 December 2022—an order denying GBIG's motion for a continuance to allow discovery and an order of liquidation against Bankers Life Insurance Company ("BLIC") and Colorado Bankers Life Insurance Company ("CBLIC"). Our review of the Record reveals that GBIG should not have been allowed to intervene; nevertheless, the trial court did not err in denying GBIG's motion to continue and ordering BLIC and CBLIC into liquidation. Accordingly, we modify the trial court's orders to clarify GBIG is not a proper party and affirm.

I. Facts and Procedural Background

The case before us is one of many cases stemming from the insolvency of several insurance companies owned by Greg Lindberg ("Lindberg"). Here, we provide only the facts pertinent to this appeal and those relevant facts that have not previously been addressed by this Court in *Southland National Insurance Corporation v. Lindberg*, 289 N.C. App. 378, 889 S.E.2d 512 (2023).

Respondents-Appellees Southland National Insurance Corporation ("Southland"), BLIC, and CBLIC are licensed domestic insurers, owned by GBIG. GBIG is wholly owned by Lindberg. On 18 October 2018, Southland, BLIC, and CBLIC consented to be placed under administrative supervision, following concerns from Petitioner-Appellee Commissioner of Insurance Mike Causey ("Causey"), that the companies would be financially unable to meet outstanding obligations to their policyholders. During the period of administrative supervision, Causey determined that under the current investment structure, Southland, BLIC, and CBLIC lacked the liquidity to pay their policyholders and ultimately placed the companies into rehabilitation.

The Southland Liquidation Hearing

After over two years of supervising Southland, on 21 March 2021, Causey filed a petition for liquidation due to Southland's insolvency. On 14 April 2021, GBIG filed an objection to the petition for liquidation as well as a motion for continuance to allow for discovery, prompting Causey to file a response in which he asserted GBIG lacked standing under N.C. Gen. Stat. § 58-30-95 (2021) to bring an objection to the petition. On 16 April 2021, the petition for liquidation of Southland was heard and the trial court, in granting GBIG's motion to intervene, stated, "I do believe [GBIG] ha[s] the right to contest [the petition]." Following the hearing, an order (the "Southland Order") was entered, in which the trial court found:

> 10. [Causey] contends that GBIG lacks standing to defend against this petition because [he] seeks a liquidation order based solely on 58-30-100—which does not mention any such right to defend. However, the immediately preceding statute, Section 58-30-95, explicitly requires the [c]ourt to "permit the directors of the insurer to take such action as are reasonably necessary to defend against the petition [for liquidation]," at least for petitions arising under that section. The [c]ourt finds it unnecessary to decide whether there is a statutory right to defend against

> a petition arising solely under 58-30-100, because the [c]ourt will exercise its "broad supervisory power" to allow GBIG to contest whether [Southland] is insolvent under the statutory definition of insolvency[.]
>
> 11. [Causey] contends that only "the directors of the insurer," may defend against the petition under Section 58-30-95(a) and therefore, GBIG does not have standing to defend against this petition. GBIG, in contrast, contends that under these circumstances, where [Southland] no longer has active directors, the statutory right of defense vests in GBIG as [Southland's] sole shareholder and owner. [Causey] notes that as Rehabilitator he possesses the statutory power to exercise and enforce all rights, remedies, and powers of the sole shareholder, under Section 58-30-85 (a)(19). Again, the [c]ourt finds it unnecessary to decide whether GBIG may defend against the petition as a matter of statutory right, because the [c]ourt will instead invoke its broad supervisory power to allow GBIG to contest whether [Southland] is insolvent under the statutory definition of insolvency.

Ultimately, as to the Southland liquidation petition, the trial court concluded that GBIG would be allowed to "contest whether [Southland] [was] insolvent under the statutory definition of insolvency" and may conduct limited prehearing discovery, but neglected to rule specifically on whether GBIG had standing to intervene.

On 10 June 2021, Southland, Causey, and GBIG jointly motioned to stay the liquidation proceedings, which the trial court granted, allowing the parties to reschedule for a later date.

A few months later, on 3 November 2021, GBIG filed a motion seeking authority from the trial court to propose a plan of rehabilitation for Southland, BLIC, and CBLIC. In its order denying GBIG's motion, the trial court found:

> Without specifically ruling on the standing issue, this [c]ourt noted that N.C. Gen. Stat. § 58-30-95 permits directors of the insurer to take action to defend against a liquidation petition, and therefore found it unnecessary to determine whether GBIG [ ] had standing to file an objection. Instead this [c]ourt exercised "broad supervisory power" to allow GBIG [ ] to contest whether [Southland]

> is insolvent as defined by statute for the purpose of hearing on that specific determination.

The BLIC and CBLIC Liquidation Hearing

Nearly one year later, on 1 November 2022, Causey filed a verified petition for an order of liquidation against BLIC and CBLIC, asserting that the companies were insolvent within the meaning of Chapter 58 of the North Carolina General Statutes. At the time of filing, BLIC's assets of $253,163,012 did not exceed its liabilities of $345,062,743, and CBLIC's assets of $1,369,052,180 did not exceed its liabilities of $2,508,953,520. Two weeks later, GBIG filed an objection to the petition for liquidation as well as a motion for continuance to allow discovery, asserting that, as the "parent company" of both BLIC and CBLIC, it should be allowed to present evidence showing neither company was insolvent.

On 21 November 2022, a hearing on GBIG's motion for a continuance to allow for discovery came on, during which the trial court engaged in a lengthy colloquy with counsel for GBIG regarding GBIG's participation in the matter. When asked where the directors of BLIC and CBLIC were, counsel for GBIG stated, "[w]ell, Your Honor, the directors were in effect disbanded when they filed liquidation." Unconvinced, the trial court then asked counsel for GBIG to point to a statute that disbands directors of an insurer upon filing of liquidation, which counsel for GBIG could not do. Eventually, counsel for GBIG conceded that, at the time the liquidation petition was filed, both BLIC and CBLIC had directors; therefore, those directors could be in court to defend against the petition.

The trial court continued questioning counsel for GBIG about whether the Rules of Civil Procedure governed this action, asking specifically if "every petition filed in Superior Court [was] governed by the Rules of Civil Procedure," to which counsel for GBIG responded, "I don't know the answer to that question." Answering its own question, the trial court clarified by stating that not all petitions in superior court are governed by the Rules of Civil Procedure. The trial court went on to explain that "the Legislature has recognized that in a liquidation proceeding, [] the directors who owe a fiduciary duty can come in and argue against [the petition]," and again asked, "so why aren't the directors here?" The following exchange then occurred:

> [COUNSEL]: My understanding is that the board, there were some directors that were in place at the time. Then the corporations were placed into rehabilitation. Those directors, I believe some of them, they've done nothing

> essentially since that time and would be surprised to know that they have any obligations at this time.
>
> THE COURT: Well, who are those directors?
>
> [COUNSEL]: I don't know their names right off the top of my head.
>
> THE COURT: You have done absolutely no investigation[.]

After the lengthy back-and-forth, the trial court ultimately concluded from the bench that "when it comes to defending against an order of liquidation, the statute only authorizes directors to do that." The Court further stated that it presumes the Legislature used the word "directors" to mean "directors, not anyone else." Apparently dissatisfied with GBIG's lack of knowledge regarding the whereabouts of BLIC's and CBLIC's directors, the trial court stated "GBIG has made no – apparently no investigation into" where the directors were or who they were. Ultimately, with respect to the BLIC and CLBIC liquidation petitions, the trial court found that "GBIG does not have standing."

Upon holding from the bench that GBIG lacked standing, counsel for GBIG motioned to intervene "both as a matter of right under 24(a) and under permissive intervention under 24(b)." After allowing GBIG's motion, the trial court added, "[y]ou should have made your motion to intervene some time ago."

On 30 December 2022, following the hearing, the trial court entered two orders—one denying GBIG's motion for continuance to allow for discovery (the "Continuance Order") and another, ordering BLIC and CBLIC into liquidation (the "Liquidation Order"). In the Continuance Order, the trial court stated its findings:

> 110. The Court finds the General Assembly's distinction between shareholders and directors is intentional and that the General Assembly conferred no right upon the shareholders of an insurer to defend against a petition for an order of liquidation. The absolute right to defend against a petition to liquidate rest solely with the insurer's board of directors. Unless otherwise ordered by the [c]ourt, the shareholders have no such right to defend against a petition for an order of liquidation and may only defend against such action as the [c]ourt in its discretion allows.
>
> . . . .

> 122. To the extent that there is any ambiguity in the [c]ourt's prior rulings on this issue, for the absence of all doubt, the [c]ourt hereby amends such interlocutory orders pursuant to its inherent authority to conform to this Order holding that GBIG does not have a statutory right to oppose the liquidation of [BLIC and CBLIC].
>
> . . . .
>
> 158. At the hearing, GBIG orally moved to intervene in this matter. In its discretion, the [c]ourt grants GBIG's oral [m]otion to [i]ntervene in this matter. The [c]ourt does not base its ruling on any finding or conclusion that GBIG has carried its burden under Rule 24(a) or (b) of the North Carolina Rules of Civil Procedure assuming that the Rules of Civil Procedure [a]pply. Rather, the [c]ourt allows the intervention in its discretion under Article 30 of Chapter 58 of the North Carolina General Statutes to administer the rehabilitation and liquidation proceedings.

Ultimately, the trial court concluded the Continuance Order by stating that, in its discretion, it would grant GBIG's motion to intervene "as a non-party in this matter for the purposes of informing the [c]ourt through argument and evidence at the hearing on the petition for liquidation." The trial court echoed that statement again in the Liquidation Order, finding: "At the hearing on [the Liquidation Petition] this [c]ourt ruled that GBIG [ ], the sole shareholder of BLIC and CBL[IC] did not have a statutory right to object to or contest the Verified Petition. Nevertheless, the [c]ourt granted GBIG's oral motion to intervene in the action."

GBIG filed timely notice of appeal from both the Continuance Order and Liquidation Order.

II. Jurisdiction

The Continuance Order, while interlocutory, is immediately appealable under N.C. Gen. Stat. § 1-278, which provides this Court may "review any intermediate order involving the merits and necessarily affecting the judgment." N.C. Gen. Stat. § 1-278 (2023). The Liquidation Order constitutes a final judgment in the liquidation proceedings against BLIC and CBLIC and is therefore appealable under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Analysis

On appeal, GBIG argues the trial court erred in denying its motion for a continuance to allow for discovery and ordering BLIC and CBLIC

into liquidation. As a threshold issue, however, we must first consider whether the trial court properly exercised "broad discretionary power" when it allowed GBIG to intervene as a non-party.

A. GBIG's Participation in the BLIC and CBLIC Liquidation Hearing

[1] Causey argues GBIG lacks standing to intervene against the liquidation petition because Chapter 58, Article 30 expressly states that the trial court shall grant "the directors of the insurer to take such action as are reasonably necessary to defend against the petition[.]" On the other hand, GBIG argues it should be allowed to intervene because the trial court had allowed it to intervene in the past, and it has a valuable property interest in both BLIC and CBLIC.

When a trial court's discretionary ruling rests on the interpretation of a statute, constructions of those statutes are reviewed *de novo*. *Myers v. Myers*, 269 N.C. App. 237, 241, 837 S.E.2d 443, 448 (2020). Rule 1 of the North Carolina Rules of Civil Procedure applies "in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C. Gen. Stat. § 1A-1, Rule 1 (2023). Our Supreme Court in *In re Ernst & Young, LLP* held, however, that when "the legislature has prescribed specialized procedures to govern a particular proceeding," the Rules of Civil Procedure "do not apply." 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009). Finally, "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe [it] using its plain meaning." *Burgess v. Your House of Raleigh Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990).

In *In re Ernst & Young*, our Supreme Court considered facts very similar to the case at bar. Ernst & Young sold several tax shelters to Wal-Mart and then helped Wal-Mart restructure to implement the tax shelters. 363 N.C. at 613, 684 S.E.2d at 152. Pursuant to N.C. Gen. Stat. § 105-258(a)(2), the Secretary of Revenue elected to request Ernst & Young provide testimony and documents relating to Wal-Mart's tax shelters. *Id.* at 613, 684 S.E.2d at 152. Ernst & Young only partially complied, prompting the Secretary to pursue a court order compelling it to comply with the summons. *Id.* at 613, 684 S.E.2d at 152. Wal-Mart then filed both a motion to intervene and a motion to dismiss. *Id.* at 614, 684 S.E.2d at 153. In its motion to intervene, Wal-Mart claimed intervention was "the only way to assert its due process rights under the North Carolina and United States Constitutions." *Id.* at 614–15, 684 S.E.2d at 153. In its motion to dismiss, Wal-Mart claimed the case should be dismissed for failure to comply with the North Carolina Rules of Civil Procedure's

service requirements. *Id.* at 614, 684 S.E.2d at 153. The trial court allowed the motion to intervene but denied the motion to dismiss.

Upon review, our Supreme Court considered, *inter alia*, whether the precise language of N.C. Gen. Stat. § 105-258(a) required the Secretary of Revenue to initiate "a civil action as defined in the General Statutes governing civil procedure." *Id.* at 617, 684 S.E.2d at 154. Ultimately, the Supreme Court held that, because the Secretary of Revenue's initial inquiry under the statute did not explicitly involve filing a civil complaint or initiating a civil action, the statute was a "self-contained, specialized procedure, supplant[ing] the Rules of Civil Procedure." *Id.* at 617, 684 S.E.2d at 155. The Supreme Court further concluded that "although the Court of Appeals erred in holding to the contrary, it correctly affirmed the order of the trial court in denying Wal-Mart's motion to dismiss." *Id.* at 620, 684 S.E.2d at 156. Ultimately, the Supreme Court modified and affirmed the decision of this Court. *Id.* at 620, 684 S.E.2d at 156.

Subsequently, this Court in *In re Simmons* cited to *In re Ernst & Young* to support the conclusion that "[a]lthough 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.' " 291 N.C. App. 30, 32, 893 S.E.2d 271, 273 (2023) (alternation in original) (quoting N.C. Gen. Stat. § 1A-1 Rule 1). In *In re Simmons*, this Court considered whether the trial court erred in denying a motion to set aside an order allowing a foreclosure sale. *Id.*, 893 S.E.2d at 272. The grantors argued that the trial court erred in denying their motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. *Id.*, 893 S.E.2d at 272. Ultimately, this Court held that the North Carolina Rules of Civil Procedure do not apply to foreclosure proceedings because the rules were not "specifically engrafted into the [foreclosure] statute." *Id.* at 34–35, 893 S.E.2d at 274.

Following the precedent set in *In re Ernst & Young* and *In re Simmons*, we note that when a statute describes a "proceeding of a civil nature with its own specialized procedure[,]" that statute then "supplants the Rules of Civil Procedure." *In re Ernst & Young*, 363 N.C. at 620, 684 S.E.2d at 156. Further, following this Court's holding in *In re Simmons*, the North Carolina Rules of Civil Procedure apply only when specifically "engrafted" into a statute that describes a proceeding with its own specialized procedure. *See In re Simmons*, 291 N.C. App. at 34–35, 893 S.E.2d at 274.

Here, applying the same tenets of statutory construction, the clear and unambiguous language of N.C. Gen. Stat. § 58-30-95 states that

"[t]he [c]ourt shall permit the directors of the insurer to take such actions as are reasonably necessary to defend against the petition[.]" N.C. Gen. Stat. § 58-30-95. Similar to the optional authority given to the Secretary of Revenue to request documents and testimony in *In re Ernst & Young*, here, the statute does not explicitly require the directors to initiate a civil action or file a complaint. Rather, the statute only confers upon the directors of an insurer the *option* to take necessary actions to defend against a liquidation petition. *See* N.C. Gen. Stat. § 58-30-95. Notably absent from the statute is any directive that directors *shall* file a civil complaint.

For those reasons, we conclude N.C. Gen. Stat. § 58-30-95 is a proceeding of a civil nature with its own specialized procedure, and therefore, it supplants the North Carolina Rules of Civil Procedure. *See In re Ernst & Young*, 363 N.C. at 620, 684 S.E.2d at 156. Having concluded that Section 58-30-95 supplants the Rules of Civil Procedure, it follows that the procedure for defending against a liquidation petition is contained in the express, unambiguous language of the statute, which grants *directors*, and directors alone, the power to take necessary actions to defend against liquidation petitions. To hold otherwise would eviscerate the thrust of our Legislature's intent in enacting N.C. Gen. Stat. § 58-30-95 by allowing any interested parties to participate in liquidation proceedings by asserting standing under N.C. R. Civ. P. 24(a) (allowing a non-party to intervene of right when they have an interest in the property or transaction) or N.C. R. Civ. P. 24(b) (allowing for permissive non-party intervention when the non-party's "claim or defense and the main action have a question of law or fact in common").

Where GBIG is not a director of either BLIC or CBLIC, non-party GBIG did not have standing to intervene, nor should it have been allowed to intervene in the liquidation proceeding simply because the trial court previously exercised its broad discretionary power to allow it to intervene in the Southland liquidation. *See* N.C. Gen. Stat. § 58-30-95.

B. Trial Court's Rulings on the Continuance and Liquidation Orders

Having concluded the trial court erred when it allowed GBIG's motion to intervene, we next consider whether the trial court nevertheless acted properly when entering both the Continuance Order and the Liquidation Order. GBIG argues the denial of its motion for a continuance "prevented it from having a meaningful opportunity to defend against the liquidation petition" and therefore, the trial court erred in denying its motion to continue and entering the liquidation order. We disagree.

1. The Trial Court's Denial of GBIG's Motion to Continue

[2] An order denying a motion for continuance is reviewed for abuse of discretion. *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976). Under an abuse of discretion standard, reversal is appropriate only to correct "gross abuse," such as where a decision "was 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).

A trial court may grant a continuance if the movants have "acted with diligence and in good faith[.]" *May v. City of Durham*, 136 N.C. App. 578, 581, 525 S.E.2d 223, 227 (2000). Accordingly, a movant cannot "use [its own] self-imposed delay to support a request for a continuance." *Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 508, 320 S.E.2d 892, 899 (1984).

Here, the trial court correctly determined that GBIG "should have made [its] motion to intervene some time ago," given GBIG waited two weeks after the superior court noticed a hearing to seek a continuance. Further, GBIG's argument that the denial of its motion to continue prevented it from having a meaningful opportunity to defend against liquidation is disingenuous, given both BLIC and CBLIC had been making detailed quarterly disclosures since being placed in rehabilitation.

Considering GBIG waited two weeks after being noticed of the upcoming hearing to file a motion for continuance, it would appear to this Court that GBIG's delay was self-imposed. For that reason, the trial court's decision to deny GBIG's motion can hardly be considered "so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

2. The Trial Court's Liquidation Order

[3] Conclusions of law are reviewed *de novo* on appeal. *See State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). " '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)). Under N.C. Gen. Stat. § 58-30-10(13), an insurer is considered insolvent when it is unable to pay its obligations when they are due or if "its admitted assets do not exceed its liabilities[.]" N.C. Gen. Stat. § 58-30-10(13) (2023).

The Record is replete with evidence to support the trial court's conclusion that both BLIC and CBLIC were insolvent and "in such condition as to render the continuance of its business hazardous, financially, or

otherwise, to its policyholders[.]" At the time of filing the liquidation petition, BLIC's assets of $253,163,012 did not exceed its liabilities of $345,062,743, and CBLIC's assets of $1,369,052,180 did not exceed its liabilities of $2,508,953,520, rendering them both insolvent under N.C. Gen. Stat. § 58-30-10(13). In ordering both BLIC and CBLIC into liquidation, the trial court focused on Article 30's purpose—to protect the interests of thousands of policyholders in the State of North Carolina. *See* N.C. Gen. Stat. § 58-30-1(c) (2023).

For the aforementioned reasons, we affirm both the Continuance Order and the Liquidation Order and modify each order to clarify that GBIG should not have been allowed to intervene pursuant to N.C. Gen. Stat. § 58-30-95 or through the exercise of the trial court's broad discretionary power. *See In re Ernst & Young, LLP*, 363 N.C. at 620, 684 S.E.2d at 156 (concluding that, despite this Court's incorrect conclusion that the Rules of Civil Procedure superseded a statutory requirement, nevertheless the order should be modified, yet affirmed).

IV. Conclusion

In conclusion, we hold that as a shareholder, GBIG should not have been allowed to intervene and defend against the liquidation petition, as only a company's directors are permitted to intervene to defend under N.C. Gen. Stat. § 58-30-95. Where the trial court allowed GBIG to participate, we modify both the Continuance Order and the Liquidation Order to clarify that GBIG is not a proper party to the action and affirm.

MODIFIED AND AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

EMILY HAPPEL, INDIVIDUALLY, TANNER SMITH, A MINOR, AND EMILY HAPPEL ON BEHALF OF TANNER SMITH AS HIS MOTHER, PLAINTIFFS
v.
GUILFORD COUNTY BOARD OF EDUCATION AND OLD NORTH STATE MEDICAL SOCIETY, INC., DEFENDANTS

No. COA23-487

Filed 5 March 2024

Immunity—statutory—public health emergency legislation—broad scope of immunity—administration of COVID-19 vaccine without parental consent

In an action filed by a fourteen-year-old student and his mother (plaintiffs), where the student visited a clinic run by a private medical society inside a high school to get tested for COVID-19 but instead received a COVID-19 vaccine without parental consent, the trial court properly dismissed plaintiffs' complaint against the medical society and the local school board (defendants) because defendants were each shielded from suit as "covered persons" under the federal Public Readiness and Emergency Preparedness Act for harms caused by the administration of any "covered countermeasure" (such as the COVID-19 vaccine) used to address a public health emergency. Further, because the Act's immunity provision applied broadly to "all claims for loss," with "loss" being defined as "any type of loss," defendants were immune from liability for plaintiffs' claims alleging battery and multiple state constitutional violations. Finally, none of plaintiffs' claims fell under the sole exception to immunity under the Act for federal causes of action for death or serious physical injury.

Appeal by Plaintiffs from an order entered 1 March 2023 by Judge Lora C. Cubbage in Guilford County Superior Court. Heard in the Court of Appeals 28 November 2023.

Walker Kiger, PLLC, by David Steven Walker, for Plaintiffs-Appellants.

Tharrington Smith, LLP, by Stephen G. Rawson, for Guilford County Board of Education, Defendants-Appellees.

Rossabi Law Partners, by Gavin J. Reardon and Amiel J. Rossabi, for Old North State Medical Society, Inc., Defendants-Appellees.

WOOD, Judge.

Tanner Smith ("Tanner") and his mother, Emily Happel ("Emily") (collectively, the "Plaintiffs") appeal the trial court's dismissal of their claims against the Guilford County Board of Education (the "Board") and Old North State Medical Society, Inc. ("ONS Medical Society") (collectively, the "Defendants") based on, among other things, statutory immunity under the federal Public Readiness and Emergency Preparedness Act ("PREP Act"). After careful review of the relevant statutes and case law, we affirm the trial court's order.

I. Factual and Procedural History

On 14 August 2021, Tanner was fourteen years old and a football player at Western Guilford High School, a school within the Guilford County Schools system. By letter dated 19 August 2021, Guilford County Schools informed Emily and Brett Happel ("Brett"), Tanner's stepfather, that Tanner may have been affected by a "recent COVID-19 cluster" involving football team members at his school, and that the Guilford County Public Health Department recommended and requested COVID-19 testing for individuals potentially infected, regardless of vaccination status. The letter stated that unless parents allowed their children to be tested, Guilford County Schools would not allow players "to return to practice until cleared by a public health professional." The letter further stated that COVID-19 testing would be available on 20 August 2021 at no cost at Northwest Guilford High School. The letter indicated ONS Medical Society would conduct the testing and "consent for testing is required."

On 20 August 2021, Brett drove Tanner to the testing site at Northwest Guilford High School. Brett remained inside his vehicle while Tanner went into the testing facility, which was also a COVID-19 vaccination site. Inside, clinic workers gave Tanner a form to fill out, which he believed to be something related to the COVID-19 test. Tanner was seated in the facility while a clinic worker tried unsuccessfully to call Emily to obtain consent to administer a COVID-19 vaccine to him. The workers did not attempt to contact Brett. After failing to make contact with Tanner's mother, one of the workers instructed the other worker to "give it to him anyway." Tanner stated he did not want a vaccine and was only expecting a test, but one of the workers administered a Pfizer COVID-19 vaccine to him.

Plaintiffs initiated this lawsuit on 19 August 2022, alleging three causes of action: (1) battery; (2) violations of Emily's constitutional liberty and parental rights and of Tanner's bodily autonomy rights under

N.C. Const. art. I, §§ 1, 13, and 19; and (3) violations of both of Plaintiffs' federal constitutional rights.[1] On 21 November 2022, the Board filed its answer, a motion to dismiss pursuant to Rules 12(b)(1) and (6), and a cross-claim against ONS Medical Society. On 30 December 2022, ONS Medical Society filed its answer and a motion to dismiss pursuant to Rules 12(b)(1) and (6).

The trial court held a hearing on 30 January 2023 and filed its written order on 1 March 2023 dismissing Plaintiffs' complaint as to both Defendants. On 9 March 2023, Plaintiffs filed timely written notice of appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2022).

II. Analysis

Plaintiffs argue the trial court erred in determining that the PREP Act, which is codified at 42 U.S.C. § 247d-6d (addressing liability immunity) is applicable to this case and provides immunity to both Defendants. Due to the sweeping breadth of the federal liability immunity provision in the PREP Act, we are constrained to disagree.

We review "a trial court's decision to grant or deny a motion to dismiss based upon the doctrine of governmental or legislative immunity . . . de novo." *Providence Volunteer Fire Dep't, Inc. v. Town of Weddington*, 382 N.C. 199, 209, 876 S.E.2d 453, 460 (2022).

Our state law requires that "a health care provider shall obtain written consent from a parent or legal guardian prior to administering any vaccine that has been granted emergency use authorization and is not yet fully approved by the United States Food and Drug Administration to an individual under 18 years of age." N.C. Gen. Stat. § 90-21.5(a1) (2021).

Enacted 30 December 2005, the PREP Act provides that when the Secretary of Health and Human Services (the "Secretary") "makes a determination that a disease or other health condition or other threat to health constitutes a public health emergency, or that there is a credible risk that the disease, condition, or threat may in the future constitute such an emergency," the Secretary may make a "declaration" recommending "the manufacture, testing, development, distribution, administration, or use of one or more covered countermeasures." 42 U.S.C. § 247d-6d(b)(1). Additionally, the Secretary may declare that the provisions of subsection (a) apply "to the activities so recommended." *Id.* Subsection (a), in turn, provides liability immunity:

1. Plaintiffs abandon their federal constitutional claims on appeal.

> Subject to the other provisions of this section, a covered person shall be immune from suit and liability under Federal and State law with respect to *all claims for loss* caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure.

42 U.S.C. § 247d-6d(a)(1) (emphasis added).

As for the scope of liability immunity, the PREP Act defines *loss* in the following manner:

> For purposes of this section, the term "loss" means *any type of loss*, including—
>
> (i) death;
>
> (ii) physical, mental, or emotional injury, illness, disability, or condition;
>
> (iii) fear of physical, mental, or emotional injury, illness, disability, or condition, including any need for medical monitoring; and
>
> (iv) loss of or damage to property, including business interruption loss.

42 U.S.C. § 247d-6d(a)(2)(A) (emphasis added). The PREP Act defines the scope of such immunity as follows:

> The immunity . . . applies to *any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure*, including a causal relationship with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, *administration*, licensing, or use of such countermeasure.

42 U.S.C. § 247d-6d(a)(2)(B) (emphasis added). "[T]he sole exception to the immunity from suit and liability of covered persons set forth in subsection (a) shall be for an exclusive Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct." 42 U.S.C. § 247d-6d(d)(1).

Additionally, we must consider two more definitions under 42 U.S.C. § 247d-6d. The PREP Act defines *covered person*, "when used with respect to the administration or use of a covered countermeasure," as the following:

> (A) the United States; or
>
> (B) a person or entity that is—
>
> (i) a manufacturer of such countermeasure;
>
> (ii) a distributor of such countermeasure;
>
> (iii) a program planner of such countermeasure;
>
> (iv) a qualified person who prescribed, administered, or dispensed such countermeasure; or
>
> (v) an official, agent, or employee of a person or entity described in clause (i), (ii), (iii), or (iv).

42 U.S.C. § 247d-6d(i)(2). A covered countermeasure includes a drug, biological product, or device that is authorized for emergency use. 42 U.S.C. § 247d-6d(i)(1).

Finally, the PREP Act contains a broad provision preempting state law, which states:

> During the effective period of a declaration under subsection (b) of this section, or at any time with respect to conduct undertaken in accordance with such declaration, no State or political subdivision of a State may establish, enforce, or continue in effect with respect to a covered countermeasure any provision of law or legal requirement that—
>
> (A) is different from, or is in conflict with, any requirement applicable under this section; and
>
> (B) relates to the design, development, clinical testing or investigation, formulation, manufacture, distribution, sale, donation, purchase, marketing, promotion, packaging, labeling, licensing, use, any other aspect of safety or efficacy, or the prescribing, dispensing, or administration by qualified persons of the covered countermeasure, or to any matter included in a requirement applicable to the covered countermeasure under this section or any other provision of this chapter.

42 U.S.C. § 247d-6d(b)(8).

On 17 March 2020, in response to COVID-19, the Secretary issued a declaration pursuant to 42 U.S.C. § 247d-6d(b)(1) recommending the use of covered countermeasures, defined as "any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to

treat, diagnose, cure, prevent, or mitigate COVID-19." Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15,198-01, 15,202. The declaration provides guidance on who is a covered person under the PREP Act:

> The PREP Act's liability immunity applies to "Covered Persons" with respect to administration or use of a Covered Countermeasure. The term "Covered Persons" has a specific meaning and is defined in the PREP Act to include manufacturers, distributors, program planners, and qualified persons, and their officials, agents, and employees, and the United States. The PREP Act further defines the terms "manufacturer," "distributor," "program planner," and "qualified person" as described below.
>
> . . .
>
> A program planner means a *state or local government*, including an Indian tribe; a person employed by the state or local government; or other person who supervises or administers a program with respect to the administration, dispensing, distribution, provision, or use of a Covered Countermeasure, including a person who establishes requirements, provides policy guidance, or supplies technical or scientific advice or assistance or *provides a facility to administer or use a Covered Countermeasure* in accordance with the Secretary's Declaration. Under this definition, a *private sector employer or community group* or other "person" can be a program planner when it carries out the described activities.

Id. at 15,199. (Emphasis added.)

Here, the trial court took "judicial notice of the fact that the required declaration by the U.S. Department of Health and Human Services was in place for the Pfizer COVID-19 vaccine at the time of the vaccination at issue in this case." Plaintiffs do not dispute that the Pfizer COVID-19 vaccine was a covered countermeasure.

As for whether Defendants are covered persons under the PREP Act, we hold ONS Medical Society is a covered person as a program planner that administered a vaccine clinic, and individually administered vaccines to individuals, within the meaning of 42 U.S.C. § 247d-6d(i)(2)(B)(iii). The declaration clearly provides that a program planner may be a private

sector employer or community group when it carries out the "described activities" including administration of a covered countermeasure. ONS Medical Society is a community group that did just that. Regarding the Board, Plaintiffs argue "[i]t is unclear under what theory the Board was a covered person under the trial court's reasoning." According to Plaintiff, the "only acceptable theory is that it is because of the Board's involvement in the partnership with ONS [Medical Society] in operating and providing the locations for the vaccine clinics." The Board contends Plaintiffs' argument essentially accepts the trial court's determination that the Board is a covered person, and therefore, it did "not respond further on this point." This Court, however, must determine whether the Board meets the criteria of "a covered person" as defined under the PREP Act. We are convinced by the Secretary's interpretation in the declaration that a covered person under the PREP Act includes a "state or local government . . . [that] provides a facility to administer or use a Covered Countermeasure." Declaration, 85 Fed. Reg. at 15,199. We hold this language includes the Board, which provided a facility—Northwest Guilford High School—for the administration of the COVID-19 vaccines.

Finally, we must determine whether the scope of immunity covers the potential liability at issue in this case. We hold that it does because, as the trial court noted, the immunity provided by the Act is extremely broad. The PREP Act provides immunity "with respect to *all claims for loss* caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure" if a declaration has been issued. 42 U.S.C. § 247d-6d(a)(1) (emphasis added). *Loss* "means any type of loss." 42 U.S.C. § 247d-6d(a)(2)(A). Specifically, the scope of immunity applies to "any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with the . . . administration . . . of such countermeasure." 42 U.S.C. § 247d-6d(a)(2)(B). Wisely or not, the plain language of the PREP Act includes claims of battery and violations of state constitutional rights within the scope of its immunity, and it therefore shields Defendants from liability for Plaintiffs' claims.

Plaintiffs argue that the PREP Act does not cover their claims because they do not arise *because* of COVID-19, but merely *happen* to relate to COVID-19. We would be inclined to agree if the PREP Act did not define the scope of immunity so broadly. Because there does not appear to be any Fourth Circuit or North Carolina federal district cases on point, ONS Medical Society draws our attention to three out-of-state cases.

First, in *Parker v. St. Lawrence Cnty. Pub. Health Dep't*, a pre-COVID-19 case, the defendant health department held a vaccination clinic due to the outbreak of the H1N1 influenza virus, and a nurse employed by the health department administered a vaccination to a child without obtaining an executed parental consent form from the plaintiff parent. 102 A.D.3d 140, 141, 954 N.Y.S.2d 259, 260–61 (2012). The plaintiff-parent alleged both negligence and battery. The court in *Parker* held, "[c]onsidering . . . the sweeping language of the statute's immunity provision, . . . Congress intended to preempt all state law tort claims arising from the administration of covered countermeasures . . . including one based upon a defendant's failure to obtain consent." *Id.* at 143–44, 954 N.Y.S.2d at 262. Therefore, the court dismissed the plaintiff's complaint. *Id.* at 144–45, 954 N.Y.S.2d at 263.

Second, in *Cowen v. Walgreen Co.*, the plaintiff alleged that she visited a Walgreens store for a flu vaccination but that a Walgreens employee administered a COVID-19 vaccination to the plaintiff without her knowledge. No. 22-CV-157-TCK-JFJ, 2022 WL 17640208, at *2 (N.D. Okla. Dec. 13, 2022) (N.D. Okla. Dec. 13, 2022). As here, the plaintiff in *Cowen* argued "that her claims should be construed . . . broadly because her injury could have happened whether she received a COVID-19 vaccine or any other vaccine." *Id.* The court in *Cowen* noted that "[i]n the PREP Act, Congress plainly provided immunity under both federal and state law with respect 'to *all* claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure.' " *Id.* at *3. (Quoting 42 U.S.C. § 247d-6d(a)(1)) (emphasis in original). The court in *Cowen* held, "While it is true that other vaccinations or procedures might have also been administered, this does not change the fact that Plaintiff's injuries actually resulted from administration of the COVID-19 vaccine. The PREP Act therefore applies." *Id.*

Finally, in *M.T. v. Walmart Stores, Inc.*, the plaintiff mother sued defendant Walmart after one of its pharmacists administered a COVID-19 vaccine to her minor child without her consent. 63 Kan. App. 2d 401, 402, 528 P.3d 1067, 1070 (2023). The court in *M.T.* noted that the scope of immunity under the PREP Act "is broad and applies to 'any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure.' " *Id.* at 406, 528 P.3d at 1073. (Quoting 42 U.S.C. § 247d-6d(a)(2)(B)). The court held that the PREP Act applied to the plaintiff mother's lawsuit, stating:

> The text of the [PREP] Act is unambiguous: The [PREP] Act applies to all claims causally related to the administration

> by a covered person of a covered countermeasure. The question presented by this interlocutory appeal is thus whether a claim based on the administration of a covered countermeasure without parental consent is causally related to the administration of a covered countermeasure. Reframed this way, the answer is yes.

Id. at 426–27, 528 P.3d at 1084.

We conclude that these cases are instructive persuasive authorities supporting our holding that the broad scope of immunity provided by the PREP Act applies to both Defendants in this case. Although Plaintiffs' claims could arise no matter what type of vaccine Tanner was given without parental consent, the PREP Act provides immunity to Defendants because it shields them from "any claim for loss that has a causal relationship with the administration" of the COVID-19 vaccine. 42 U.S.C. § 247d-6d(a)(2)(B).

We note our General Assembly amended N.C. Gen. Stat. § 90-21.5 in 2021 to add subsection (a1), which requires parental consent before a vaccine granted emergency use authorization may be administered to a minor. Its intent is to prevent the egregious conduct alleged in the case before us, and to safeguard the constitutional rights at issue—Emily's parental right to the care and control of her child, and Tanner's right to individual liberty. *See* N.C. Const. art. I, §§ 1, 19; *Petersen v. Rogers*, 337 N.C. 397, 400–01, 445 S.E.2d 901, 903 (1994). Notwithstanding, the statute remains explicitly subject to "any other provision of law to the contrary" under the broad provision preempting state law in the PREP Act. 42 U.S.C. § 247d-6d(b)(8). The PREP Act provides only one exception for a "Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct." 42 U.S.C. § 247d-6d(d)(1). Because Plaintiffs have not made any such allegations in their complaint, we are constrained to conclude the PREP Act preempts the protections provided pursuant to N.C. Gen. Stat. § 90-21.5(a1).

III. Conclusion

"We are not to question the wisdom or policy of the statute under consideration, but should enforce it as it is written, unless we conclude that there is an unmistakable conflict with the organic law." *Faison v. Bd. of Comm'rs of Duplin Cnty.*, 171 N.C. 411, 415, 88 S.E. 761, 763 (1916). Bound by the broad scope of immunity provided by the PREP Act, we are constrained to hold it shields Defendants, under the facts of this case, from Plaintiffs' claims relating to the administration of the

COVID-19 vaccine. Accordingly, we affirm the trial court's dismissal of Plaintiffs' claims.

AFFIRMED.

Judges COLLINS and CARPENTER concur.

IN THE MATTER OF R.G.

Nos. COA23-625 and COA23-790

Filed 5 March 2024

1. Appeal and Error—initial permanency planning order—reunification efforts ceased in prior order—no basis to appeal current order

A mother's appeal from an initial permanency planning order setting permanent plans for her minor child was dismissed on the basis that she had no right to appeal the order under N.C.G.S. § 7B-1001(a)(5) because that order did not eliminate reunification as a permanent plan; instead, she had a right to appeal from the prior adjudication and disposition order, in which the trial court relieved the department of social services of reunification efforts (after finding aggravating factors under section 7B-901(c)), but she did not do so. Based on recent statutory amendments by the legislature, an initial permanency planning order is no longer presupposed to require reunification.

2. Child Abuse, Dependency, and Neglect—jurisdiction—Uniform Child Custody and Jurisdiction Enforcement Act—modification of out-of-state custody order—statutory requirements met

The trial court's permanency planning order awarding guardianship of a minor child to the child's maternal grandmother was affirmed where the trial court had subject matter jurisdiction pursuant to the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA). The trial court's initial exercise of temporary emergency jurisdiction was proper where the matter involved allegations of child sexual abuse. Further, after the trial court learned that a prior custody determination had been made in New York, the court properly followed statutory procedures by holding a UCCJEA

conference with the New York judge, during which the New York judge agreed that North Carolina had jurisdiction over the proceeding. The letter from the New York judge had sufficient indicia of veracity and officiality to serve as a trustworthy proxy for a court order to relinquish jurisdiction over the matter.

Consolidated appeals by respondent-mother from orders entered 30 December 2022 and 25 May 2023 by Judges Adam Phillips and Rosalyn Hood in District Court, Cumberland County. Heard in the Court of Appeals 15 February 2024.

Dawn M. Oxendine for petitioner-appellee Cumberland County Department of Social Services.

Matthew D. Wunsche for guardian ad litem.

Parent Defender Wendy C. Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for respondent-appellant mother.

No brief for respondent-appellee father.

ARROWOOD, Judge.

Respondent-mother ("Mother") appeals from two permanency planning orders which (1) set a primary permanent plan of guardianship with concurrent secondary plans of custody with a relative and reunification with respondent-father ("Father") for her minor child, R.G. ("Riley"),[1] and (2) awarded guardianship of Riley to her maternal grandmother. Mother asserts identical arguments in both appeals that "[t]he trial court lacked [subject matter] jurisdiction to enter anything other than emergency custody orders . . . [because] it violated the UCCJEA." For the reasons below, Mother's first appeal is dismissed and the court's orders that are the subject of Mother's second appeal are affirmed.

I. Background

Mother is Riley's biological aunt, and in November 2018 Mother and Father adopted Riley. Mother and Riley have resided in North Carolina since Riley was adopted, but at some point between Riley's adoption in November 2018 and May 2019 Father relocated to New York. After

1. The juvenile is referred to by a stipulated pseudonym to protect her identity and for ease of reading.

Father relocated to New York a custody dispute arose, and on or about 3 September 2019 the Herkimer County, New York Family Court entered an "Order of Custody and Visitation" ("New York Order") that, *inter alia*,[2] granted Mother and Father joint legal custody and Mother primary physical custody of Riley.

On 22 December 2021, the Cumberland County Department of Social Services ("DSS") took nonsecure custody of Riley and filed a juvenile petition ("Petition") alleging Riley was an abused and neglected juvenile, based on allegations that Riley was sexually abused by a man ("Caretaker")[3] living with Mother. The Petition alleged Riley "consistently disclosed" abuse by Caretaker, and that as a result Caretaker was charged with several felony sex offenses. The Petition further alleged that Caretaker had previously abused another minor child. However, after Mother was made aware of Caretaker's abuse of Riley and the other minor child, Mother made no attempt to protect Riley and continued to cohabitate with Caretaker.

Between January and March 2022, the trial court entered five orders continuing nonsecure custody with DSS. These orders found that DSS placed Riley with her maternal grandmother, Riley was doing well in this placement, that the Petition alleged abuse that necessitated Riley's removal from Mother's home, and that the allegations in the Petition justified DSS retaining nonsecure custody in order to protect Riley.

On 26 April 2022, Mother filed two petitions to register and enforce the New York Order under North Carolina's codification of the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"). Mother's petition to enforce the New York Order asserted (1) New York was Riley's home state pursuant to the UCCJEA; (2) the New York Order had not been vacated, stayed, or modified by any court; and (3) the New York Order had been confirmed by the Herkimer County Family Court. Mother requested the court dismiss the Petition because DSS willfully omitted the New York Order from the Petition and took no action to validate the New York Order before filing the Petition; therefore, the Petition was "not properly validated[.]"

On 28 April 2022, based on a 23 March 2022 hearing, the trial court entered another order on nonsecure custody and a pre-adjudication

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2. The New York proceeding also addressed custody of Mother and Father's other children, who were not the subject of this juvenile case.

3. The Petition does not clearly identify the relationship between Mother and this man, other than they lived together in Mother's home. This man is referred to by the same pseudonym used by the trial court.

conference that makes similar findings to the other orders on nonsecure custody. This order does not refer to Mother's petitions to enforce the New York Order.

On 4 May 2022, the trial court stayed Mother's petitions to enforce the New York Order because the court was exercising its exclusive juvenile jurisdiction under Chapter 7B of the General Statutes.

On 18 May 2022, based on a 20 April 2022 hearing, the trial court entered another order on continued nonsecure custody finding Mother had "notified the Court that she contests the Court's subject matter jurisdiction." "The Court informed Respondent Mother that even if jurisdiction was an issue it would be exercising emergency jurisdiction until jurisdiction could be resolved at the appropriate hearing and that, as this was a hearing on the need for continued nonsecure custody, no arguments would be heard[.]"

On 27 May 2022, the trial court filed a letter from the trial court to a Herkimer County, New York judge, Judge Luke, requesting a UCCJEA conference. The letter notified Judge Luke that DSS had filed the Petition and that the trial court was exercising temporary emergency jurisdiction.

On 10 June 2022, based on a 17 May 2022 hearing, the trial court entered an order finding that "[DSS] is exercising emergency jurisdiction until jurisdiction could be resolved at the Judicial Settlement Conference on May 26, 2022." The court then made findings consistent with prior orders, and continued the juvenile case.

On 13 June 2022, the court filed a return letter from Herkimer County Family Court Judge Luke. The letter indicated a UCCJEA conference was held 9 June 2022, and that Judge Luke and the trial court agreed that North Carolina had jurisdiction over the juvenile proceeding. Judge Luke reviewed the court file for the New York custody case and determined (1) that Mother and Riley lived in North Carolina when the New York Order was entered; (2) there were no other New York proceedings as to the New York custody case; and (3) there were "no known connections between the allegations [in the Petition] and New York . . . that would confer jurisdiction to New York." The trial court thereafter entered four more orders on continued nonsecure custody, which found, *inter alia*, that "the subject matter jurisdiction issue was resolved[,]" as confirmed by Judge Luke's letter to the trial court.

On 1 November 2022, the trial court entered an adjudication and initial disposition order ("ADO"). The court found Mother had attempted

to enforce the New York Order, but that per Judge Luke's letter "New York no longer has grounds for continuing exclusive jurisdiction and otherwise declined to exercise jurisdiction." The trial court found all parties were aware of Judge Luke's letter, "and none of the parties presented evidence or arguments to contest jurisdiction when given the opportunity to do so at today's preliminary hearing, nor have they raised the issue at any prior hearing since the communication." The court also found there were no pending proceedings in New York concerning Riley, "North Carolina is a more convenient forum and New York ha[d] declined to exercise jurisdiction, [and] therefore th[e] court ha[d] authority to modify the" New York Order. The trial court then adjudicated Riley abused and neglected for the reasons stated in the Petition, *i.e.*, that Caretaker sexually abused Riley and Mother took no action to protect Riley after becoming aware of the abuse.

The trial court then made dispositional findings that Riley was still living with her maternal grandmother and was doing well in that placement. The trial court also recounted Caretaker's abuse of Riley and Mother's failure to protect Riley, and found Mother had taken no action toward relieving any conditions which led to Riley's removal from the home. Based on these findings, the trial court concluded that "[p]er N.C. Gen. Stat. § 7B-901(c)(1), . . . aggravated circumstances exist because Respondent Mother . . . has allowed the continuation of sexual abuse upon the juvenile and has committed other acts that increased the enormity and added to the injurious consequences of the abuse or neglect." "Pursuant to N.C. Gen. Stat. § 7B-901(c)," the trial court ceased reunification efforts between Mother and Riley.

On 30 December 2022, the trial court entered an initial permanency planning order setting permanent plans for Riley ("Initial PPO"). The court found *inter alia*, that DSS was relieved of reunification efforts with Mother in the ADO due to aggravated circumstances and decreed that "[r]eunification with Respondent Mother remains eliminated from the permanent plans." The court set a primary permanent plan of guardianship with concurrent secondary permanent plans of custody with a relative and reunification with Father. Mother appealed from the Initial PPO.

On 25 May 2023, the trial court entered another permanency planning order which granted guardianship of Riley to Riley's grandmother ("Guardianship PPO"). Mother also appealed from the Guardianship PPO.

On 1 September 2023, Mother filed a Motion to Consolidate Appeals, which this Court allowed on 5 September 2023. On 29 September 2023,

the guardian *ad litem* ("GAL") filed a "Motion to Dismiss Respondent Mother's Interlocutory Appeal" ("Motion to Dismiss"), (capitalization altered), asserting Mother has no right to appeal the Initial PPO. On 10 October 2023, Mother filed a Response to the Motion to Dismiss and a petition for writ of certiorari.

II. Mother's First Appeal (COA23-625)

[1] Mother first appealed from the Initial PPO pursuant to N.C.G.S. § 7B-1001(a)(5), which grants a parent a right to appeal "[a]n order under G.S. 7B-906.2(b) eliminating reunification . . . as a permanent plan" for a juvenile. N.C.G.S. § 7B-1001(a)(5) (2021). The GAL argues that Mother has no right to appeal the Initial PPO "because reunification efforts were ceased in the [ADO] pursuant to N.C. Gen. Stat. § 7B-901(c) (2021), and reunification was, therefore, never part of the permanent plan by operation of N.C. Gen. Stat. § 7B-906.2(b) (2021)."

Mother did not have a right to appeal the Initial PPO pursuant to N.C.G.S. § 7B-1001(a)(5), because N.C.G.S. § 7B-906.2(b) operates to exclude reunification as a permanent plan once the trial court makes findings of aggravated factors under N.C.G.S. § 7B-901(c) at disposition. There is no required delay between the trial court's dispositional order and first permanency planning order for the court to eliminate reunification from the permanent plans for a juvenile after the trial court makes dispositional findings of the specific, statutorily prescribed circumstances under N.C.G.S. § 7B-901(c).

Mother's arguments are in part based on this Court's opinion in *In re C.P. See In re C.P.*, 258 N.C. App. 241 (2018). In *In re C.P.*, the respondent-mother argued the trial court lacked the authority to cease reunification efforts at an initial dispositional hearing; she specifically challenged the trial court's combined hearing and asserted the trial court was required to order reunification as a concurrent plan as part of the initial permanent plans. *See id.* at 244. This Court held the trial court erred by failing to order reunification as one of the initial plans for the juvenile. *See id.* At the time of the hearing, N.C.G.S. § 7B-906.2(b) read " '[a]t any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. *Reunification shall remain* a primary plan or secondary plan unless' certain findings are made." *Id.* at 244–45 (emphasis in original) (quoting N.C.G.S. § 7B-906.2(b) (2015)). The *In re C.P.* Court reasoned "[t]he statutory requirement that 'reunification shall remain' a plan presupposes the existence of a prior concurrent plan which included

reunification. Thus, reunification *must be part of an initial permanent plan*." *Id.* at 245 (emphasis added).[4]

But this Court also concluded reunification efforts were a distinct, independent concept from reunification as a permanent plan. *See id.* The Court based this determination wholly on prior controlling precedent, which held "that a trial court can cease reunification efforts at the first permanency planning hearing if necessary findings of fact were made that showed reunification would be unsuccessful or not in the juvenile's interest." *Id.* (citing *In re H.L.*, 256 N.C. App. 450, 461–62 (2017)); *see also id.* at 245 n.3 (citing *In re Civil Penalty*, 324 N.C. 373, 384 (1989)). Ultimately, the Court's holdings created a two-step process where reunification must be part of an initial plan at an initial permanency planning hearing and can only be eliminated at a subsequent permanency planning hearing, regardless of whether reunification efforts were ceased at the first hearing. *See id.* at 244–45.

This Court later expressed reservations about the holdings in *In re C.P.* in *In re M.T.-L.Y. See In re M.T.-L.Y.*, 265 N.C. App. 454, 464–466 (2019). The *In re M.T.–L.Y.* Court identified a number of "anomalous results and consequences that raise more questions than answers going forward[,]" including the exact contours of a parent's right to appeal pursuant to N.C.G.S. § 7B-1001(a)(5), due to the "dichotomy between 'reunification' and 'reunification efforts' " and expressly "encourage[d] the North Carolina General Assembly to amend these statutes to clarify their limitations." *Id.* at 465–66.

The General Assembly has since amended N.C.G.S. § 7B-906.2(b) twice and clarified the limitations in the statutes governing permanency planning hearings. These changes also significantly undermine the rationale in *In re C.P.* that reunification must be part of the initial permanent plans for a juvenile and that reunification efforts and reunification as a permanent plan are disjoined concepts. First, in 2019, the General Assembly amended N.C.G.S. § 7B-906.2(b) to remove the word "remain." *See* 2019 N.C. Sess. Laws 2019-33, § 11. Where N.C.G.S. § 7B-906.2(b) used to read "[r]eunification *shall remain* a primary or secondary plan unless the court made findings under G.S. 7B-901(c)[,]" N.C.G.S. § 7B-906.2(b) (eff. 1 October 2015 to 30 September 2019), it was amended to read "[r]eunification *shall be* a primary or secondary plan unless the court

4. Notably, the trial court in *In re C.P.* omitted a portion of N.C.G.S. § 7B-906.2 stating those "certain findings" may be findings made under N.C.G.S. § 7B-901(c). *See* N.C.G.S. § 7B-906.2(b) (2015). Regardless, the holding in *In re C.P.* indicates that, in all cases, reunification was to be part of the initial plans for a juvenile. *See In re C.P.*, 258 N.C. App. at 245.

made written findings under G.S. 7B-901(c)[.]" N.C.G.S. § 7B-906.2(b) (eff. 1 October 2019). The Court's reasoning in *In re C.P.* that the statutory language "reunification shall remain . . . presupposes the existence of a prior concurrent plan which included reunification" no longer applies given this change. *In re C.P.*, 258 N.C. App. at 245. The plain language of N.C.G.S. § 7B-906.2(b) now permits trial courts to exclude reunification from the permanent plans for a juvenile at any time, including immediately following disposition, and need not be a permanent plan for a juvenile, at all, *if findings were made* under N.C.G.S. § 7B-901(c). *See* N.C.G.S. § 7B-906.2(b).

Second, in 2021, the General Assembly again amended N.C.G.S. § 7B-906.2(b) to clarify the relationship between reunification efforts and reunification as a permanent plan. *See* 2021 N.C. Sess. Laws 2021-100, § 11. The version of N.C.G.S. § 7B-906.2(b) prior to this amendment stated the trial court could eliminate reunification if "the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. The finding that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health and safety may be made at any permanency planning hearing." N.C.G.S. § 7B-906.2(b) (eff. 1 October 2019 to 30 September 2021). Additional language was added to the statute, and it now reads "[t]he finding that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety may be made at any permanency planning hearing, *and if made, shall eliminate reunification as a plan.*" N.C.G.S. § 7B-906.2(b) (eff. 1 October 2021 to present). This change clarifies that reunification efforts and reunification as a permanent plan are not distinct, decoupled concepts; the General Assembly has expressly directed, at least in that context, that the cessation of reunification efforts also eliminates reunification as a permanent plan. There is no two-step process for eliminating reunification, and the trial court may both cease reunification efforts and eliminate reunification as a permanent plan at the initial permanency planning hearing by making a single finding that reunification efforts would be unsuccessful given the facts and circumstances of the case. *See* N.C.G.S. § 7B-906.2(b).

These statutory changes clarify that there is no presupposition that an initial permanency plan must require reunification. Sections 7B-901(c) and 7B-906.2(b) operate together to allow the trial court to (1) cease reunification efforts at disposition, *see* N.C.G.S. § 7B-901(c), and (2) omit reunification from the permanent plans for a juvenile where the court has found aggravating factors under N.C.G.S. § 7B-901(c). *See*

N.C.G.S. § 7B-906.2(b). Here, because the trial court made written findings under N.C.G.S. § 7B-901(c) in the ADO, reunification was excluded and omitted from the permanent plans for Riley beginning at disposition and was never eliminated as a permanent plan at the first permanency planning hearing. Therefore, because Mother only had a right to appeal from "[a]n order under G.S. 7B-906.2(b) *eliminating* reunification . . . as a permanent plan[,]" she did not have a right to appeal the Initial PPO. N.C.G.S. § 7B-1001(a)(5) (emphasis added).

This interpretation is reinforced by the fact that Mother had the opportunity to contest the trial court's decision to cease reunification efforts and omit reunification as a permanent plan, including the court's findings under N.C.G.S. § 7B-901(c), because she had a separate and specific right to appeal the ADO and failed to do so. *See* N.C.G.S. § 7B-1001(a)(3) (granting a right to appeal "[a]ny initial order of disposition and the adjudication order upon which it is based"). We see no reason why the General Assembly would allow Mother to appeal from the ADO and assert error under N.C.G.S. § 7B-901(c) then also appeal the Initial PPO and assert error under § 7B-906.2(b) when any error under § 7B-906.2(b) in this context would be based on the same error Mother would have already had the opportunity to contest. Mother's interpretation of Chapter 7B would grant a respondent a proverbial second bite at the apple to appeal multiple orders and assert substantially the same argument when the court omits reunification as a permanent plan.

For the reasons above, the GAL's Motion to Dismiss is allowed and Mother's first appeal, filed in this Court under No. COA23-625, is dismissed. Furthermore, Mother's petition for a writ of certiorari is denied for the reasons stated in her response to the Motion to Dismiss; Mother's second appeal raises an identical issue to her first appeal and this Court may reach the merits of Mother's argument below.

III. Mother's Second Appeal (COA23-790)

[2] We first note Mother's second appeal is a properly authorized appeal pursuant to N.C.G.S. § 7B-1001(a)(4) from an order changing custody of the juvenile. *See* N.C.G.S. § 7B-1001(a)(4). Mother asserts the trial court lacked jurisdiction under the UCCJEA to enter anything other than emergency custody orders because the court failed to comply with various provisions of the UCCJEA.

A. Standard of Review

North Carolina's codification of the UCCJEA is applicable to juvenile cases and "governs the district court's subject-matter jurisdiction in child

custody disputes. A trial court's jurisdiction pursuant to the UCCJEA is reviewed *de novo*." *In re A.L.L.*, 254 N.C. App. 252, 262 (2017) (citation omitted). This Court "presumes the trial court has properly exercised jurisdiction unless the party challenging jurisdiction meets its burden of showing otherwise." *In re L.T.*, 374 N.C. 567, 569 (2020).

B. UCCJEA

North Carolina's version of the UCCJEA is codified in Chapter 50A, Article 2 of the General Statutes. "The UCCJEA recognizes four modes of subject-matter jurisdiction: (1) initial child-custody jurisdiction, N.C. Gen. Stat. § 50A-201; (2) exclusive, continuing jurisdiction, N.C. Gen. Stat. § 50A-202; (3) jurisdiction to modify determination, N.C. Gen. Stat. § 50A-203; and (4) temporary emergency jurisdiction, N.C. Gen. Stat. § 50A-204." *In re A.L.L.*, 254 N.C. App. at 262. The trial court has "temporary emergency jurisdiction if the child is present in this State and . . . it is necessary in an emergency to protect the child because the child . . . is subjected to or threatened with mistreatment or abuse." N.C.G.S. § 50A-204(a) (2021). "A North Carolina court that does not have jurisdiction under N.C. Gen. Stat. §§ 50A-201 or 50A-203 has temporary emergency jurisdiction[.]" *In re A.L.L.*, 254 N.C. App. at 262 (citation and quotation marks omitted). However, upon learning of a custody determination in another state, a court exercising temporary emergency jurisdiction "must communicate with the other state's court to resolve subject matter jurisdiction going forward because the other state exercises exclusive and continuing jurisdiction as a result of its prior order." *Id.* at 263 (citations omitted).

There is no dispute that the trial court had temporary emergency jurisdiction to enter the nonsecure custody orders to protect Riley; DSS sought the orders as a result of alleged child sexual abuse and the trial court made findings that the orders were necessary to protect Riley. *See* N.C.G.S. § 50A-204(a). However, the New York Order set custody of Riley, and therefore the trial court could only modify the New York custody determination if the requirements of the UCCJEA regarding modification of another state's custody determination were met. *See* N.C.G.S. § 50A-203 (2021).

To modify a child custody determination made by a court of another state, a North Carolina court must have "jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2)" and the other state's court must "determine[ ] it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be

a more convenient forum under G.S. 50A-207[.]"[5] N.C.G.S. § 50A-203(1). Section 50A-201(a) in turn provides for initial custody jurisdiction if "[t]his State is the home state of the child on the date of the commencement of the proceeding[.]" N.C.G.S. § 50A-201(a)(1) (2021). The child's home state is "the state in which [the] child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C.G.S. § 50A-102(7) (2021). North Carolina "determine[s] a child's home state jurisdiction based on the physical location of a child and their parent." *In re A.L.L.*, 254 N.C. App. at 263.

Mother asserts the trial court failed to comply with various provisions of the UCCJEA. Mother argues (1) the trial court failed to stay its simultaneous proceeding with New York as required by N.C.G.S. § 50A-206; (2) Mother was denied the right to be heard under N.C.G.S. § 50A-110(b) before the trial court made a determination on jurisdiction; (3) Judge Luke's letter was insufficient to relinquish jurisdiction to North Carolina under N.C.G.S. § 50A-203; and (4) the trial court incorrectly applied the factors under N.C.G.S. § 50A-207 when determining whether New York was an inconvenient forum. The GAL and DSS assert the trial court had jurisdiction because the court "took the action required by" the UCCJEA after the trial court "learned of a 2019 New York custody order, by contacting the New York Court, making a record of that contact, and acting only after receiving the New York court's written determination that North Carolina was a more convenient forum for the abuse and neglect case."

Here, we focus on Mother's third argument, because her remaining arguments are misplaced. As to simultaneous proceedings, the trial court is permitted to enter temporary emergency orders when necessary to protect a juvenile from "mistreatment or abuse." N.C.G.S. § 50A-204(a). Section 50A-206 specifically carves out an exception that allows the trial court to exercise temporary emergency jurisdiction even if there are simultaneous proceedings in two states. *See* N.C.G.S. § 50A-206. As noted above, the trial court was exercising temporary emergency jurisdiction when it entered the nonsecure custody orders and in doing so did not violate N.C.G.S. § 50A-206.

As to Mother's right to be heard, Mother asserts she was entitled to "present facts and legal argument before a decision on jurisdiction [was] made." N.C.G.S. § 50A-110(b). The trial court exercised temporary

5. A court of this State may also obtain jurisdiction to modify a child custody determination of another state if the child and their parents do not "presently reside in the other state." N.C.G.S. § 50A-203(2). However, because Father still lived in New York during this proceeding, this section is inapplicable.

emergency jurisdiction when entering the nonsecure custody orders up until a preliminary adjudicatory hearing, where it needed to make jurisdictional determination to modify New York's custody determination in the ADO. At the preliminary hearing, the trial court gave Mother an opportunity to contest jurisdiction and, although Mother was aware of Judge Luke's letter, she did not "present[ ] evidence or arguments to contest jurisdiction when given the opportunity to do so . . . nor [did] [she] raise[ ] the issue at any prior hearing since [Judge Luke's] communication." Instead, Mother discharged her attorney and abstained from the preliminary hearing "in what appear[ed] to be protest of th[e] Court proceeding." Mother was given an opportunity to present facts and legal arguments before the trial court exercised anything other than temporary emergency jurisdiction but refused to do so. The trial court did not violate N.C.G.S. § 50A-110(b).

As to the factors under N.C.G.S. § 50A-207, Mother's argument is misplaced. Mother argues the *New York* court failed to properly weigh the inconvenient forum factors and that the *North Carolina* trial court should have held an evidentiary hearing to weigh the factors. But under the UCCJEA, "the original decree state is the sole determinant of whether jurisdiction continues[,]" *In re A.L.L.*, 254 N.C. App. at 265, and "nothing in the UCCJEA requires North Carolina's district courts to undertake collateral review of" another state's jurisdictional determination. *In re T.R.*, 250 N.C. App. 386, 391 (2016). To the extent Mother challenges New York's jurisdictional determination, her remedy lies in New York, not North Carolina.

Mother's only remaining argument is that Judge Luke's letter was insufficient, as a matter of law, to confer jurisdiction on the trial court and that the New York court could only relinquish jurisdiction by entry of a court order. This argument is focused on the second requirement of N.C.G.S. § 50A-203. The first requirement of N.C.G.S. § 50A-203 is clearly met because Riley has lived in North Carolina with Mother since 2018. North Carolina is Riley's "home state" within the meaning of the UCCJEA. *See* N.C.G.S. § 50A-102(7).

The UCCJEA and the official commentary to the UCCJEA contemplate the entry of an order from the state relinquishing jurisdiction before our district courts exercise jurisdiction to modify a child custody determination. *See* N.C.G.S. § 50A-204(c) ("[A]ny order issued by a court of this State under this section must specify in the order a period that the court considers adequate *to allow the person seeking an order to obtain an order* from the state having jurisdiction . . . . The order issued in this State remains in effect *until an order is obtained from the other state*[.]" (emphasis added)); N.C.G.S. § 50A-202 cmt. 1 (2021) ("A

party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction."); N.C.G.S. § 50A-204 cmt. But, while the statutory language and commentary of the UCCJEA strongly indicate that a foreign state will be relinquishing jurisdiction via a court order, the UCCJEA does not expressly require that a state do so. Nor does the UCCJEA expressly state our courts can only exercise jurisdiction under N.C.G.S. § 50A-203 when the trial court has a foreign court order relinquishing jurisdiction in hand. The UCCJEA merely requires the foreign state to make a jurisdictional "determination" before our courts can modify that state's custody determination. *See* N.C.G.S. § 50A-203(1).

A review of this Court's precedent similarly indicates that our courts have generally looked for a foreign court order making one of the two determinations under N.C.G.S. § 50A-203 to determine whether the foreign court has relinquished jurisdiction under the UCCJEA. As a general trend, where such an order exists this Court considers jurisdiction to have been relinquished by the other state. *See In re A.L.L.*, 254 N.C. App. at 264 ("We will not disturb the trial court's assertion of jurisdiction based upon a facially valid order from another state ceding jurisdiction to this State."); *In re N.B.*, 240 N.C. App. 353, 358 (2015) ("The remaining jurisdictional requirement for a modification under the UCCJEA is satisfied by the New York Court's order relinquishing jurisdiction to the State of North Carolina." (citation and quotation marks omitted)). Where such orders are missing, this Court has concluded the trial court's orders must be vacated due to a lack of subject matter jurisdiction. *See In re N.R.M.*, 165 N.C. App. 294, 300 (2004) ("In the case before our Court, there is no Arkansas order in the record stating that Arkansas no longer has jurisdiction."). However, this Court has never expressly held that a court order is the only method by which a sister state can relinquish jurisdiction over a child custody proceeding.

Furthermore, the parties note this trend is not absolute, and this Court has accepted a sufficiently trustworthy proxy for a court order relinquishing jurisdiction. In *In re T.R.*, this Court held an Illinois trial court's docket entry "was tantamount to a determination that North Carolina" was a more appropriate forum under N.C.G.S. § 50A-207 to satisfy the second requirement under N.C.G.S. § 50A-203. *In re T.R.*, 250 N.C. App. at 390. The Illinois trial court had not entered an order relinquishing jurisdiction to North Carolina, but the Illinois court did make a docket entry that:

> possesse[d] all of the substantive attributes of a court order. It reache[d] the conclusion that the case should

> be transferred from the courts of Illinois to the courts of North Carolina and fully explain[ed] its rationale for that conclusion. Moreover . . . there [was] no indication in the record . . . that Respondent did not receive a copy of the docket entry from the Illinois court or that Respondent made any effort to appeal [the court's] ruling.

Id. at 391.[6]

Here, Judge Luke's letter is analogous to the court's docket entry in *In re T.R.* Judge Luke wrote:

> As a result of our [UCCJEA] conference yesterday, I concur that Jurisdiction for the alleged child abuse and neglect proceedings is in the State of North Carolina and not in Herkimer County New York. I reviewed the file from a court proceeding in Herkimer County that occurred on August 29, 2019, and at that time [Mother], mother of [Riley] agreed to a Custody Order in which she would have custody of her daughter, [Riley]. This was done with the consent of the child's father, [Father]. Importantly, at the time of the agreement, [Mother] and her daughter lived in the State of North Carolina. There are no other Family Court proceedings in New York in this matter. Assuming [Mother] and her daughter continued to reside in North Carolina from the time [of] the Order until the allegations, it is apparent jurisdiction in North Carolina is proper. Finally, there are no known connections between the allegations and New York, witnesses or otherwise, that have been made known to me that would confer jurisdiction to New York.

Like the docket sheet in *In re T.R.*, Judge Luke's letter "reaches the conclusion that the case should be transferred from the courts of [New York] to the courts of North Carolina and fully explains its rationale for that conclusion." *Id.* Judge Luke laid out salient facts that supported his conclusion that jurisdiction lied in our courts, *i.e.*, that there were no connections between the allegations of the Petition and the previous New York custody case. *See id.* On its face, Judge Luke's letter contains the same "substantive attributes of a court order" identified in *In re T.R.* *Id.* at 391.

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6. This Court's opinion in *In re T.R.* was based, in part, on the fact that "[t]he Illinois Court of Appeals has accepted a docket sheet entry as an order of the court where there was no transcript of the hearing and no written order." *Id.* (citation and quotation marks omitted).

Mother attempts to distinguish the letter as an "unverified document[ ]" and mere informal "correspondence" that falls short of the docket entry in *In re T.R.* But Judge Luke's letter contains sufficient indicia of veracity and officiality that Mother's argument is not persuasive. Judge Luke's letter is in direct response to, and based on, the trial court's requested UCCJEA conference. The letter is on "Family Court of the State of New York . . . County of Herkimer" letterhead. The letter recounts facts of the prior New York custody proceeding that are consistent with the New York Order in the record on appeal. Judge Luke signed the letter himself; it was not drafted by the clerk of court or another clerical employee. Additionally, Judge Luke is the sitting Family Court Judge for Herkimer County, New York, of which this Court takes notice. Finally, the trial court concluded the letter was sufficiently trustworthy that the court filed the letter upon receipt.

Additionally, our courts cannot dictate how a sister state relinquishes jurisdiction, and "[n]othing in the UCCJEA requires North Carolina's district courts to undertake collateral review of a facially valid order from a sister state before exercising jurisdiction pursuant to N.C. Gen. Stat. § 50A-203(1)." *In re T.R.*, 250 N.C. App. at 391, 792 S.E.2d at 201. While we acknowledge the better practice may be for a district court to enter a court order relinquishing jurisdiction over a child custody case, on the specific facts of this case we hold Judge Luke's letter was sufficient to relinquish jurisdiction over the child custody determination and allow the trial court to exercise jurisdiction pursuant to N.C.G.S. § 50A-203.

For the reasons above, the trial court complied with the relevant provisions of the UCCJEA and had jurisdiction to enter the ADO and subsequent orders.

IV. Conclusion

Mother's appeal in COA23-625 from the Initial PPO is interlocutory and dismissed. As to Mother's second appeal in COA23-790, based on the specific facts of this case the trial court had subject matter jurisdiction over the Petition and to enter the challenged orders. The trial court's juvenile orders are affirmed.

COA23-625; DISMISSED.

COA23-790; AFFIRMED.

Chief Judge DILLON and Judge GRIFFIN concur.

RENE ROBINSON, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF VELVET FOOTE, PLAINTIFFS

v.

HALIFAX REGIONAL MEDICAL CENTER, DR. JUDE OJIE AND DR. SIMBISO RANGA, INDIVIDUALLY AND AS EMPLOYEES, AGENTS, OF HALIFAX REGIONAL MEDICAL CENTER, DEFENDANTS

No. COA23-641

Filed 5 March 2024

Medical Malpractice—9(j) certification—expert qualification—standard of care—exclusion under Rule 702(b)

The trial court did not misapprehend the law or abuse its discretion when it dismissed plaintiff's medical malpractice action for noncompliance with Civil Procedure Rule 9(j) after determining that plaintiff's expert witness did not meet the requirements under Evidence Rule 702(b) for a standard-of-care expert. Plaintiff's argument that she had a reasonable expectation of her expert's qualification was unavailing because, although her complaint was facially valid regarding her designated medical expert, the ruling to exclude the witness as an expert came after the parties conducted discovery and was based on sufficient findings of fact.

Appeal by plaintiff from order and judgment entered 3 October 2022 by Judge J. Carlton Cole in Halifax County Superior Court. Heard in the Court of Appeals 29 November 2023.

BA Folk, PLLC, by Brice M. Bratcher and Jeremy D. Adams, for plaintiffs-appellants.

Harris Creech Ward & Blackerby, PA, by Christina J. Banfield and C. David Creech, for defendants-appellees.

GORE, Judge.

The question in this appeal is whether the trial court properly dismissed plaintiff's medical malpractice claims pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. Here, the trial court determined that plaintiff's designated medical expert, Dr. Mallory, would not reasonably be expected to testify as to the standard of care under Rule 702(b) of the North Carolina Rules of Evidence and N.C.G.S. § 90-21.12. Upon review, we affirm the trial court's Order.

In *Moore v. Proper*, our Supreme Court "addressed the manner in which a trial court should evaluate compliance with Rule 9(j), as well as the standard of review for a reviewing court on appeal." *Preston v. Movahed*, 374 N.C. 177, 187 (2020) (citing *Moore v. Proper*, 366 N.C. 25 (2012)). The Court observed:

> Rule 9(j) serves as a gatekeeper . . . to prevent frivolous malpractice claims by requiring expert review *before* filing of the action. Rule 9(j) thus operates as a preliminary qualifier to "control pleadings" rather than to act as a general mechanism to exclude expert testimony. Whether an expert will ultimately qualify to testify is controlled by Rule 702. The trial court has wide discretion to allow or exclude testimony under that rule. However, the preliminary, gatekeeping question of whether a proffered expert witness is "reasonably expected to qualify as an expert witness under Rule 702" is a different inquiry from whether the expert *will actuall*y qualify under Rule 702.

Moore, 366 N.C. at 31 (citations omitted). Thus, as addressed in the prior appeal of this case — *Robinson v. Halifax Reg'l Med. Ctr.*, 271 N.C. App. 61 (2020) — we reversed in part the trial court's decision to dismiss this action for noncompliance with Rule 9(j). Specifically, we concluded "that the trial court 'jumped the gun' in determining that [p]laintiffs failed to comply with Rule 9(j)[ ]" of the North Carolina Rules of Civil Procedure because plaintiff's complaint, on its face, *did* satisfy our preliminary pleading requirements. 271 N.C. App. at 66. However, the Court in *Moore* further stated:

> a complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable. Therefore, to evaluate whether a party reasonably expected its proffered expert witness to qualify under Rule 702, the trial court must look to all the facts and circumstances that were known or should have been known by the party at the time of filing.
>
> Though the party is not necessarily required to know all the information produced during discovery at the time of filing, the trial court will be able to glean much of what the party knew or should have known from

> subsequent discovery materials. But to the extent there are *reasonable* disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage of determining whether the party *reasonably expected* the expert witness to qualify under Rule 702. When the trial court determines that reliance on disputed or ambiguous forecasted evidence was not reasonable, the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination. We note that because the trial court is not generally permitted to make factual findings at the summary judgment stage, a finding that reliance on a fact or inference is not reasonable will occur only in the rare case in which no reasonable person would so rely.

Moore, 366 N.C. at 31–32 (internal citations omitted).

Consistent with our Supreme Court's analysis in *Moore*, our reversal in *Robinson* came with a caveat:

> it may alternatively be that discovery will, indeed, demonstrate that [p]laintiffs should have not reasonably believed that their expert would qualify under Rule 702. Indeed, after deposing Dr. Mallory or conducting other discovery, [d]efendants may be able to show that when [p]laintiffs filed their complaint, they could not have reasonably expected Dr. Mallory to qualify, at which point, dismissal under Rule 9(j) would be appropriate. However, at this point, [d]efendants have simply not met their burden of showing that they are entitled to a dismissal under Rule 9(j).

271 N.C. App. at 69–70.

Accordingly, upon remand of this action to the trial court on 11 May 2020, the parties engaged in discovery. Eventually, defendants filed a renewed and amended Motion to Dismiss and for Summary Judgment on 23 June 2022, attaching supporting affidavits from defendants Dr. Ojie and Dr. Ranga as well as defendant's expert witnesses.

After a hearing on the Motions on 26 August 2022, the trial court ruled in favor of defendants, granting their Motion to Dismiss and for Summary Judgment upon the basis of noncompliance with Rule 9(j), and dismissing all claims in plaintiff's complaint. In an Order filed 3 October 2022, the trial court made the following findings of fact, in relevant part:

> 10. On [17 July 2020], [p]laintiff served her responses to [d]efendants' outstanding discovery requests, including her responses to [d]efendants' Rule 9(j) Interrogatories. Plaintiff identified only one expert witness, Dr. Mallory, in her Rule 9(j) interrogatory responses and other discovery responses, and included an affidavit from Dr. Mallory.
>
> 11. On [17 June 2021], [d]efendants filed a Motion for Discovery Scheduling Order pursuant to Rule 26(f1); after a hearing on [d]efendants' Motion on [19 July 2021], the Honorable Judge Cy Grant entered a Discovery Scheduling Order on [27 July 2021]. Per the Discovery Scheduling Order, [p]laintiff was required to designate all expert witnesses by [1 November 2021], and was required to make a designated expert witness available for deposition by [1 January 2022].
>
> 12. Plaintiff did not designate any expert witnesses other than Dr. Mallory by [1 November 2021].
>
> 13. Upon an agreement by all counsel, Dr. Mallory's deposition was set for [29 December 2021]. On [9 December 2021], [d]efendants' counsel properly noticed Dr. Mallory's deposition for [29 December 2021], to be taken in-person in Cocoa Beach, Florida, where Dr. Mallory resides.
>
> 14. On [27 December 2021], two days before the scheduled deposition on [29 December 2021], [p]laintiff's counsel first informed [d]efendants' counsel that Dr. Mallory would not make himself available for the deposition without being paid a deposit for the deposition at least seven (7) days in advance of the deposition. The deposition was therefore cancelled due to [p]laintiff's inability to make her expert witness available for the scheduled deposition.
>
> 15. Defendants' counsel was never made aware of Dr. Mallory's advance payment requirement prior to [27 December 2021].

16. On [1 January 2022], the deadline passed for [p]laintiff to make her expert witness available for deposition, as set forth in the Discovery Scheduling Order.

17. The deposition of Dr. Mallory did not occur prior to the deadline set forth in the Discovery Scheduling Order.

18. On [15 February 2022], [d]efendants filed a Motion to Strike Plaintiff's Expert Witness and a Motion to Dismiss and for Summary Judgment. On [23 June 2022], [d]efendants filed an Amended Motion to Dismiss and for Summary Judgment.

SPECIFIC FINDINGS OF FACTS REGARDING DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT PURSUANT TO RULE 9(j)

19. Plaintiff's action against the [d]efendants arises out of allegations of medical malpractice, as defined in [N.C.G.S.] § 90-21.11 and § 90-21.12, and [p]laintiff is required to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure, by including a certification in her Complaint that the medical care and all medical records in this case have been reviewed by an expert witness who is reasonably expected to qualify as such and who is willing to testify as to the standard of care.

20. Upon the refiling of this action on [16 January 2018], [p]laintiff did include a certification, which on its face met the requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure.

21. The Rule 9(j) expert witness and only expert witness designated by [p]laintiff in this matter pursuant to the Discovery Scheduling Order is Dr. Mallory.

22. Pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure, [d]efendants properly pursued written and other discovery to determine whether [p]laintiff did in fact comply with Rule 9(j) by retaining an expert witness who was reasonably expected to qualify as such under Rule 702 of the North Carolina Rules of Evidence; had reviewed the medical care and all medical records relevant to the events at issue; and was willing to testify that the defendants had violated the standard of care.

23. The Court finds that the pleadings, the materials on the record in the case, and the materials submitted by the parties, including affidavits and discovery exchanged, show that Dr. Mallory would not be able to qualify as an expert witness in this case pursuant to Rule 702(b) of the North Carolina Rules of Evidence. The [c]ourt finds that the [p]laintiff has failed and is otherwise unable to show that:

> a. Dr. Mallory practiced as a physician specializing in internal medicine and practicing as a hospitalist during the period of [15 January 2014] through [15 January 2015];
>
> b. Dr. Mallory has experience admitting patients to hospitals, providing long-term treatment to admitted patients, or entering Do Not Resuscitate Orders for patients admitted to hospitals, all of which constitute the substance of [p]laintiff's allegations and claims against [d]efendants;
>
> c. Dr. Mallory has experience treating admitted hospital patients who are similar or have similar medical issues as [the decedent] Ms. Foote;
>
> d. Dr. Mallory is familiar with the resources available to Dr. Jude Ojie, Dr. Simbiso Ranga, and Halifax Regional Medical Care in the county of Halifax, North Carolina during the period of [15 January 2014] through [15 January 2015]; and
>
> e. Dr. Mallory is familiar with the medical training and/or medical background of the [d]efendants Dr. Ojie and Dr. Ranga.

24. The [c]ourt therefore finds that there is nothing in the pleadings, the materials on the record in the case, and the materials submitted by the parties, including the affidavits and discovery exchanged, which prove that Dr. Mallory is or could be familiar with the standard of care for internal medicine physicians practicing as hospitalists in Halifax County or similarly situated communities during the period of [15 January 2014] through [15 January 2015] as required by [N.C.G.S.] § 90-21.12(a).

25. The [c]ourt therefore finds that Dr. Mallory is not qualified under Rule 702(b) of the North Carolina Rules

of Evidence to provide expert witness testimony as to the standard of care applicable to the [d]efendants.

26. Additionally, the [c]ourt finds that Dr. Mallory was unwilling to testify as to standard of care opinions in this action, due to Dr. Mallory's failure to attend his deposition scheduled for [29 December 2021].

27. The time set forth in the Discovery Scheduling Order entered by the Honorable Judge Cy Grant in this case for [p]laintiff to designate any expert witnesses had expired by [1 November 2021].

28. Plaintiff failed to designate any expert witness other than Dr. Mallory prior on or before [1 November 2021].

29. Plaintiff failed to make Dr. Mallory, as her designated expert witness, available by [1 January 2022], the date set forth in the Discovery Scheduling Order entered by the Honorable Judge Cy Grant in this case.

30. Additionally, [p]laintiff failed to move for an amendment of the Discovery Scheduling Order in this action to secure an extension of the time in which to make her designated expert witness available for deposition.

31. Because Dr. Mallory is not qualified to provide expert witness testimony as to the standard of care pursuant to Rule 702(b) of the North Carolina Rules of Civil Procedure and [N.C.G.S.] § 90-21.12(a); because [p]laintiff failed to make her sole expert witness, Dr. Mallory, available for a deposition by the deadline set forth in the Discovery Scheduling Order in this case; and because [p]laintiff has failed to designate any other expert witness in this case, the [c]ourt finds that [p]laintiff has failed to retain an expert witness in compliance with Rule 9(j) of the North Carolina Rules of Civil Procedure, and [p]laintiff's action should be dismissed in its entirety, with prejudice.

Turning to the matter now before us, plaintiff presents the sole issue of whether the trial court erred in granting defendants' Motion to Dismiss and for Summary Judgment and in disqualifying Dr. Malloy as an expert witness. Plaintiff argues the trial court: (1) erroneously applied a heightened standard for compliance with Rule 9(j), and (2) erred in both its application and evaluation of Rule 702.

> Generally, we review a trial court's ruling on a motion to exclude expert testimony for an abuse of discretion. However, when the pertinent inquiry on appeal is based on a question of law — such as whether the trial court properly interpreted and applied the language of a statute — we conduct de novo review. . . . The trial court's determination that proffered expert testimony meets Rule 702[ ]'s requirements of qualification, relevance, and reliability will not be reversed on appeal absent a showing of abuse of discretion. But the trial court's articulation and application of the relevant legal standard is a legal question that is reviewed de novo. And, whatever the standard of review, an error of law is an abuse of discretion.

Miller v. Carolina Coast Emergency Physicians, LLC, 382 N.C. 91, 104 (2022) (cleaned up).

First, plaintiff argues the trial court's "three justifications," as set forth in finding of fact 31 of the Order, "for dismissal under Rule 9(j) are directly at odds with the guidance set forth in *Moore* and *Preston*." Plaintiff asserts "the lower court adds additional requirements not found in Rule 9(j), specifically that the [plaintiff] was required to 'retain an expert witness' and make that expert witness available for deposition. Rule 9(j) contains no such requirements." Plaintiff further argues, "the proper question to ask is whether . . . the [plaintiff] had a reasonable belief or expectation that Dr. Mallory would qualify as an expert witness at the time of filing the complaint, not whether or not he ultimately would qualify."

We discern no such misapprehension of law in the trial court's ruling. Rule 9(j) provides, in pertinent part:

> [a]ny complaint alleging medical malpractice by a health care provider . . . in failing to comply with the applicable standard of care under [N.C.G.S.] 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry *have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702* of the Rules of Evidence *and who is willing to testify* that the medical care did not comply with the applicable standard of care . . . .

N.C.G.S. § 1A-1, Rule 9(j) (2022) (emphasis added). As our Supreme Court stated in *Moore*, "the preliminary, gatekeeping question of whether a proffered expert witness is reasonably expected to qualify as an expert witness under Rule 702 is a different inquiry from whether the expert *will actually* qualify under Rule 702." 366 N.C. at 31 (internal quotation marks and citation omitted). "[A] complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable." *Id.* at 31–32 (internal citation omitted). "Whether an expert will ultimately qualify to testify is controlled by Rule 702. The trial court has wide discretion to allow or exclude testimony under that rule." *Id.* at 31 (citation omitted). Plaintiff reiterates her expectation that Dr. Mallory would qualify as an expert witness was *reasonable*, yet the trial court was not, upon remand, engaged in preliminary examination of her pleadings. The trial court's analysis of whether Dr. Mallory *actually* qualified as an expert witness under Rule 702(b) is not a misstatement of the law, but rather, it is inherent to its evaluation of *actual* compliance with Rule 9(j) beyond the preliminary stages of the proceedings.

Moore articulates the three-part test to qualify as an expert witness under Rule 702(b):

> (1) whether, during the year immediately preceding the incident, the proffered expert was in the same health profession as the party against whom or on whose behalf the testimony is offered; (2) whether the expert was engaged in active clinical practice during that time period; and (3) whether the majority of the expert's professional time was devoted to that active clinical practice.

Id. at 33 (citation omitted). The trial court's findings of fact, such as numbers 23(a)–(e) and 24, address the elements of this test. Plaintiff does not argue that the trial court arbitrarily disqualified Dr. Mallory, rather, plaintiff argues the trial court misapplied the law by "apply[ing] a stricter standard in its evaluation than espoused by the appellate courts." Upon review of plaintiff's brief, we discern no fundamental misapprehension or misapplication of Rule 702(b). Rather, plaintiff appears to present an alternative interpretation of the discovery materials and to propose an alternative ruling based on her interpretation. The fact remains, the trial court *did* make findings supporting a basis to exclude and strike Dr. Mallory as an expert witness under Rule 702(b). Plaintiff has not shown an abuse of discretion in that determination.

We discern no abuse of discretion or misapprehension of law in this case. Accordingly, we affirm the trial court's Order.

AFFIRMED.

Chief Judge DILLON and Judge MURPHY concur.

STATE OF NORTH CAROLINA
v.
ALEJANDRO CORDOVA AGUILAR

No. COA23-556

Filed 5 March 2024

1. Appeal and Error—preservation of issues—improper line of questioning—initial objection renewed only once

In a prosecution for sexual battery, assault on a female, and false imprisonment, defendant preserved for appellate review his objection to the lead detective's testimony after the State asked the detective whether she ever questioned the victim's truthfulness while interviewing the victim. The trial court overruled defendant's initial objection to the testimony, which defendant renewed after the State was allowed to repeat the question. Although defendant did not object to each additional question on the same issue, N.C.G.S. § 15A-1446(d)(10) provides litigants the right to challenge subsequent evidence admitted in a specific line of questioning when, as was determined here by the appellate court, "there has been an improperly overruled objection to the admission of evidence involving that line of questioning."

2. Evidence—lay opinion testimony—sexual battery prosecution—vouching for victim's credibility—prejudice

In a prosecution for sexual battery, assault on a female, and false imprisonment, where a teenaged girl testified that defendant grabbed her and kissed her inside a closet at their workplace, the trial court abused its discretion by admitting the lead detective's testimony about how she never questioned the victim's story when interviewing the victim. Although law enforcement officers may testify as to why they made certain choices in the course of an investigation, along with their basis for believing a particular witness, the detective did not make her statements in response to a direct

question about her investigatory decision-making; thus, she improperly vouched for the victim's credibility. Although a party may bolster a witness's credibility under Evidence Rule 608(a) after it has been attacked, that Rule was inapplicable here since defendant had not attacked the victim's credibility using reputation or opinion evidence. Furthermore, the court's error prejudiced defendant where all of the evidence about what happened in the closet came from the victim, making her credibility the central issue in the case.

Appeal by Defendant from Judgments entered 9 January 2023 by Judge Reggie E. McKnight in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Hilary R. Ventura, for the State.

Joseph P. Lattimore for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Alejandro Cordova Aguilar (Defendant) appeals from Judgments entered pursuant to jury verdicts finding Defendant guilty of Sexual Battery, Assault on a Female, and False Imprisonment. The Record before us, including evidence produced at trial, tends to show the following:

The alleged victim in this case is S.S.[1] At the time of the incident at issue in this case, S.S. was fifteen years old, working as a hostess at Azteca Mexican Restaurant in Matthews, North Carolina. Defendant worked as a waiter at the same restaurant. S.S. testified at trial that around 2:00 p.m. on 5 October 2019, she took her break and went to a closet to retrieve her belongings. S.S. stated after picking up her book bag, she turned around and saw Defendant right in front of her, holding the door with one hand. S.S. testified Defendant began kissing her and grabbing her inappropriately. According to S.S., Defendant then abruptly stopped and walked out of the closet. She exited the closet shortly thereafter and encountered two other employees near the closet. S.S. told those employees Defendant had just said "hi" to her.

1. A pseudonym stipulated to by the parties.

S.S.'s cousin testified she was supposed to drive S.S. home after her shift at the restaurant on 5 October; however, S.S. asked her to come inside, and she found S.S. in the bathroom. When her cousin asked S.S. what happened, S.S. began to cry and told her Defendant "put his hands on her and started kissing her forcefully." S.S. and her cousin then told S.S.'s mother about the incident, and they called the police.

Detective Danielle Helms of the Matthews Police Department interviewed S.S., her mother, and her cousin. The statement Detective Helms reported S.S. made was consistent with S.S.'s trial testimony.

At trial, during the State's direct examination of Detective Helms, the following exchange occurred:

> [State's Counsel]: And, Detective Helms, you said you investigated felonies and serious misdemeanors for the better part of 18 years; is that right?
>
> [Detective Helms]: Correct.
>
> [State's Counsel]: At any point in your investigation, did you question the validity of [S.S.]'s sorry? [sic]
>
> [Detective Helms]: I did not.
>
> [Defense Counsel]: Objection.
>
> [Trial Court]: Sustained. If you can rephrase your question.

The State then asked for clarification as to the basis for the trial court's decision and each side was heard. Defense counsel specifically raised the issue of the Detective offering opinion testimony, stating: "So what she's trying to do is invade that providence [sic] of the jury. This is the jury's determination whether someone's telling the truth or not." The trial court then, hearing the State repeat its question, overruled the objection and allowed Detective Helms to answer. The State then continued this line of questioning:

> [State's Counsel]: And why did you feel that you didn't have any reason to question the truthfulness of [S.S.]?
>
> [Detective Helms]: During her-- you know, during the course of the investigation, she came forward immediately with the accusation, as soon as it happened. Her cousin picked her up, and she was obviously very volatile, crying, upset, went home, contacted her mom, told her the story. They immediately contacted the police, came in. I

was able to talk to her. The story stayed the same, consistent with the statement that she gave the first officer, with my interview, and I know we have corroborating evidence of the Aztec video.

[State's Counsel]: And you said that the story stayed the same as far as her statements that she gave to the other officer and to you.

[Detective Helms]: Correct.

[State's Counsel]: Anything about the fact that she mentioned details about talking to those other witnesses after she left the storage closet or any of the other details that she added that are not in State's Exhibit 2 give you any reason to feel differently?

[Detective Helms]: No.

[Defense Counsel]: I'll renew my objection. This is all just opinion.

[Trial Court]: Overruled.

Defendant challenged the veracity of S.S.'s account at various points during the trial by illustrating inconsistencies in prior statements given by S.S., pointing out discrepancies between the video footage and S.S.'s statements, and eliciting an admission from S.S. that she did not report the alleged assault to the coworkers she encountered when she left the closet.

On 9 January 2023, the jury returned verdicts finding Defendant guilty of Sexual Battery, Assault on a Female, and False Imprisonment. The trial court consolidated the convictions for Sexual Battery and Assault on a Female into one Judgment and sentenced Defendant to 75 days of imprisonment, which was suspended with supervised probation for 12 months. The trial court imposed a suspended sentence of 45 days of imprisonment for the False Imprisonment conviction and ordered 12 months of unsupervised probation to run consecutive to the other sentence. Defendant timely filed written Notice of Appeal on 11 January 2023.

Issue

The issue before us is whether the trial court erred by allowing Detective Helms to vouch for the alleged victim's credibility.

Analysis

I. Preservation

[1] As a threshold issue, the State contends Defendant failed to preserve this issue for appeal. The State argues Defendant's objection did not preserve this issue because Defendant did not object to all of the challenged testimony. Thus, in the State's view, Defendant's prior and subsequent objections were waived. *See State v. Walters*, 357 N.C. 68, 104, 588 S.E.2d 344, 365 (2003). Contrary to the State's assertion, pursuant to N.C. Gen. Stat. § 15A-1446(d)(10), even if a party fails to object to the admission of evidence at some point during trial, that party may nevertheless challenge "[s]ubsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning." N.C. Gen. Stat. § 15A-1446(d)(10) (2023); *see also State v. Corbett*, 376 N.C. 799, 826, 855 S.E.2d 228, 248 (2021).

Here, Defendant immediately objected when the State asked Detective Helms whether she had questioned S.S.'s story. The trial court heard the parties' arguments on the objection and Defendant explicitly stated the State's question was asked for a credibility judgment: "So what [the State] is trying to do is invade that providence [sic] of the jury. This is the jury's determination whether someone's telling the truth or not." Thus, Defendant timely objected and gave a proper foundation for the objection, which Defendant argues here. The trial court then overruled Defendant's objection and the State was allowed to ask the question again and proceeded to ask a few follow-up questions. At the conclusion of the follow-up, Defendant renewed his objection, stating: "This is all just opinion." Although Defendant did not object to each additional question on this issue, our Supreme Court has held N.C. Gen. Stat. § 15A-1446(d)(10) provides litigants the right to challenge subsequent evidence admitted in a specific line of questioning "when there has been an improperly overruled objection to the admission of evidence involving that line of questioning." *Corbett*, 376 N.C. at 826, 855 S.E.2d at 248 (quoting N.C. Gen. Stat. § 15A-1446(d)(10) (2019)).

This Court has recently addressed this issue, applying the statute to a similar set of facts in *State v. Graham*, 283 N.C. App. 271, 276-78, 872 S.E.2d 573, 578-79 (2022). There, defense counsel initially objected to an improper question about the defendant's communications with his attorney but failed to renew his objection when the State asked subsequent questions on this issue. *Id.* This Court rejected the State's argument the defendant had failed to preserve the issue for appellate

review, concluding: "Defendant did object to the State's initial question regarding the substance of Defendant's communications with counsel. Accordingly, any further questions regarding the substance of those communications is preserved as a matter of law if the objection was erroneously overruled." *Id.* at 278, 872 S.E.2d at 579. The facts of this case are the same, except that here Defendant did renew his objection after the State's subsequent questions. Thus, Defendant's objection to Detective Helms' testimony as improper opinion testimony is preserved if we conclude Defendant's initial objection was erroneously overruled. Because we so conclude, this issue is properly before this Court.

II. Detective Helms' Testimony

[2] On appeal, "[w]e review a trial court's ruling on the admissibility of lay opinion testimony for abuse of discretion." *State v. Belk*, 201 N.C. App. 412, 417, 689 S.E.2d 439, 442 (2009) (citations omitted). North Carolina Rule of Evidence 701 governs lay opinion testimony. It provides: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2023). Our Courts have consistently held "[i]t is improper for one witness to vouch for the veracity of another." *State v. Bellamy*, 172 N.C. App. 649, 663, 617 S.E.2d 81, 91 (2005) (citing *State v. Robinson*, 355 N.C. 320, 334-35, 561 S.E.2d 245, 255 (2002)); *see also State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988) (citations omitted) (noting ordinarily the State may not present testimony "to the effect that a prosecuting witness is believable, credible, or telling the truth[.]").

Further, "[t]he admission of opinion testimony intended to bolster or vouch for the credibility of another witness violates N.C. Gen. Stat. § 8C-1, Rule 701." *State v. Harris*, 236 N.C. App. 388, 403, 763 S.E.2d 302, 313 (2014) (citing *Robinson*, 355 N.C. at 334-35, 561 S.E.2d at 255). "[T]he trial court commits a fundamental error when it allows testimony which vouches for the complainant's credibility in a case where the verdict entirely depends upon the jurors' comparative assessment of the complainant's and the defendant's credibility." *State v. Warden*, 376 N.C. 503, 504, 852 S.E.2d 184, 186 (2020). Our Supreme Court has explained the rationale behind the exclusion of lay opinion testimony as follows:

> [T]he truthfulness of a particular witness should be determined by the jury rather than by a witness for one party or the other, as the "jury is the lie detector in the courtroom"

> and "is the only proper entity to perform the ultimate function of every trial—determination of the truth[.]"

State v. Caballero, 383 N.C. 464, 475, 880 S.E.2d 661, 669 (2022) (quoting *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986)).

Considering the Record before us and applicable precedent, we are persuaded the challenged portion of Detective Helms' testimony was inadmissible. We have noted a detective or other law enforcement officer may testify as to why they made certain choices in the course of an investigation, including their basis for believing a particular witness. *See State v. Taylor*, 238 N.C. App. 159, 168-69, 767 S.E.2d 585, 591-92 (2014) (Bryant, J. dissenting), *rev'd*, 368 N.C. 300, 776 S.E.2d 680 (reversing the Court of Appeals opinion "[f]or reasons stated in the dissenting opinion.").

Here, in contrast, the challenged testimony was clearly unrelated to Detective Helms' investigatory decision-making. First, unlike the exchange at issue in *Taylor*, Detective Helms' statement was not made in connection with a direct question about her investigative choices. In *Taylor*, counsel for the State asked the lead investigator on the case, "What made you go forward [with the investigation]?" *Id.* at 165, 767 S.E.2d at 589. The investigator responded she believed the alleged victim was telling her the truth because she had given the investigator "all the information possible[.]" *Id.* Similarly, in *State v. Richardson*, the police department's investigatory decisions were a key issue. 346 N.C. 520, 488 S.E.2d 148 (1997). There, law enforcement had initially investigated a person as the perpetrator and obtained a warrant for his arrest, but then changed course and arrested the defendant instead. *Id.* at 527-28, 488 S.E.2d at 152-53. After interviewing the person the defendant identified as the perpetrator, law enforcement then believed the defendant was the perpetrator. *Id.* at 528, 488 S.E.2d at 152. At trial, the State's questioning asked law enforcement officers to explain that shift and their choice to believe the witness' story instead of the defendant's. *Id.* at 533-34, 488 S.E.2d at 156.

In contrast, here, the State merely asked Detective Helms whether she had questioned the validity of S.S.'s story. Rather than asking the detective to explain her decision-making process in the course of the investigation, the State elicited an evaluation of S.S.'s credibility. The follow-up question after Defendant's objection was overruled asked Detective Helms to explain why she thought S.S. was credible. Again, this question went precisely to the issue of credibility, or as the State put it in the question, "the truthfulness of [S.S.][.]"

Moreover, these questions were not posed in the context of examining law enforcement's decisions made during the course of the investigation. Unlike the law enforcement officers in *Richardson* and *Taylor*, Detective Helms was not asked in this exchange why she made certain decisions or why she did or did not do something; she was merely asked whether she had doubted S.S. and to explain why she believed S.S. was truthful. Although whether an officer believes a witness is telling them the truth certainly may influence his or her decision-making in an investigation, that issue was not raised by the questioning in this case. The challenged testimony came after Detective Helms testified as to what S.S. had told her in the initial interview and stated that she had reviewed the footage from Azteca Restaurant. Immediately preceding the challenged exchange, the State asked: "And, Detective Helms, you said you investigated felonies and serious misdemeanors for the better part of 18 years; is that right?" This underscores that the question was posed for the foundational purpose of reminding the jury of Detective Helms' experience so that they would trust her judgment of S.S.'s credibility rather than making an independent determination based on the evidence presented. Thus, the challenged testimony was not offered for a permissible purpose. Therefore, the testimony impermissibly vouched for another witness' credibility.

The State further contends even if the challenged portion of Detective Helms' testimony had been improperly admitted, Defendant had opened the door to such evidence through the cross-examination of S.S., and thus this testimony was admissible under N.C. R. Evid. 608(a). The State argues Defendant "raised inferences concerning the lead detective's investigation and about S.S.'s credibility" during his cross-examination of S.S. Consequently, in the State's view, the State had the right to offer rebuttal and explanatory testimony on those issues. *See State v. Johnston*, 344 N.C. 596, 605-06, 476 S.E.2d 289, 294 (1996). We disagree.

Rule 608(a) of the North Carolina Rules of Evidence provides:

> The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

N.C. Gen. Stat. § 8C-1, Rule 608(a) (2023). "Put another way, Rule 608(a) allows the party that called a witness to bolster the credibility of that witness' 'character for truthfulness' in the event that the credibility of that witness has been attacked 'by evidence in the form of reputation or opinion.' " *Caballero*, 383 N.C. at 479, 880 S.E.2d at 671. Our Supreme Court in *Caballero* rejected a similar challenge to a police officer's testimony regarding a witness' credibility. *Id.* at 478-79, 880 S.E.2d at 671. In dismissing this argument, the Court characterized the defendant's cross-examination as "pointing out what he believed to be inconsistencies between the information contained in [the victim's] trial testimony and the statements that [the victim] gave to investigating officers." *Id.* at 479, 880 S.E.2d at 671. It continued, "the challenged portion of [the officer]'s testimony constituted a direct assertion that [the victim] had passed the credibility test that he had administered to her rather than 'evidence of truthful character.' " *Id.*

Likewise in this case, Defendant did not attack S.S.'s credibility "by opinion or reputation evidence or otherwise." Instead, Defendant attempted to challenge S.S.'s credibility by pointing out inconsistencies in prior statements given by S.S., showing discrepancies between the video footage and S.S.'s statements, and eliciting an admission from S.S. that she did not report the alleged assault to the coworkers she encountered when she left the closet. These methods are consistent with those our Supreme Court held in *Caballero* do not implicate Rule 608(a). Moreover, just as in *Caballero*, Detective Helms' testimony was a direct assertion S.S. was credible; it cannot be characterized as mere "evidence of truthful character." *Id.*

III. Prejudice

"[E]ven if the admission of [evidence] was error, in order to reverse the trial court, the appellant must establish the error was prejudicial. If the other evidence presented was sufficient to convict the defendant, then no prejudicial error occurred." *State v. James*, 224 N.C. App. 164, 166, 735 S.E.2d 627, 629 (2012) (quoting *State v. Bodden*, 190 N.C. App. 505, 510, 661 S.E.2d 23, 26 (2008) (citation omitted)). "The burden of showing such prejudice . . . is upon the defendant." *Bellamy*, 172 N.C. App. at 661, 617 S.E.2d at 90 (citations omitted). "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2023).

The State contends there was sufficient evidence beyond Detective Helms' vouching for S.S.'s credibility to convict Defendant. The State points to S.S.'s testimony, video of her interview with Detective Helms and her victim statement, the video of Defendant entering the closet with S.S. at Azteca Restaurant, and testimony from S.S.'s cousin and mother. However, much of that evidence relied on S.S.'s credibility, including her testimony, interview, and witness statement. Further, S.S.'s cousin and mother were not witnesses to the alleged incident; rather, they testified only to their interactions with S.S. after the alleged incident. While the video from Azteca Restaurant does show Defendant entering the closet after S.S., it does not show what happened inside the closet. All of the evidence about what happened in the closet came from S.S. Thus, her credibility was the most significant issue in the case.

Our Supreme Court has stated:

> [C]oncern for the fairness and integrity of criminal proceedings requires trial courts to exclude testimony which purports to answer an essential factual question properly reserved for the jury. When the trial court permits such testimony to be admitted, in a case where the jury's verdict is contingent upon its resolution of that essential factual question, then our precedents establish that the jury's verdict must be overturned.

Warden, 376 N.C. at 510, 852 S.E.2d at 190.

The Court's analysis in *State v. Aguallo* is instructive. 318 N.C. 590, 350 S.E.2d 76 (1986). There, in addition to the victim's testimony, the State offered evidence the victim had consistently told the same story to others. *Id.* at 599, 350 S.E.2d at 82. Although there was some physical evidence, the Court determined "the State's case hinged on the victim's testimony and thus upon her credibility." *Id.* The Court noted cross-examination of the victim "raised some doubts about the victim's credibility" and consequently concluded admission of testimony improperly vouching for the victim's credibility was prejudicial error "[b]ecause it is likely that any doubts the jurors may have had about the victim's credibility were allayed by the pediatrician's testimony that she found the victim to be 'believable[.]' " *Id.* Absent that testimony, the Court concluded there was a "reasonable possibility that a different result would have been reached by the jury." *Id.* at 599-600, 350 S.E.2d at 82.

In the present case, defense counsel likewise worked to undermine S.S.'s credibility by illustrating inconsistencies in prior statements given by S.S., pointing out discrepancies between the video footage and S.S.'s

statements, and eliciting an admission from S.S. that she did not report the alleged assault to the coworkers she encountered when she left the closet. Thus, not only was S.S.'s credibility the central issue of the case but also the other evidence offered was not substantial in the face of doubts raised by Defendant. Considering these circumstances and consistent with our Supreme Court's holding in *State v. Aguallo*, we conclude there is a reasonable possibility the jury would have reached a different result absent Detective Helms' testimony vouching for S.S.'s credibility. Therefore, Defendant was prejudiced by the erroneous admission of Detective Helms' challenged testimony.

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court's Judgments and remand for a new trial.

NEW TRIAL.

Judges CARPENTER and GORE concur.

STATE OF NORTH CAROLINA
v.
MARCUS D. GEORGE, DEFENDANT

No. COA22-958

Filed 5 March 2024

1. Search and Seizure—traffic stop—extension—denial of motion to suppress—sufficiency of findings

In a prosecution for multiple drug possession and trafficking charges, the trial court entered sufficient findings of fact that were supported by competent evidence in its order denying defendant's motion to suppress, including that: an officer conducting a traffic stop gave defendant a verbal warning for speeding; as he returned defendant's driver's license and registration, the officer asked defendant about the presence of illegal drugs and asked to search his vehicle; defendant denied having illegal drugs inside his vehicle and denied the officer's request to search; and then the officer had his canine (who was already at the scene) conduct a free air sniff of defendant's vehicle, during which the dog positively alerted to the odor of narcotics inside. Contrary to defendant's argument,

the findings that he challenged on appeal were neither unclear nor incomplete and, taken together with the court's unchallenged findings, supported the court's conclusion that the officer did not unconstitutionally prolong the traffic stop.

2. Search and Seizure—traffic stop—extension—reasonable suspicion—based on sight and smell of marijuana—legalization of hemp—irrelevant

In a prosecution for multiple drug trafficking and possession charges arising from a traffic stop, the trial court properly denied defendant's motion to suppress upon concluding that the officer did not unconstitutionally prolong the stop where, after giving defendant a verbal warning for speeding, he asked defendant about the presence of illegal drugs inside the vehicle and then had his canine perform a drug sniff. The officer had sufficient reasonable suspicion of criminal activity to extend the stop after smelling a faint odor of marijuana and seeing marijuana residue on the vehicle's floorboard. Although marijuana smells the same as legalized hemp, binding precedent affirms that, regardless of hemp's legalization, the plain odor of marijuana gives law enforcement probable cause to conduct a search; therefore, the sight and smell of marijuana inside defendant's car was enough to satisfy the less-demanding reasonable suspicion standard.

Appeal by defendant from judgment entered 23 April 2021 by Judge Henry L. Stevens in Sampson County Superior Court. Heard in the Court of Appeals 10 May 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Macari, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for the defendant-appellant.

STADING, Judge.

Marcus D. George ("defendant") appeals from a judgment entered after a jury found him guilty of trafficking heroin by possession, trafficking heroin by transport, possession with intent to sell or deliver heroin, possession with intent to sell or deliver cocaine, and resisting a public officer. At sentencing, defendant admitted his habitual felon status. For the reasons below, we hold no error.

I. Background

On 27 July 2017, Lieutenant Bass ("Lt. Bass") of the Sampson County Sheriff's Office observed a vehicle speeding seventy miles per hour in a fifty-five mile per hour zone. Lt. Bass initiated a traffic stop and approached to find defendant in the driver's seat with a passenger in his vehicle. Lt. Bass requested defendant for his license and registration. As defendant searched for his registration, Lt. Bass noticed him "moving around a lot inside the vehicle" and "shaking very nervously." According to Lt. Bass, defendant "would never make eye contact" or "look [his] way." While at the vehicle, Lt. Bass saw "what appeared to be marijuana residue" on the passenger side floorboard and could smell "a faint odor of marijuana coming from the vehicle."

Eventually, the passenger found defendant's registration in the glovebox, a location defendant had previously checked. Lt. Bass returned to his patrol car and called for backup. Deputy Wilkes arrived on the scene while Lt. Bass completed the "registration check." To ensure officer safety, Deputy Wilkes asked defendant to exit the vehicle and conducted a pat-down to check for weapons. During the pat-down, defendant "was moving around" and "kept trying to turn around." Meanwhile, Lt. Bass attempted to produce a printed citation, but his computer and printer lost power. Consequently, defendant received a verbal warning for speeding. Defendant responded to the verbal warning by disputing Lt. Bass's description of the events leading up to the traffic stop.

Upon returning defendant's driver's license and registration, Lt. Bass asked defendant if there were "any illegal drugs inside the vehicle," to which defendant responded, "no." Lt. Bass asked for consent to search the vehicle, but defendant refused. "At that time," Lt. Bass informed defendant that he "would be conducting a free-air sniff with [his canine] around the vehicle" and instructed the passenger to exit the vehicle before performing the search. When the passenger door was opened, Lt. Bass verified the substance on the floorboard was "marijuana stems, residue." Then, the canine alerted to the presence of narcotics at the driver's door. A search of the vehicle led to the discovery of, among other things, marijuana and "a small plastic baggy containing a white powder." During the search, defendant "seemed . . . agitated . . . and . . . was pacing back and forth[.]" Thereafter, Lt. Bass attempted to arrest defendant, but he pulled away, fought, and reached for his waistband. Then, defendant put something in his mouth, which turned out to be a baggie containing an "off-white rock substance." Once defendant was handcuffed, another baggie, which contained a brown powder, was located on the ground nearby.

Defendant was indicted for numerous drug offenses, among them trafficking heroin, possession with intent to sell or deliver heroin, possession with intent to sell or deliver cocaine, maintaining a vehicle for the purpose of keeping or selling cocaine and heroin, and possession of testosterone and marijuana. He also faced charges of destroying evidence and resisting a public officer. Additionally, defendant was indicted for the status offense of habitual felon. On 31 August 2018, defendant filed a pretrial motion to suppress evidence obtained from the traffic stop. His motion alleged that the search was "without a search warrant, probable cause, consent, exigent circumstances or any other exception to the warrant requirement." The trial court conducted a suppression hearing and accepted evidence in the form of testimony from Lt. Bass, a video tendered by the State, and two photographs tendered by defendant. At the conclusion of the hearing, the trial court denied defendant's motion.

Defendant's trial began on 19 April 2021 in Sampson County Superior Court. The State chose not to prosecute defendant for the charges of possession of testosterone, possession of marijuana, possession of marijuana paraphernalia, and destroying evidence. At the close of all evidence, the trial court dismissed the charge of maintaining a vehicle to keep or sell a controlled substance. Following deliberations, the jury found defendant guilty of trafficking heroin, possession with intent to sell or deliver heroin, possession with intent to sell or deliver cocaine, and resisting a public officer. Defendant admitted to his habitual felon status and was sentenced by the trial court. Thereafter, defendant entered his notice of appeal in open court.

II. Jurisdiction

This Court has jurisdiction over this appeal pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Analysis

Defendant presents two issues on appeal: (1) whether the trial court made findings of fact to support its conclusion of law that the stop was lawfully extended, and (2) whether the trial court erred in denying defendant's motion to suppress. Below, we address each of defendant's arguments.

A. Standard of Review

"A trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence." *State v. Cobb*, 381 N.C. 161, 164, 872 S.E.2d

21, 25 (2022) (citations omitted). Our review of the trial court's order is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Left unchallenged on appeal, findings of fact are "deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Conclusions of law are reviewed de novo. *See Cobb*, 381 N.C. at 164, 872 S.E.2d at 25; *see also State v. Faulk*, 256 N.C. App. 255, 262, 807 S.E.2d 623, 628–29 (2017).

B. The Trial Court's Order

[1] Defendant argues that the trial court failed to make sufficient findings of fact to support its conclusion of law that the traffic stop was not unconstitutionally prolonged. He erroneously contends that only four findings of fact contained in the trial court's order address the contested conclusion of law:

> [D]efendant stood at the window of [Lt.] Bass's patrol car. [Lt.] Bass told [ ] defendant he would issue a speeding citation and defendant said he was going down a hill and [Lt.] Bass told him he was not.
>
> The power failed on [Lt.] Bass's computer and he returned defendant's license and registration.
>
> [Lt.] Bass requested consent to search and defendant said no.
>
> [Lt.] Bass utilized his [canine] to conduct a free air sniff of defendant's vehicle and the [canine] gave a positive alert for the odor of narcotics to the seam of the driver's door near the handle.

Furthermore, defendant maintains that these findings are incomplete and do not support the challenged conclusion of law.

Defendant does not clearly contest the findings of fact but claims they are incomplete. In an abundance of caution, we first carefully review the record to evaluate those findings of fact. During the suppression hearing, Lt. Bass testified that after returning to his patrol car, he planned to issue defendant a citation for speeding, but the power failed for his computer and printer. Hence, Lt. Bass gave defendant a verbal warning instead, and defendant took this opportunity to explain that he

was traveling downhill. In disagreement, Lt. Bass retorted that defendant was not going downhill when clocked on the radar. As he returned the driver's license and registration, Lt. Bass asked about the presence of illegal drugs and requested to search the vehicle. Defendant denied the presence of illegal drugs and declined the request to search his vehicle. Then the canine, already present on the scene with Lt. Bass, performed a "free-air sniff" around defendant's vehicle. The canine "alerted to the odor of narcotics" at the driver's door. To the extent defendant challenges these findings of fact, we hold that they are sufficiently supported by competent evidence.

Defendant contends that the foregoing findings of fact fail to support the challenged conclusion of law for the reasons that (1) they imply that the stop was not over because Lt. Bass was still taking action related to the purpose of the stop, and (2) they omit the bulk of the events which occurred when the stop was unconstitutionally extended. Therefore, defendant claims that this matter must be remanded for the trial court to clarify its findings of fact and conclusion of law regarding the extension of the traffic stop. As a preliminary matter, we note that since the challenged findings of fact are adequately supported by competent evidence, all of the findings contained in the trial court's order are conclusively binding on appeal. *See State v. Biber*, 365 N.C. at 168, 712 S.E.2d at 878; *see also State v. Byrd*, 287 N.C. App. 276, 279, 882 S.E.2d 438, 440 (2022) (holding that unchallenged findings of fact are binding on appeal). Significant here and discussed in greater detail below, defendant overlooks the unchallenged finding contained in the trial court's order that "[Lt.] Bass observed marijuana residue on the passenger floorboard and could smell the faint odor of marijuana." This observation was made while the mission of the traffic stop was ongoing, during Lt. Bass's initial approach of defendant's vehicle and before returning to his patrol car with defendant's registration. The trial court's order also included an unchallenged finding that Lt. Bass had worked in crime interdiction since 2003. Moreover, several unchallenged findings in the trial court's order described defendant's nervous behavior and peculiar movements. As explained in the following section, our de novo review examining the constitutionality of the traffic stop's extension shows that the challenged legal conclusion is adequately supported by the findings of fact.

C. Extension of the Traffic Stop

[2] Defendant maintains that the trial court erred in both denying his motion to suppress and determining that the traffic stop was not unconstitutionally prolonged. Specifically, defendant challenges the

legal sufficiency of the trial court's conclusion "that the stop was not prolonged and [Lt.] Bass had probable cause to search the defendant's vehicle based on his observation of marijuana residue on the passenger floorboard and faint odor of marijuana." Citing *Rodriguez v. United States*, defendant maintains that the traffic stop ended when his license and registration were returned, and the required reasonable suspicion to extend the stop did not exist. 575 U.S. 348, 135 S. Ct. 1609 (2015).

"Under *Rodriguez*, 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 . . . unless reasonable suspicion of another crime arose before that mission was completed[.]" *State v. Bullock*, 370 N.C. 256, 257, 805 S.E.2d 671, 673 (2017) (emphasis added) (citing *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S. Ct. 834, 836 (2005)). And "investigations into unrelated crimes during a traffic stop, even when conducted without reasonable suspicion, are permitted if those investigations do not extend the duration of the stop." *Id.* at 258, 805 S.E.2d 674. In any event, extending a traffic stop is permissible if law enforcement finds a reasonable articulable suspicion of criminal activity that justifies further delay of the stop's conclusion. *See id.* at 257, 805 S.E.2d 673; *see also State v. Heien*, 226 N.C. App. 280, 286, 741 S.E.2d 1, 5 (2013) ("Once the purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay."). The threshold for reasonable articulable suspicion of criminal activity requires only "a minimal level of objective justification, something more than an unparticularized suspicion or hunch." *State v. Campbell*, 359 N.C. 644, 664, 617 S.E.2d 1, 14 (2005) (internal quotation marks and citation omitted). "A court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion . . . exists." *Id.* at 664, 617 S.E.2d at 14 (internal quotation marks and citation omitted).

While waiting for defendant to produce his registration, Lt. Bass smelled a faint odor of marijuana and saw what he believed to be marijuana residue on the floorboard of the vehicle. Defendant disputes the veracity of this evidence, but upon "examining the trial court's order, we do not 'reweigh the evidence and make our own factual findings on appeal, a task for which an appellate court like this one is not well suited.' " *State v. Rodriguez*, 371 N.C. 295, 319, 814 S.E.2d 11 (2018) (quoting *State v. Corbett*, 376 N.C. 799, 822, 855 S.E.2d 228, 245 (2021)). Invoking this Court's ruling in *State v. Parker*, defendant argues that the scent of marijuana alone cannot "establish criminal activity of another substance" since it smells "indistinguishable" from hemp, which is legal

in North Carolina. 277 N.C. App. 531, 540, 860 S.E.2d 21, 28 (2021); *see also* N.C. Gen. Stat. § 106-568.50 (2023) (The Industrial Hemp Act). While this case is not wholly inapplicable, it does not support defendant's position. In *State v. Parker*, this Court was called on to assess "whether the trial court's order correctly determined that the search of Defendant's vehicle was supported by probable cause." 277 N.C. App. at 538, 860 S.E.2d at 27. In any event, no decision was made as to "whether the scent or visual identification of marijuana alone remains sufficient to grant an officer probable cause to search a vehicle" since law enforcement "had more than just the scent of marijuana to indicate that illegal drugs might be present in the car." *Id.* at 541, 860 S.E.2d at 29. Even under the probable cause standard, the United States Supreme Court has noted that it "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n.13, 103 S. Ct. 2317, 2335 (1983).

Here, the question before us requires not a determination of probable cause but consideration of whether the sight or smell of this substance meets the less demanding standard of reasonable suspicion, required to extend the traffic stop beyond the length of time that is reasonably necessary to accomplish its mission. *See Rodriguez v. United States*, 575 U.S. 348, 135 S. Ct. 1609; *see also State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) ("The reasonable suspicion standard is 'a less demanding standard than probable cause' and a 'considerably less [demanding standard] than preponderance of the evidence.' " (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673 (2000)). Extension of the stop must be supported by reasonable suspicion, a determination which "need not rule out the possibility of innocent conduct." *United States v. Arvizu*, 534 U.S. 266, 277, 122 S. Ct. 744, 753 (2002). And even where "the conduct justifying the stop [is] ambiguous and susceptible of an innocent explanation," "officers [may] detain the individuals to resolve the ambiguity." *Illinois v. Wardlow*, 528 U.S. at 125, 120 S. Ct. at 677.

Defendant posits that the sight or smell of marijuana does not permit the extension of a traffic stop and seeks to analogize this matter with this Court's decision in *State v. Cabbagestalk*, 266 N.C. App. 106, 113-14, 830 S.E.2d 5, 10-11 (2019) (holding that an officer lacked reasonable suspicion to stop the defendant for driving while impaired, in violation of N.C. Gen. Stat. § 20-138.1 (2023), after observing the defendant drinking a beer and driving a car two hours later without any evidence of impairment). However, a comparison of the facts and alleged crimes of each case reveal that defendant's position is

untenable. The driving while impaired statute states, in relevant part: "A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State: (1) While under the influence of an impairing substance; or (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. . . ." N.C. Gen. Stat. § 20-138.1. The facts of *Cabbagestalk* displayed insufficient reasonable suspicion as to one element of the alleged crime. The applicable drug statute states, in relevant part: "Except as authorized . . . it is unlawful for any person . . . [t]o possess a controlled substance." N.C. Gen. Stat. § 90-95 (2023). And marijuana remains a controlled substance under N.C. Gen. Stat. § 90-94 (2023). In contrast to the impaired driving case, the trial court's order contains findings of fact that address all elements of the alleged crime. Thus, we next consider whether the contested conclusion, undergirded by the trial court's findings, survives constitutional demands.

Similar to this Court's decision in *State v. Teague*, we find the analyses of the federal courts of North Carolina instructive. 286 N.C. App. 160, 179, 879 S.E.2d 881, 896 (2022) (discretionary review denied *State v. Teague*, 385 N.C. 311, 891 S.E.2d 281 (2023)). When addressing the higher standard of probable cause, the United States District Court for the Eastern District of North Carolina noted that "the smell of marijuana alone . . . supports a determination of probable cause, even if some use of industrial hemp products is legal under North Carolina law. This is because 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' " *United States v. Harris*, No. 4:18-CR-57-FL-1, 2019 U.S. Dist. LEXIS 211633, at *9 (E.D.N.C. Dec. 9, 2019) (quoting *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317 (1983)). The United States District Court for the Western District of North Carolina has taken a similar approach when addressing the defendant's claim that "the alleged contraband found in his vehicle could have been legal hemp not marijuana. . . ." *United States v. Brooks*, No. 3:19-CR-00211-FDW-DCK, 2021 U.S. Dist. LEXIS 81027, at *10 (W.D.N.C. Apr. 28, 2021). There, the court concluded that "even with the social acceptance of marijuana seeming to grow daily, precedent on the plain odor of marijuana giving law enforcement probable cause to search has not been overturned." *Id.* at *13. Moreover, when considering an analogous issue, the United States Court of Appeals for the Fourth Circuit held that a glass stem pipe in plain view, which "may be put to innocent uses" provided sufficient probable cause to search a vehicle. *United States v. Runner*, 43 F.4th 417, 423 (4th Cir. 2022). The court held that "[d]espite the increased use of glass pipes to ingest legal substances

such as CBD oil, it is still reasonable that a police officer would reach the belief that a glass pipe was evidence of a crime supporting probable cause." *Id.* at 422.

As this Court determined in *State v. Teague*, "[t]he passage of the Industrial Hemp Act, in and of itself, did not modify the State's burden of proof at the various stages of our criminal proceedings." 286 N.C. App. at 179, 879 S.E.2d at 896. Thus, our de novo review of this matter leads us to conclude that the traffic stop was not unlawfully extended, and the trial court did not err in concluding the same. Considering the totality of the circumstances, there was at least "a minimal level of objective justification, something more than an unparticularized suspicion or hunch" of completed criminal activity—possession of marijuana. *State v. Campbell*, 359 N.C. at 664, 617 S.E.2d at 14. We hold that the stop of defendant was not extended in contravention of his constitutional rights. Therefore, the trial court did not err in denying defendant's motion to suppress, and this assignment of error is overruled.

IV. Conclusion

The trial court properly denied defendant's motion to suppress. For the reasons set forth above, we hold that (1) to the extent defendant challenges the trial court's findings of fact, they are adequately supported by competent evidence, (2) the trial court made sufficient findings of fact to support the challenged conclusion of law, and (3) the trial court did not err in denying defendant's motion to suppress and determining that the traffic stop was not unconstitutionally prolonged.

NO ERROR.

Chief Judge DILLON and Judge COLLINS concur.

STATE v. JACKSON

[292 N.C. App. 616 (2024)]

STATE OF NORTH CAROLINA
v.
CURTIS LEVON JACKSON, DEFENDANT

No. COA22-280

Filed 5 March 2024

1. Constitutional Law—right to autonomy in presentation of defense—criminal case—record unclear regarding absolute impasse—no structural error

In a prosecution for second-degree forcible rape and other related offenses, where defense counsel informed the court that defendant would not introduce any evidence at trial but where defendant told the court during a colloquy that he did want defense counsel to introduce certain documentary evidence, it was impossible to determine from the cold record whether an "absolute impasse" existed between defendant and his counsel such that the trial court—by not instructing defense counsel to conform to defendant's wishes—deprived defendant of his Sixth Amendment right to autonomy in the presentation of his defense. Even so, any error in that regard would not have amounted to structural error under the applicable precedent.

2. Constitutional Law—effective assistance of counsel—criminal case—defense's closing argument—no implied concession of guilt

In a prosecution for second-degree forcible rape and other related offenses, defendant was not deprived of his Sixth Amendment right to effective assistance of counsel, as there was no *Harbison* error during closing arguments where defense counsel mentioned all except one of the charges against defendant when asking the jury to find him not guilty. This omission was not an implied concession of defendant's guilt as to that particular crime, especially where defense counsel had made other statements noting the lack of evidence to support such a charge and otherwise generally asked the jury to find defendant not guilty.

3. Indictment and Information—facial validity—habitual misdemeanor assault—physical injury element—described as "serious" injury

The trial court had jurisdiction to sentence defendant for habitual misdemeanor assault, since the indictment was facially valid where it alleged that, in addition to having two prior assault convictions,

defendant "did assault and strike" his girlfriend in violation of N.C.G.S. § 14-33.2 by "hitting her shoulder, thereby inflicting serious injury." Although the indictment did not precisely state that defendant caused "physical injury," as prescribed in section 14-33.2, the term "serious injury" includes physical injuries; therefore, under recent legal trends moving away from technical pleading requirements, defendant still received sufficient notice of the charge made against him.

Judge MURPHY concurring in part and dissenting in part.

Appeal by Defendant from judgment entered 12 August 2021 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 11 January 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford, for the State.

Joseph P. Lattimore for Defendant.

GRIFFIN, Judge.

Defendant Curtis Levon Jackson appeals from judgment entered upon a jury verdict finding him guilty of second-degree forcible sex offense; second-degree forcible rape; first-degree kidnapping; assault on a female; interfering with emergency communication; assault with a deadly weapon; and assault inflicting serious injury. Defendant contends he was denied protections guaranteed by the Sixth Amendment when he was deprived of both the right to autonomy in the presentation of his defense and the right to effective assistance of counsel. Defendant further contends the trial court lacked jurisdiction to sentence him for habitual misdemeanor assault where the indictment was facially invalid. We hold Defendant was not denied any right guaranteed by the Sixth Amendment. Additionally, we hold the trial court maintained jurisdiction to sentence Defendant for habitual misdemeanor assault as the indictment was not facially invalid.

I. Factual and Procedural Background

This case arises from incidents which occurred 26 April 2020. Evidence at trial tended to show the following:

In March 2020, Defendant met the victim at a grocery store. The two began dating and maintained a tumultuous relationship. On the evening of 25 April 2020, victim attended a party. Defendant became agitated

and repeatedly called victim. When victim finally answered, Defendant told her to bring him food. Defendant threatened to drive to victim's home, where she resided with her children, if she refused. In an effort to keep Defendant away from her children, victim reluctantly agreed to take food to Defendant at his home.

Upon victim's arrival with the food, Defendant turned off victim's phone and took her keys. Throughout the night and into the next morning, 26 April 2020, Defendant continually raped and assaulted victim. Defendant told victim, on the morning of 26 April 2020, she was going to drive him to an appointment. Defendant threatened to tie victim up in his room if she refused.

Victim drove Defendant to the appointment but remained in the car. Throughout Defendant's appointment, victim made several attempts to get help. Eventually, she was able to alert a store clerk nearby to call the police. Defendant was arrested shortly thereafter, and victim was transported to a nearby hospital for treatment of her injuries.

On 4 May 2020, Defendant was indicted on charges of second-degree forcible sex offense, second-degree forcible rape, first-degree kidnapping, assault on a female, habitual misdemeanor assault, interfering with emergency communication, assault with a deadly weapon, and assault inflicting serious injury.

The matter came on for jury trial on 9 August 2021 in Wake County Superior Court. On 12 August 2021, the jury returned a verdict, finding Defendant guilty on all charges. The trial court arrested judgment on the assault inflicting serious injury conviction—the predicate offense for the habitual misdemeanor assault conviction. The court then pronounced judgment and sentenced Defendant on the remaining convictions.

Defendant gave notice of appeal in open court.

II. Analysis

Defendant argues (A) he was denied protections guaranteed by the Sixth Amendment when he was deprived of both the right to autonomy in the presentation of his defense and the right to effective assistance of counsel. Defendant further argues (B) the trial court lacked jurisdiction to sentence him for habitual misdemeanor assault as the indictment was facially invalid. We disagree.

A. The Sixth Amendment

Defendant contends he was denied protections guaranteed by the Sixth Amendment when he was deprived of both the right to autonomy

in the presentation of his defense and the right to effective assistance of counsel.

We review alleged violations of a defendant's constitutional rights de novo. *See State v. Crump*, 273 N.C. App. 336, 342, 848 S.E.2d 501, 505 (2020); s*ee also State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) ("Under a de novo review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." (internal marks, emphasis, and citation omitted)).

1. Defendant's right to autonomy in the presentation of his defense

[1] Defendant contends he was denied his Sixth Amendment right to autonomy in the presentation of his defense as the trial court committed a structural error in failing to instruct Defendant's counsel to conform to Defendant's desire to introduce documentary evidence when the two reached an absolute impasse.

The Sixth Amendment guarantees the accused, in all criminal prosecutions, not only the right to have the assistance of counsel in making his defense, but also the right to make his own defense. *See* U.S. Const. amend. VI; N.C. Const. Art. I, § 23 ("In all criminal prosecutions, every person charged with crime has the right to . . . have counsel for defense[.]"); *see also State v. Payne*, 256 N.C. App. 572, 581, 808 S.E.2d 476, 483 (2017) ("Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is [ ] necessarily implied by the structure of the Amendment." (quoting *Faretta v. California*, 422 U.S. 806, 819–20 (1975))). Even where a defendant elects to exercise his right to have the assistance of counsel, he is still entitled to some autonomy over his defense. *See Faretta*, 422 U.S. at 819–20; *see also State v. Ali*, 329 N.C. 394, 403, 407 S.E.2d 183, 189 (1991) ("No person can be compelled to take the advice of his attorney." (internal marks and citations omitted)). This is because the attorney-client relationship is one based in the "principles of agency, [ ] not guardian and ward." *Ali*, 329 N.C. at 403, 407 S.E.2d at 189 (internal marks and citation omitted). Thus, an attorney "is bound to comply with her client's lawful instructions" and may only act within the scope of the authority conferred upon her by the defendant. *Id.* (citation omitted).

Our Courts have previously recognized certain decisions, relating to the conduct of a case, are to be made by the accused, while other strategic and tactical decisions, such as what and how evidence should be introduced, are to be made by defense counsel after consultation with the defendant. *Id.*; *see also* The American Bar Association Criminal

Justice Standards for the Defense Function Standard 4-5.2 (4th ed. 2017). However, where the defendant and his defense counsel reach an absolute impasse and are unable come to an agreement on such tactical decisions, the defendant's wishes must control. *State v. Ward*, 281 N.C. App. 484, 487, 868 S.E.2d 169, 173 (2022) (internal marks and citation omitted). Notably, upon reaching an absolute impasse, "defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached." *Ali*, 329 N.C. at 404, 407 S.E.2d at 189; *see also State v. Floyd*, 369 N.C. 329, 340, 794 S.E.2d 460, 467 (2016).

In *State v. Floyd*, the defendant argued, on appeal, the trial court failed to adequately address an impasse between the defendant and his counsel regarding certain unidentified questions the defendant wanted to be asked of a witness. *Id.* Further, the defendant argued the trial court's failure to instruct his counsel to comply with his wishes amounted to a denial of his constitutional right to control his defense and confront a witness. *Id.* Our Supreme Court stated, while the defendant did tell the court his attorney was not asking the questions the defendant told him to ask, the record did "not shed any light on the nature or the substance" of those questions. *Id.* at 341, 794 S.E.2d at 468. Further, the Court also recognized the defendant was generally disruptive throughout trial and was forced to leave the courtroom, which led him to have a consultation with his attorney, while the witness, to whom he wished to ask the desired questions, was on the witness stand. *Id.* Accordingly, our Supreme Court held it was unable, without engaging in conjecture, to determine whether the defendant had a serious disagreement with his attorney regarding trial strategy and therefore could not determine, from the cold record, whether an absolute impasse existed. *Id.*

Here, defense counsel stated Defendant would not introduce evidence or testify on his own behalf. The trial court then conducted a colloquy to ensure Defendant understood it was his right to testify and was waiving the right upon his own volition:

TRIAL COURT:	All right. Now, you mentioned—I mentioned evidence. You have a right to present evidence through other witnesses and so forth. Do you understand that?
DEFENDANT:	Yes, sir.
TRIAL COURT:	All right. My understanding is you have no intentions of putting on any evidence; is that correct?

DEFENDANT: I have no intention of testifying.

TRIAL COURT: Okay. Are you going to present any evidence?

DEFENDANT: I wanted my attorney to present some evidence.

. . .

TRIAL COURT: All right. Now, are you—in reference to evidence, is it some type of documentation or some type of physical or tangible object that you wanted to present as evidence?

DEFENDANT: Yeah, documentation.

Defendant contends, during this colloquy, the trial court was presented with an absolute impasse, which occurred between Defendant and defense counsel, concerning Defendant's desire to introduce certain documentary evidence. However, while Defendant did announce to the court he wanted his attorney to "present some evidence," the record fails to indicate the substance of such questions. Therefore, just as our Supreme Court held in *Floyd*, we hold we are unable to determine from the cold record whether there was a true disagreement, which would amount to an absolute impasse, between Defendant and defense counsel.

Defendant further contends, upon being presented with what he argued was an absolute impasse, the trial court committed a structural error.

A structural error is a rare constitutional error "resulting from structural defects in the constitution of the trial mechanism[.]" *State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (internal marks and citation omitted). These errors "prevent a criminal trial from reliably serving its function as a vehicle for determination of guilt or innocence." *State v. Veney*, 259 N.C. App. 915, 919, 817 S.E.2d 114, 117 (2018) (internal marks and citation omitted); *see also Garcia*, 358 N.C. at 409, 597 S.E.2d at 744 ("Such errors infect the entire trial process and necessarily render a trial fundamentally unfair[.]" (internal marks and citations omitted)). Our Supreme Court has identified six instances of structural error, which include:

> (1) complete deprivation of right to counsel; (2) a biased trial judge; (3) the unlawful exclusion of grand

> jurors of the defendant's race; (4) denial of the right to self-representation at trial; (5) denial of the right to a public trial; and (6) constitutionally deficient jury instructions on reasonable doubt.

State v. Minyard, 289 N.C. App. 436, 448–49, 890 S.E.2d 182, 191 (2023) (internal marks and citations omitted). These structural errors are reversible per se. *See State v. Campbell*, 280 N.C. App. 83, 87–88, 866 S.E.2d 325, 328 (2021) (quoting *Garcia*, 358 N.C. at 409, 597 S.E.2d at 744 ("[A] defendant's remedy for structural error is not [dependent] upon harmless error analysis[.]")).

After Defendant stated there was documentary evidence he wanted defense counsel to introduce, the trial court conducted the following colloquy:

> TRIAL COURT: All right. Now, you've talked about this with your attorney, correct?
>
> DEFENDANT: Yes, sir.
>
> TRIAL COURT: All right. Your attorney has addressed with you the legal issues as far as any documentation is concerned?
>
> DEFENDANT: Legal issues as?
>
> TRIAL COURT: About how it could be—if it can be admitted into evidence.
>
> . . .
>
> [discussion of potential foundational issues concerning the introduction of evidence]
>
> . . .
>
> TRIAL COURT: You may not agree with it, but do you understand it?
>
> DEFENDANT: Yeah. Like—like if I wanted to enter some type of evidence, it would totally be up to my attorney? Evidence away from me testifying?
>
> TRIAL COURT: Well, if your attorney has determined that that evidence may not be legally admissible, relevant, pertinent, and a slew of other things, he can make that

> determination. But I will say this also, even if you thought, respectfully, if you were representing yourself and you attempted to put that object in, I cannot guarantee it's going to come into evidence if it's not coming in properly under the evidentiary rules. Because there are rules that would involve whether or not it's admissible or not.

Defendant argues the trial court committed structural error as it failed to properly address the alleged absolute impasse when it did not require defense counsel to comply with Defendant's desire to present evidence.

As stated above, we are unable to determine from the cold record whether there existed an absolute impasse between Defendant and defense counsel. Nonetheless, the error here, which Defendant contends amounted to a structural error, is not one our Supreme Court has previously identified as a structural error. *See Minyard*, 289 N.C. App. at 448–49, 890 S.E.2d at 191. Therefore, Defendant's argument fails.

2. Defendant's right to effective assistance of counsel

[2] Defendant contends he was denied his Sixth Amendment right to effective assistance of counsel as defense counsel committed a *Harbison* error during closing arguments by impliedly conceding Defendant's guilt. Further, Defendant argues the trial court erred as it failed to conduct an inquiry with Defendant to ensure he knowingly consented to defense counsel's concession of guilt.

Again, we note the Sixth Amendment guarantees the accused, in all criminal prosecutions, the right to have the assistance of counsel in making his defense. *See* U.S. Const. amend. VI; N.C. Const. Art. I, § 23. Inherent in the right to the assistance of counsel is the right to have effective assistance of counsel. *See State v. McNeill*, 371 N.C. 198, 217, 813 S.E.2d 797, 812 (2018) (citation omitted). Generally, where a defendant makes an ineffective assistance of counsel claim, arguing he was denied effective assistance of counsel, he must satisfy a two-part test established by the United States Supreme Court in *Strickland v. Washington*. *See Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *see also State v. Braswell*, 312 N.C. 553, 562–63, 324 S.E.2d 241, 248 (1985) ("[W]e expressly adopt the test set out in *Strickland v. Washington* as a uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution."). To meet his burden under *Strickland*, a defendant must show (1) his

counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. *See Strickland*, 466 U.S. at 687–88; *see also McNeill*, 371 N.C. at 218, 813 S.E.2d at 812.

While acknowledging the *Strickland* test for claims of ineffective assistance of counsel, our Supreme Court in *State v. Harbison* held ineffective assistance of counsel, per se in violation of the Sixth Amendment, occurs where defense counsel admits a defendant's guilt to the jury without consent. *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507–08 (1985). This violation, known as a *Harbison* error, exists where, in viewing the defense counsel's statements in context, the statements " 'cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense[.]' " *State v. Moore*, 286 N.C. App. 341, 345, 880 S.E.2d 710, 714 (2022) (quoting *State v. McAllister*, 375 N.C. 455, 475, 847 S.E.2d 711, 723 (2020)); *see also State v. Mills*, 205 N.C. App. 577, 587, 696 S.E.2d 742, 748–49 (2010) (explaining defense counsel's statements "must be viewed in context to determine whether the statement was, in fact, a concession of [the] defendant's guilt of a crime[.]" (citation omitted)); *McAllister*, 375 N.C. at 473, 847 S.E.2d at 722 (holding *Harbison* errors extended not only to the defense counsel's express admissions of guilt but also to implied admissions of guilt).

A *Harbison* error does not exist where the defendant has consented to his counsel's statement as a trial strategy. *McAllister*, 375 N.C. at 475, 847 S.E.2d at 723. However, even under these circumstances, "the trial court must be satisfied that, prior to any admissions of guilt . . . , the defendant [gave] knowing and informed consent, and the defendant [was] aware of the potential consequences of his decision." *State v. Foreman*, 270 N.C. App. 784, 790, 842 S.E.2d 184, 189 (2020) (internal marks and citation omitted).

In *State v. McAllister*, the defendant was indicted on charges of: habitual misdemeanor assault based on assault on a female, assault by strangulation, second-degree sexual offense, and second-degree rape. 375 N.C. at 458–59, 847 S.E.2d at 714. During the State's case in chief, a law enforcement interview with the defendant was entered into evidence and played for the jury. *Id.* at 459, 847 S.E.2d at 714. Then, during closing arguments, the defense counsel referred to the interview stating:

> You heard him admit that things got physical. You heard him admit that he did wrong, God knows he did. They got in some sort of scuffle or a tussle or whatever they want to call it, she got hurt, he felt bad, and he expressed that to detectives. . . .

> . . .
>
> [Y]ou may dislike [the defendant] for injuring [the victim], that may bother you to your core but he, without a lawyer and in front of two detectives, admitted what he did and only what he did. He didn't rape this girl. . . .
>
> . . .
>
> Can you convict this man of rape and sexual offense, assault by strangulation based on what they showed you? You can't. Please find him not guilty.

Id. at 460–61, 847 S.E.2d at 715. After deliberation, the jury returned a verdict finding the defendant not guilty on all charges except the charge of assault on a female. *Id.* at 461, 847 S.E.2d at 715.

On appeal, our Supreme Court noted the defense counsel's statements were problematic as he: attested to the accuracy of the admissions made by the defendant in his interview; reminded the jury the defendant did wrong and implied there was no justification for the defendant's use of force against the victim; and asked the jury to find the defendant not guilty of all charges while omitting mention of the charge of assault on a female. *Id.* at 474, 847 S.E.2d at 722–23. Thus, our Supreme Court held the defense counsel's statements amounted to an implied admission of guilt and remanded the case to the Superior Court for an evidentiary hearing to determine whether the defendant knowingly consented in advance to the defense counsel's admission of guilt to the assault on a female charge. *Id.* at 477–78, 847 S.E.2d at 725.

Here, in his closing argument, defense counsel stated, in relevant part:

> [Defendant] is charged with some very serious crimes. I mean, kidnapping, forcible rape. Years and years and years in prison.
>
> . . .
>
> When you look at evidence in this case, the credible evidence, . . . not evidence that just comes out of her mouth. She says it, that doesn't make it true. You are the sole judges of credibility in this case. You have to use your common sense. You have to evaluate the witness. And that's your job.

> . . .
>
> I mean, ladies and gentlemen, when a witness gets up here and makes—spits out rhetoric that doesn't make any sense at all, you can't just accept it as true.
>
> . . .
>
> So, when you think about the other witnesses, the nurse . . . that form that was filled out that I believe has been submitted to evidence, you all got to look at it, the checklist, it said no injuries. I mean, we're talking about the neck and we're talking about strangulation, but there's no marks on the neck.
>
> [Victim] testified that she could hardly walk. She had to have somebody help her shower, bathe, and that kind of thing. Think about the body cam when she's running around all over the place.
>
> I mean, the doctor at the stem cell center, she approached him, . . . he said she looked fine. There was nothing wrong with her. And she's alleging these serious injuries. I mean, common sense tells you she's not seriously injured.
>
> Forcible rape, kidnapping, we don't have that here.
>
> . . .
>
> Ladies and gentlemen, [Defendant] is not guilty of kidnapping, and he's not guilty of a sexual offense of any kind. We'd ask that you find him not guilty. Thank you very much for your time.

Undoubtedly, Defense counsel only mentioned Defendant's charges for kidnapping and "sexual offense of any kind," omitting reference to Defendant's charge for assault on a female. Nevertheless, unlike the defendant's counsel in *McAllister*, defense counsel here never implied or mentioned any misconduct on behalf of Defendant. Instead, defense counsel, despite failing to specifically reference Defendant's assault charge, spent ample time making statements explicitly calling the jury's attention to the lack of evidence to support a conviction on such a charge and asked the jury, generally, to find Defendant not guilty. Thus, in viewing the entirety of defense counsel's statements in context, we hold those statements cannot logically be interpreted as an implied concession of Defendant's guilt.

We recognize Defendant further argues the trial court erred as it failed to conduct the required inquiry with Defendant to ensure he knowingly consented to defense counsel's concession of guilt. However, because we hold defense counsel did not concede guilt on behalf of Defendant, we hold the trial court was not required to conduct an inquiry and therefore did not err.

B. Validity of the Indictment and the Trial Court's Jurisdiction

[3] Defendant contends the indictment was facially invalid as to the charge of habitual misdemeanor assault thereby divesting the trial court of jurisdiction. We disagree.

An indictment is a pleading which makes a formal accusation that the defendant has committed a crime. *See State v. Abbott*, 217 N.C. App. 614, 617, 720 S.E.2d 437, 439 (2011). The purpose of an indictment is, among other things, to provide the accused with notice of the offense with which he is charged. *See State v. Williams*, 368 N.C. 620, 623, 781 S.E.2d 268, 270–71 (2016); *see also State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953). Thus, our North Carolina General Statutes, section 15A-924(a)(5), requires an indictment contain:

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

N.C. Gen. Stat. § 15A-924(a)(5) (2021). Where the indictment fails to do so, there is not a sufficient accusation against the defendant, the trial court acquires no jurisdiction, and any subsequent trial and conviction are a nullity. *See State v. Harris*, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012) ("There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation." (internal marks and citation omitted)).

Here, Defendant argues the indictment failed to allege every element of the offense of habitual misdemeanor assault because count IV failed to state the assault on a female caused "physical injury." However, habitual misdemeanor assault in violation of N.C. Gen. Stat. § 14-33.2 was sufficiently alleged in counts V and VIII:

> V. And the grand jurors for the state upon their oath present that on or about April 26, 2020, [ ] [D]efendant had been previously convicted of two or more felony or

> misdemeanor assaults, and the earlier of these convictions occurred no more than 15 years prior to the date of the current offense, to wit:
>
> > a. On or about July 31, 2011 [ ] [D]efendant did commit the assault of Assault on a Government Official/Employee in Wake County, North Carolina, and thereafter was convicted and judgment entered on August 22, 2011 in Wake County District Court (File No. 11 CR 217692).
> >
> > b. On or about July 31, 2011 [ ] [D]efendant did commit the assault of Assault on a Female in Wake County, North Carolina, and thereafter was convicted and judgment entered on August 22, 2011 in Wake County District Court (File No. 11 CR 217690).
>
> . . .
>
> VIII. And the grand jurors for the state upon their oath present that on or about April 26, 2020, in Wake County, [ ] [D]efendant named above unlawfully and willfully did assault and strike [victim] [ ], by hitting her shoulder, thereby inflicting serious injury. This act was done in violation of [N.C. Gen. Stat § 14-33.2].

Pursuant to N.C. Gen. Stat. § 14-33.2, a defendant is guilty of habitual misdemeanor assault where he,

> violates any of the provisions of [N.C. Gen. Stat. § 14-33] and causes physical injury, or [N.C. Gen. Stat. §14-34], and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation.

N.C. Gen. Stat. § 14-33.2 (2021). Accordingly, the essential elements of habitual misdemeanor assault are, the defendant: (1) violates any of the provisions of N.C. Gen. Stat. § 14-33, (2) causes physical injury, and (3) has two or more prior convictions for misdemeanor or felony assault, with the earlier of the two occurring less than 15 years prior to the date of the current violation.

The indictment here included allegations concerning elements (1) and (3) of the offense of habitual misdemeanor assault. Defendant's two prior convictions were alleged in count V, and Defendant having

violated the provisions of N.C. Gen. Stat. § 14-33, was alleged in count VIII (assault inflicting serious injury). Thus, we need only determine whether the indictment was sufficient as to element (2) of the habitual misdemeanor assault charge where count VIII stated Defendant inflicted "serious injury" rather than "physical injury," as prescribed in the statutory language of N.C. Gen. Stat. § 14-33.2.

In drawing an indictment, we recognize the "true and safe rule for prosecutors . . . is to follow strictly the precise wording of the statute." *State v. Sturdivant*, 304 N.C. 293, 310–11, 283 S.E.2d 719, 731 (1981) (internal marks and citations omitted). Nonetheless, our precedent makes clear "it is not the function of an indictment to bind the hands of the State with technical rules of pleading[.]" *Id.* at 311, 283 S.E.2d at 731; *see also In re J.U.*, 384 N.C. 618, 623, 887 S.E.2d 859, 863 (2023); *State v. Jones*, 265 N.C. App. 644, 648, 829 S.E.2d 507, 510–11 (2019); *Williams*, 368 N.C. at 623, 781 S.E.2d at 270–71.

At common law, our courts were bound by strict, highly technical pleading standards which required specific evidentiary allegations to support each element. *See State v. Owen*, 5 N.C. 452, 464 (1810) (holding an indictment for murder, where the death was occasioned by a wound, was insufficient as it failed to describe the dimensions of the wound). However, our General Assembly has since enacted statutes intended to alleviate such technical pleading requirements. *See State v. Rankin*, 371 N.C. 885, 919, 821 S.E.2d 787, 810–11 (2018) (Martin, C.J., dissenting) (thoroughly recounting the history of criminal pleadings in North Carolina). Through such legislative reforms, North Carolina criminal law and procedure has "evolved from requiring elemental specificity to a more simplified requirement that indictments allege facts supporting each essential element of the charged offense." *In re J.U.*, 384 N.C. at 623, 887 S.E.2d at 863 (internal marks and citation omitted).

Today, our General Statutes provide, an indictment "is sufficient in form for all intents and purposes if it express[es] the charge against the defendant in a plain, intelligible, and explicit manner[.]" N.C. Gen. Stat. § 15-153 (2021). Further, section 15-153 states an indictment will not "be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment." *Id.*

In considering the "serious injury" language used in count VIII above, we note, our Court in *State v. Harris* stated, "an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words."

219 N.C. App. at 592–93, 724 S.E.2d at 636 (internal marks and citation omitted); *see also State v. Singleton*, 85 N.C. App. 123, 126, 354 S.E.2d 259, 262 (1987) ("An indictment couched in the language of the statute is generally sufficient to charge the statutory offense." (citation omitted)). Similarly, our Supreme Court most recently stated, "[i]t is generally held that the language in a statutorily prescribed form of criminal pleading is sufficient if the act or omission is clearly set forth so that a person of common understanding may know what is intended." *In re J.U.*, 384 N.C. at 624, 887 S.E.2d at 863 (internal marks and citation omitted).

Relevant here, our Courts have repeatedly applied a broad definition of serious injury—including within that definition both physical and mental injuries. *See State v. Everhardt*, 326 N.C. 777, 781, 392 S.E.2d 391, 393 (1990) (holding a mental injury will support the element of serious injury under N.C. Gen. Stat. § 14-32); *State v. Demick*, 288 N.C. App. 415, 436, 886 S.E.2d 602, 618 (2023) (citing N.C. Gen. Stat. § 14-318.4, which defines serious physical injury to include physical and mental injuries). Moreover, we note the purpose of an indictment is, among other things, to provide the defendant with notice of the offense with which he is charged, using language which would allow a person of common understanding to know what is intended, so that he may properly prepare for trial. *See Williams*, 368 N.C. at 623, 781 S.E.2d at 270–71; *see also In re J.U.*, 384 N.C. at 624, 887 S.E.2d at 863. Regardless of whether count VIII of the indictment used the broader, "serious injury" language, it logically follows Defendant was noticed of his need to defend against an allegation that he caused physical injury as "serious injury" is defined to include physical injury. Thus, in using "serious injury" rather than "physical injury" the indictment still served its purpose—to provide Defendant with notice of the offense with which he was charged, N.C. Gen. Stat. § 14-33.2.

North Carolina law shows a consistent trend away from the archaic and technical pleading requirements at common law. Thus, despite the use of the term "serious injury" rather than "physical injury" in the indictment, we hold the indictment was not facially invalid as it sufficiently noticed Defendant of the charges against him. Because the indictment was not facially invalid, the trial court was not deprived of jurisdiction.

III. Conclusion

We hold Defendant was not denied any right guaranteed by the Sixth Amendment. Further, we hold the trial court maintained jurisdiction to sentence Defendant for habitual misdemeanor assault as the indictment was not facially invalid.

NO ERROR.

Judge CARPENTER concurs.

Judge MURPHY concurs in part and dissents in part by separate opinion.

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

While I fully concur in the Majority's analysis of Defendant's *Harbison* argument, I respectfully dissent from its holding as to the sufficiency of the indictment. To be valid and thus confer jurisdiction to the trial court, a criminal indictment must allege every essential element of the charged offense. In limited circumstances, when one count in an indictment does not allege all essential elements, those elements may be imputed from a separate count in the indictment. Defendant appeals his conviction of habitual misdemeanor assault under N.C.G.S. § 14-33.2 on jurisdictional grounds on the basis that the indictment failed to allege "physical injury." In my view, Defendant was not properly indicted with habitual misdemeanor assault under N.C.G.S. § 14-33.2 due to the indictment's failure to allege the element of physical injury, either expressly or through supplementation. I would therefore vacate Defendant's habitual misdemeanor assault conviction and remand for a new sentencing hearing on Defendant's conviction for assault inflicting serious injury.

Defendant Curtis Levon Jackson appeals from convictions of second-degree forcible sex offense in violation of N.C.G.S. § 14-27.27, second-degree forcible rape in violation of N.C.G.S. § 14-27.22, first-degree kidnapping in violation of N.C.G.S. § 14-39, habitual misdemeanor assault in violation of N.C.G.S. § 14-33.2, assault with a deadly weapon in violation of N.C.G.S. § 14-33(C)(1), interfering with emergency communication in violation of N.C.G.S. § 14-286.2, and assault inflicting serious injury against Tanya,[1] his ex-partner, in violation of N.C.G.S. § 14-33(C)(2).

In early March 2020, Tanya and Defendant met at a grocery store. Tanya gave Defendant her phone number. Thereafter, they began talking on the phone and spending time together on weekends at Defendant's house. The relationship started off well, but it soured in April 2020 when Tanya became pregnant, informed Defendant, and lost the baby a week

1. I use a pseudonym to protect the identity of the victim and for ease of reading.

and a half later. According to Tanya, things went "downhill real quick [sic]." Defendant exhibited the occasional "tantrum" and would take her belongings to keep her from leaving.

On 24 April 2020, Tanya told Defendant over the phone that she did not want to continue their relationship. That same day, she agreed to meet Defendant at his friend's house to talk. Defendant drove his roommate's car to his friend's house. When she arrived at the house, Defendant joined her in her truck. During their conversation, Defendant "got frustrated" over a phone call she received about an upcoming party. Tanya testified that "[Defendant] didn't want to sit there no more. He wanted to go [to] his place." When she refused to drive him to his place, Defendant grabbed her pocketbook, food, and keys; got back into his roommate's car; and drove away with her belongings.

Using her truck's spare key, Tanya followed Defendant to his house to retrieve her belongings. When she arrived, Defendant got inside of her truck, and the two argued. Defendant took Tanya's spare key out of the truck's ignition, along with her pocketbook, food, phone, and first set of keys, and went into his room. When Tanya followed Defendant into his room for her belongings, Defendant slapped her in the face, berated her, and refused to let her leave.

The next day, on 25 April 2020, Tanya drove Defendant to an appointment. After his appointment, she and Defendant argued because she planned to attend a party later that evening. Defendant, in response, took her keys and grabbed her gun to prevent her from leaving. However, Defendant returned both the keys and gun when Tanya threatened to call the police.

That night, Tanya attended the party. Defendant repeatedly called and texted her while she was at the party, but she had blocked his phone number. Defendant then called Tanya from her son's phone to speak with her. Defendant complained to Tanya about hunger and back pain, threatening to show up at her home if she did not bring food to his house. Eventually, Tanya agreed to take Defendant some food because she did not want Defendant to be around her children at home. When Tanya arrived at Defendant's house, Defendant became agitated and requested that Tanya get off her phone so the two could engage in uninterrupted conversation.

Tanya turned her phone off as Defendant requested without "think[ing] much of it." Defendant then "flipped" and announced he was "going to beat" Tanya. Defendant claimed to have "planned everything all the way up to this." Defendant seized Tanya's keys and phone and started swinging at her, slapping her face, and punching her arms while

calling her names. Defendant also hit her with a broom handle, choked her, and put a pillow over her face. Defendant tried to damage her phone with a hammer but was unsuccessful. Defendant threatened Tanya not to call the police and raped and assaulted her several times from the night of 25 April 2020 until 8:00 am on 26 April 2020. Fearing Defendant would tie her up at his house if she did not join him, Tanya agreed to accompany Defendant to an appointment on the morning of 26 April 2020. After several attempts to get help, she successfully alerted a store clerk to call the police. Defendant was arrested shortly thereafter, and Tanya was transported to a nearby hospital for treatment of her injuries.

On 4 May 2020, Defendant was indicted for second-degree forcible sex offense, second-degree forcible rape, first-degree kidnapping, habitual misdemeanor assault, interfering with emergency communication, and assault with a deadly weapon inflicting serious injury ("AWDWISI"). The indictment alleged, in relevant part:

> IV. [] [T]he grand jurors for the [S]tate upon their oath present that on or about [26 April] 2020, in Wake County, [Defendant] unlawfully and willfully did assault and strike [Tanya], a female person. [Defendant] is a male person and was at least 18 years of age when the assault occurred. This act was done in violation of N.C.G.S. § 14-33(c)(2).
>
> V. And the grand jurors for the [S]tate upon their oath present that on or about [26 April] 2020, [Defendant] had been previously convicted of two or more felony or misdemeanor assaults, and the earlier of these convictions occurred no more than 15 years prior to the date of the current offense, to wit:
>
> > a. On or about [13 July 2011,] [Defendant] did commit the assault of Assault on a Government Official/Employee in Wake County, North Carolina, and thereafter was convicted and judgment entered on [22 August 2011] in Wake County District Court (File No. 11 CR 217692).
> >
> > b. On or about [13 July 2011], [Defendant] did commit the assault of Assault on a Female in Wake County, North Carolina, and thereafter was convicted and judgment entered on [22 August 2011] in Wake County District Court (File No. 11 CR 217690).
>
> . . . .

> VIII. And the grand jurors for the [S]tate upon their oath present that on or about [26 April] 2020, in Wake County, [Defendant] unlawfully and willfully, did assault and strike [Tanya], by hitting her shoulder, thereby inflicting serious injury. This act was done in violation of N.C.G.S. § 14-33.2.

During trial, outside the presence of the jury, Defendant admitted that, prior to the date of his 25 April and 26 April 2020 assault charges against Tanya, he had been convicted of the crimes of assault on a government official and assault on a female on 22 August 2011, as alleged in Count V.

Later in the proceedings, the trial court conducted a colloquy with Defendant, during which it informed Defendant about his rights to present evidence and testify. Defendant affirmed to the trial court that he understood and voluntarily elected not to testify. Defendant, however, noted his interest in presenting documentary evidence through his defense counsel. Defendant communicated some uncertainty about how to get a certain document admitted into evidence. The following conversation occurred:

> [DEFENDANT]: I wanted my attorney to present some evidence.
>
> [COURT]: All right. Now, as far as evidence, I don't want to get into any attorney-client privilege issues, but is it fair to say that you're asking to have someone else testify in this matter?
>
> [DEFENDANT]: Evidence is only someone testifying?
>
> [COURT]: No. But I'm inquiring, are you asking someone else to testify? That's the first question that I have.
>
> [DEFENDANT]: No, sir.
>
> [COURT]: All right. Now, are you – in reference to evidence, is it some type of documentation or some type of physical or tangible object that you wanted to present as evidence?
>
> [DEFENDANT]: Yeah, documentation.
>
> [COURT]: All right. Now, you've talked about this with your attorney, correct?
>
> [DEFENDANT]: Yes, sir.

> [COURT]: All right. Your attorney has addressed with you the legal issues as far as any documentation is concerned?
>
> [DEFENDANT]: Legal issues as?
>
> [COURT]: About how it could be – if it can be admitted into evidence.
>
> [DEFENDANT]: I think –

The trial court clarified the necessary legal steps Defendant could take with the help of his counsel to ensure a document is appropriately admissible. Defendant communicated that he understood the trial court's explanations; however, right before the jury returned, he noted the following:

> [DEFENDANT]: I know we spoke about the evidence. I mean, I just wanted to say that I did have evidence that—I didn't want to testify. I did have evidence that I thought would help prove my innocence, and my attorney didn't think we should enter that evidence.
>
> . . . .
>
> And it wasn't that he didn't think we could get it in the court, he just didn't think we should enter it. And I just wanted to state that on the record.

The trial court acknowledged the statement, and defense counsel did not respond except to affirm that the defense was ready for the jury to return to the courtroom. Defendant did not present any evidence during the trial or make an offer of proof.

After the trial court provided its jury instructions, the State presented its closing argument, explaining every charge in turn, starting with the more severe crimes—second-degree rape, second-degree sex offense, and first-degree kidnapping—and ending with the "litany of assaults." Defense counsel, inter alia, argued in closing that "[Defendant] doesn't have to prove one single thing. . . . [The State] [has] to prove these charges beyond a reasonable doubt." Defense counsel began and ended his argument by discussing the "very serious crimes" that Defendant was charged with, i.e., "kidnapping[] [and] forcible rape." Defense counsel explained to the jury what the State's burden of proof was regarding the charges and challenged them to carefully evaluate the "stor[ies] [they] heard" and testimonies about Defendant's charges for contradictions. Additionally, defense counsel placed emphasis on the "very serious crimes" throughout his closing argument. The pattern of

defense counsel's emphasis on the more serious crimes alleged by the State was as follows:

> [Defendant] is charged with some very serious crimes. I mean, kidnapping, forcible rape. Years and years and years in prison.
>
> . . . .
>
> Forcible rape, kidnapping, we don't have that here. Every element has to be satisfied.
>
> . . . .
>
> Ladies and gentlemen, [Defendant] is not guilty of kidnapping, and he's not guilty of a sexual offense of any kind. We'd ask that you find him not guilty.

The jury found Defendant guilty on all counts. The trial court arrested judgment on the assault inflicting serious injury conviction due to the habitual misdemeanor assault conviction.

Defendant argues that the indictment was facially invalid as to the habitual misdemeanor assault charge because it failed to allege that the charge on which Defendant claims the habitual misdemeanor assault was predicated, assault on a female, "caused physical injury."[2] Defendant contends that, absent the physical injury element, the trial court lacked subject matter jurisdiction to sentence Defendant for habitual misdemeanor assault.

"[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its [subject matter] jurisdiction, a challenge to that indictment may be made at any time," even for the first time on appeal. *State v. Wallace*, 351 N.C. 481, 503 (2000). We review whether the trial court had subject matter jurisdiction over the habitual misdemeanor assault charge de novo. *State v. Barnett*, 223 N.C. App. 65, 68 (2012).

To be valid and thus confer jurisdiction, N.C.G.S. § 15A-924(a)(5) requires that "an indictment charging a statutory offense must allege all of the essential elements of the charged offense." *Barnett*, 223 N.C. App. at 68 (citing *State v. Snyder*, 343 N.C. 61, 65 (1996)); *see also State v. Kelso*, 187 N.C. App. 718, 722 (2007) ("[A]n indictment must allege every element of an offense in order to confer subject matter

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2. Physical injury is an essential element required for charging habitual misdemeanor assault under N.C.G.S. § 14-33.2. *See* N.C.G.S § 14-33.2 (2021); *see also State v. Garrison*, 225 N.C. App. 170, 172 (2013).

jurisdiction on the court."), *disc. rev. denied*, 362 N.C. 367 (2008). "The sufficiency of an indictment is a question of law reviewed de novo." *State v. White*, 372 N.C. 248, 250 (2019).

A defendant is guilty of habitual misdemeanor assault if

> that person violates any of the provisions of [N.C.G.S.] § 14-33 and causes *physical injury*, or [N.C.G.S.] § 14-34, and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation.

N.C.G.S. § 14-33.2 (2021) (Emphasis added). Defendant challenges the validity of his indictment with respect to the habitual misdemeanor assault charge because the indictment did not allege that the assault on a female caused physical injury. Count IV of the indictment alleged that

> [Defendant] unlawfully and willfully did assault and strike [Tanya], a female person. [Defendant] is a male person and was at least 18 years of age when the assault occurred. This act was done in violation of N.C.G.S. § 14-33(c)(2).

Count V of the indictment alleged that

> [Defendant] had been previously convicted of two or more felony or misdemeanor assaults, and the earlier of these convictions occurred no more than 15 years prior to the date of the current offense[.]

Neither Count IV nor Count V contain language alleging that Defendant caused physical injury to Tanya. Thus, Defendant argues, the allegations in Count IV, describing the April 2020 offense, and Count V, describing his previous convictions, are insufficient to indict him for habitual misdemeanor assault.

In response, the State argues that the allegation of injury contained in Count VIII satisfies the physical injury element for the habitual misdemeanor assault charge. Count VIII of the indictment alleges that

> [Defendant] unlawfully and willfully, did assault and strike [Tanya], by hitting her shoulder, thereby inflicting *serious injury*. This act was done in violation of N.C.G.S. § 14-33.2.

(Emphasis added).

While I do not constrain my analysis of the sufficiency of Defendant's indictment to Counts IV and V, the allegation of "serious injury" in Count

VIII is insufficient to satisfy the "physical injury" element for Defendant's habitual misdemeanor assault charge.

In *State v. Barnett*, the defendant was indicted for one count of assault on a female under N.C.G.S. § 14-33 and one count of habitual misdemeanor assault under N.C.G.S. § 14-33.2. *State v. Barnett*, 245 N.C. App. 101, 111–12 (2016), *rev'd in part*, 369 N.C. 298 (2016). The defendant's first count, assault on a female, alleged "physical injury" to the victim; however, the allegations contained in his second count,

> which charged [the defendant] with habitual misdemeanor assault and properly referenced [the defendant's] two prior misdemeanor assaults that occurred less than 15 years prior to date of his current violation, did not include any language regarding [the defendant's] current charge of assault on a female resulting in a physical injury, a necessary showing for a [N.C.G.S.] § 14-33.2 violation.

Id. at 112. The defendant did not dispute the validity of his first count, which alleged assault on a female. *Id.* at 110. However, he "argued that the second count of the indictment fail[ed] to properly allege habitual misdemeanor assault because it did not include . . . a physical injury." *Id.* at 111. Although the count of habitual misdemeanor assault did not contain the physical injury element, we held that the defendant's indictment was sufficient. Defendant's first count, alleging assault on a female, alleged physical injury; therefore, we held that count one supplied the missing physical injury element of the count alleging habitual misdemeanor assault. *Id.* at 113–14. Thus, if an allegation of physical injury from the assault was alleged by the grand jury elsewhere in the indictment, we may impute this element to the otherwise defective allegation of habitual misdemeanor assault in Count V.

Defendant correctly observes that, unlike in *Barnett*, Count IV (assault on a female) here did not include an allegation of physical injury. However, since we may supplement the missing element of physical injury from another part of the indictment, I continue my analysis to determine whether another count in the indictment alleged physical injury.

The State argues that "[C]ount VIII of the indictment sufficiently sets out the charge of habitual misdemeanor assault" because it "allege[s] an assault 'inflicting serious injury. . . .' " I disagree. Count VIII of the indictment provides, in pertinent part:

> [Defendant] unlawfully and willfully did assault and strike [Tanya], by hitting her shoulder, thereby *inflicting serious injury*. The act was done in violation of N.C.G.S. § 14-33.2.

(Emphasis added).

Count VIII alleged "serious injury" and not "physical injury" as required by N.C.G.S. § 14-33.2. We have observed that our Supreme Court "has not defined 'serious injury' for purposes of assault prosecutions, other than stating that 'the injury must be serious, but it must fall short of causing death' and that 'further definition seems neither wise nor desirable.' " *State v. McLean*, 211 N.C. App. 321, 325 (2011) (marks and citation omitted). In *State v. Everhardt*, we held that "[t]he term ['serious injury,' under [N.C.G.S.] § 14-32(b), means physical or bodily injury resulting from an assault with a deadly weapon." *State v. Everhardt*, 96 N.C. App. 1, 12 (1989), *aff'd*, 326 N.C. 777 (1990). However, while not supplying a more limited definition, our Supreme Court rejected this more restrictive equivocation. Upon reviewing *Everhardt*, it held that the term "serious injury" may also encompass mental injury. *Everhardt*, 326 N.C. at 781 (holding that "mental injury will support the element of serious injury under N.C.G.S. § 14-32").

While *Everhardt* analyzed only N.C.G.S. § 14-32(b), we have also applied its definition of "serious injury" outside the § 14-32(b) context. *See*, *e.g.*, *State v. Lofton*, 193 N.C. App. 364, 374 (2008) (applying the broader understanding of "serious injury" discussed in *Everhardt* to N.C.G.S. § 14-32.1(e) and holding that "[b]ecause 'serious injury' may include serious mental injury . . . [defendant's] testimony regarding her mental state . . . is [] relevant"). As we have applied *Everhardt*'s broader definition of "serious injury" beyond N.C.G.S. § 14-32(b), we must also apply it here to reject the premise that "serious injury" only means "physical injury."

The State made no argument as to whether "physical injury" can be squarely defined within our caselaw's interpretation of "serious injury," but rather presupposes "serious injury" to be a viable substitute for "physical injury" for the purposes of alleging habitual misdemeanor assault.[3] Without more appearing on the face of the indictment, the State's implication that "physical injury" is *per se* alleged within the use

3. The State also mentions Count VII in its brief, stating that "Count VII of the indictment alleges a charge of [N.C.G.S.] § 14-33(c)(1), assault with a deadly weapon." However, it makes no further arguments about Count VII or how it supplements the "physical injury" element for a habitual misdemeanor assault charge.

of the phrase "serious injury" is not supported by the broader interpretation we must apply.

While our approach to evaluating indictments is to refrain from "hyper technical scrutiny with respect to form[,]" *In re S.R.S.*, 180 N.C. App. 151, 153 (2006), we must not abscond from our charge to apply governing caselaw and relevant statutory provisions where the General Assembly uses unambiguous language. The unambiguous language of N.C.G.S. § 14-33.2 states that "[a] person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of [N.C.G.S.] § 14-33 and causes *physical injury*[.]" N.C.G.S. § 14-33.2 (2021) (emphasis added). The broadening of the definition of "serious injury" to include both mental and physical injury established that serious injury is not synonymous with physical injury. *Everhardt*, 326 N.C. at 781. Count VIII of the indictment provides that Defendant "inflict[ed] serious injury" by striking and hitting Tanya on her shoulder. However, the indictment alone cannot make the leap from "serious injury" to "physical injury."

Here, the essential element of "physical injury" was not sufficiently alleged in the indictment to satisfy a habitual misdemeanor assault charge. The grand jury failed to allege "physical injury" for the purposes of indicting Defendant for habitual misdemeanor assault pursuant to N.C.G.S. § 14-33.2. The defective indictment failed to confer the trial court with subject matter jurisdiction over the charge of habitual misdemeanor assault. Accordingly, I would vacate this conviction and remand for a new sentencing hearing on Defendant's conviction in file number 20 CRS 206791. *See Barnett*, 223 N.C. App. at 68 (marks omitted) (noting that the "[l]ack of jurisdiction in the trial court due to a fatally defective indictment requires the appellate court to arrest judgment or vacate any order entered without authority"). I therefore respectfully dissent from that portion of the Majority's opinion.

STATE v. LINDSAY

[292 N.C. App. 641 (2024)]

STATE OF NORTH CAROLINA
v.
NEVIN JAY LINDSAY

No. COA23-563

Filed 5 March 2024

1. Evidence—sexual offense prosecution—bench trial—out-of-court statements by victim and her mother—corroboration of trial testimony

In a bench trial for second-degree forcible sexual offense, sexual battery, and assault on a female, the trial court did not plainly err in admitting out-of-court statements made by the victim and her mother during their interviews with law enforcement, in which they both described an incident of defendant performing cunnilingus on the victim. These statements—which included different details from the ones testified to at trial but did not differ substantially from the witnesses' in-court testimony—did not constitute hearsay because they were not offered for the truth of the matter asserted but, instead, were offered to corroborate the witnesses' in-court testimony and were therefore admissible. Moreover, defendant failed to rebut the presumption that a court in a bench trial ignores any inadmissible evidence, and therefore failed to establish plain error.

2. Criminal Law—bench trial—prosecutor's closing argument—potentially improper expressions of opinion—presumed ignored

In a bench trial for second-degree forcible sexual offense, sexual battery, and assault on a female, the trial court was not required to intervene ex mero motu when the prosecutor stated during closing arguments that the victim had "no reason to lie" about defendant sexually assaulting her, since this and other similar statements made by the prosecutor were merely inferences reasonably drawn from the evidence. Even so, assuming that these statements constituted impermissible expressions of opinion, they were not so grossly improper as to require the trial court's intervention. Furthermore, under the presumption applied to bench trials, the court presumably disregarded any improper statements made during the State's closing argument.

Judge MURPHY dissenting in part and concurring in result only.

Appeal by defendant from judgment entered 20 February 2023 by Judge David A. Phillips in Superior Court, Gaston County. Heard in the Court of Appeals 7 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amanda J. Reeder, for the State.

Sean P. Vitrano, for defendant-appellant.

ARROWOOD, Judge.

Nevin Jay Lindsay ("defendant") appeals from judgment entered upon his conviction for second degree forcible sexual offense, sexual battery, and assault on a female. For the following reasons, we affirm the judgment.

I. Background

Defendant waived his right to a jury trial on 5 January 2023, and the case came on for bench trial on 23 January 2023. The evidence offered at trial tended to show the following facts:

In April 2021, Zara[1] was an eighteen-year-old senior in high school living with her mother and two younger brothers in an apartment. During the latter part of the month, defendant—a close friend of Zara's family—was staying at the apartment while visiting from New York.

On 26 April, defendant picked Zara up from school and drove her back to the apartment. At 7:26 p.m., while Zara's mother was taking a nap in her room, defendant texted Zara that he was "rolling up in the car" to smoke marijuana with Zara. Zara responded via multiple texts, stating:

Zara: Okay

Zara: Coming give me sex[2]

Zara: Sec [laughing emoji]

1. Zara is a pseudonym used to keep the individual's name anonymous in the interest of privacy.

2. Zara testified that she meant to type "sec"—i.e., that she was coming to meet defendant in a second—but the phone auto-corrected to "sex." Zara immediately corrected the error by sending the message, "Sec."

Defendant and Zara smoked marijuana on the front porch around 8:00 p.m.[3] At 8:59 p.m., defendant texted Zara, "Wow ok[,]" and then at 10:28 p.m., he texted her, "Cum get this[.]"[4]

Zara's mother left for work around 9:50 p.m. At approximately 11:00 p.m., while Zara was cleaning the kitchen and her brothers were watching television in their mother's room, defendant went into Zara's bedroom and laid down in her bed. When Zara went to her bedroom around midnight, she discovered defendant sleeping in her bed.[5] Zara testified that she tried getting defendant up so he could move to the living room, but "he was just knocked out cold[,] [s]o I just left him there." Zara placed blankets on her bedroom floor and went to sleep there.

Zara's recollection of what happened next was detailed during direct testimony at trial:

> **Zara**: I remember me getting ready to just doze off. And I definitely felt like a discomfort feeling, so I eventually woke up. And when I woke up I didn't see anybody on the bed, so it made me startled where I seen [defendant], like, at the bottom of me, under my blanket.
>
> **The State**: I'm going to stop you there just a second, okay, Zara? When you said you felt something, I think you used the word uncomfortable ---
>
> **Zara**: Yes.
>
> **The State**: --- what did you feel?
>
> **Zara**: I felt, like, moisture. Like I felt somebody doing something to my private area.
>
> **The State**: Did you feel something inside your private area, like moving around?

---

3. Zara testified that defendant also drank alcohol that evening but that she did not.

4. Zara testified that defendant's 8:59 p.m. text "was in response to [her earlier] sex/sec [text,]" and his 10:28 p.m. text was in reference to the marijuana he was going outside to smoke. Zara did not go outside to smoke with him on this subsequent occasion.

5. Zara testified that when defendant previously stayed with them, he normally slept on the couch in the living room, and Zara always slept in her bedroom.

Zara: No, ma'am.

The State: Okay. When you say you felt moisture in your private area, was it in your vaginal area?

Zara: Yes.

The State: Was it between the labia, or the lips of your vaginal area?

Zara: Yeah.

The State: What were you wearing at the time?

Zara: Leggings.

The State: Where were your leggings at that point, when you felt that?

Zara: It was, like, under, like, my butt cheeks, like, my bottom.

The State: Did you have underwear on?

Zara: No. Just because my bottoms felt like – they fitted me like sweatpants, you know, like baggy. So, no, I didn't.

The State: Baggy leggings?

Zara: Yeah.

The State: Were you – when you woke up, and you felt this on your vaginal area, were you laying on your stomach or on your side or on your back? How were you laying?

Zara*:* On my stomach.

The State: Where was the blanket?

Zara: At that point my blanket was, like, more on my back.

The State: You've described what you felt. Describe what you saw. Were you able to, like, look up?

Zara: Yeah, once I turned around.

The State: What do you mean, turned around, like, look behind you?

Zara: Yes.

The State: What did you see?

Zara: I seen him on all fours.

The State: Who did you see on all fours?

Zara: [Defendant].

The State: What did you do?

Zara: I stood there in shock. And I asked him what he was doing.

The State: When you say you stood there, were you actually standing, or how were you positioned?

Zara: I was still laying on my back. I'm sorry, my stomach. But, you know, for me turning around, like, I was just turned (indicating).

The State: Okay. And you said to him, what are you doing?

Zara: Yes.

The State: What did he say?

Zara: Oh, I'm sorry, I'm sorry, I'm sorry.

The State: What happened next?

Zara: I said, you better get the fuck out. I got up. I ran to the bathroom, I washed myself.

After leaving the bathroom, Zara went straight to her mother's room and locked the door.[6] At that point, defendant had left Zara's bedroom and was in the living room. Zara testified that defendant then came to her mother's door asking Zara to come out and talk to him. According to Zara, defendant sounded scared and was slurring his words. At 2:24 a.m., defendant texted Zara the following messages:

Defendant: You really not coming to talk to me

Defendant: Ok if you feel that way come lock the door

6. While in her mother's room, Zara testified that she attempted to contact her older cousin and best friend, but they did not respond until the following day.

Defendant left the apartment shortly after sending these texts. Zara did not go back to sleep the rest of the night.

In the morning, Zara spoke with her cousin and told her what happened between her and defendant. Specifically, Zara's cousin testified that Zara told her, "I was sleeping and I just felt really moist, so when I woke up I seen [defendant's] head between my legs." Zara's cousin further testified that while Zara was on the phone with her, Zara was "crying, bawling" and "in shock."

Around 6:15 a.m., Zara's mother returned home from work. At some point that day, Zara asked to speak with her mother in Zara's bedroom. Then, while on the phone with her cousin,[7] Zara explained to her mother what defendant did. Zara's mother testified that Zara told her that "she ended up waking up to [defendant] between her legs while she was on her stomach" and that defendant's "face was in between . . . her buttocks, basically."

Zara's mother immediately confronted defendant via video call. Zara's mother testified that, while on the call, defendant denied putting his "mouth on her" but admitted to "bit[ing Zara] on her lower back." Later, defendant sent Zara's mother a text message stating, "First how the hell I get her naked while she sleeping? Second I never licked her I bit her just above lower back she woke, and I told her to take her bed n I'll stay on the floor the next thing I know she jumped in the shower."

Zara's mother also called the police, and Officer Alexis Snyder ("Officer Snyder") from Gastonia Police Department met with Zara and her mother at the apartment. Officer Snyder spoke with Zara's mother first. At trial, Officer Snyder testified[8] that Zara's mother informed her that defendant sexually assaulted Zara; specifically, Zara's mother stated that "her daughter told her that this uncle/friend had used his tongue on her vagina[.]" When interviewing Zara, Officer Snyder testified that Zara told her that while "[s]he was sleeping, . . . she awoke to [defendant] in between her legs, licking her vagina." Defendant did not object to either of these statements by Officer Snyder.

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7. Zara testified that she wanted her cousin on the phone with her while talking to her mother because Zara was afraid of "how her response was just going to be" since defendant "was somebody that we really, like, took in as family."

8. The State called Officer Snyder as a witness for the purpose of corroborating the in-court testimony of Zara and Zara's mother. Additionally, before Officer Snyder testified, the State sought permission from the trial court and defense counsel to call Officer Snyder to the stand prior to Zara's mother testifying because Officer Snyder was in nursing school at the time and needed to "get back to her other school duties." The trial court subsequently permitted it.

While in Zara's bedroom, Officer Snyder "observe[d] the blankets and the pillows on the floor[.]" Officer Snyder advised Zara not to get a sexual assault kit examination because a supervisor had told her that "due to the time frame" and that Zara had showered, it was not recommended. Officer Snyder also collected Zara's leggings as evidence.

Zara and her mother later agreed to recorded interviews with Detective Heather Houser ("Detective Houser") of the Gastonia Police Department. Without objection, portions of the 29 April 2021 interviews were admitted as evidence at trial. During Zara's interview, Zara told Detective Houser that "[defendant] definitely didn't penetrate me. I definitely felt moisture, which was definitely his mouth area, so he was using his tongue. . . . All I felt really were like licks." During the interview with Zara's mother, Zara's mother stated that "[Zara] was sleeping on the floor . . . and when she was awakened, [defendant] was in between her legs with his face, his mouth, down on her, licking her vagina."

Detective Houser tried reaching defendant by phone but never received a call back. Pursuant to search warrant, Detective Houser collected a buccal DNA swab from defendant on 6 July 2021.[9] Detective Houser further testified that Zara's leggings were tested for DNA because, according to Zara, she had put them on "after the incident[.]"[10]

At the close of the State's evidence, defendant moved to dismiss the charges on the basis that the elements had not been met, but the motion was denied. After declining to testify or present evidence, defendant moved again to dismiss the charges, and the motion was denied.

During closing arguments, the State, in relevant part, stated:

> [Zara] has no reason to lie about this. She loved this man as her uncle. He was brought into the home. You heard about the earlier events that day. Absolutely no argument, no animosity, nothing going on for her to make this up. She has nothing against him. She loved him. The defendant wants you to believe, or is pretty much asking you to believe that she made this up. Why would she make this up and put herself and her family through all of this? An entire investigation, talking to not one police officer but then two more detectives, and then actually having to

9. When Detective Houser attempted to obtain defendant's DNA, defendant stated that he was not going to comply without his attorney present. Detective Houser (and other officers) then used force to obtain defendant's saliva sample.

10. At trial, the State did not submit the results of any DNA testing.

come in and testify in a courtroom. She wouldn't do that unless she was telling the truth, and she is, and she did.

In a sexual assault case like this, especially when you are – when it involves a person that is trusted and known to the victim, you have to look at the credibility of the victim, and of the witnesses in the case. You have to look at consistency and corroboration. Your Honor knows that if you believe this victim in this case then you believe this case beyond a reasonable doubt. And that's why consistency and corroboration are important.

[Zara], on this particular date, back in April of 2021, in the middle of the night she texted her cousin [ ]. The next morning is when she finally had the opportunity to speak to [her cousin]. She told [her] what [defendant] had done to her. She then told her mother. She talked to Patrol Officer . . . Snyder. She talked to detectives. And then she testified under oath. And throughout all of it she was consistent. She did not embellish, she didn't change the facts, because she was telling the truth.

And what did she gain from this? She gained nothing but embarrassment. She told this courtroom, including the defendant, had to face him, and other strangers in here, what she had experienced. She benefited in no way at all by coming forward in this case. In fact, this was embarrassing for her. But the defendant still is denying it and saying this was all made up. You could hear, and you could see in her testimony how hard this was for her to talk about. She would stop, she would breathe, at one point she had to blow her nose. Visibly upset.

You heard from . . . her cousin, her big sis, and her mother, that as [Zara] told them what the defendant did to her she cried, he was upset. And then, even in the video interview that you saw of the victim, [Zara], visibly on two separate occasions got upset. [Zara] is not an Academy Award-winning actress, she's a victim, and she was traumatized, and she has no reason to lie about this.

Don't allow that defendant to benefit from assaulting her at a time when there were no witnesses around, when he had the opportunity to be alone with her. The defense is almost saying, like, this is some big conspiracy theory.

> Like, she decided to wake up in the middle of the night and say, hey, I'm going to claim that he did this to me, text [her cousin], lock herself in a bathroom, go to the bedroom, tell two relatives the next day, go to police. For what? It's not just something she thought up to do. She's telling the truth.

The judge found defendant guilty of second-degree forcible sexual offense, assault on a female, and sexual battery. The court consolidated the three offenses into the second-degree forcible sexual offense and sentenced defendant to a minimum of 100 month and a maximum of 180 months in the North Carolina Department of Adult Corrections. The court also ordered that, upon his release from imprisonment, defendant register as a sex offender for thirty years. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant contends that the trial court committed plain error when it admitted Officer Snyder's testimony regarding out-of-court statements as well as statements from the recorded interview. Defendant also contends that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. We take each argument in turn.

A. Out of Court Statements

[1] Defendant contends that the out-of-court statements at issue are inadmissible hearsay evidence because (1) none of the statements corroborated in-court testimony and (2) the hearsay exception for excited utterances was inapplicable to the recorded statements. We disagree.

When an issue is not preserved by objection at trial, appellate courts review the issue for plain error. *State v. Caballero*, 383 N.C. 464, 473 (2022) (citing N.C. R. App. P. 10(a)(4) (2023)). Plain error concerns error that "seriously affects the fairness, integrity, or public reputation of judicial proceedings" and should "be applied cautiously and only in the exceptional case." *State v. Odom*, 307 N.C. 655, 660 (1983) (cleaned up). Proving plain error requires that the defendant show that the error at trial was fundamental—i.e., the error had a probable impact on the jury's finding that the defendant was guilty. *State v. Lawrence*, 365 N.C. 506, 518 (2012) (citation omitted).

However, "in a bench trial, we presume the trial court ignored any inadmissible evidence unless the defendant can show otherwise." *State v. Jones*, 260 N.C. App. 104, 109 (2018) (citation omitted). In other words,

we give the trial court the benefit of the doubt that it adhered to basic rules and procedure when sitting without a jury. *Id.* Therefore, "no prejudice exists simply by virtue of the fact that such evidence was made known to [the trial judge] absent a showing by the defendant of facts tending to rebut this presumption." *State v. Jones*, 248 N.C. App. 418, 424 (2016).

" 'Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness.' " *State v. Harrison*, 328 N.C. 678, 682 (1991) (quoting *State v. Rogers*, 299 N.C. 597, 601 (1980)). A prior statement may be used to corroborate a witness's in-court testimony even if the witness has not been impeached. *State v. Harris*, 253 N.C. App. 322, 332 (2017) (citation omitted); *see also State v. Walters*, 357 N.C. 68, 88 (2003) (concluding that both a 911 tape and the witness's out-of-court statement to a detective were admissible to corroborate the witness's earlier in-court testimony). Prior statements admitted for corroborative purposes are not hearsay because they are not offered for the truth of the matter asserted. *State v. Thompson*, 250 N.C. App. 158, 163 (2016) (citations omitted). Consequently, such statements do not implicate the confrontation clause and are not to be admitted as substantive evidence. *Id.* (citations omitted).

To be admissible as corroborative evidence, "prior consistent statements merely must tend to add weight or credibility to the witness's testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates." *State v. Farmer*, 333 N.C. 172, 192 (1993) (citations omitted); *see also Thompson*, 250 N.C. App. at 165 ("[T]he mere fact that a corroborative statement contains additional facts not included in the statement that is being corroborated does not render the corroborative statement inadmissible[.]"); *State v. Barrett*, 228 N.C. App. 655, 664 (2013) (concluding the prior statements were admissible as corroborative evidence despite having minor inconsistencies with the trial testimony); *State v. Martin*, 309 N.C. 465, 476 (1983) ("If the previous statements are generally consistent with the witness' testimony, slight variations will not render the statements inadmissible, but such variations only affect the credibility of the statement." (citing *State v. Britt*, 291 N.C. 528 (1977)).

Here, defendant contends that neither Zara nor her mother testified that defendant performed cunnilingus[11] on Zara. Additionally, because the

11. As defendant points out in his brief, our Supreme Court considers cunnilingus to be "the slightest touching by the lips or tongue of another to any part of the woman's genitalia." *State v. Ludlum*, 303 N.C. 666, 674 (1981).

out-of-court statements were that defendant "licked [Zara's] vagina"—i.e., performed cunnilingus on her—defendant contends the statements contradicted the testimony. We disagree as the out-of-court statements at issue were corroborative and not substantially different from the in-court testimony. Specifically, when asked if the moisture she felt was in her "vaginal area[,]" Zara testified, "Yes." Moreover, when asked if the moisture feeling was "between the labia, or the lips of [her] vaginal area[,]" Zara testified, "Yeah." Similarly, Zara's mother testified that Zara had explained to her that she woke "up to [defendant] between her legs while she was on her stomach" and that defendant's "face was in between . . . her buttocks[.]"

Both the out-of-court statements and in-court testimony thus tended to show that defendant pulled Zara's pants down, manipulated her body, and pressed his tongue against her vagina while she was sleeping—i.e., defendant engaged in a sexual act by force and against Zara's will. N.C.G.S. § 14-27.27(a)(1) (2023); *see also* § 14-27.20(4) (including cunnilingus as an example of a "sexual act"). Further, any differences between the out-of-court statements and the in-court testimony do not constitute substantial variance, let alone contradictory information. Accordingly, the out-of-court statements at issue are not hearsay and were admissible for corroboration purposes.[12]

However, even assuming arguendo that the trial court should not have admitted the statements, defendant failed to show that the trial judge did not ignore the statements in making their decision and that the statements were prejudicial. Accordingly, "[w]e do not make assumptions of error where none is shown." *Jones*, 260 N.C. App. at 110 (citation omitted).

In view of the fact that bench trials in North Carolina are a relatively new occurrence and rarely used, *see* N.C. Const. art. I, § 24 (permitting criminal defendants to waive their right to a jury trial in certain cases and request a bench trial as of 2014), there do not appear to be cases that have determined whether a plain error analysis is on point given the longstanding authority that a judge is presumed to have ignored any incompetent evidence. Thus, it does not seem that one can establish plain error in a bench trial despite defendant contending that such error occurred here. Rather, as discussed above, the standard in a bench trial is distinct from plain error review and requires that defendant introduce facts showing the trial judge, in fact, considered inadmissible evidence.

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12. Because the out-of-court statements were admissible as corroborative evidence, we do not need to address whether the recorded statements constitute excited utterances.

B. State's Closing Argument

[2] Defendant contends that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. Specifically, defendant contends that the State's "repeated statements that [Zara] was telling the truth constituted improper vouching and violated" N.C.G.S. § 15A-1230(a). We disagree.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133 (2002) (citation omitted). The standard thus requires determining (1) whether the argument was improper, and if so, (2) whether it "was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, 370 N.C. 174, 179 (2017) (citations omitted).

Section 15A-1230 of the North Carolina General Statutes states that during closing arguments, attorneys may not "express [their] personal belief[s] as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant . . . ." N.C.G.S. § 15A-1230(a). Yet, attorneys "are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *State v. Richardson*, 342 N.C. 772, 792–93, *cert. denied*, 519 U.S. 890 (1996).

Here, the statements at issue—e.g., that Zara "ha[d] no reason to lie about this"—were merely inferences reasonably drawn from the evidence, which defense counsel details in its closing. However, even assuming arguendo that some of the State's closing arguments included impermissible statements of opinion, none of it was so "grossly improper" as to have required the trial court to intervene *ex mero motu*. *Jones*, 355 N.C. at 133; *see also State v. Brown*, 320 N.C. 179, 206 (1987) ("Although the prosecutor may have strained the rational connection between evidence and inference, he did not strain it so far as to require *ex mero motu* intervention by the trial court . . . .").

Further, because it is presumed that trial judges "ignore inadmissible evidence when they serve as the finder of fact in a bench trial," it follows that such judges also presumably ignore any personal beliefs of counsel that were included in their closing arguments. *Jones*, 248 N.C. App. at 424. Thus, like in *Jones*, the trial judge presumably disregarded any personal beliefs purportedly inserted into the State's closing argument that pertained to whether Zara was telling the truth. Accordingly,

the trial court did not err by failing to intervene *ex mero motu* during the State's closing argument.

III. Conclusion

For the foregoing reasons, we affirm the trial court's judgment.

AFFIRMED.

Judge HAMPSON concurs.

Judge MURPHY dissents in part and concurs in result only.

MURPHY, Judge, dissenting in part and concurring in result only.

The Majority makes a sweeping expression in dicta that "it does not seem that one can establish plain error in a bench trial[.]" Majority at 651. I cannot join my colleagues in this sentiment as the presumption that the trial court ignores incompetent evidence and improper arguments is merely a *presumption*. *In re M.L.B.*, 377 N.C. 335, 338 (2021) (emphasis added) ("When a judge sits without a jury, [our Supreme] Court *presumes* that the trial court disregards any incompetent evidence and will affirm the judgment or order if the trial court's findings are supported by competent evidence."). In addressing the rebuttal of such a presumption, we have previously held:

> Respondents next argue the trial court erred in admitting in evidence various hearsay statements, as well as medical documents which allegedly were not properly authenticated. The mere admission by the trial court of incompetent evidence over proper objection does not require reversal on appeal. *See Best v. Best*, 81 N.C. App. 337, 341[] . . . (1986). "Rather, the appellant must also show that the incompetent evidence caused some prejudice." *Id.* In the context of a bench trial, an appellant "must show that the court relied on the incompetent evidence in making its findings." *Id.* at 342[] . . . (citation omitted).

In re Huff, 140 N.C. App. 288, 301 (2000), *appeal dismissed*, *disc rev. denied*, 353 N.C. 374 (2001); *see also State v. Morales*, 159 N.C. App. 429, 433–34 (2003); *In re A.W.*, 283 N.C. App. 127, 132 (2022) (citing *Morales*, 159 N.C. App. at 433–34). Preservation—or the lack thereof—does not change the concern regarding the trial court's reliance on improper

evidence or arguments; it merely adds to an appellant's burden to show a higher degree of resulting prejudice. The Majority's dicta, especially in a published decision, risks turning this legal fiction into an irrebuttable presumption—or, at least, introducing unnecessary confusion into our caselaw.

With this proviso in mind, I agree that Defendant has not met his burden to overcome the presumption. While it was not required to do so, the trial court included its jury instructions in this matter and read them aloud at the equivalent of a jury trial charge conference, allowing for the parties to be heard at their conclusion. *State v. Cheeks*, 267 N.C. App. 579, 592–95 (2019) ("Here, the trial court elected to follow a hybrid procedure by adopting 'jury instructions' setting forth the law it would apply to the case, as required in a jury trial[.] . . . We appreciate the trial court's attention to detail and effort to provide this Court with a full understanding of the law applied and the facts it determined to be true. . . . [T]he trial court handled it carefully. The additional procedural steps used by the trial court [in a felony criminal bench trial] are fully within the trial court's discretion, but we note they are not required by the North Carolina Rules of Criminal Procedure or Chapter 15A, Article 73 of North Carolina's General Statutes."), *aff'd*, 377 N.C. 528 (2021). These jury instructions included, *inter alia*, the following:

> Evidence has been received tending to show that at an earlier time a witness made a statement which may conflict or be consistent with the testimony of a witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe the earlier statement was made, and that it conflicts or is consistent with the testimony of a witness at this trial, you may consider this, and all other facts and circumstances bearing upon the witness' truthfulness in deciding whether you will believe or disbelieve the witness' testimony.
>
> . . . .
>
> You have heard the evidence and the arguments of counsel, if your recollection of the evidence differs from that of the attorneys you are to rely solely upon your recollection. Your duty is to remember the evidence whether called to your attention or not. You should consider all of the evidence, the arguments, contentions, and positions urged

> by the attorneys, and any other contention that arises from the evidence.
>
> The law requires that the presiding judge be impartial. You should not infer from anything I have done or said that the evidence is to be believed or disbelieved, that a fact has been proved, or what your findings ought to be. It is your duty to find the facts and to render a verdict reflecting the truth.

As a result, the record demonstrates that the trial court did not rely on the out-of-court statements for substantive purposes, nor did it improperly consider the State's closing argument. Defendant's only argument that the trial court improperly relied upon these statements for substantive purposes is that the testimony at trial was not otherwise sufficient to establish the act of cunnilingus; however, I concur with the Majority's determination as to the sufficiency of Zara's testimony to establish the act of cunnilingus. Majority at 651. Further, I agree with the Majority's ultimate holding that "the judge presumably disregarded any personal beliefs purportedly inserted into the State's closing argument that pertained to whether Zara was telling the truth." Majority at 652.

On this record, Defendant fails to overcome the presumption that the trial court improperly considered the out-of-court statements for substantive purposes or that the Defendant was prejudiced by the State's closing argument. I respectfully dissent from the Majority's dicta regarding plain error review from a bench trial, but I concur in upholding Defendant's convictions.

STATE OF NORTH CAROLINA
v.
JACK LABRITTAN SMITH, DEFENDANT

No. COA23-575

Filed 5 March 2024

Constitutional Law—right to counsel—forfeiture—six attorney withdrawals—combative in-court conduct—trial significantly delayed

The trial court in a criminal case did not err in finding that defendant had forfeited his right to counsel where: through his insistence that his attorneys pursue unethical legal strategies and his refusal to cooperate when they would not comply with his requests, defendant caused six court-appointed attorneys to withdraw from representing him; defendant was often combative and interruptive in the courtroom, which resulted in the court holding him in contempt for ninety days; and defendant's conduct delayed his case from being tried for two years.

Appeal by defendant from judgment entered 26 July 2022 by Judge Julia Gullett in Stanly County Superior Court. Heard in the Court of Appeals 6 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Isham Faison Hicks, for the State.

Mark Montgomery, for defendant-appellant.

FLOOD, Judge.

Jack Labrittan Smith ("Defendant") appeals from the 26 July 2022 judgment in which the trial court concluded Defendant had forfeited his right to counsel. Our review of the Record reveals the trial court correctly concluded Defendant, by his own actions, forfeited his right to counsel; therefore, we conclude the trial court did not err.

I. Factual and Procedural Background

On 13 December 2017, following events that occurred in May 2016 between Defendant and a woman with whom he had a relationship ("Mary"), Defendant entered a plea of guilty of first degree kidnapping, second degree rape, and second degree burglary. Defendant was then

sentenced to 86 to 116 months' imprisonment. Several years later on 6 July 2020, due to a sentencing issue on the December 2017 judgment regarding "the maximum sentence not corresponding to the minimum," Defendant was brought back before the trial court and was represented by attorney Patrick Currie ("Attorney Currie"). At this hearing, the trial court corrected Defendant's sentence, Defendant asked for his guilty plea to be set aside, and Attorney Currie motioned to withdraw as counsel. The trial court granted Defendant's request to set his guilty plea aside, granted Attorney Currie's request to withdraw, and appointed a new attorney, Andrew Scales ("Attorney Scales") to represent Defendant.

On 10 November 2020, Defendant and Attorney Scales appeared before the trial court to address Defendant's contention that Attorney Scales did not "have [Defendant's] best interest in mind." Defendant requested that he be represented by an attorney who was not a member of the Stanly County Bar. Attorney Scales made a motion to withdraw as counsel due to Defendant making "it clear that he no longer trusted [Attorney Scales] to represent him." The trial court granted Attorney Scales's motion to withdraw and indicated that Defendant would have "another attorney appointed outside of [Stanly] county . . . ." Attorney Butch Jenkins ("Attorney Jenkins") of the Montgomery County Bar was then appointed to represent Defendant.

On 17 March 2021, Defendant and Attorney Jenkins appeared before the trial court for a hearing on Attorney Jenkins's motion to withdraw as counsel. During the hearing, Attorney Jenkins explained to the trial court that Defendant indicated he would like to proceed with his case under a theory that Defendant's former court-appointed counsel had engaged in misconduct. Attorney Jenkins stated that he felt "strongly that [Defendant] ha[d] a right to pursue his defenses" but that Attorney Jenkins had relationships with both Attorney Currie and Attorney Scales and therefore "could not be effective as [Defendant's] counsel . . . ." When asked whether he objected to Attorney Jenkins's motion, Defendant stated he did not and asked that his next court-appointed counsel not be appointed "by you," referring to the presiding judge. Defendant explained he could not trust the trial judge because Defendant had told the trial judge that Attorney Currie "destroyed [his] client file" and nothing was done. After a combative back and forth, the trial judge stated he would "recuse [himself] from any other matters" concerning Defendant.

On 13 April 2021, attorney Richard Roose ("Attorney Roose") was appointed to Defendant's case. Defendant's arraignment hearing was scheduled for 12 July 2021, at which Defendant made a motion for new counsel, alleging Attorney Roose committed legal malpractice.

When asked to speak on Defendant's motion for new counsel, Attorney Roose stated:

> There are issues, and I think that I see the same issues that caused [Attorney] Jenkins to withdraw, appear to be arising in this case in that, you know, I have a – a plan on how to proceed with this case, but it's not enough for [Defendant]. He wants me to do other things that I can't do involving the previous attorneys here. And I see that coming. I don't see us resolving that matter.

After hearing from both Attorney Roose and Defendant, the trial court concluded that Attorney Roose would remain as counsel for Defendant, to which Defendant, referring to Attorney Roose, responded, "[l]ook at his face, Your Honor. He is – I will represent myself before he is my attorney."

On 14 October 2021, Attorney Roose made a motion to withdraw as counsel for Defendant. In his presentation to the trial court, Attorney Roose stated that, pursuant to Rule 1.16 of the Rules of Professional Conduct, "a lawyer shall not represent a client who insists upon taking action that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer[,] [a]nd that is exactly the situation that we have here."

In responding to Attorney Roose's motion, Defendant reiterated previous complaints about legal malpractice, ineffective assistance of counsel, and ethical code violations. Ultimately, the trial court granted Attorney Roose's motion to withdraw and appointed Indigent Defense Services to represent Defendant.

Attorney Charles B. Brooks ("Attorney Brooks") was appointed to represent Defendant, but after just three months of working with Defendant, Attorney Brooks filed a motion to withdraw as counsel, citing a "breakdown in communications" such that representation would not be possible. The motion to withdraw was heard on 18 January 2022, during which the assistant district attorney argued that Defendant's "efforts to continually change lawyers is, at minimum, an effort to obstruct and delay the trial." When the trial judge questioned Defendant about Attorney Brooks's motion, Defendant repeatedly interrupted the trial court and asserted that his previous attorneys "flagrantly violated the rules of criminal procedure" and that he sought to hold Attorney Brooks "accountable." Several times throughout the hearing, the trial judge asked Defendant not to interrupt and warned Defendant that his inability to work with his appointed counsel could result in forfeiture

of the right to an attorney. Eventually, the presiding judge, Attorney Brooks, and Defendant had an *in camera* conference in the judge's chambers, after which the trial court allowed Attorney Brooks to withdraw as counsel and appointed attorney Randolph Lee ("Attorney Lee") to represent Defendant. After the trial court announced the appointment of Attorney Lee, Defendant objected to the appointment and made a motion for the trial judge to recuse himself. The objection was overruled, and the motion was denied.

On 9 May 2022, Defendant appeared *pro se* with Attorney Lee as standby counsel. During the hearing, Defendant became combative and asserted that all of his motions were "going to be denied, but, yeah, let's – let's – let's play." The trial court warned Defendant he could be held in contempt for his behavior to which Defendant replied, "I've been locked up 2100 days. Been brought back from prison. Contempt me, Your Honor, if that's what you want to do." Defendant continued, "I ain't scared of nothing. . . . I trust God and that's it. Okay. Don't ever call yourself honorable. There's only one righteous judge." The trial court then held Defendant in contempt and sentenced him to ninety After being held in contempt, the hearing continued, during which Defendant stated, "I've been focusing on God these last five weeks, so I haven't really done much work on this case." When the trial court urged Defendant to present his arguments, Defendant mocked the trial court and questioned its ability to be honest and impartial, which prompted the trial court to warn Defendant he could be held in contempt for another ninety days.

Finally, on 19 July 2022, Defendant's case came on for trial, during which Defendant proceeded *pro se* with Attorney Lee as standby counsel. At the outset of the trial, Defendant confirmed he wished to proceed *pro se*. Defendant then made a motion for the trial judge to recuse herself for prejudice, which the trial court denied. The trial court again asked Defendant if he would like an appointed lawyer, to which Defendant replied "yes[,]" and Attorney Lee was reappointed as full counsel.

On the final day of trial, after the State rested its case, Defendant stated that Attorney Lee's cross examination of Mary put Defendant in "quite a predicament." Defendant told the trial court that he wanted to introduce allegedly exculpatory text messages sent by Mary into evidence and have Attorney Lee question Mary about the texts. During the questioning of Mary, Attorney Lee paused in between each question to confer with Defendant. Eventually, Attorney Lee asked the trial court for an *ex parte* conference, during which Attorney Lee motioned to withdraw as counsel because Defendant was of the opinion that [Attorney

Lee] had thrown him "under the bus[,]" and there was now an "irreconcilable conflict" between them. After Attorney Lee made his motion, the trial court excused the prosecutors and police officers from the courtroom. Defendant then addressed the trial court and stated that, in his opinion, Attorney Lee was "helping" Mary by "doctoring up" what she said in the texts and asking her easy questions. Defendant went on to accuse Attorney Lee of lying under oath. The trial court then emphasized that six different attorneys had been appointed to represent Defendant, before asking him whether he wanted to release Attorney Lee from the case. Defendant refused to answer the question directly, instead saying, "I want him to ask [Mary] the questions that I would like to ask that are not . . . against the ethical rules."

From the bench, the trial court began making findings of fact, while Defendant continuously interrupted, causing the trial court to threaten to remove him from the courtroom. The trial court's findings of fact summarized the history of Defendant's case, the tenuous relationship between Defendant and his appointed counselors, and Defendant's insistence on pursuing legal strategies that were improper. After making the factual findings, the trial court ruled that "[Defendant] by his own actions has . . . forfeited his right to a court-appointed lawyer and that the relationship between he and [Attorney] Lee has gotten so bad that [Attorney] Lee finds that he cannot continue." Defendant appealed.

II. Jurisdiction

This case is properly before this Court as an appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

On appeal, Defendant argues the trial court erred in finding that he forfeited his constitutional right to counsel. We disagree.

"The right to counsel in a criminal proceeding is protected by both the federal and state constitutions," and therefore, "[o]ur review is *de novo* . . . ." *State v. Simpkins*, 373 N.C. 530, 533, 838 S.E.2d 439, 444 (2020). "A finding that a defendant has forfeited the right to counsel requires egregious[,] dilatory[,] or abusive conduct on the part of the defendant which undermines the purposes of the right to counsel . . . ." *Id.* at 541, 838 S.E.2d at 449. Egregious conduct

> may take the form of "a criminal defendant's display of aggressive, profane, or threatening behavior," but . . . can also result where a defendant remains polite and apparently cooperative if the defendant's "obstreperous actions"

> are so severe as to . . . completely prevent a trial court from proceeding in the case.

State v. Atwell, 383 N.C. 437, 449, 881 S.E.2d 124, 132 (2022) (citations omitted). "Examples of such obstreperous actions include, *inter alia*, a defendant's 'refus[al] to obtain counsel after multiple opportunities to do so . . . or [the] continual hir[ing] and fir[ing of] counsel and significantly delay[ing] the proceedings.' " *Id.* at 449, 881 S.E.2d at 132 (quoting *State v. Harvin*, 382 N.C. 566, 587, 879 S.E.2d 147, 161 (2022)) (alterations in original). "[E]ven if a '[defendant]'s conduct [is] highly frustrating,' " however, "forfeiture is not constitutional where any difficulties or delays are 'not so egregious that [they] frustrated the purposes of the right to counsel itself.' " *Id.* at 449, 881 S.E.2d at 132 (quoting *Simpkins*, 373 N.C. at 539, 838 S.E.2d at 448).

While Defendant concedes his conduct may have "been irritating to the learned attorneys and judges," he argues his conduct fell far short of conduct in cases where this Court has previously concluded a defendant had lost their right to counsel. *See State v. Montgomery*, 138 N.C. App. 521, 523, 530 S.E.2d 66, 68 (2000) (where the defendant threw water in his attorney's face and was subsequently held in contempt of court); *see also State v. Joiner*, 237 N.C. App. 513, 515–16, 767 S.E.2d 557, 559 (2014) (where the defendant refused to answer the trial court's questions, threatened to punch the judge in the face, and smeared feces on the walls of his holding cell); *see also State v. Brown*, 239 N.C. App. 510, 519, 768 S.E.2d 896, 901 (2015) (where the defendant "repeatedly and vigorously objected to the trial court's authority to proceed," thus willfully obstructing and delaying the trial proceedings).

Here, while Defendant never physically assaulted an officer of the court, our *de novo* review of the Record reveals Defendant's inability to work with court-appointed counsel and insistence that the trial court could not be impartial amount to obstreperous conduct. *See Atwell*, 383 N.C. at 449, 881 S.E.2d at 132. Similar to the defendant's conduct in *Montgomery*, Defendant's conduct in the courtroom was egregious enough to warrant his being held in contempt for ninety days. *See Montgomery*, 138 N.C. App. at 523, 530 S.E.2d at 68.

Additionally, Defendant's insistence that his attorneys pursue defenses that were barred by ethical rules and his refusal to cooperate when they would not comply with his requests resulted in the withdrawal of six different attorneys. Further, our review of the trial transcripts shows that Defendant was combative and interruptive during the majority of his appearances in court, sometimes going so far that

the trial judge threatened removal. Finally, Defendant's conduct delayed his case from being tried for two years, causing a significant delay of the proceedings. *See Atwell*, 383 N.C. at 449, 881 S.E.2d at 132.

As our Supreme Court concluded in *Simpkins* and *Atwell*, a defendant forfeits their right to counsel if their conduct is so egregious, dilatory, or abusive that it prevents the trial court from proceeding in a case. *See Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449; *see also Atwell* 383 N.C. at 449, 881 S.E.2d at 132. Given Defendant was held in contempt and caused six different attorneys to withdraw, resulting in a two-year delay in the proceedings, we conclude the trial court was correct in finding Defendant, by his own actions, forfeited his right to counsel.

IV. Conclusion

Defendant's egregious and dilatory conduct undermined the purpose of the right to counsel; therefore, the trial court did not err when finding Defendant had forfeited that right.

NO ERROR.

Chief Judge DILLON and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
DWIGHT DOUGLAS SMITH

No. COA23-645

Filed 5 March 2024

1. Appeal and Error—notice of appeal—given prematurely—prior to sentencing—certiorari granted

Where defendant's notice of appeal from his conviction of driving while impaired was defective because it was given prematurely—prior to sentencing and entry of judgment—the appellate court granted defendant's petition for writ of certiorari to reach the merits of defendant's appeal.

2. Appeal and Error—preservation of issues—impaired driving—failure to renew motion to dismiss at the close of the evidence

In defendant's trial for driving while impaired, where defense counsel did not renew defendant's motion to dismiss the charge for

lack of sufficient evidence at the close of all the evidence, defendant failed to preserve for appellate review the issue of whether his motion to dismiss should have been allowed.

3. Constitutional Law—effective assistance of counsel—failure to renew motion to dismiss—substantial evidence of charged offense

Defendant did not receive ineffective assistance of counsel in his trial for driving while impaired where, although defense counsel failed to renew defendant's motion to dismiss for lack of sufficient evidence at the close of all the evidence—and therefore failed to preserve the issue for appellate review—the State presented substantial evidence of each element of the offense, including an officer's direct observation of defendant's demeanor, the results of two tests administered to defendant which indicated alcohol impairment, and defendant's admission to having driven his vehicle after he consumed alcohol. Therefore, there was no reasonable possibility that the trial court would have allowed the motion had it been renewed.

Appeal by Defendant from judgment entered 27 October 2022 by Judge Henry L. Stevens in Robeson County Superior Court. Heard in the Court of Appeals 23 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Liliana R. Lopez, for the State-Appellee.

John W. Moss for Defendant-Appellant.

COLLINS, Judge.

Defendant Dwight Smith appeals from judgment entered upon a guilty verdict of driving while impaired. Defendant argues that the trial court erred by denying his motion to dismiss, and that he received ineffective assistance of counsel because defense counsel did not renew his motion to dismiss at the close of all of the evidence. Because defense counsel did not renew Defendant's motion to dismiss at the close of all of the evidence, Defendant's argument that the trial court erred by denying his motion to dismiss is not properly before us, and we therefore dismiss in part. Defendant did not receive ineffective assistance of counsel, and we therefore find no error in part.

I. Background

The evidence at trial tended to show the following: On 1 April 2019 at approximately 9:00 p.m., Trooper Justin Waldrop with the North Carolina Highway Patrol was advised of a collision on Boone Road. Waldrop arrived on the scene and observed Defendant standing outside a pickup truck that was pulling a trailer. Defendant's two sons were also at the scene. Defendant told Waldrop that there was a "small collision" between his truck and another vehicle, and that he was driving the truck at the time of the collision.

Waldrop observed that Defendant had red, glassy eyes, slurred speech, and a strong odor of alcohol. Defendant was walking in a "zig-zag pattern" and stumbling, and Waldrop had to keep him from falling at one point. Thereafter, Waldrop asked Defendant to perform field sobriety tests. Waldrop administered the horizontal gaze nystagmus test to Defendant to measure the "involuntary jerking of [his] eyes." The test revealed that Defendant exhibited six out of the six clues indicating impairment. Waldrop then administered a portable breath test, known as the Alco-Sensor, at 9:10 p.m. and again at 9:22 p.m., which confirmed the presence of alcohol in Defendant's system. At that point, Waldrop formed the opinion that Defendant had consumed a sufficient amount of alcohol to appreciably impair his mental and physical faculties.

Waldrop arrested Defendant for driving while impaired and transported him to the Robeson County Detention Center to read him his *Miranda* rights and administer an Intoximeter breath test, which uses a "deep lung sample" to determine the "percent of alcohol in the defendant's body." Upon arriving at the detention center, Waldrop asked Defendant a series of questions. Waldrop asked Defendant whether he had been operating a vehicle, and Defendant responded "yes." When asked what time he began drinking and how many drinks he had, Defendant stated that he had one drink at 4:00 p.m. Waldrop asked Defendant what size the drink was and Defendant responded, "Not sure." Waldrop then asked, "On a scale of zero to ten, zero being completely sober and ten being completely drunk, where do you see yourself?" Defendant responded, "One." Waldrop asked, "In your opinion, should you have been operating a vehicle[,]" to which Defendant responded, "Yes." Waldrop read Defendant his rights concerning the Intoximeter at 9:58 p.m. Thereafter, Defendant refused to provide a breath sample for the Intoximeter.

Defendant was found guilty in district court of driving while impaired and subsequently appealed to superior court. The matter came on for trial on 26 October 2022. Defendant moved to dismiss the charge for insufficient evidence at the close of the State's evidence, and the

trial court denied the motion. Defendant then put on evidence but did not renew his motion to dismiss. The jury returned a guilty verdict of driving while impaired. The trial court sentenced Defendant to 60 days of imprisonment, suspended for 12 months of supervised probation. Defendant appealed.

II. Discussion

A. Appellate Jurisdiction

[1] As a threshold issue, we must determine whether we have jurisdiction to hear this appeal.

N.C. Gen. Stat. § 15A-1448(b) states, "Notice of appeal shall be given within the time, in the manner and with the effect provided in the rules of appellate procedure." N.C. Gen. Stat. § 15A-1448(b) (2023). Rule 4(a) of the North Carolina Rules of Appellate Procedure provides that an appeal in a criminal case may be taken by either "giving oral notice of appeal at trial" or by filing a written notice of appeal within 14 days after entry of judgment. N.C. R. App. P. 4(a). When a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005).

Prior to sentencing, defense counsel stated, "Judge, I've never done this, but I don't know at what point in this process I do, but Mr. Smith wants to give notice of appeal." The trial court responded, "Okay. We can do that once we get the judgment in." After entry of the final judgment, defense counsel did not enter oral notice of appeal, but the trial court "note[d] the [prior] appeal and . . . [ap]pointed the appellate defender to represent [Defendant]." As Defendant prematurely entered oral notice of appeal before entry of the final judgment in violation of Rule 4, this Court does not have jurisdiction to hear Defendant's direct appeal. *See State v. Lopez*, 264 N.C. App. 496, 503, 826 S.E.2d 498, 503 (2019).

Acknowledging that his notice of appeal was defective, Defendant filed a petition for writ of certiorari. This Court may issue a writ of certiorari "in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). In our discretion, we grant Defendant's petition for writ of certiorari and reach the merits of his appeal.

B. Motion to Dismiss

[2] Defendant argues that the trial court erred by denying his motion to dismiss. Defendant concedes that defense counsel failed to renew

his motion to dismiss at the close of all of the evidence, but nonetheless argues that the denial of his motion to dismiss was error.

A defendant in a criminal case may not challenge the sufficiency of the evidence on appeal unless a motion to dismiss is made at trial. N.C. R. App. P. 10(a)(3). "If a defendant makes such a motion after the State has presented all its evidence . . . and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal . . . made at the close of State's evidence is waived." *Id.* If a defendant subsequently fails to renew his motion to dismiss at the close of all of the evidence, the defendant "may not challenge on appeal the sufficiency of the evidence to prove the crime charged." *Id.*

Here, Defendant moved to dismiss at the close of the State's evidence, and the trial court denied the motion. Defendant then presented his own evidence but did not renew his motion to dismiss at the close of all of the evidence. Consequently, Defendant's argument that the trial court erred by denying his motion to dismiss is not properly before us, and that portion of his appeal is dismissed.

C. Ineffective Assistance of Counsel

[3] Defendant also argues that he received ineffective assistance of counsel because defense counsel failed to renew his motion to dismiss at the close of all of the evidence.

We review whether a defendant was denied effective assistance of counsel de novo. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). Under de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

"A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citation omitted). To show ineffective assistance of counsel, a defendant must show that his counsel's conduct fell below an objective standard of reasonableness. *State v. Anthony*, 271 N.C. App. 749, 754, 845 S.E.2d 452, 456 (2020). A defendant must satisfy a two-part test to meet this burden:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This

> requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (emphasis omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). Thus, to prevail on an ineffective assistance of counsel claim in which the defendant argues that his counsel failed to renew his motion to dismiss, the defendant must show that there is a reasonable probability that the trial court would have allowed the renewed motion. *See State v. Blackmon*, 208 N.C. App. 397, 401, 702 S.E.2d 833, 836 (2010).

"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. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Lopez*, 274 N.C. App. 439, 446, 852 S.E.2d 658, 662 (2020). "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. Austin*, 279 N.C. App. 377, 382, 865 S.E.2d 350, 354 (2021) (quotation marks and citation omitted). "Contradictions and 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).

Under N.C. Gen. Stat. § 20-138.1(a)(1), a person commits the offense of driving while impaired if "he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance[.]" N.C. Gen. Stat. § 20-138.1(a)(1) (2023). A person is under the influence if "his physical or mental faculties, or both, [are] appreciably impaired by an impairing substance." *Id.* § 20-4.01(48b) (2023). "An officer's opinion that a defendant is appreciably impaired is competent testimony and admissible evidence when it is based on the officer's personal observation of an odor of alcohol and of faulty driving or other evidence of impairment." *State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002) (citations omitted). "The refusal to submit to an intoxilyzer test also is admissible as substantive evidence of guilt on a DWI charge." *Id.* (citation omitted); *see also* N.C. Gen. Stat. § 20-139.1(f) (2023) ("If any person charged with

an implied-consent offense refuses to submit to a chemical analysis or to perform field sobriety tests at the request of an officer, evidence of that refusal is admissible in any criminal, civil, or administrative action against the person.").

Defendant argues that "there [was] no direct evidence that [he] was impaired at the same time that he was driving" because "the State presented no evidence regarding the lapse of time between the accident and [Defendant's] call to law enforcement or between [Defendant's] call and Trooper Waldrop's arrival on scene." However, when viewing the evidence in the light most favorable to the State, there was substantial evidence that Defendant was driving while impaired.

Waldrop testified that he was advised of a collision on Boone Road at approximately 9:00 p.m. When Waldrop arrived on the scene, he observed Defendant standing outside a pickup truck that was pulling a trailer. Defendant told Waldrop that there had been a "small collision" between his truck and another vehicle, and that he was driving the truck at the time of the collision. Defendant had red, glassy eyes, slurred speech, and a strong odor of alcohol. Defendant was walking in a "zig-zag" pattern and stumbling, and Waldrop had to keep him from falling at one point. Waldrop administered the horizontal gaze nystagmus test, and Defendant exhibited six out of the six clues indicating impairment. An Alco-Sensor breath test was administered at 9:10 p.m. and again at 9:22 p.m., which confirmed the presence of alcohol in Defendant's system. At that point, Waldrop formed the opinion that Defendant had consumed a sufficient amount of alcohol to appreciably impair his mental and physical faculties.

Waldrop arrested Defendant for driving while impaired and transported him to the Robeson County Detention Center to read him his *Miranda* rights and administer an Intoximeter breath test. At the detention center, Defendant admitted that he was driving the truck and that he had consumed alcohol prior to driving. Waldrop read Defendant his rights concerning the Intoximeter at 9:58 p.m., and Defendant subsequently refused to provide a breath sample. As this was relevant evidence that a reasonable mind might accept as adequate to support a conclusion that Defendant was driving while impaired, Defendant has failed to show that there is a reasonable probability that, but for defense counsel's failure to renew his motion to dismiss, the trial court would have allowed the motion. *See Blackmon*, 208 N.C. App. at 403, 702 S.E.2d at 837 (holding that defendant did not receive ineffective assistance of counsel based on defense counsel's failure to renew his motion to

dismiss because "a second motion to dismiss would not have altered the result in [the] case").

Accordingly, Defendant did not receive ineffective assistance of counsel.

III. Conclusion

Defendant's argument that the trial court erred by denying his motion to dismiss is not properly before us, and we therefore dismiss in part. Furthermore, Defendant did not receive ineffective assistance of counsel, and we therefore find no error in part.

DISMISSED IN PART; NO ERROR IN PART.

Judges ZACHARY and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 MARCH 2024)

BLACKWELL v. N.C. DEP'T OF PUB. INSTRUCTION/BUNCOMBE CNTY. SCHS. No. 23-418	N.C. Industrial Commission (13-719914)	Affirmed
C.J. CHADWICK & ASSOCS., LLC v. CHADWICK No. 23-515	Carteret (22CVS504)	Affirmed
CURLINGS v. IRELAND No. 23-767	Beaufort (20CVS1024)	No Error
FENTY v. WAKE CNTY. PUB. SCH. SYS./N.C. DEP'T OF PUB. INSTRUCTION No. 23-696	N.C. Industrial Commission (20-009966)	Affirmed
HEIJMEN v. HEIJMEN No. 23-509	Durham (18CVD4282)	Affirmed
IN RE A.A.G. No. 23-766	Columbus (21JT84)	Affirmed
IN RE A.W. No. 23-455	Person (20JT26)	Vacated and Remanded
IN RE B.L.J. No. 23-582	Polk (21JT27)	Affirmed
IN RE D.J.W. No. 23-347	Robeson (20JT152)	Reversed
IN RE E.C. No. 23-143	Bladen (20JA35) (22CVD534)	Vacated In Part; Remanded.
IN RE K.E. No. 23-570	Greene (19JT15) (19JT16)	Affirmed
IN RE L.E. No. 23-191	Sampson (20JA74) (20JA75) (20JA76) (20JA77) (20JA78)	Vacated and Remanded

IN RE R.V.D. No. 23-613	Guilford (21JT553)	Affirmed
IN RE V.W. No. 23-649	Mecklenburg (19JT287)	Affirmed
KEENAN v. FED. EXPRESS CORP. No. 23-723	N.C. Industrial Commission (17-022057)	Affirmed
MILLER v. SOUDRETTE No. 23-493	Guilford (22CVS6698)	Affirmed
STATE v. BENNETT No. 23-502	Guilford (19CRS78790) (19CRS78792)	No Plain Error
STATE v. CORPENING No. 23-707	Dare (23CRS29)	Affirmed
STATE v. FREEMAN No. 23-731	Wilson (21CRS51996)	No Error
STATE v. HUDSON No. 23-336	Pitt (20CRS55228)	No Error
STATE v. LAWSON No. 23-611	Davidson (19CRS1000) (19CRS50961) (19CRS50972)	No Error
STATE v. McDOWELL No. 23-277	Bladen (17CRS51779)	No Error
STATE v. McKINLEY No. 23-442	Mecklenburg (20CRS231606) (20CRS231607)	No Error
STATE v. OSPINA No. 23-454	Union (20CRS52472)	No Error
STRICKLAND v. STRICKLAND No. 23-353	Mecklenburg (20CVD7321)	VACATED AND REMANDED.
WEBSTER v. DEVANE-WEBSTER No. 22-975	Wake (19CVD15723)	Affirmed
WEBSTER v. DEVANE-WEBSTER No. 22-977	Wake (19CVD15723)	Affirmed

WEBSTER v. DEVANE-WEBSTER No. 22-976	Wake (19CVD15723)	Affirmed

HEADNOTE INDEX

APPEAL AND ERROR—Continued

certification of its appeal under N.C.G.S. § 15A-979(c) (required for appeals from orders granting motions to suppress); and violated Appellate Rule 28(b)(4) by failing to include a statement of grounds for appellate review in its principal brief. The State's violations of the Appellate Rules constituted, at most, jurisdictional defects in the appeal, or, at minimum, substantial non-jurisdictional violations justifying the appeal's dismissal. Ultimately, although the State did not petition for certiorari review, the appellate court exercised its discretion to issue a writ of certiorari to hear the appeal. However, the costs of the appeal were taxed to the State as a sanction pursuant to Appellate Rule 34(b)(2)(a). **State v. Springs, 207.**

Guilty plea to habitual felon status—statutory right of appeal—statutory mandate—factual basis for plea—After a criminal defendant was convicted of embezzlement and obtaining property by false pretenses and then pleaded guilty to attaining habitual felon status, defendant had a statutory right of appeal from the entry of her guilty plea under N.C.G.S. § 15A-1444(a2), since she disputed her status as a habitual felon and was therefore arguing pursuant to subsection (a2)(3) that her term of imprisonment was unauthorized by statute. Furthermore, defendant's right to appeal was automatically preserved where she argued that the trial court acted contrary to the statutory mandate in N.C.G.S. § 15A-1022(c), which required the court to determine whether a factual basis existed for defendant's guilty plea. **State v. Mincey, 345.**

Ineffective assistance of counsel—criminal case—trial record insufficient to permit appellate review—In an appeal from multiple convictions arising from a domestic violence incident, where defense counsel asked the jury during closing argument to find defendant not guilty of the felony assault and kidnapping charges but to find him guilty of related misdemeanor charges because defendant had "admitted" to committing those crimes, the Court of Appeals declined to address defendant's ineffective assistance of counsel claim and dismissed it without prejudice, because the trial record was not sufficiently developed to permit review of the matter on direct appeal. **State v. Martin, 505.**

Initial permanency planning order—reunification efforts ceased in prior order—no basis to appeal current order—A mother's appeal from an initial permanency planning order setting permanent plans for her minor child was dismissed on the basis that she had no right to appeal the order under N.C.G.S. § 7B-1001(a)(5) because that order did not eliminate reunification as a permanent plan; instead, she had a right to appeal from the prior adjudication and disposition order, in which the trial court relieved the department of social services of reunification efforts (after finding aggravating factors under section 7B-901(c)), but she did not do so. Based on recent statutory amendments by the legislature, an initial permanency planning order is no longer presupposed to require reunification. **In re R.G., 572.**

Interlocutory appeal—petition for writ of certiorari regarding additional issues—mootness—In an action arising from two failed real estate transactions in which plaintiffs sought to buy a former school from a county historic landmarks commission, where the appellate court addressed several issues in the appeal from an interlocutory order, defendants' petition for certiorari review of two additional issues was dismissed in part as moot—where the appellate court had reversed portions of the trial court's order—and denied in part as to an issue regarding a motion for which no ruling appeared in the record on appeal. **Bates v. Charlotte-Mecklenburg Historic Landmarks Comm'n, 1.**

APPEAL AND ERROR—Continued

CRIMINAL LAW—Continued

Joinder—murder and robbery—witness intimidation—transactional connection—discretionary decision—The trial court did not abuse its discretion by granting the State's motion to join defendant's charges for murder and robbery with a witness intimidation charge based on multiple factors, including that, despite defendant's argument that the intimidation charge was not transactionally related to the murder and robbery charges, defendant assaulted the witness because he knew the witness was likely to testify against him on those charges and he was trying to prevent him from doing so. Further, evidence of the intimidation would have been admissible in the murder and robbery trial, and vice versa, if the charges had been tried separately. Similarly, the trial court did not abuse its discretion by denying defendant's motions to sever the charges where defendant failed to demonstrate that severance was required for a fair determination of his guilt or innocence of each offense. **State v. Hair, 484.**

Motion for mistrial—rape prosecution—victim as witness—alcohol consumption before testifying—In a prosecution for first-degree forcible rape and other related offenses, where the State informed the trial court on the fourth day of trial that the victim (who was testifying for the State) was seen in possession of alcohol and had possibly consumed alcohol that morning, the trial court did not abuse its discretion by denying defendant's motion for a mistrial after noting—on the record and outside of the jury's presence—that the victim had taken a portable breathalyzer test that day with "a 0.0 outcome." Further, although the victim later admitted to consuming alcohol that morning and the day before, the court did not err in declining to declare a mistrial sua sponte, since the court took immediate measures to address the victim's behavior, including ordering her to refrain from consuming any impairing substances, requiring her to remain in the courtroom until she needed to testify again, and advising her that a member of the district attorney's office would stay with her while she was not testifying to ensure her compliance. **State v. Thompson, 81.**

Prosecutor—opening statement—closing argument—not grossly improper—In a prosecution for multiple crimes arising from a domestic violence incident, the trial court did not err by failing to intervene ex mero motu during the State's opening statement and closing argument, during which the prosecutor spoke passionately but neither disparaged defendant personally nor spoke to matters or events unrelated to the trial. **State v. Martin, 505.**

Prosecutor's closing argument—differences in defendant's pretrial statements and trial testimony—credibility argument—In a prosecution arising from the rape of a sixty-five-year-old woman, the trial court did not abuse its discretion by failing to intervene ex mero motu during the prosecutor's closing argument, during which the prosecutor highlighted the differences between defendant's recorded statement to law enforcement days after the rape and his trial testimony, describing the differences as "the evolution of a defense." Rather than improperly suggesting—as defendant contended on appeal—that defendant testified falsely at trial pursuant to his lawyers' advice, it could be reasonably inferred from the record that the prosecutor was merely pointing out defendant's differing statements in order to call defendant's credibility into question. **State v. Ball, 151.**

DAMAGES AND REMEDIES

Breach of separation agreement—spousal support provision—specific performance—inadequacy of remedies at law—ability to pay support—In a breach of contract action, where an ex-husband stopped making spousal support payments to

DAMAGES AND REMEDIES—Continued

his ex-wife pursuant to their separation agreement, the trial court erred in awarding specific performance of the ex-husband's monthly support obligation as the ex-wife's remedy. Although the agreement contained a provision stating that any remedies at law would be inadequate for any breach thereof, the ex-wife was still required to show to the court that her remedies at law were, in fact, inadequate. Further, the court entered insufficient findings regarding the ex-husband's ability to make the required support payments under the agreement. **Meeker v. Meeker, 32.**

Punitive damages—summary judgment—negligence action—golfing accident—In a negligence action arising from a golfing accident, where defendant hit a ball that struck plaintiff's eye while plaintiff sat inside a golf cart that was parked by the driving range, the trial court properly granted summary judgment to defendant on plaintiff's claim for punitive damages, since none of defendant's actions amounted to fraud, malice, or willful or wanton conduct. **Moseley v. Hendricks, 258.**

DIVORCE

Breach of separation agreement—spousal support provision—payment made pursuant to vacated contempt order—claim for attorney fees—In a breach of contract action, where the appellate court vacated the trial court's order holding an ex-husband in civil contempt for failing to pay spousal support, but where the appellate court affirmed the trial court's finding in a prior order that the ex-husband owed his ex-wife over $113,000 in spousal support arrearages under the parties' separation agreement, it was not unjust for the ex-wife to retain a $38,800 payment that the ex-husband made as a purge condition under the vacated contempt order. Therefore, the ex-husband's request for an order on remand that he be reimbursed the $38,800 payment was denied on appeal. Additionally, defendant's request that he be awarded attorney fees based on his claim that his ex-wife breached the separation agreement was meritless, where the ex-wife was not cohabiting with another man and, even if she were, such cohabitation would not have constituted a breach—rather, it would have merely terminated the ex-husband's spousal support obligation under the agreement. **Meeker v. Meeker, 32.**

Equitable distribution—classification of property—stipulation—consideration by trial court—The trial court in an equitable distribution matter did not err in distributing certain real property to defendant husband upon classifying it as his separate property without first entering an order setting aside a prior written agreement in which the parties stipulated that the property was marital. The court properly considered a pre-trial order in which the parties entered into an additional set of stipulations, one of which stated that the parties disagreed about how to classify the real property at issue but agreed as to its value and that the property should be distributed to defendant. Further, the court's final equitable distribution order accurately reflected the property value listed in both of the parties' written stipulations. **Smith v. Smith, 443.**

Equitable distribution—statutory distributional factors—findings of fact—evidentiary support—In an equitable distribution matter where the trial court ordered an unequal division of the parties' marital property to the advantage of defendant husband, to whom the court distributed the marital residence, competent evidence supported the court's findings pertaining to the distributional factors listed in N.C.G.S. § 50-20(c), including that: the marital residence as non-liquid property was the parties' biggest asset, while other more liquid assets that were to be distributed to defendant had already been liquidated to pay off marital debt; although

DRUGS—Continued

decision interpreted the 2016 version of the statute to include opioids in the definition of "opium or opiate" for purposes of the offense, since the 2017 version of the same statute, under which defendant was charged, kept the same language, the same interpretation applied. The legislature's addition in 2017 of a new, separate definition of "opioids" in N.C.G.S. § 90-87(18a) did not materially alter the meaning of section 90-95(h)(4) where there was no explicit change to the latter statute or to the definition of "opiate." **State v. Miller, 519.**

EVIDENCE

Expert testimony—defining "sovereign citizen"—no plain error—There was no plain error in defendant's trial for felony fleeing to elude arrest by the admission of expert testimony from a police officer who defined "sovereign citizen" during his testimony. The officer stated that he had received over 1,000 hours of instruction, including training on sovereign citizens, and there was no indication that the admission had a probable impact on the jury's finding that defendant was guilty of the offense. **State v. Jones, 493.**

Expert witness—general testimony—concepts relevant to the case—In a prosecution for multiple sexual offenses with a child, the trial court did not commit plain error by allowing the State's expert to testify generally about the clinical meaning of the term "grooming," common grooming practices, and delayed reporting of abuse rather than apply her expertise to the specific facts of the case. The expert testified about concepts that were relevant to the case and gave the jury necessary information to evaluate the other testimony offered at trial, especially given how the victim repeatedly described defendant's abusive behaviors toward her as "grooming" and how defense counsel cross-examined the victim regarding her delay in reporting defendant. **State v. Cox, 473.**

Expert witness—qualification—areas not stipulated to by defendant—no improper opinion expressed by court—In a prosecution for multiple sexual offenses with a child, where the State tendered a witness as an expert in multiple areas—including how to interpret interviews of children who are suspected victims of sexual abuse, delayed reporting of sexual abuse, and what constitutes grooming—but where defendant stipulated to the witness being an expert solely in forensic interviewing, the trial court did not express an impermissible opinion to the jury when it qualified the witness as an expert in forensic interviewing and all of the other areas that the State had listed. Firstly, the court, in its gatekeeping role, was making an ordinary ruling during the course of the trial and had discretion to qualify the expert in any of the areas defendant did not stipulate to. Secondly, while the expert was qualified in areas relevant to the case, her expertise did not determine the ultimate question for the jury—whether defendant had sexually abused his minor stepdaughter. In fact, the expert's testimony—which did not include opinions regarding the victim's credibility or whether she was abused—demonstrated that its purpose was to give the jury context for evaluating the victim's account in the case, not to suggest what the jury should find. **State v. Cox, 473.**

Hearsay—murder and robbery trial—cell phone records—geo-tracking data—no plain error—There was no plain error in defendant's trial for first-degree murder and robbery with a dangerous weapon by the admission of cell phone records and geo-tracking evidence—which defendant contended did not fall within an applicable hearsay exception—where there was other evidence from two different witnesses linking defendant to the murder and robbery of the victim. **State v. Hair, 484.**

EVIDENCE—Continued

Lay opinion testimony—sexual battery prosecution—vouching for victim's credibility—prejudice—In a prosecution for sexual battery, assault on a female, and false imprisonment, where a teenaged girl testified that defendant grabbed her and kissed her inside a closet at their workplace, the trial court abused its discretion by admitting the lead detective's testimony about how she never questioned the victim's story when interviewing the victim. Although law enforcement officers may testify as to why they made certain choices in the course of an investigation, along with their basis for believing a particular witness, the detective did not make her statements in response to a direct question about her investigatory decision-making; thus, she improperly vouched for the victim's credibility. Although a party may bolster a witness's credibility under Evidence Rule 608(a) after it has been attacked, that Rule was inapplicable here since defendant had not attacked the victim's credibility using reputation or opinion evidence. Furthermore, the court's error prejudiced defendant where all of the evidence about what happened in the closet came from the victim, making her credibility the central issue in the case. **State v. Aguilar, 596.**

Prior bad acts—prosecution for assault and kidnapping—prior assaults of same victim—intent, motive, manner, and common scheme—In a prosecution for multiple assault charges, first-degree kidnapping, and other crimes arising from a domestic violence incident, during which defendant used physical force and threats to confine his girlfriend to their trailer and then repeatedly assaulted her, the trial court did not err in admitting—under Evidence Rules 403 and 404(b)—evidence of defendant's alleged prior assaults against his girlfriend. The prior assaults showed a pattern of defendant engaging in violent, threatening, and controlling behavior toward his girlfriend whenever she made him feel jealous or angry; thus, evidence of those assaults was admissible as proof of intent and motive. Further, the prior assaults illustrated the manner and common scheme defendant used to confine and abuse his girlfriend, and they negated any inference that defendant acted in self-defense or that his girlfriend somehow caused her own injuries. **State v. Martin, 505.**

Prior bad acts—prosecution for sexual offenses with a child—inappropriate behavior toward victim's cousin—plain error analysis—In a prosecution for multiple sexual offenses with a child, where defendant was accused of sexually abusing his minor stepdaughter over a span of five years, the trial court did not commit plain error by failing to exclude testimony from the victim's cousin, who described two incidents where, when she was fourteen years old, defendant moved her clothing aside to comment on her "nice tan line." Even if the cousin's testimony had been inadmissible under Evidence Rule 404(b)(on the ground that the incidents she described were not sufficiently similar to the conduct alleged in the case), because of the substantial evidence of defendant's guilt—including the victim's detailed testimony regarding the alleged abuse and the corroborative testimonies of other witnesses—defendant could not show that the jury probably would have reached a different verdict had the cousin's testimony been excluded. **State v. Cox, 473.**

Sexual offense prosecution—bench trial—out-of-court statements by victim and her mother—corroboration of trial testimony—In a bench trial for second-degree forcible sexual offense, sexual battery, and assault on a female, the trial court did not plainly err in admitting out-of-court statements made by the victim and her mother during their interviews with law enforcement, in which they both described an incident of defendant performing cunnilingus on the victim. These statements—which included different details from the ones testified to at trial but did not differ substantially from the witnesses' in-court testimony—did not constitute hearsay

MEDICAL MALPRACTICE—Continued

providers limited immunity from civil liability for damages resulting from care provided during the pandemic. First, defendants' affidavits did not, as required for immunity under the Act, show a causal link between the impact of COVID-19 and their failure to properly complete plaintiff's hysterectomy, take appropriate measures after complications developed during the surgery, and remove a piece of plaintiff's uterus that was left in her pelvic cavity during the procedure and became dangerously infected. Second, the affidavits did not address the third requirement for immunity under the Act regarding whether defendants acted in good faith when treating plaintiff. Finally, plaintiff's complaint sufficiently alleged that defendants engaged in conduct falling under the Act's exception to immunity. **Land v. Whitley, 244.**

Rule 9(j) certification—language used in Rule—different language used in complaint—no strict pleading required—In a medical malpractice case arising from an incomplete hysterectomy that was performed on plaintiff during the beginning of the COVID-19 pandemic, the trial court properly denied defendants' motion to dismiss where defendants (the surgeon, medical practice, and hospital involved) argued that plaintiff's complaint did not comply with Civil Procedure Rule 9(j). The certification in plaintiff's complaint did not perfectly mirror the language in Rule 9(j), since it stated that a medical expert "reviewed all the allegations of negligence" and "all medical records pertaining to the alleged negligence" whereas the Rule requires a review of "the medical care" itself along with the relevant medical records. However, Rule 9(j) does not contain a strict pleading requirement, and plaintiff's language sufficiently conveyed the same principles reflected in the Rule's certification provision. **Land v. Whitley, 244.**

MORTGAGES AND DEEDS OF TRUST

Nonjudicial power of sale foreclosure—reverse mortgage—validity of debt—competency of mortgagor—equitable versus legal defenses—In determining whether a reverse mortgage lender had the right to a nonjudicial power of sale foreclosure pursuant to a deed of trust, the trial court erred by determining that the lender failed to comply with statutorily mandated credit counseling provisions and, as a result, that the note on the subject property did not constitute a valid debt as required by N.C.G.S. § 45-21.16(d) (listing six mandatory elements for foreclosure). Where it was undisputed that the mortgagor received loan counseling by phone and that the counselor certified the session prior to the loan closing, the lender met the conditions precedent to foreclosure. Further, where the trial court based its decision on its concern about the mortgagor's mental capacity, rather than constituting a legal defense appropriate for the hearing held under section 45-21.16, that concern raised a potential equitable defense to the foreclosure that should have been asserted in an action to enjoin the foreclosure sale under section 45-21.34; thus, the matter was remanded for further proceedings. **In re Foreclosure of Jones, 417.**

MOTOR VEHICLES

Driving while impaired—breath chemical analysis—chewing gum in mouth—shortened observation period—no prejudicial error—There was no prejudicial error in defendant's trial for impaired driving by the admission of breath chemical analysis results, which were collected from defendant after three standardized field sobriety tests indicated a high likelihood that defendant was appreciably impaired. Where defendant gave an initial breath sample while he had chewing gum in his mouth, and a second sample was collected two minutes after he was made to spit out the gum, the admission of the results was error because the officer did not start a new

MOTOR VEHICLES—Continued

fifteen-minute observation period prior to collecting the second sample as required by administrative rules. However, the error was not prejudicial where there was not a reasonable possibility that, absent the error, a different result would have been reached at trial, based on the arresting officer's direct observations of defendant's demeanor at the scene and the results of the field sobriety tests. **State v. Forney, 165.**

Driving while impaired—impairment at time of vehicle operation—defendant as driver—circumstantial evidence—The State presented substantial evidence from which a jury could conclude that defendant was the driver of a vehicle that law enforcement discovered wrecked in the middle of a road and that defendant was impaired at the time he drove it, including that defendant was found hiding behind a building about thirty yards away from the vehicle with no other individuals nearby; the wreck appeared to be recent based on "fresh" rut marks in the road and damage to a nearby tree; defendant smelled of alcohol, had red and glassy eyes, slurred his speech, and was unsteady on his feet when officers approached; defendant had a bump and cut on his forehead consistent with a car crash; and the keys to the vehicle were found in defendant's pocket. **State v. Simpson, 532.**

NEGLIGENCE

Contributory negligence—summary judgment—golfing accident—city-owned golf course—In a negligence action arising from a golfing accident at a municipal golf course, where plaintiff's eye was struck by a golf ball while plaintiff sat inside a golf cart that was parked by the driving range, the trial court properly granted summary judgment to defendant-city because, even if the defense of governmental immunity was unavailable, there was no genuine issue of material fact regarding plaintiff's contributory negligence during the accident, and therefore plaintiff's negligence claim was barred. **Moseley v. Hendricks, 258.**

Contributory negligence—summary judgment—golfing accident—plaintiff struck by golf ball—failure to maintain awareness of surroundings—In a negligence action arising from a golfing accident at a municipal golf course, where defendant hit a ball that struck plaintiff's eye while plaintiff sat inside a golf cart that was parked by the driving range, the trial court properly granted summary judgment to defendant (and the city that owned the golf course) on the issue of plaintiff's contributory negligence. The evidence showed that plaintiff—who had previously played and watched golf, and therefore was familiar with the dangers of being exposed to areas where balls are hit—failed to exercise ordinary care for his safety by failing to maintain awareness of his surroundings, in large part because he had consumed substantial amounts of alcohol that day and was heavily impaired at the time of the accident. Although the parties disputed whether the golf cart plaintiff was sitting in had inadvertently rolled in front of the unfenced section of the driving range or whether it had originally been parked there, that factual dispute did not constitute a genuine issue of material fact because, either way, a prudent person in plaintiff's position would have eventually noticed that he was in harm's way. **Moseley v. Hendricks, 258.**

Last clear chance—summary judgment—golfing accident—plaintiff struck by golf ball—defendant looking down when hitting ball—In a negligence action arising from a golfing accident, where defendant hit a ball that struck plaintiff's eye while plaintiff sat inside a golf cart that was parked by the driving range, the trial court properly granted summary judgment to defendant upon concluding that the last clear chance doctrine was inapplicable. The evidence showed that defendant

PUBLIC ASSISTANCE—Continued

North Carolina administrative rule previously allowed extended family members to collect benefits, after a new federal law took effect that revised Medicaid eligibility groups, North Carolina adopted a State Plan Amendment (SPA) in which the State declined to adopt an expanded definition of "caretaker relative" as allowed by the new federal law. Since the previously-enacted and still-existing rule and the SPA were in direct conflict with each other, the SPA controlled as the most recent expression of the State's intent regarding this issue. **Hill v. Div. of Soc. Servs., 119.**

PUBLIC OFFICERS AND EMPLOYEES

Campus police officer—Special Separation Allowance—eligibility—membership of participating retirement plan required—In a declaratory judgment action to determine whether plaintiff, a law enforcement officer hired by a county board of education (defendant) as a campus police officer, was eligible to receive a Special Separation Allowance upon retiring from his position, the trial court properly concluded that plaintiff was not entitled to the allowance, which by statute was expressly premised on membership in, and retirement from, the Local Government Employees' Retirement System. The record reflected that plaintiff retired under the Teachers' and State Employees' Retirement System instead. **Hanson v. Charlotte-Mecklenburg Bd. of Educ., 221.**

Campus police officers—Supplemental Retirement Income Plan—eligibility—county board of education—definition of "employer"—In a declaratory judgment action to determine whether plaintiffs—all current or former law enforcement officers employed by a county board of education (defendant) as campus police officers—were eligible for certain retirement contributions and benefits under the Supplemental Retirement Income Plan (Plan) for Local Government Law-Enforcement Officers, the portion of the trial court's order declaring that defendant was not required to pay plaintiffs the 5% contribution to the Plan was reversed. Contrary to the trial court's conclusions, since defendant is a political subdivision of the State, it met the definition of "employer" provided in N.C.G.S. § 143-166.50(a)(2). Further, the plain language of N.C.G.S. § 143-166.50(e) did not restrict eligibility for the supplemental benefits to only members of the Local Government Employees' Retirement System. Therefore, plaintiffs met the statutory criteria of being law enforcement officers employed by a local government employer and were thus participating members in the Plan. **Hanson v. Charlotte-Mecklenburg Bd. of Educ., 221.**

Position designated exempt—political affiliation discrimination—prima facie case—lack of discriminatory intent—An administrative law judge did not err by granting summary judgment in favor of the Office of Administrative Hearings (OAH) in a contested case in which petitioner, who was employed at OAH as general counsel, challenged the designation of his position as an exempt managerial position by the OAH director (which was allowed after the legislature enacted a special provision). Petitioner failed to establish a prima facie case of political affiliation discrimination pursuant to N.C.G.S. § 126-34.02 where the evidence did not show that the director made the designation with discriminatory intent, primarily since petitioner's arguments about the director's state of mind amounted to mere speculation, but also because the director designated three additional positions as managerial exempt, one of which was held by someone who had a different political affiliation than petitioner. **Culpepper v. N.C. Off. of Admin. Hearings, 15.**

SENTENCING—Continued