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COURT OF APPEALS
REPORTS

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CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

A&D ENVIRONMENTAL SERVICES, INC., PLAINTIFF
v.
JOEL E. MILLER, DEFENDANT

No. COA14-1397

Filed 15 September 2015

1. Appeal and Error—interlocutory order—substantial right—venue—earning a living

An appeal from an interlocutory order granting a preliminary injunction affected the substantial right of having the case heard in the proper venue. However, the substantial right of earning a living was not affected because the preliminary injunction only limited defendant’s activities and did not prevent defendant from working in plaintiff’s industry.

2. Appeal and Error—interlocutory order—two appeals

The trial court did not err by refusing to consider defendant’s contention about an interlocutory order affecting a substantial right in a second action that was taken during the pendency of the appeal in a first action on the same matter where both appeals involved venue. Despite defendant’s contention that he was advancing a new theory, his argument was embraced by the first appeal.

Appeal by Defendant from order entered 8 October 2014 by Judge A. Robinson Hassell in Guilford County Superior Court. Heard in the Court of Appeals 20 May 2015.

Graebe Hanna & Sullivan, PLLC, by Mark R. Sigmon and M. Todd Sullivan, for Defendant-Appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James C. Adams, II, and Andrew L. Rodenbough, for Plaintiff-Appellee.

DILLON, Judge.

This is the second appeal taken by Joel E. Miller (“Defendant”) in this proceeding. The first appeal was from an order by the trial court denying Defendant’s Rule 12(b)(3) motion to dismiss based on improper venue, for which we have filed an opinion. *A&D Environmental Services v. Miller*, ___ N.C. App. ___, 770 S.E.2d 755 (filed 7 April 2015). This second appeal is from a preliminary injunction which was entered by the trial court while the first appeal was still pending before our Court. We affirm in part and dismiss in part.

I. Background

A&D Environmental Services, Inc., (“Plaintiff”) is a company which provides environmental services. Defendant went to work for Plaintiff in 2011, signing a non-compete, non-solicitation, confidentiality agreement (the “Agreement”). The Agreement provided, in part, that for a period of 24 months following Defendant’s last day of employment, Defendant would not, *inter alia*, solicit business from or provide services for a defined group of customers or prospects.

In early 2014, Defendant resigned from Plaintiff to work for a competitor. Plaintiff came to believe that Defendant was performing duties for the competitor which were in violation of the Agreement.

On 4 June 2014, Plaintiff commenced this action in Guilford County seeking an order to enjoin Defendant from violating the Agreement. In its verified Complaint, Plaintiff stated that its principal place of business was in Guilford County.

A. First Appeal – Defendant’s Rule 12(b)(3) Venue Motion

Defendant moved the trial court to dismiss the action pursuant to Rule 12(b)(3) of the North Carolina Rules of Civil Procedure, arguing that venue in Guilford County was improper based on a provision in the Agreement requiring that all disputes thereunder be maintained in Mecklenburg County.

On 6 June 2014, the trial court entered an order denying Defendant’s Rule 12(b)(3) motion to dismiss. On 10 June 2014, Defendant entered his notice of appeal – the first appeal in this proceeding – from this order.

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On 7 April 2015, this Court filed its opinion in the first appeal, affirming the trial court's order denying Defendant's Rule 12(b)(3) motion to dismiss.

B. Second Appeal – Plaintiff's Motion for a Preliminary Injunction

However, while the first appeal was pending in this Court, Plaintiff filed a motion in the trial court for a preliminary injunction after discovering that Defendant was performing certain duties for the competitor which it believed were in violation of the Agreement. The trial court conducted a hearing on the motion.

At the hearing, Defendant argued that Guilford County was not the proper venue, but for an entirely different reason than the reason he gave at the hearing on his Rule 12(b)(3) motion. Specifically, he represented to the trial court that he had recently discovered evidence suggesting that Plaintiff's principal place of business was not in Guilford County, and that Plaintiff's representation in its Complaint to the contrary was false. Defendant argued that the trial court should consider this new-found evidence as a basis to deny Plaintiff's motion. Alternatively, Defendant argued that the trial court should determine that it lacked jurisdiction to act on Plaintiff's motion for a preliminary injunction while the first appeal was pending before our Court.

On 8 October 2014, while the first appeal was still pending before our Court, the trial court granted Plaintiff's motion, entering a preliminary injunction which enjoined Defendant from marketing, selling or providing any services or products to a defined group of customers. In part of the order, the trial court essentially concluded that since the issue of venue was pending before our Court, it would not be appropriate for the trial court to consider Defendant's new venue theory which concerned the actual location of Plaintiff's principal place of business. Defendant timely noticed his appeal from the preliminary injunction order, which is the subject of this second appeal.

II. Jurisdiction

On appeal, Defendant makes a venue argument and a jurisdiction argument to attack the preliminary injunction. First, Defendant argues that the trial court erred in refusing to address the merits of his new improper venue theory, a theory which was being considered by our Court in the first appeal. Second, Defendant argues that the trial court lacked jurisdiction to issue the injunction while the first appeal was still pending in this Court.

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This appeal, however, is interlocutory. Though the general rule is that “there is no right of immediate appeal from interlocutory orders and judgments[,]” *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992), one exception to this rule is where the interlocutory order “affects a substantial right.” N.C. Gen. Stat. § 7A-27(b)(3)(a).

Defendant claims that we have jurisdiction over this interlocutory appeal because the preliminary injunction affects two substantial rights. First, Defendant states that the preliminary injunction affects his right to have the case heard in the proper venue. Defendant argues that this right is a substantial right. We agree. Indeed, we have held that the “grant or denial of a motion asserting a statutory right to venue affects a substantial right and is immediately appealable.” *Snow v. Yates*, 99 N.C. App. 317, 319, 392 S.E.2d 767, 768 (1990).

Second, Defendant states that the preliminary injunction affects his right to earn a living. Defendant argues that this right is a substantial right. We disagree. Not every order which affects a person’s right to earn a living is deemed to affect a substantial right. Rather, whether such an order affects a substantial right depends on the extent that a person’s right to earn a living is affected. For instance, we have held that a preliminary injunction which effectively *prevents* a person from “a realistic opportunity to use his own skill and talents” rises to the level of a substantial right. *Masterclean v. Guy*, 82 N.C. App. 45, 52, 345 S.E.2d 692, 697 (1986). *See also Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 635, 568 S.E.2d 267, 271 (2002) (substantial right is affected where it “effectively prohibits defendant from earning a living and practicing his livelihood in [two states]”); *Milner Airco v. Morris*, 111 N.C. App. 866, 869, 433 S.E.2d 811, 813 (1993) (recognizing that an injunction which creates the “inability to do business” may affect a substantial right). However, we have also held that an injunction which merely *limits* a person’s ability to earn a living may not affect a substantial right. *See Consol. Textiles, Inc. v. Sprague*, 117 N.C. App. 132, 134, 450 S.E.2d 348, 349 (1994) (holding that a substantial right was not affected where “defendant was not prevented from earning a living or practicing his livelihood” when he was merely enjoined from contacting the customers whom he had solicited while working with his former employer). *See also Bessemer City Express v. City of Kings Mountain*, 155 N.C. App. 637, 573 S.E.2d 712 (2002).

In the present case, the preliminary injunction at issue does not prevent Defendant from working in Plaintiff’s industry, but rather it merely limits his activities by not allowing him to call on or service a narrowly

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defined group of customers, similar to the narrowly defined group in *Sprague*.¹ Therefore, we hold that Defendant's statement – that the preliminary injunction affects his ability to earn a living – fails to articulate a basis for appellate review.²

In conclusion, we hold that we have jurisdiction to consider the merits of any argument by Defendant which touch on his right to have the case heard in the proper venue. Specifically, Defendant's argument that the trial court erred at the preliminary injunction hearing in not considering his new improper venue theory affects this substantial right; and, therefore, we consider the merits of this argument. However, Defendant's argument that the trial court lacked jurisdiction to entertain Plaintiff's preliminary injunction motion while the first appeal was pending does not affect this substantial right; and, therefore, we lack jurisdiction to reach the merits of this argument. Therefore, Defendant's jurisdiction argument is dismissed. We now turn to address the merits of Defendant's improper venue argument.

III. Analysis

Defendant argues on this appeal that the trial court erred in refusing to consider his contention that Guilford County was not a proper venue for Plaintiff's preliminary injunction motion to be heard.

We hold that the trial court acted correctly in accordance with N.C. Gen. Stat. § 1-294, which states that an appeal “stays all further proceedings in the court below upon the judgment appealed from, or upon *the matter embraced therein*[.]” N.C. Gen. Stat. § 1-294 (emphasis added). Specifically, the issue of whether venue in Guilford County was proper was before this Court when the trial court entered the preliminary injunction; and, therefore, Defendant's argument at the preliminary

1. The preliminary injunction here states, in relevant part, that “Defendant is enjoined from marketing, selling, or providing any services or products competitive with services and products offered by [Plaintiff] to any customer of [Plaintiff] which [Defendant] contacted and serviced on behalf of [Plaintiff], or about which [Defendant] obtained confidential information through his work with [Plaintiff], during the last twelve months that [Defendant] worked for [Plaintiff].”

2. We do not suggest that an injunction which merely prevents a person from working with a defined group of customers could *never* affect a person's substantial rights. For example, it could be argued in a future case that a defendant's substantial right is affected where a “defined group of customers” in the injunction is so large that the injunction leaves very few, if any, viable prospects or customers for a defendant to call on. In the present case, however, Defendant makes no claim or showing that the group of customers defined in the preliminary injunction is so large that he has no one to call on or work with.

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[243 N.C. App. 6 (2015)]

injunction hearing that Guilford County was not the proper venue for that hearing was a matter embraced by the first appeal.

Defendant, nonetheless, contends that the trial court *did* have the authority to consider his venue argument because he was basing his argument on a different theory than the theory that he had advanced at the Rule 12(b)(3) motion hearing and in the first appeal. However, the fact that Defendant was advancing a new theory does not change our conclusion that his argument – that venue in Guilford County was improper – was “a matter embraced” in the first appeal. Therefore, we hold that the trial court did not err in its conclusion that Defendant’s “objections regarding venue are not properly before [the trial court] at this time[.]”

IV. Conclusion

We affirm the trial court’s refusal to consider Defendant’s venue argument as a basis to deny Plaintiff’s motion for a preliminary injunction. However, because Defendant has failed to show how his argument that the trial court lacked jurisdiction to enter the preliminary injunction during the pendency of the first appeal affects a substantial right, we dismiss this argument.

AFFIRMED IN PART, DISMISSED IN PART.

Judges BRYANT and ELMORE concur.

JAMES GEORGE BRITTIAN, BY AND THROUGH EXECUTRIX OF THE
ESTATE DEBORAH HILDEBRAN, PLAINTIFF

v.

MICHAEL TODD BRITTIAN, JAMES KEVIN BRITTIAN, BRETT TYLER BRITTIAN
AND CHANTÉ FARE BRITTIAN, DEFENDANTS

No. COA15-139

Filed 15 September 2015

1. Wills—declaratory judgment—caveat—distinguished

The trial court’s dismissal of plaintiff-executor’s action for a declaratory judgment was in error where it appeared that the trial court mistakenly concluded that plaintiff was challenging the will itself. Any interested person may bring a declaratory judgment action to construe a will, while on the other hand a caveat is a challenge to a purported will.

BRITTIAN v. BRITTIAN

[243 N.C. App. 6 (2015)]

2. Civil Procedure—summary judgment—following a Rule (12)(b)(6) dismissal

The trial court's denial of plaintiff's motion for summary judgment in an action for a declaratory judgment construing a will was void ab initio where the trial court had already granted a Rule 12(b)(6) motion against plaintiff, albeit erroneously. A dismissal under Rule 12(b)(6), with prejudice, operates as an adjudication on the merits.

Appeal by Plaintiff from order entered 22 September 2014 by Judge Robert T. Sumner in Burke County Superior Court. Heard in the Court of Appeals 12 August 2015.

Patrick, Harper & Dixon, LLP, by Thomas Filopoulos and David W. Hood, for the Plaintiff-Appellant.

LeCroy Law Firm, PLLC, by M. Alan LeCroy, for the Defendant-Appellant, Chanté Fare Brittian.

DILLON, Judge.

Deborah Brittian Hildebran ("Plaintiff"), on behalf of the Estate of James George Hildebran (the "Estate"), appeals from an order dismissing her action for a declaratory judgment and denying her motion for summary judgment. For the following reasons, we reverse that portion of the order dismissing her declaratory judgment action and vacate that portion of the order denying her motion for summary judgment.

I. Background

This proceeding is a declaratory judgment action filed in superior court concerning the rights of the parties under a will (the "Will") executed by James George Brittian ("Testator"), now deceased – a will that has been accepted for probate in a separate proceeding before the clerk.

Prior to Testator's death, he executed the Will, naming his daughter (Plaintiff) as executrix, and gave the Will to her for safekeeping. The Will left the property in his estate to various beneficiaries. The Will contained a number of markings, one of which struck through the name of Testator's granddaughter, Chanté Fare Brittian (the "Granddaughter").

The Will was probated in common form before the clerk and letters testamentary were issued appointing Plaintiff as executrix. However, an assistant clerk in the Estates Division wrote a letter to Plaintiff to inform her that personnel in the Estates Division had been able "to read

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the blacked out sections on the original version [of the Will] and ha[d] typed up the sections from the original Will,” and that “any modification by strike-outs, additions to and/or interlineations [were] not valid for purposes of probate,” essentially taking the position that the apparent partial revocation of the Will disinheriting the Granddaughter was ineffective. Attached to this letter was a document typed up by personnel in the clerk’s office which reproduced the language in the Will which had been marked through.

Plaintiff responded by letter through counsel, stating her position that the partial revocation was effective. However, in response to Plaintiff’s letter, the assistant clerk wrote to Plaintiff advising her that it was in her best interest to file an action for a declaratory judgment, stating that “[a] ruling on this issue from a Superior Court Judge would clarify the matter.”

Thereafter, Plaintiff instituted the present action for a declaratory judgment. The Granddaughter answered, moving to dismiss the action pursuant to Rule 12(b)(6) of our Rules of Civil Procedure for failure to state a claim upon which relief can be granted, or, in the alternative, asserting that the partial revocation of the Will was ineffective.

Plaintiff then moved for summary judgment. The Granddaughter responded to Plaintiff’s summary judgment motion, asserting, *inter alia*, that Plaintiff was objecting to a duly admitted will in probate and that, therefore, Plaintiff was required to file a caveat in the probate proceeding before the clerk rather than through a declaratory judgment action in superior court.

After a hearing on the matter, the superior court entered an order granting the Granddaughter’s Rule 12(b)(6) motion, *and further* denying Plaintiff’s motion for summary judgment. Plaintiff entered timely notice of appeal.

II. Analysis

A. Granddaughter’s Rule 12(b)(6) Motion

[1] Plaintiff first argues that the trial court erred in granting the Granddaughter’s Rule 12(b)(6) motion to dismiss. Specifically, Plaintiff contends that where the *construction* – rather than the *validity* – of a will is contested, the appropriate procedure for obtaining a declaration of the rights of the parties under that will is an action for a declaratory judgment, not a caveat proceeding. We agree.

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Our Supreme Court has held that the construction of a will presents “a proper justiciable question . . . under the provisions of the North Carolina Declaratory Judgment Act.” *Johnson v. Wagner*, 219 N.C. 235, 238, 13 S.E.2d 419, 421 (1941). That Act, as codified in relevant part in N.C. Gen. Stat. § 1-254, provides that “[a]ny person interested under a . . . will . . . may have determined any question of construction . . . arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder.” N.C. Gen. Stat. § 1-254 (2014). Thus, any interested party under a will may bring an action for a declaratory judgment, see *Taylor v. Taylor*, 301 N.C. 357, 364, 271 S.E.2d 506, 511 (1980), including the executor of the estate, see *First Sec. Trust Co. v. Henderson*, 226 N.C. 649, 651, 39 S.E.2d 804, 805 (1946).

By contrast, a caveat proceeding is the method by which a writing offered for probate and purporting to be a will is challenged. *Rogel v. Johnson*, 114 N.C. App. 239, 241, 441 S.E.2d 558, 560 (1994). As our Supreme Court has explained,

[w]hen a paper writing purporting to be a will is presented to the Judge of Probate he takes proof with respect to its execution. If found in order the script is admitted to probate in common form as a will. . . . It stands as the testator’s will, and his only will, until challenged and reversed in a proper proceeding before a competent tribunal. The challenge must be by *caveat* and be heard in the Superior Court.

In re Charles’s Will, 263 N.C. 411, 415, 139 S.E.2d 588, 591 (1965) (emphasis in original) (internal citation omitted). See also N.C. Gen. Stat. § 31-32(a) (2014) (“At the time of application for probate of any will, . . . any party interested in the estate, may . . . enter a caveat to the probate of such will”). Unlike a declaratory judgment action, “[t]he purpose of a caveat is to determine whether the paperwriting purporting to be a will is in fact the last will and testament of the person for whom it is propounded.” *In re Spinks’s Will*, 7 N.C. App. 417, 423, 173 S.E.2d 1, 5 (1970). Thus, while the issue of whether a contested writing is the valid will of the testator may only be challenged by caveat, where the *construction* of an unchallenged will¹ is contested, an action for a

1. We note that a photocopy of the Will was found among the Testator’s personal effects and that this photocopy did not contain a marking striking through the Granddaughter’s name. However, there has been no caveat filed in the estate proceeding claiming that the original Will in Plaintiff’s possession was not valid or that the photocopy should be probated.

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[243 N.C. App. 6 (2015)]

declaratory judgment is the appropriate procedure for determining the rights of the parties under that will. *Compare id. with Taylor*, 301 N.C. at 364, 271 S.E.2d at 511.

The trial court in the present case, however, appears to have mistakenly concluded that Plaintiff was challenging the Will itself rather than seeking a judicial resolution of the rights of the parties under the terms of the Will and the effect of the markings thereon on these parties' rights. Therefore, the court's dismissal of Plaintiff's action on this basis was error.

B. Plaintiff's Summary Judgment Motion

[2] The trial court, after granting the Granddaughter's Rule 12(b)(6) motion, purported in its order to deny Plaintiff's summary judgment motion, which Plaintiff also argues was erroneous. Specifically, Plaintiff points out that the trial court's basis for denying her summary judgment motion is unclear, as it was denied rather than dismissed as moot, and there is no indication in the order whether the court considered evidence outside the pleadings in reaching the conclusion that the motion should be denied. However, upon concluding, albeit erroneously, that Plaintiff had failed to state a claim upon which relief could be granted, the trial court no longer had any claim before it with respect to which it could conclude whether summary judgment was or was not appropriate. Therefore, the trial court's purported denial of Plaintiff's motion for summary judgment *after it dismissed Plaintiff's only claim as legally insufficient* was void *ab initio*.

Our Supreme Court has long recognized that "[t]he only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed." *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979). Therefore, where "a trial court dismisses a claim under Rule 12(b)(6) for failure to state a claim for relief, that dismissal operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice." *Cnty. of Durham v. Daye*, 195 N.C. App. 527, 532, 673 S.E.2d 683, 687 (2009) (internal marks omitted).

However, unlike a motion to dismiss under Rule 12(b)(6), the purpose of summary judgment under Rule 56 is not to test the legal sufficiency of the pleadings, but rather, in reviewing evidentiary material from outside the pleadings, "to provide an efficient method for determining whether a material issue of fact actually exists." *Southerland v. Kapp*, 59 N.C. App. 94, 95, 295 S.E.2d 602, 603 (1982). Thus, "[t]he distinction between a Rule 12(b)(6) motion to dismiss and a motion for summary judgment is [] more than a mere technicality." *Locus v. Fayetteville State*

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Univ., 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991). Accordingly, the *denial* of a motion to dismiss under Rule 12(b)(6) does not subsequently prevent a court from granting summary judgment under Rule 56. *Barbour v. Little*, 37 N.C. App. 686, 692, 247 S.E.2d 252, 255-56 (1978).

However, the converse does not hold. That is, once a court *grants* a motion under Rule 12(b)(6), dismissing the claim with prejudice, “the dismissal operates as an adjudication on the merits[.]” *Daye*, 195 N.C. App. at 532, 673 S.E.2d at 687. After concluding that the pleadings are legally insufficient to state a valid claim for relief, a court cannot then adjudicate whether there is a genuine issue of material fact and the movant is entitled to judgment as a matter of law on that very same claim because the court has already concluded the asserted claim, as a matter of law, is no claim at all. *See id.* Therefore, on remand, the trial court must disregard the purported denial of Plaintiff’s motion for summary judgment because this denial was and is a nullity.²

III. Conclusion

We reverse the portion of the trial court’s order dismissing Plaintiff’s claim for a declaratory judgment pursuant to Rule 12(b)(6). Furthermore, we vacate that portion of the trial court’s order denying Plaintiff’s motion for summary judgment. On remand, the trial court must determine the rights of the parties under the terms of the Will, including the effect of any partial revocations thereof on the parties’ rights under the Will.

REVERSED AND REMANDED IN PART, AND VACATED IN PART.

Judges CALABRIA and ELMORE concur.

2. We are mindful that a trial court’s ruling on a motion under Rule 12(b)(6) must be regarded as one for summary judgment under Rule 56 “[w]here matters outside the pleadings are presented to and not excluded by the court,” *see DeArmon v. B. Mears Corp.*, 312 N.C. 749, 758, 325 S.E.2d 223, 229 (1985). However, in the present case, the trial court neither heard evidence nor based its ruling on any evidentiary materials. Instead, the court simply dismissed the claim with prejudice and then went on to deny Plaintiff’s motion for summary judgment on that same claim without stating the basis for this ruling.

CREDIT UNION AUTO BUYING SERV., INC. v. BURKSHIRE PROPS. GRP. CORP.

[243 N.C. App. 12 (2015)]

CREDIT UNION AUTO BUYING SERVICE, INC., PLAINTIFF

v.

BURKSHIRE PROPERTIES GROUP CORP., JOSEPH FELIX STREVELL AND
CHAUNCEY STREVELL, ALL INDIVIDUALLY AND D/B/A JOE'S GARAGE AND RJC TRADING
COMPANY; STATE LINE AUTO AUCTION, INC., STRAIGHT LINE, L.L.C., DEFENDANTS

No. COA15-187

Filed 15 September 2015

Jurisdiction—quasi in rem—vehicles located in N.C.—out-of-state auto broker

The Court of Appeals rejected the argument of appellant, an auto broker incorporated and doing business in New York, that the trial court erred by exercising quasi in rem jurisdiction over a controversy involving vehicles that were located in North Carolina. Pursuant to N.C.G.S. § 1-75.8, plaintiff's claim concerned a security interest in and certificates of title to vehicles located in North Carolina. The requirements of federal due process were also satisfied based on the location of the vehicles in North Carolina, appellants' awareness of the vehicles' destination, and the tangible nature of the vehicles.

Appeal by defendant Straight Line, L.L.C., from order entered 13 November 2014 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 26 August 2015.

Spillman Thomas & Battle, PLLC, by Bryan G. Scott, for plaintiff-appellee.

Connors Morgan, PLLC, by Jeffrey T. Workman and Daniel W. Koenig, for defendant-appellant.

ZACHARY, Judge.

Where the property at issue was located in North Carolina, the trial court did not err in exercising *quasi in rem* jurisdiction over the controversy.

I. Factual and Procedural Background

Credit Union Auto Buying Service, Inc. (appellee CUABS) is a not-for-profit corporation organized under North Carolina law, with its principal place of business in Winston-Salem, North Carolina. CUABS is an

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automobile dealer that sells cars, primarily to credit unions. State Line Auto Auction, Inc. (State Line) is a company incorporated in New York, with its principal place of business in Waverly, New York. State Line acts as a broker for vehicle sales at its auction location in Waverly. Burkshire Properties Group Corp., doing business as Joe's Garage and RJC Trading Company, (Burkshire) is another corporation organized under New York law with its place of business in New York; it is owned by Joseph Felix Strevell and Chauncey Strevell (the Strevells).

Burkshire purchased vehicles from State Line under a line of credit extended by Straight Line, L.L.C. (appellant Straight Line). Appellant Straight Line maintained a security interest in the vehicles and retained the certificates of title to the vehicles as collateral. All transactions between Burkshire, State Line, and appellant Straight Line occurred in New York.

Appellee CUABS began purchasing vehicles from Burkshire in January of 2013. Appellee CUABS would pay money to Burkshire to cover the price of the vehicles, the buyer's fees, fees to transfer certificates of title, and fees for delivery of the vehicles to North Carolina for resale. In April of 2014, Burkshire failed to provide to appellee CUABS the certificates of title for 46 vehicles that appellee CUABS had purchased. The vehicles at issue had been purchased by Burkshire at a State Line auction with financing provided by appellant Straight Line, and appellant Straight Line claimed a security interest in the vehicles. Burkshire delivered these vehicles to appellee CUABS in North Carolina.

On 10 June 2014, appellee CUABS brought this action against Burkshire, the Strevells, State Line, and appellant Straight Line, alleging breach of contract and unjust enrichment, and seeking a declaratory judgment and specific performance. On 25 August 2014, appellant Straight Line moved to dismiss the complaint pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure due to an alleged lack of personal jurisdiction. On 13 November 2014, the trial court denied this motion.

Appellant Straight Line filed timely notice of appeal.

II. Standard of Review

As a general rule, denial of a motion to dismiss is deemed to be interlocutory, and is not immediately reviewable by this Court. An exception lies, however, as concerns a denial of a motion to dismiss based on a lack of personal jurisdiction. N.C. Gen. Stat. § 1-277 "allows a party to immediately appeal an order that . . . constitutes an adverse ruling as

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to personal jurisdiction.” *Can Am S., LLC v. State*, ___ N.C. App. ___, ___, 759 S.E.2d 304, 307, *review denied*, 367 N.C. 791, 766 S.E.2d 624 (2014). This right of immediate appeal “is limited to rulings on ‘minimum contacts’ questions, the subject matter of Rule 12(b)(2).” *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982). Accordingly, this matter is proper for review by this Court at this time.

Additionally, it is well established that:

[t]he determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact. The standard of [appellate] review of an order determining personal jurisdiction is 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.

Wyatt v. Walt Disney World Co., 151 N.C. App. 158, 163, 565 S.E.2d 705, 708 (2002) (quoting *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140–141, 515 S.E.2d 46, 48 (1999)).

III. Personal Jurisdiction

Appellant Straight Line contends that the trial court erred in denying its motion to dismiss for lack of personal jurisdiction. We disagree.

The appropriate exercise of personal jurisdiction by our courts is determined first by the existence of a statutory basis for the exercise of jurisdictional authority, and second by the dictates of federal due process.

The trial court in the instant case exercised *quasi in rem* jurisdiction over the controversy pursuant to N.C. Gen. Stat. § 1-75.8. This statute provides that *quasi in rem* jurisdiction may be invoked “[w]hen the subject of the action is real or personal property in this State and the defendant has or claims any lien or interest therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein.” N.C. Gen. Stat. § 1-75.8(1) (2013). In the instant case, appellee CUABS’s claim concerned the security interest in several vehicles it had purchased and the certificates of title to said vehicles.

Even though *quasi in rem* jurisdiction is provided by statute, such jurisdiction must also meet the standards of federal law. “[T]he final determinative factor is whether the nonresident defendant has certain minimum contacts with the forum state such that the maintenance of

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the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Canterbury v. Monroe Lange Hardwood Imports Div. of Macrose Indus. Corp.*, 48 N.C. App. 90, 93, 268 S.E.2d 868, 870 (1980) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945)). There are two forms of personal jurisdiction which might bring this case within the jurisdiction of North Carolina courts: specific jurisdiction, in which the controversy arises from a defendant’s contact with the forum state; and general jurisdiction, in which, although the controversy is unrelated to defendant’s activities within the forum, sufficient contacts exist between defendant and the forum so as to permit jurisdiction. *Wyatt*, 151 N.C. at 165, 565 S.E.2d at 709. Specific jurisdiction exists if the defendant has purposely directed his conduct towards a resident of the forum state, and thereby “purposefully availed itself of the privilege of conducting activities in-state, thereby invoking the benefits and protections of the forum state’s laws,” whereas general jurisdiction exists if the defendant has continuous and systematic contacts with the forum state. *Id.* at 165, 565 S.E.2d at 710.

The United States Supreme Court has held that “when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction.” *Shaffer v. Heitner*, 433 U.S. 186, 207, 53 L.Ed.2d 683, 700 (1977). This Court, relying on *Shaffer*, has upheld jurisdiction where the property at issue was located in North Carolina. For example, in *Canterbury*, the plaintiff, based in West Virginia, sought and obtained an order of attachment on a quantity of lumber owned by the defendant, a New York corporation. The lumber in question was located in North Carolina. The plaintiff subsequently filed a complaint alleging that he had sold the lumber to the defendant and, pursuant to the defendant’s orders, shipped it to North Carolina. The defendant, in its answer, moved to dismiss the complaint for lack of jurisdiction. The trial court entered an order dismissing the complaint, and the plaintiff appealed. *Canterbury*, 48 N.C. App. at 91-92, 268 S.E.2d at 869.

On appeal, this Court held that statutory grounds existed for the exercise of personal jurisdiction pursuant to N.C. Gen. Stat. § 1-75.8, and then found a combination of several factors that established the requisite connection between the defendant and the forum: (1) the presence of the lumber in the forum state; (2) the relationship of the lumber to the controversy; (3) the defendant’s specific instruction to ship the lumber to North Carolina; and (4) the tangible nature of the property, as lumber is a physical object over which a court may exercise jurisdiction. *Id.* at

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93-95, 268 S.E.2d at 870-71. Based on these factors, we held that jurisdiction was appropriate.

The instant case presents similar facts. The vehicles in question are located in North Carolina, and their ownership is central to the controversy. Further, appellant Straight Line was not unaware of the vehicles' destination. In its responses to appellee CUABS's interrogatories, appellant Straight Line acknowledged that it was aware that Burkshire "was purchasing vehicles at State Line Auto Auction to eventually send to a Burkshire customer in North Carolina." Appellant Straight Line was informed that the North Carolina customer "paid Burkshire thirty days after any vehicles were purchased at the auction, thus necessitating Straight Line's financing." These conversations between Burkshire and appellant Straight Line took place in late June and early July of 2013. On 26 July 2013, after having had these conversations and having been made aware of the destination of the vehicles it was financing, appellant Straight Line signed a financing and security agreement with Burkshire. Although appellant Straight Line did not direct the vehicles to be shipped to North Carolina, appellant had no reason to doubt that any challenge to its security interest would occur here. Lastly, the tangible nature of the vehicles as the subject of controversy and as objects over which *quasi in rem* jurisdiction can be exercised is parallel to that of the lumber in *Canterbury*. As the facts in the instant case satisfy the same reasoning as *Canterbury*, it is evident that *quasi in rem* jurisdiction was appropriately exercised in this case.

Appellant Straight Line makes extensive arguments regarding the fact that, aside from this transaction, it has had no contact with North Carolina. Appellant Straight Line contends that North Carolina has neither specific nor general jurisdiction over it, and that it would be unconstitutional to exercise *quasi in rem* jurisdiction under those circumstances.

Even assuming *arguendo* that appellant Straight Line has had no contact with North Carolina beyond this transaction, the controversy at hand concerns a number of vehicles in which appellant Straight Line claims a security interest. These vehicles were purchased by a North Carolina plaintiff and the vehicles are located in North Carolina. Moreover, appellant Straight Line had prior knowledge that these vehicles would be sold in North Carolina. *Shaffer* and *Canterbury* make quite clear that the presence of these vehicles in the State is a perfectly reasonable basis upon which a trial court could find the existence of *quasi in rem* jurisdiction, as their presence constitutes evidence of contact with the State. We hold that the trial court's finding of contact is

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supported by this evidence, and that the trial court did not err in denying appellant Straight Line's motion to dismiss.

This argument is without merit.

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

IRVING EHRENHAUS, ON BEHALF OF HIMSELF AND ALL
OTHERS SIMILARLY SITUATED, PLAINTIFF

v.

JOHN D. BAKER, II, PETER C. BROWNING, JOHN T. CASTEEN, III, JERRY GITT,
WILLIAM H. GOODWIN, JR., MARYELLEN C. HERRINGER, ROBERT A. INGRAM,
DONALD M. JAMES, MACKEY J. MCDONALD, JOSEPH NEUBAUER, TIMOTHY D.
PROCTOR, ERNEST S. RADY, VAN L. RICHEY, RUTH G. SHAW, LANTY L. SMITH,
DONA DAVIS YOUNG, WACHOVIA CORPORATION AND WELLS FARGO & COMPANY,
DEFENDANTS

IRVING EHRENHAUS, ON BEHALF OF HIMSELF AND ALL
OTHERS SIMILARLY SITUATED, PLAINTIFF

v.

JOHN D. BAKER, II; PETER C. BROWNING; JOHN T. CASTEEN, III; JERRY GITT;
WILLIAM H. GOODWIN, JR.; MARYELLEN C. HERRINGER; ROBERT A. INGRAM;
DONALD M. JAMES; MACKEY J. MCDONALD; JOSEPH NEUBAUER; TIMOTHY D.
PROCTOR; ERNEST S. RADY; VAN I. RICHEY; RUTH G. SHAW; LANTY L. SMITH;
DONA DAVIS YOUNG; AND WELLS FARGO & COMPANY, DEFENDANTS

Nos. COA14-1201 and COA14-1083

Filed 15 September 2015

1. Attorney Fees—American Rule—class action—settlement

Plaintiff's class action lawsuit challenging the merger of two banks did not result in the establishment of a common fund, so that the common fund exception to the American Rule (prohibiting the payment of attorney fees to the prevailing party without statutory authorization) did not apply. Defendant's payment of plaintiff's attorney fees was provided by a voluntary settlement between the parties.

2. Attorney Fees—class action—settlement—judicial approval

It has been expressly recognized that parties may agree to the payment of attorney fees in settling disputes. The settlement of class

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actions, unlike settlements in ordinary civil actions, must be judicially approved in a fairness hearing, during which the trial court must carefully assess the award of attorney fees to ensure that it is fair and reasonable.

3. Attorney Fees—on remand—supporting order from trial court—within scope of remand

On remand in a class action arising from the merger of two banks, a trial court order was within the scope of remand instructions where the trial court had been directed to complete its review of the evidence, articulate a legal basis for any award of attorney fees, and make the appropriate findings and conclusions on the issue of how it arrived at the figure to be awarded.

4. Appeal and Error—notice of appeal—filed with Business Court electronic system—not sufficient

Plaintiff did not properly give notice of appeal where the only timely notice of appeal was filed with the North Carolina Business Court using its electronic filing system instead of with the clerk of superior court.

5. Appeal and Error—petition for certiorari to Court of Appeals denied—extraordinary writ not justified

Certiorari was not granted by the Court of Appeals in a case involving attorney fees in a class action where the circumstances of the case did not justify the extraordinary remedy.

Appeal by objectors Michael L. Robinson¹ and John H. Loughbridge, Jr. from order entered 25 March 2014 by Judge Calvin E. Murphy in Mecklenburg County Superior Court and appeal by plaintiff from order entered 16 July 2014 by Judge James L. Gale in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 March 2015.

Greg Jones & Associates, P.A., by Gregory L. Jones, and Wolf Popper LLP, by Chet B. Waldman, pro hac vice, for plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by Adam K. Doerr and Robert W. Fuller, for defendants-appellees.

Michael L. Robinson and John H. Loughridge, Jr., pro se.

1. On 11 August 2015, this Court granted Michael L. Robinson's motion to substitute himself — in his capacity as executor of the estate — for Objector Norwood Robinson, who died on 18 July 2015.

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DAVIS, Judge.

In this consolidated appeal from the class action that was filed concerning the merger between Wachovia Corporation (“Wachovia”) and Wells Fargo & Company (“Wells Fargo”), Michael L. Robinson and John H. Loughridge, Jr. (“Objectors”) appeal in COA14-1201 from the Honorable Calvin E. Murphy’s 25 March 2014 order awarding Wolf Popper LLP (“Wolf Popper”) \$1,056,067.57 in attorneys’ fees and expenses, contending that the award of legal fees and expenses is not supported by North Carolina law and must be vacated. In COA14-1083, Plaintiff appeals from Judge James L. Gale’s 16 July 2014 order dismissing his attempted cross-appeal from Judge Murphy’s order, arguing that the defects in his notice of appeal were nonjurisdictional such that the dismissal of his appeal was improper. After careful review, we affirm Judge Murphy’s order and dismiss Plaintiff’s appeal of Judge Gale’s order.

Factual Background

This matter is before this Court for a second time. The facts surrounding this action are set out more fully in *Ehrenhaus v. Baker*, 216 N.C. App. 59, 717 S.E.2d 9 (2011), *appeal dismissed and disc. review denied*, 366 N.C. 420, 735 S.E.2d 332 (2012) (“*Ehrenhaus I*”), but are summarized in pertinent part as follows: In 2008, a national financial crisis ensued as a series of financial collapses eroded confidence in our nation’s banking and mortgage institutions. Various events, including the United States government’s decision to place the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation under government control and conservatorship on 7 September 2008, “culminated in a rapid decline in the public confidence in banks that held large positions in government-backed mortgage securities.” *Id.* at 63, 717 S.E.2d at 13.

Wachovia, which in September 2008 was the fourth largest banking institution in the nation, was one such bank. It had acquired a substantial number of mortgages as a result of its 2007 purchase of Golden West Financial Corporation, the second largest dedicated mortgage bank in the country at the time. Indeed, “[t]hese mortgage liabilities caused Wachovia’s depositors and investors to lose confidence in that institution and a ‘run’ on the bank developed, causing the Federal Deposit Insurance Corporation (‘FDIC’) to inform Wachovia’s corporate officers and the Wachovia board of directors . . . that Wachovia needed to merge with a solvent financial institution or be placed into receivership.” *Id.* at 62, 717 S.E.2d at 12-13.

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After several other potential mergers did not materialize, Wachovia's board of directors ("the Board") ultimately accepted a merger proposal advanced by Wells Fargo whereby Wells Fargo would acquire all of Wachovia's assets without government assistance. The agreement called for a separate share exchange between Wachovia and Wells Fargo "pursuant to which Wells Fargo would acquire ten newly issued shares of Wachovia Series M, Class A Preferred Stock, representing 39.9 percent of Wachovia's aggregate voting rights, including the right to vote on the approval of the proposed merger, in exchange for 1000 shares of Wells Fargo common stock." *Id.* at 64-65, 717 S.E.2d at 14.

Under the agreement, these newly issued, preferred shares of Wachovia stock would be subject to a "tail provision," meaning that the shares were not redeemable by Wachovia for 18 months following the shareholder vote on the merger — even if the merger was not effectuated. *Id.* at 65, 717 S.E.2d at 14. The agreement provided for a share exchange in which Wachovia's public shareholders would obtain 0.1991 shares of Wells Fargo common stock in exchange for each share of Wachovia common stock. *Id.* The agreement also included a "fiduciary out" provision that required the Board to submit the proposed merger for a vote even if the Board was no longer recommending it. *Id.* The Board voted unanimously to approve the proposed merger, and the Federal Reserve System's board of governors approved the merger shortly thereafter. *Id.* at 66, 717 S.E.2d at 15.

On 8 October 2008, Irving Ehrenhaus ("Plaintiff") filed this class action on behalf of Wachovia's shareholders of common stock — challenging the merger and asserting a breach of fiduciary duty claim against Wachovia, members of the Board, and Wells Fargo (collectively "Defendants"). In his complaint, Plaintiff alleged that (1) the share exchange providing Wells Fargo with 39.9% of the voting power for the merger "invalidly disenfranchised Wachovia shareholders"; (2) the tail provision was overly coercive because "it impeded the Board from seeking out other bidders for at least eighteen months after a shareholder vote rejecting the Merger"; (3) the exchange ratio contained in the merger agreement offered inadequate consideration to Wachovia shareholders in exchange for their shares; and (4) the fiduciary out provision was inadequate because the Board could not withdraw from the merger agreement if a superior proposal was offered but rather would be required to submit the Wells Fargo merger agreement to a vote despite the existence of the better offer. *Id.* In his lawsuit, Plaintiff sought to enjoin — or, alternatively, rescind — the merger. The case was subsequently designated as a mandatory complex business case and assigned to the North Carolina Business Court.

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On 15 October 2008, Plaintiff filed a motion for a preliminary injunction, requesting that the trial court invalidate the tail provision, the fiduciary out provision, and the share exchange provision of the merger agreement. The trial court granted partial preliminary injunctive relief, enjoining the tail provision based on its determination that this provision “would impede the Board in fulfilling its fiduciary duty to seek out merger partners in the event a potential suitor’s overtures had been rejected.” *Id.* at 67, 717 S.E.2d at 16. As a whole, however, the trial court concluded that the Board’s approval of the Merger was “an informed decision, made in good faith, with an honest belief that the action was in the best interests of Wachovia and its shareholders” and was reasonable under the circumstances. *Id.*

Following the partial injunction, Plaintiff amended his original complaint to add allegations that Wachovia’s proxy statement “contained material false and misleading statements and omitted material information related to the Merger.” *Id.* at 67-68, 717 S.E.2d at 16. The parties began settlement negotiations shortly thereafter and entered into a memorandum of understanding (“MOU”) containing an agreement to settle the action. The MOU required Wachovia to make additional disclosures relating to the omitted information that Plaintiff had referenced in his amended complaint. The MOU also provided that (1) Wells Fargo would pay the costs associated with providing notice of the proposed settlement to the class members; (2) Wells Fargo would pay up to \$1.975 million in attorneys’ fees to class counsel; and (3) all causes of action against Defendants arising from the allegations contained in Plaintiff’s amended complaint and related to the merger — excluding actions to enforce the merger and claims alleging violations of federal securities laws — would be released and discharged. *Id.* at 68, 717 S.E.2d at 16. The MOU allowed class counsel to conduct confirmatory discovery in order to ensure the fairness of the settlement. *Id.*

The merger was approved on 23 December 2008 by 76% of the votes entitled to be cast on Wachovia’s outstanding common and preferred stock and consummated on 31 December 2008. *Id.* The trial court entered an order granting preliminary approval of the settlement and certifying the action as a non-opt out class action, naming Plaintiff as the class representative, Wolf Popper (a New York law firm) as Plaintiff’s lead counsel, and Greg Jones & Associates, P.A. (“Jones”) as Plaintiff’s local counsel. *Id.* at 68, 717 S.E.2d at 17.

On 20 August 2009, the trial court held a fairness hearing on the proposed settlement and heard from various parties who objected to

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the settlement, including Objectors. On 5 February 2010, the court entered an order approving the settlement and awarding class counsel \$932,621.98 in attorneys' fees.

Objectors appealed from this order, and in *Ehrenhaus I*, we affirmed the trial court's approval of the settlement but vacated the award of attorneys' fees. We remanded the case to the trial court for additional findings of fact and conclusions of law concerning the reasonableness of the attorneys' fee award, explaining that the lack of findings on this issue in the 5 February 2010 order prevented us from conducting meaningful appellate review of the fee award. *Id.* at 96, 717 S.E.2d at 33. Objectors filed a petition for discretionary review, which our Supreme Court denied on 12 December 2012. *See Ehrenhaus I*, 366 N.C. 420, 735 S.E.2d 332 (2012).

On remand, Plaintiff's counsel submitted a renewed fee application to the trial court seeking \$1,500,000.00 in attorneys' fees and expenses. Defendants and Objectors filed responses to Plaintiff's fee application, and the trial court held a hearing on the matter on 6 August 2013.

On 25 March 2014, Judge Murphy entered an order ("Judge Murphy's Order") containing a determination that an award of attorneys' fees was legally permissible in this case because the parties had "amicably settled the case" and Defendants had agreed in the settlement to pay the attorneys' fees and expenses of class counsel. Judge Murphy then engaged in a reasonableness analysis regarding the appropriate amount of fees and expenses to be awarded, applying the factors articulated in Rule 1.5 of the North Carolina Rules of Professional Conduct. Based on his analysis of these factors, Judge Murphy awarded \$1,056,067.57 in attorneys' fees and expenses to Wolf Popper. However, Judge Murphy also ruled that despite the existence of a valid fee-sharing agreement between Wolf Popper and Jones, the absence of evidence as to "the time expended, the rate charged, or the expenses incurred by Greg Jones in prosecuting this action as local counsel" rendered the court "unable to determine whether any division of fees with Greg Jones is reasonable." For this reason, Judge Murphy did not award any portion of the attorneys' fees to Jones.

Objectors have now once again appealed to this Court, asserting that there was no valid legal basis for an award of attorneys' fees in this case and that Judge Murphy's award must therefore be vacated. Plaintiff filed an electronic notice of appeal with the North Carolina Business Court in an attempt to cross-appeal from the portions of Judge Murphy's Order (1) awarding a lesser amount of attorneys' fees than Plaintiff had

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requested based on the trial court's conclusion that the application of a contingency multiplier was inappropriate; and (2) declining to award any attorneys' fees to Jones. Plaintiff later filed a written notice of appeal in Mecklenburg County Superior Court as required by the North Carolina Rules of Appellate Procedure, but this notice was untimely. Consequently, Judge James L. Gale dismissed Plaintiff's appeal in an order entered 16 July 2014 ("Judge Gale's Order"). On 1 August 2014, Plaintiff filed a notice of appeal from Judge Gale's Order dismissing his appeal.

Analysis

As discussed above, two separate appeals are currently before us. In COA14-1201, Objectors appeal from Judge Murphy's Order, arguing that there was no valid legal basis for an award of attorneys' fees in this case. In COA14-1083, Plaintiff appeals from Judge Gale's Order, which dismissed his attempted cross-appeal from Judge Murphy's Order because it was untimely. We address each of the parties' respective appeals in turn.

I. Objectors' Appeal (COA14-1201)

Objectors argue that there was no "legally cognizable basis to support the fee award contemplated by the settlement." For the reasons discussed below, we reject their argument on this issue.

A. *Ehrenhaus I*

In order to address Objectors' contentions in the present appeal, it is appropriate to review our prior decision in *Ehrenhaus I*. In *Ehrenhaus I*, Objectors made "four general arguments on appeal: (1) the trial court should have enjoined the Merger; (2) the trial court erred in certifying the Class; (3) the trial court erred in approving the Settlement; and (4) the trial court failed to consider critical evidence." *Ehrenhaus I*, 216 N.C. App. at 69, 717 S.E.2d at 17. In our opinion, we rejected the majority of Objectors' contentions, holding that the trial court neither erred in certifying the class nor in approving the challenged portions of the settlement. *Id.* at 82-93, 717 S.E.2d at 25-32.

Specifically, we held that the trial court's certification of the class action was proper because (1) the court conducted a sufficient inquiry into Plaintiff's qualifications to serve as class representative and Plaintiff was capable of adequately and fairly representing the interests of the class; (2) Plaintiff's counsel was capable of acting as class counsel based on their proficiency in litigating class action suits; and (3) the trial

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court's decision to certify the class as a non-opt-out class did not violate the procedural due process guarantees provided by the Constitution. *Id.* at 76-82, 717 S.E.2d at 20-25. With regard to Objectors' challenges to the settlement agreement, we concluded that the trial court correctly determined the terms were fair and reasonable based on a consideration of Plaintiff's likelihood of success, the benefits conferred upon the class, the sufficiency of the notice provided to the class concerning the terms of the settlement, and the "muted" reaction of the class to the settlement terms (as there were only two remaining objectors to the settlement at the time of the hearing). *Id.* at 92-93, 717 S.E.2d at 31-32.

However, with respect to the award of attorneys' fees, we concluded that the trial court's bare conclusion that Plaintiff's counsel would be awarded "\$932,621.98 in attorney fees and expenses for the representation of the Class in this action. . . . in accordance with the terms of the Stipulation [of settlement]" was insufficient to support an award of legal fees. We determined that the trial court's lack of findings and conclusions regarding both the legal basis for the fee award and the reasonableness of the amount awarded left us "unable to adequately review the decision of the trial court . . . on the issue of attorney's fees." *Id.* at 96, 717 S.E.2d at 33. As a result, we "vacate[d] that portion of the court's order" and remanded for the trial court to (1) articulate the legal basis for any fee it chose to award; and (2) analyze the reasonableness of any such award by considering the factors set out in Rule 1.5 of the North Carolina Rules of Professional Conduct. *Id.* We summarized the trial court's task on remand by means of the following specific directive:

While the trial court's analysis did partially complete its task, it did not finish the task of reviewing the necessary evidence to make its decision. On remand, we trust the trial court to examine additional evidence and to make the appropriate findings of fact and conclusions of law, including a reasoned decision on the issue of how it arrived at the figure to be awarded.

Id. at 99, 717 S.E.2d at 35. In conformity with our instructions in *Ehrenhaus I*, Judge Murphy entered the 25 March 2014 order that forms the basis of Objectors' present appeal.

B. Judge Murphy's Order

In accordance with our directions on remand, Judge Murphy held a new hearing, examined additional evidence regarding the legal fees and expenses incurred during the litigation, and entered an order (1)

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determining that an award of attorneys' fees in this case was legally permissible; and (2) concluding that an award of \$1,056,067.57 in legal fees and expenses was reasonable based on his consideration of each of the eight factors articulated in Rule 1.5 of the North Carolina Rules of Professional Conduct.

Regarding the legal basis of the attorneys' fee award, Judge Murphy noted in his order that the "American Rule" precludes an award of attorneys' fees to the party who prevails in litigation from the non-prevailing party. He then reasoned that "the scope of the American Rule [does not] reach cases such as this, where the parties have amicably reached an agreement *during the course of litigation* that one party will pay the attorney's fees and expenses of the other and neither party is a 'successful' litigant." Ruling that an award of attorneys' fees in this case was therefore legally permissible, he concluded that "the Court's sole directive, going forward, is to determine whether Plaintiff's attorney's fee award request of \$1.5 million is reasonable in light of Rule 1.5 . . ."

Judge Murphy then made detailed findings of fact addressing the Rule 1.5 factors, determining that (1) Wolf Popper spent 3,328.70 hours in representing Plaintiff in this case and that "prosecution of this action required an extensive amount of attorney time and labor, and the novel and complex nature of the issues involved required legal counsel to possess a high level of skill"; (2) representing Plaintiff in this action likely precluded Wolf Popper from other employment; (3) Wolf Popper's hourly rates are similar to those charged by a comparable North Carolina law firm and are not excessive; (4) Wolf Popper obtained a "highly favorable" result for the class members because it "ensured the Class would receive a more-detailed proxy statement regarding the Wachovia-Wells Fargo Merger and effectively extinguished the tail provision, allowing the shareholders to cast informed votes on the Merger and protect their interests"; (5) the circumstances of the case — particularly, the fact that there was a "narrow window of time available to Wachovia to exercise a viable option for the benefit of the company and its shareholders" — imposed stringent time limitations on Plaintiff's counsel; (6) "the nature of the professional relationship between Plaintiff and his counsel was complex and expansive" due to the complexity of the litigation and the large number of class members; (7) the attorneys employed by Wolf Popper were experienced in class action litigation and "were well suited to perform the services required of counsel in a complex case such as this"; and (8) in determining the proper amount of attorneys' fees to award, (a) the use of a contingency multiplier as requested by Plaintiff's counsel in the calculation of the fee award was inappropriate,

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and (b) after considering the factors set forth in Rule 1.5, an award of \$1,012,326.00 in attorneys' fees was reasonable.

Judge Murphy also determined that the legal expenses incurred in prosecuting the class action totaling \$43,741.57 were not excessive and should be part of the attorneys' fee award, thereby concluding that a total award of \$1,056,067.57, inclusive of both attorneys' fees and expenses, was appropriate. Finally, with regard to the division of fees between Wolf Popper and Jones, he concluded that although "a valid fee-sharing agreement" existed between the two firms, the absence of documentation in the record as to Jones' rates, time expended, and expenses incurred in connection with this litigation made it unfeasible to conduct "a proper analysis regarding the services rendered by Greg Jones to Plaintiff." The trial court thus awarded no portion of the fees to Jones because it was unable to determine whether the division of fees between him and Wolf Popper was reasonable.

C. Objectors' Arguments**1. Legal Basis for Award of Attorneys' Fees**

[1] The primary argument asserted by Objectors in this appeal is that no legal basis existed under North Carolina law for an award of attorneys' fees in these circumstances. Objectors contend that the only basis upon which attorneys' fees may properly be awarded in a class action in this State is through the application of the "common fund" doctrine. Under the common fund doctrine, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Taylor v. City of Lenoir*, 148 N.C. App. 269, 275, 558 S.E.2d 242, 247 (citation and quotation marks omitted), *disc. review denied*, 355 N.C. 500, 546 S.E.2d 235 (2002).

The common fund doctrine is premised "upon the ground that where one litigant has borne the burden and expense of the litigation that has inured to the benefit of others as well as to himself, those who have shared in its benefits should contribute to the expense." *Bailey v. State*, 348 N.C. 130, 160, 500 S.E.2d 54, 71 (1998) (citation and quotation marks omitted); *see also Taylor*, 148 N.C. App. at 275, 558 S.E.2d at 247 ("[A] plaintiff's attorney may himself present a claim to compensation and reimbursement for expenses from the fund, on the theory that he has provided or preserved a benefit — the fund itself — and that the reasonable value of his services should be borne proportionally by all plaintiffs" (citation and emphasis omitted)). In North Carolina, the common fund doctrine is a well-recognized and long-standing exception to

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the general policy — known as the American Rule — that “attorneys’ fees may not be awarded to the prevailing party without statutory authority.” *Faulkenbury v. Teachers’ & State Employees’ Ret. Sys. of N.C.*, 345 N.C. 683, 696, 483 S.E.2d 422, 430 (1997).

However, in the present case, Plaintiff’s lawsuit challenging the merger did not result in the establishment of a common fund. For this reason, this doctrine does not apply. *See Stephenson v. Bartlett*, 177 N.C. App. 239, 245, 628 S.E.2d 442, 446 (explaining that common fund doctrine “has no application . . . [where] there is no common fund resulting from the litigation”), *disc. review denied*, 360 N.C. 544, 635 S.E.2d 59 (2006).

A number of other jurisdictions recognize the “common benefit” doctrine as a second exception to the American Rule in the class action context. Under that theory, an award of attorneys’ fees to a litigant’s counsel is permissible when that litigant “confers a common monetary benefit upon an ascertainable stockholder class” in a shareholder action. *In re Wachovia S’holders Litig.*, 168 N.C. App. 135, 139, 607 S.E.2d 48, 50-51 (citation omitted), *disc. review denied*, 359 N.C. 411, 613 S.E.2d 25 (2005). However, as this Court has previously recognized, North Carolina has declined to adopt this doctrine. *Id.* at 139, 607 S.E.2d at 51 (explaining that North Carolina does not recognize the common benefit doctrine); *see also Madden v. Chase*, 84 N.C. App. 289, 292, 352 S.E.2d 456, 458 (declining to adopt common benefit doctrine to permit attorneys’ fee award in case involving corporate merger), *disc. review denied*, 320 N.C. 169, 358 S.E.2d 53 (1987).

Objectors assert that because (1) the common fund doctrine is the only exception to the American Rule in the context of class actions recognized under North Carolina law; and (2) that doctrine does not apply here, no legal basis existed for the trial court’s award of attorneys’ fees. The fatal flaw in Plaintiff’s argument is that the award of attorneys’ fees in this case did not trigger the operation of the American Rule because Defendants’ payment of Plaintiff’s attorneys’ fees was provided for in a voluntary settlement between the parties.

As discussed above, the American Rule provides that “a successful litigant may not recover attorneys’ fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute.” *Stillwell Enters., Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980). Here, however, because the parties entered into a voluntary settlement, there was no “successful litigant.” Therefore, the concerns the American Rule was intended to alleviate were not implicated. *See Crutchfield v. Marine Power Engine Co.*, 209 P.3d 295, 304

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(Okla. 2009) (recognizing that rationale underlying American Rule is that “attorney fee awards against the non-prevailing party have a chilling effect on open access to the courts” and “[e]xceptions to the American Rule are usually crafted to encourage the conservation of judicial resources by promoting settlement . . .”). Indeed, our caselaw expressly recognizes the enforceability of settlement agreements providing for the payment of one party’s attorneys’ fees by the other party to the lawsuit. *See Carter v. Foster*, 103 N.C. App. 110, 114-15, 404 S.E.2d 484, 487-88 (1991) (affirming trial court’s award of attorneys’ fees to plaintiff based on provision contained in negotiated settlement agreement providing for payment of such fees by defendants).

[2] This Court has reasoned that giving effect to a negotiated settlement agreement providing for the payment of one party’s attorneys’ fees by the other party is consistent with the well-established policy of encouraging the settlement of disputes between litigants and is therefore permissible despite a lack of explicit statutory authorization for such an award. *Id.* at 117, 404 S.E.2d at 489. In *Carter*, the plaintiff made various loans totaling \$150,000.00 to the defendants to support their business venture, which was ultimately unsuccessful. *Id.* at 111, 404 S.E.2d at 485. After the business venture failed, the plaintiff filed a complaint in superior court alleging that the defendants had defaulted on the loans. *Id.* at 112, 404 S.E.2d at 486. Before the matter went to trial, the parties negotiated a settlement resolving all of the plaintiff’s claims against the defendants and providing that the defendants would pay the plaintiff’s attorneys’ fees in the amount of 15% of the principal sums due on each of the outstanding debts. *Id.* While we recognized that there was no statutory basis for awarding attorneys’ fees to the plaintiff under these circumstances, we concluded that “[i]n view of long standing policy which encourages the settlement of legal disputes between the conflicting parties and the enforcement of settlement contracts, . . . the trial court did not err in awarding attorney’s fees . . .” *Id.* at 117, 404 S.E.2d at 489.

Thus, this Court has expressly recognized that “parties may, in settling disputes, agree to the payment of attorney’s fees” and that the courts should uphold such settlement agreements in accordance with our duty to encourage the voluntary resolution of legal disputes by the parties to those disputes. *Id.* at 115, 404 S.E.2d at 488; *see also Forsyth Mun. Alcoholic Beverage Control Bd. v. Folds*, 117 N.C. App. 232, 238, 450 S.E.2d 498, 502 (1994) (recognizing that general rule prohibiting award of attorneys’ fees in absence of statutory authority does not apply to fee-shifting provisions in settlement agreements); *Bromhal v. Stott*, 116 N.C. App. 250, 255, 447 S.E.2d 481, 484 (1994) (applying principle of

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law that “settlement agreements may include provisions for attorney’s fees” to separation agreement executed between husband and wife), *aff’d*, 341 N.C. 702, 462 S.E.2d 219 (1995).²

The present appeal is the first instance in which our Court has addressed the question of whether this doctrine is applicable in the class action context. We hold that it does, in fact, apply to settlements of class action lawsuits.

We recognize that class actions are unique. Unlike a traditional civil suit, a class action involves a group of individuals “so numerous that it is impractical to bring them all before the court.” *Ehrenhaus I*, 216 N.C. App. at 70, 717 S.E.2d at 18. Adjudicating a case and resolving a dispute that affects a class of individuals who are not before the court implicates “unique due process concerns.” *Id.* at 72, 717 S.E.2d at 19. Thus, while we are “generally indifferent to the nature of the parties’ agreement [in non-class actions] . . . we *are* concerned with the circumstances and terms of class action settlements.” *Id.* (internal citations and quotation marks omitted and emphasis added).

For these reasons, the settlement of class actions — unlike settlements in ordinary civil actions — must be judicially approved. *See* N.C.R. Civ. P. 23(c) (“A class action shall not be dismissed or compromised without the approval of the judge.”); *see also Ehrenhaus I*, 216 N.C. App. at 71, 717 S.E.2d at 18 (“Because settlements are ‘compromises,’ a class action [settlement] must . . . be subject to judicial review before it can be effectuated.”).

In *Ehrenhaus I*, we observed that “[w]hile our business courts have reviewed class action settlements with regularity under a ‘fairness, reasonable and adequacy’ standard based upon persuasive authority developed by federal courts and cases from other jurisdictions, no North Carolina appellate court has specifically reviewed this standard.” *Ehrenhaus I*, 216 N.C. App. at 71, 717 S.E.2d at 18. We proceeded to adopt the two-step procedure generally employed by federal courts in evaluating a class action settlement, directing trial courts (1) to analyze whether the proposed settlement is “within the range of possible approval” so as to require notification to the class of the proposed settlement; and

2. We note that a federal court applying North Carolina law likewise relied upon this principle in awarding attorneys’ fees based on a provision in the parties’ settlement agreement. *See VF Jeanswear Ltd. P’ship v. Molina*, 320 F.Supp.2d 412, 423 (M.D.N.C. 2004) (citing *Carter* and awarding attorneys’ fees based on “the well-established policy of encouraging settlement of disputes and enforcing settlement contracts”).

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(2) upon granting preliminary approval, to hold a fairness hearing “at which all interested parties are afforded an opportunity to be heard on the proposed settlement.” *Id.* at 73, 717 S.E.2d at 19 (citations and quotation marks omitted). At the fairness hearing, the trial court “must ascertain whether the proposed settlement is fair, reasonable and adequate.” *Id.* (citation and quotation marks omitted).

Objectors have failed to offer any persuasive argument as to why a trial court’s ability to evaluate the fairness and reasonableness of a class action settlement does not include the concomitant ability to determine whether a provision in such a settlement authorizing the payment of attorneys’ fees is likewise fair and reasonable. As we stated in *Ehrenhaus I*, public policy considerations favor the settlement of lawsuits, and “[t]his preference for settlement applies to class actions.” *Id.* at 72, 717 S.E.2d at 19. A ruling that courts may enforce settlement agreements providing for the payment of attorneys’ fees by one party to another party only in non-class action lawsuits would run counter to this public policy favoring the settlement of litigation. Moreover, as discussed above, we see no valid reason for creating such a distinction.

For all of these reasons, we hold that the parties to a class action may agree to a fee-shifting provision in a negotiated settlement that is — like all other aspects of the settlement — subject to the trial court’s approval in a fairness hearing. During the fairness hearing, the trial court must carefully assess the award of attorneys’ fees to ensure that it is fair and reasonable. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011) (explaining that in assessing attorneys’ fee provisions in class action settlements, “courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount”).

2. Scope of Remand

[3] Objectors also assert that Judge Murphy’s Order exceeded the scope of our instructions on remand in *Ehrenhaus I*, and as a result, his 25 March 2014 order was “unauthorized and void.” We disagree.

In *Ehrenhaus I*, we directed the trial court to complete its review of the evidence, articulate a legal basis for any award of attorneys’ fees, and “make the appropriate findings of fact and conclusions of law . . . on the issue of how it arrived at the figure to be awarded.” *Id.* at 99, 717 S.E.2d at 35. On remand, Judge Murphy did just that. In his order, he concluded that ordering Defendants to pay Plaintiff’s attorneys’ fees was legally permissible because — as discussed above — North Carolina law allows the judicial enforcement of settlement agreements in which, as here,

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the parties have agreed to a fee-shifting arrangement. Judge Murphy then engaged in an extensive reasonableness analysis before ultimately arriving at an award of \$1,056,067.57 in attorneys' fees and expenses, making detailed findings regarding his consideration of each of the factors contained in Rule 1.5 as he was instructed to do in *Ehrenhaus I. Id.* at 96, 717 S.E.2d at 33.

Objectors offer no argument challenging the sufficiency of these reasonableness findings, and we are satisfied that Judge Murphy properly fulfilled his obligation to ensure that the award of fees was fair and reasonable. While the amount of attorneys' fees he ultimately awarded is greater than the initial award of attorneys' fees that was before us in *Ehrenhaus I*, our prior opinion implicitly recognized the probability that "the figure to be awarded" on remand would vary from the initial amount awarded given that the trial court would be reviewing additional evidence in order to determine what amount of attorneys' fees would be fair and reasonable. *Id.* at 99, 717 S.E.2d at 35. We therefore conclude that the trial court's order did not exceed the limited scope of our remand.

II. Plaintiff's Appeal (COA14-1083)

[4] Plaintiff attempted to cross-appeal from Judge Murphy's Order in order to challenge the trial court's refusal to (1) allocate any portion of the attorneys' fee award to Plaintiff's local counsel; and (2) apply a contingency multiplier when calculating the amount of attorneys' fees to be awarded to Wolf Popper. However, Plaintiff did not properly give notice of appeal. Instead of filing the notice of appeal with the clerk of superior court as required by Rule 3(a) of the North Carolina Rules of Appellate Procedure, see N.C.R. App. P. 3(a) ("Any party entitled by law to appeal from a judgment or order of a superior . . . court rendered in a civil action . . . 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." (emphasis added)), the only notice of appeal submitted by Plaintiff within the requisite time period was filed with the North Carolina Business Court using its electronic filing system.

Plaintiff later attempted to remedy his error by filing a notice of appeal with the clerk of court in Mecklenburg County Superior Court. However, this notice of appeal was not filed until 15 May 2014 and, therefore, did not fall within the ten-day window of time for filing a cross-appeal that was triggered by the filing and service of Objectors' notice of appeal on 24 April 2014. See N.C.R. App. P. 3(c) ("If timely notice of

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appeal is filed and served by a party, any other party may file and serve a notice of appeal within ten days after the first notice of appeal was served on such a party.”). Therefore, because Plaintiff failed to give proper notice of appeal within the applicable deadline, Judge Gale dismissed his appeal on 16 July 2014. Plaintiff filed a notice of appeal from Judge Gale’s Order on 1 August 2014 and contends that Judge Gale erred in dismissing his appeal because Judge Gale’s Order did not “properly take into consideration the particular facts of this case.”

It is well established, however, that “[n]o appeal lies from an order of the trial court dismissing an appeal for failure to perfect it within apt time, the proper remedy to obtain review in such case being by petition for writ of certiorari.” *State v. Evans*, 46 N.C. App. 327, 327, 264 S.E.2d 766, 767 (1980). On 10 October 2014, Defendants filed a motion to dismiss Plaintiff’s appeal from Judge Gale’s Order. Four days later, on 14 October 2014, Plaintiff filed a petition for writ of certiorari seeking review of Judge Gale’s Order or, in the alternative, seeking “to afford Plaintiff the opportunity to appeal [Judge Murphy’s] Order even if its appeal of [Judge Gale’s] Order is denied.”

[5] Rule 21 of the Appellate Rules authorizes this Court to 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). However, “our Courts have frequently observed that a writ of certiorari is an extraordinary remedial writ.” *Branch Banking and Trust Co. v. Peacock Farm, Inc.*, ___ N.C. App. ___, ___, 772 S.E.2d 495, 500 (2015) (citation, quotation marks, and alteration omitted). In our view, the circumstances of the present case do not justify this extraordinary remedy. Indeed, Plaintiff’s appellate brief and petition for writ of certiorari primarily address the alleged errors in Judge Gale’s Order and offer little argument as to why the underlying decision of Judge Murphy not to award Jones a portion of the attorneys’ fees constituted error. Consequently, in our discretion, we decline to grant certiorari.³

3. While we express no opinion on this issue, we note that Judge Murphy’s Order does not contain language expressly foreclosing the possibility of Jones ultimately being deemed entitled to receive some portion of the attorneys’ fees at issue. Instead, Judge Murphy merely ruled that based upon the evidence before him at the time of his decision, he was “unable to determine whether any division of fees with Greg Jones is reasonable” and would not award a portion of the total attorneys’ fee award to Jones “until such time as there is sufficient evidence before the Court to support a proper analysis regarding the services rendered by Greg Jones to Plaintiff.”

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Conclusion

For the reasons stated above, we (1) affirm Judge Murphy's 25 March 2014 order in COA14-1201; and (2) dismiss Plaintiff's appeal and deny his petition for certiorari in COA14-1083.

AFFIRMED IN PART; DISMISSED IN PART.

Judges STROUD and DILLON concur.

WILLIAM H. HARRIS, JR., PLAINTIFF
v.
TESTAR, INC., TESTAR ENGINEERING, P.C., GARY L. WILLIAMS, DAVID G. BRINTLE,
AND HERBERT T. DIXON, JR., DEFENDANTS

No. COA14-1034

Filed 1 September 2015

1. Corporations—director—dismissal from company

The trial court did not err in granting defendants' motion for summary judgment as to all of plaintiff's claims in an action arising from his termination from a company that transported and handled hazardous materials for concealing his and his son's criminal and driving history. There were two issues: the trial court resolved the first (whether plaintiff resigned or was terminated) by construing the facts in the light most favorable to plaintiff (the non-moving party) and assuming that plaintiff was terminated, but found on the second (the basis of the termination) that there was no genuine issue of fact (plaintiff's concealment of driving and criminal records presented a potential threat to the ability of the company to operate).

2. Corporations—fiduciaries—concealment of records

Plaintiff breached a fiduciary duty to the corporation that terminated him where plaintiff owed the corporation a fiduciary duty as a director, the corporation's business was transporting hazardous materials and it was required to maintain accurate criminal and driving records, and plaintiff concealed the criminal and driving records of himself and his son.

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3. Corporations—shareholder’s reasonable expectations—terminated director

The trial court’s award adequately protected plaintiff’s reasonable expectations as a complaining shareholder where the company lawfully terminated plaintiff by applying the Stockholders’ agreement.

Appeal by plaintiff from order entered on 25 March 2014 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals on 5 March 2015.

Law Office of Matthew I. Van Horn, PLLC, by Matthew I. Van Horn, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Charles F. Marshall and Eric M. David, for defendant-appellees.

STROUD, Judge.

William H. Harris, Jr. (“plaintiff”) appeals from an order in which the trial court (1) granted a motion for summary judgment by Testar, Inc., Testar Engineering, P.C., Gary L. Williams, David G. Brintle, and Herbert T. Dixon, Jr. (collectively, “defendants”) as to all of plaintiff’s claims; and (2) granted defendants’ motion for summary judgment as to their counterclaims for fraud and breach of fiduciary duty. We affirm.

I. Background

In 1998, plaintiff, Williams, Brintle, and Dixon formed Testar, Inc. Each of the four men served on its Board of Directors and worked as employees. Testar provides air emissions testing services for clients in the municipal waste industry. To provide these services, Testar employees travel to various industrial facilities throughout the eastern United States and transport and handle hazardous materials.

In October 2003, plaintiff, Williams, Brintle, and Dixon executed a Stockholders’ Agreement. Each of the four men owned 1,000 shares of stock. Section 4(i) of the Stockholders’ Agreement provides that

the employment of a Stockholder may only be terminated for good cause, and based on a breach of fiduciary duty of a Stockholder to [Testar] and the other Stockholders, or on some intentional or grossly negligent action taken by said Stockholder which puts [Testar] or the other

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Stockholders at substantial risk of civil or criminal penalties or sanctions.

Section 4(c) provides that upon termination, a stockholder must immediately sell all of his stock to Testar. Section 4(f) further provides that the purchase price per share of stock is \$1.00 and that this price may only be changed by the unanimous agreement of the Stockholders. Section 4(g) also provides that “[e]ach Stockholder . . . agrees to waive any and all claims against [Testar] or the other Stockholders for any value of Stock except as provided herein.” Section 15 provides that the agreement “contains the entire understanding among the parties[.]” and section 20 provides that the agreement “shall not be modified or amended except by unanimous written agreement of the Stockholders.”

On 6 January 2007, plaintiff’s son, Barrett Harris, was charged with driving by person less than 21 years after consuming alcohol or drugs and simple possession of a Schedule VI substance. *See* N.C. Gen. Stat. §§ 20-138.3, 90-95(d)(4) (2007). The trial court dismissed the charges. On 15 June 2007, plaintiff and Barrett were charged with maintaining a place for using, keeping, or selling a controlled substance and simple possession of marijuana. *See id.* §§ 90-95(d)(4), -108(a)(7) (2007). Barrett was also charged with possession of drug paraphernalia. *See id.* § 90-113.22 (2007). Both plaintiff and Barrett were convicted of simple possession of marijuana, and Barrett was also convicted of possession of drug paraphernalia.

In 2007, plaintiff, Williams, Brintle, and Dixon learned that the U.S. Department of Transportation (“DOT”) required Testar to perform annual driving record checks for all employees. In August 2009, upon plaintiff’s recommendation, Barrett began working for Testar. In September 2009, plaintiff, Williams, Brintle, and Dixon learned that DOT regulations also required Testar to have a security plan, to provide Testar employees with Hazardous Materials (“HAZMAT”) training, and to perform criminal background checks on all employees. Dixon thus requested that plaintiff run criminal and driving record checks on all HAZMAT employees, which included plaintiff and Barrett. In September 2009, plaintiff stored all of these records in sealed envelopes to conceal his and Barrett’s criminal and driving history. Plaintiff also intentionally kept an incomplete record of Barrett’s criminal history. Plaintiff told Dixon that he had run the criminal background checks and that no employee had ever been arrested.

On 10 July 2010, plaintiff was charged with driving while impaired (“DWI”), and his driver’s license was revoked for thirty days. *See id.*

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§§ 20-16.5, -138.1 (2009). Despite the revocation, from 18 July 2010 to 24 July 2010, during a Testar business trip, plaintiff rented a car.

In May 2012, Williams, Brintle, and Dixon discovered plaintiff's and Barrett's June 2007 criminal charges and plaintiff's July 2010 DWI. On 29 May 2012, Williams, Brintle, and Dixon held a meeting in which they voted to remove plaintiff from Testar because of plaintiff's concealment of his and Barrett's criminal and driving records. Williams, Brintle, and Dixon then hired a locksmith to change the locks to Testar's office.

On 8 June 2012, plaintiff again was charged with DWI and his driver's license was revoked for thirty days. *See id.* §§ 20-16.5, -138.1 (2011). Plaintiff was also charged with transporting an open container of alcohol. *See id.* § 20-138.7(a)(1) (2011).

On or about 3 August 2012, plaintiff sued Williams, Brintle, Dixon, and Testar for oppression as to his shares of stock, among other claims, and alleged that they had wrongfully terminated him. Plaintiff also sought a preliminary injunction. On 7 September 2012, the trial court denied plaintiff's claim for a preliminary injunction but ordered Testar to place plaintiff on administrative leave until 29 October 2012. On 31 October 2012, Williams, Brintle, and Dixon held a meeting and decided to terminate plaintiff's employment because of plaintiff's concealment of his and Barrett's criminal and driving records.

On 5 November 2012, Williams, Brintle, Dixon, and Testar moved to dismiss, answered, and counterclaimed for fraud and breach of fiduciary duty, among other counterclaims. Williams, Brintle, and Dixon formed Testar Engineering, P.C., and on 18 June 2013, plaintiff amended his complaint and added Testar Engineering, P.C. as a defendant. On 27 January 2014, defendants moved for summary judgment, and on 28 February 2014, plaintiff moved for summary judgment.

On 25 March 2014, the trial court (1) granted defendants' motion for summary judgment as to all of plaintiff's claims, thereby dismissing all of plaintiff's claims; (2) granted defendants' motion for summary judgment as to their counterclaims for fraud and breach of fiduciary duty; and (3) granted plaintiff's motion for summary judgment as to defendants' remaining counterclaims, thereby dismissing those counterclaims. In its order, the trial court acknowledged that the parties disputed whether plaintiff resigned or was terminated at the 29 May 2012 meeting. The trial court construed the facts in the light most favorable to plaintiff and assumed that plaintiff did not resign but was terminated at the 29 May 2012 meeting. The trial court awarded defendants \$1 in nominal damages and released to plaintiff \$1,000, which had been deposited by

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defendants with the trial court, in exchange for plaintiff's 1,000 shares in Testar, thereby terminating plaintiff's interest in Testar. On 24 April 2014, plaintiff timely filed a notice of appeal.¹

II. Standard of Review

We review a trial court's summary judgment order *de novo* and view the evidence in the light most favorable to the non-movant. *Erthal v. May*, 223 N.C. App. 373, 377, 736 S.E.2d 514, 517 (2012), *appeal dismissed and disc. review denied*, 366 N.C. 421, 736 S.E.2d 761 (2013). We engage in a two-part analysis of whether:

(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.

Summary judgment is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party.

Id. at 378, 736 S.E.2d at 517 (citations and quotation marks omitted).

III. Motion for Summary Judgment

Plaintiff argues that the trial court erred in (1) granting defendants' motion for summary judgment as to all of plaintiff's claims; and (2) granting defendants' motion for summary judgment as to their counterclaim for breach of fiduciary duty.

A. Plaintiff's Removal From Testar

[1] Plaintiff first contends that there is a genuine issue of material fact as to (1) whether Testar terminated plaintiff; and (2) if Testar did terminate plaintiff, the basis for that termination. Although there is a factual

1. Defendants argue that plaintiff did not appeal the portion of the order which granted summary judgment in favor of defendants as to their counterclaims for fraud and breach of fiduciary duty. But in his notice of appeal, plaintiff appealed the entire order except the portion in which the trial court granted summary judgment in favor of plaintiff as to defendants' remaining counterclaims. We therefore hold that *plaintiff* has properly appealed the portions of the order that plaintiff has argued on appeal, in which the trial court entered summary judgment against him.

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dispute as to whether plaintiff resigned or was terminated at the 29 May 2012 meeting, the trial court resolved this factual dispute in plaintiff's favor. In his complaint, plaintiff alleged that Testar wrongfully terminated him. Additionally, in his deposition, plaintiff stated that, at the 29 May 2012 meeting, he was "forced" to leave. In his deposition, plaintiff also stated that, at the 31 October 2012 meeting, Testar terminated him. Accordingly, we hold that the trial court properly resolved this factual dispute in plaintiff's favor by assuming that Testar terminated plaintiff. *See id.* at 377, 736 S.E.2d at 517. We additionally hold that there is no genuine issue of material fact as to the basis for plaintiff's termination, because defendants proffered uncontroverted evidence that Testar terminated plaintiff because of plaintiff's concealment of his and Barrett's criminal and driving history. In addition, because of the nature of Testar's business and the need for compliance with DOT HAZMAT rules, plaintiff's concealment of his and his son's criminal and driving records created a potential threat to Testar's ability to continue to operate its business.

B. Breach of Fiduciary Duty

[2] Plaintiff next contends that the trial court erred in concluding that he breached his fiduciary duty to Testar. A director of a corporation owes that corporation a duty of loyalty. *See* N.C. Gen. Stat. § 55-8-30(a) (3) (2013). In the context of a fiduciary relationship, "there is a duty to disclose all material facts[.]" *See Vail v. Vail*, 233 N.C. 109, 114, 63 S.E.2d 202, 206 (1951); *Sidden v. Mailman*, 150 N.C. App. 373, 376, 563 S.E.2d 55, 58 (2002) ("A duty to disclose arises where a fiduciary relationship exists between the parties to a transaction." (quotation marks and brackets omitted)), *cert. denied*, 356 N.C. 678, 577 S.E.2d 888 (2003).

As a director, plaintiff owed Testar a fiduciary duty. *See* N.C. Gen. Stat. § 55-8-30(a)(3). There is no dispute that after his fellow directors entrusted plaintiff to run complete and accurate criminal and driving record checks, plaintiff intentionally concealed his June 2007 and July 2010 criminal charges, which included a DWI charge, and Barrett's January 2007 and June 2007 criminal charges, which included a charge of driving by person less than 21 years after consuming alcohol or drugs. *See id.* §§ 20-138.1, -138.3. Plaintiff's concealment constitutes a failure to disclose material facts, especially in light of Testar's business of transporting hazardous materials and DOT's requirement that it maintain accurate criminal and driving records of all HAZMAT employees, which included plaintiff and Barrett. Additionally, we note that defendants proffered uncontroverted evidence that plaintiff affirmatively stated that no employee had ever been arrested. Accordingly, we hold that plaintiff

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breached a fiduciary duty to Testar. *See Vail*, 233 N.C. at 114, 63 S.E.2d at 206; *Sidden*, 150 N.C. App. at 376, 563 S.E.2d at 58.

C. Reasonable Expectations of Minority Shareholder

[3] Plaintiff finally contends that the trial court erred in failing to protect his “reasonable expectations” as a complaining shareholder, in contravention of *Meiselman v. Meiselman*, 309 N.C. 279, 301, 307 S.E.2d 551, 564 (1983), and N.C. Gen. Stat. §§ 55-14-30(2)(ii), -14-31(d) (2013). For plaintiff to obtain relief under a “reasonable expectations” analysis, he must prove that (1) he had one or more substantial reasonable expectations known or assumed by the other participants; (2) the expectation has been frustrated; (3) the frustration was without fault of plaintiff and was in large part beyond his control; and (4) under all of the circumstances of the case, plaintiff is entitled to some form of equitable relief. *Meiselman*, 309 N.C. at 301, 307 S.E.2d at 564.

In order for plaintiff’s expectations to be reasonable, they must be known to or assumed by the other shareholders and concurred in by them. Privately held expectations which are not made known to the other participants are not “reasonable.” Only expectations embodied in understandings, express or implied, among the participants should be recognized by the court.

Id. at 298, 307 S.E.2d at 563. However,

a complaining shareholder’s reasonable expectations cannot be viewed in a vacuum; rather they must be examined and re-evaluated over the entire course of the various participants’ relationships and dealings. Furthermore, these expectations are not limited to those memorialized in the by-laws or other written instruments; they must be gleaned from the parties’ actions as well as their signed agreements.

Royals v. Piedmont Electric Repair Co., 137 N.C. App. 700, 706, 529 S.E.2d 515, 519 (citation, quotation marks, and brackets omitted), *disc. review denied*, 352 N.C. 357, 544 S.E.2d 548 (2000).

Here, section 4(i) of the Stockholders’ Agreement provides that

the employment of a Stockholder may only be terminated for good cause, and based on a breach of fiduciary duty of a Stockholder to [Testar] and the other Stockholders, or on some intentional or grossly negligent action taken by said Stockholder which puts [Testar] or the other

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Stockholders at substantial risk of civil or criminal penalties or sanctions.

Section 4(c) provides that upon termination, a stockholder must immediately sell all of his stock to Testar. Section 4(f) further provides that the purchase price per share of stock is \$1.00. Because we hold that plaintiff breached a fiduciary duty to Testar, we hold that Testar lawfully terminated plaintiff under section 4(i), which triggered plaintiff's duty to sell his 1,000 shares to Testar at \$1.00 per share under sections 4(c) and 4(f). We thus hold that the trial court adequately protected his "reasonable expectations" as a complaining shareholder by awarding him \$1,000 in exchange for his 1,000 shares in Testar.

Relying on *Royals*, plaintiff argues that the Stockholders' Agreement does not contain all of his reasonable expectations. *Royals*, 137 N.C. App. at 706, 529 S.E.2d at 519. But plaintiff fails to articulate any expectations beyond this agreement. In his deposition, plaintiff admitted that the Stockholders' Agreement "is the document that sets forth [his] rights, responsibilities, and expectations as a shareholder[.]" Additionally, on appeal, plaintiff admits that under this agreement, he had "reasonable expectations that [he] . . . would *not* receive a fair value if [he] breached a fiduciary duty." (Emphasis added). Moreover, we note that section 4(g) of the agreement provides that "[e]ach Stockholder . . . agrees to waive any and all claims against [Testar] or the other Stockholders for any value of Stock except as provided herein." Additionally, section 15 of the agreement provides that the agreement "contains the entire understanding among the parties[.]" and section 20 provides that the agreement "shall not be modified or amended except by unanimous written agreement of the Stockholders." Accordingly, we distinguish *Royals* and hold that the trial court adequately protected plaintiff's "reasonable expectations" by applying the Stockholders' Agreement.

IV. Conclusion

For the foregoing reasons, we hold that the trial court did not err in (1) granting defendants' motion for summary judgment as to all of plaintiff's claims; and (2) granting defendants' motion for summary judgment as to their counterclaim for breach of fiduciary duty. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges DILLON and INMAN concur.

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IN THE MATTER OF M.P.M.

No. COA15-238

Filed 1 September 2015

1. Termination of Parental Rights—findings of fact—abuse by other parent—failure to appreciate

In its order terminating the parental rights of respondent-father, the trial court's findings of facts were supported by clear, cogent, and convincing evidence. Respondent's failure to understand or appreciate the mother's established pattern of child abuse and his own inability to protect the child was supported by testimony from the social worker and his psychological evaluation.

2. Termination of Parental Rights—conclusions of law—abuse of siblings—danger from other parent

In its order terminating the parental rights of respondent-father, the trial court's findings of fact supported its conclusion that respondent neglected his child at the time of the termination hearing and that there was a likelihood of repetition of neglect. The findings showed that respondent and the child's mother had severely abused the child's siblings, respondent was dishonest about his role in the abuse and his continued contact with the mother, and respondent lacked understanding of the danger that the mother posed to the child.

TYSON, Judge, dissenting.

Appeal by respondent from order entered 12 December 2014 by Judge Michelle Fletcher in District Court, Guilford County. Heard in the Court of Appeals on 27 July 2015.

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

Mary McCullers Reece, for respondent-appellant.

The Opoku-Mensah Law Firm, by Gertrude Opoku-Mensah, for guardian ad litem.

STROUD, Judge.

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Respondent appeals from an order terminating his parental rights to his child M.P.M. (hereinafter referred to as “May”) on the ground that he neglected the juvenile.¹ See N.C. Gen. Stat. § 7B-1111(a)(1) (2013). Respondent contends that the trial court erred in (1) making certain findings of fact; and (2) concluding that Respondent neglected May at the time of the termination hearing and that there was a likelihood of repetition of neglect. We affirm.

I. Background

In 1999, Arlington County Department of Social Services in Virginia took Arnold, Mother’s son, into custody. A court in Arlington County adjudicated Arnold to be abused and neglected, and on or about 24 October 2000, the court terminated Mother’s parental rights as to Arnold. In 2001, Margaret was born, and in 2003, Carl was born. In 2003, Mother began a romantic relationship with Mr. F. While on probation in Virginia, Mother and Mr. F. moved to Mecklenburg County. In 2005, Katie was born.

In 2006, Mother and Mr. F. were arrested in Mecklenburg County for absconding from their probation. They were extradited to Virginia where they began serving prison sentences for grand larceny by credit card fraud. On or about 1 September 2006, Mecklenburg County Department of Social Services took Margaret, Carl, and Katie into custody. On or about 18 October 2006, a district court in Mecklenburg County adjudicated the juveniles to be neglected and dependent. In December 2006, while in prison, Mother gave birth to Lance. In February or March 2007, Mr. F. was released from prison and moved back to Mecklenburg County. In 2008, Mr. F. gained custody of Margaret, Carl, Katie, and Lance. In July 2009, Mother was released from prison and, in August 2009, she returned to Mecklenburg County.

On or about 14 August 2009, Katie was hospitalized for severe injuries she sustained from being beaten while in the care of Mr. F. Mr. F. coached the juveniles on what to say when asked how Katie was injured. Mecklenburg County Department of Social Services again took custody of Margaret, Carl, Katie, and Lance, and a district court in Mecklenburg County adjudicated the juveniles to be abused, neglected, and dependent. Mother entered into a service agreement with Mecklenburg County Department of Social Services to work toward regaining custody of her children.

1. We use pseudonyms to protect the identity of the juveniles.

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In September 2009, Mother moved from Mecklenburg County to Guilford County. In May 2010, Mother began a romantic relationship with Respondent. Shortly thereafter, Mother and Respondent began living together. In November 2010, Mecklenburg County Department of Social Services returned Margaret, Carl, Katie, and Lance to Mother. May, the subject juvenile of this case, was born in February 2011, and Respondent was subsequently determined by DNA paternity testing to be her biological father.

During the period from November 2010 to October 2012 while the juveniles resided with Mother and Respondent, Mother habitually physically and emotionally abused May's four half-siblings. This abuse included beating them, hitting them with items such as shoes, belts, and metal hangers, kicking them in the stomach, screaming at them, and grabbing and pulling them by the hair. Mother often held her hand over the children's mouths and noses to prevent them from screaming while she beat them. She also often put her foot on their backs to hold them down on the floor so they could not escape. During one incident when Respondent attempted to intervene on behalf of Carl, Mother told him that Carl was her child and that he could leave if he did not like the way she disciplined him. Respondent did leave the home, leaving his daughter May with Mother, and returned the next morning.

At some point between November 2010 and October 2012, Respondent began participating in the abuse of May's four half-siblings. On one occasion, as punishment for playing with matches, Respondent and Mother held Carl's face close to a hot burner. On other occasions, Respondent hit the children with shoes, and on at least one occasion, Respondent hit the children with a copper wire.

On 1 October 2012, Mother threatened to strike Carl with an axe. The following day, Margaret disclosed to a social worker the incident with the axe and the daily abuse inflicted upon the children. On or about 3 October 2012, Guilford County Department of Health and Human Services ("DHHS") gained custody of all five juveniles. On 19 December 2012, Respondent signed a service agreement that addressed emotional and mental health, parenting, family relationships, housing, and employment matters. On 7 January 2013, the trial court adjudicated Margaret, Carl, Katie, and Lance to be abused, neglected, and dependent and adjudicated May to be neglected and dependent. The trial court awarded Respondent one hour of supervised visitation per week. On 23 January 2013, the trial court directed DHHS to proceed with termination of parental rights. On 20 March 2013, DHHS filed a petition to terminate

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the parental rights of Respondent as to May and the parental rights of Mother as to all five children.

Respondent took a parenting psychological evaluation with Dr. Michael McColloch and a pre-psychiatric evaluation, but he failed to comply with Dr. McColloch's recommendation for a full psychiatric evaluation, because he made it clear that he was unwilling to take any medications, which may be recommended as a result of the evaluation. The parenting psychological evaluation noted "personality difficulties," including depressive, avoidant, and schizoid characteristics.

During a session with his individual therapist, Respondent denied that he had ever hit the children. At the time of the filing of the petition in March 2013, Respondent agreed to move out of Mother's home and to cease all contact with Mother. But Respondent continued to call, text, and send photographs of May to Mother, which he took during his visits with May, until October 2013 when Robert McEntire, the DHHS social worker in charge of the case, discovered their continued contact. During this period, Respondent repeatedly falsely reported to McEntire that he was having no contact with Mother. After McEntire confronted Respondent, Respondent explained that "he felt sorry for her" and that "she ha[d] suffered enough." Respondent also stated that he could resume his relationship with Mother if he was certain that she had her anger under control, and that the risk of harm to his daughter if she were left alone with Mother "would be no different than leaving her with a babysitter or someone else because you can't predict what someone will do." In April 2014 during a visit with May, Respondent stated that he was open to leaving May in Mother's care during the day because "she would never hurt her."

The trial court conducted the termination hearing on 11 August 2014, 8 September 2014, 9 September 2014, and 7 October 2014. On 12 December 2014, the trial court concluded that Respondent had neglected May, that Respondent neglected May at the time of the termination hearing, and that there is a likelihood of repetition of neglect should Respondent regain custody of May. *See* N.C. Gen. Stat. § 7B-1111(a)(1). The trial court also concluded that termination of his parental rights was in May's best interest. The trial court further concluded that Mother neglected all five children and that termination of her parental rights was in their best interest. Respondent gave timely notice of appeal.

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II. Termination of Parental Rights

A. Standard of Review

Termination of parental rights proceedings are conducted in two stages: adjudication and disposition. In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B-1111(a). This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law. If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary. However, the trial court's conclusions of law are fully reviewable *de novo* by the appellate court.

In re A.B., ___ N.C. App. ___, ___, 768 S.E.2d 573, 575 (2015) (citations, quotations marks, and brackets omitted).

B. Findings of Fact

[1] Respondent contends that the following findings are not supported by clear, cogent, and convincing evidence:

(1) Since [May] has been in custody, [Respondent] never demonstrated that he learned anything from therapy in terms of how he would keep [May] safe in the future. To the contrary, [Respondent] has continued to believe that allowing [Mother] to watch [May] while he works is a viable option. [Respondent's] explanation for his contact with [Mother] was that he felt sorry for her and that she "has been through enough." [Respondent's] conduct and statements reveal that his concern for [Mother] is greater than his desire to reunify with [May].

....

(3) It is clear that [Respondent] has not gained an adequate understanding of what unfolded during his relationship with [Mother], the seriousness of what transpired in

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that home, and the role he played in creating and fostering an injurious and abusive environment for his daughter.

(4) [Respondent's] testimony and history reveal that he is unable or [un]willing to protect [May] from abuse and harm, particularly if doing so would require excluding [Mother] from [May's] life. [Respondent] does not have a protective instinct for his child that is strong enough to overcome his need to submit to a dominant personality. [Respondent] lacks the ability to protect [May] from a dominant personality such as that of [Mother].

Respondent argues that the evidence showed that he followed his case plan by establishing paternity, undergoing mental health evaluations, engaging in parent-centered therapy, completing his individual therapy to his therapist's satisfaction, establishing a home apart from Mother, eventually ceasing contact with Mother, and engaging in regular, appropriate and affectionate visitations with May. He submits that this evidence showed that he had demonstrated "sufficient growth as a parent to merit a chance at reunification with his daughter." Our dissenting colleague agrees with Respondent and takes the position that Respondent is being punished for Mother's actions. Although we agree that Respondent may be a better parent than Mother and that he made some progress, that is not the question before us. The trial court properly addressed the concerns about each parent separately. Ultimately, the trial court based its decision primarily upon Respondent's failure to understand or appreciate the extent and effects of Mother's established pattern of child abuse and his inability to protect May. And this is why Mother's history of child abuse is relevant to the determination about Respondent.

We hold that clear, cogent, and convincing evidence supports the challenged findings of fact. *See id.* at ___, 768 S.E.2d at 575. McEntire, the DHHS social worker who had worked on this case since October 2012 when the children came into DHHS custody, testified that, during a session with his individual therapist, Respondent denied that he had ever hit the children. McEntire also testified that, after DHHS had filed its petition in March 2013 and Respondent had agreed to cease all contact with Mother, Respondent continued to call, text, and send photographs of May to Mother, which he took during his visits with her, until October 2013 when McEntire discovered their continued contact. McEntire testified that during this period, Respondent repeatedly falsely reported to him that he was having no contact with Mother. McEntire further testified that after he confronted Respondent, Respondent explained that "he

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felt sorry for her” and that “she ha[d] suffered enough.” McEntire also testified that Respondent stated that he could resume his relationship with Mother if he was certain that she had her anger under control, and that the risk of harm to his daughter if she were left alone with Mother “would be no different than leaving her with a babysitter or someone else because you can’t predict what someone will do.” McEntire further testified that, in April 2014 during a visit with May, Respondent stated that he was open to leaving May with Mother during the day because “she would never hurt her.” Finally, McEntire testified that he was concerned that Respondent failed to comprehend the dangers or risks involved in resuming a relationship with Mother or allowing May to remain alone with Mother.

In addition, although Respondent did have a parenting psychological evaluation and a pre-psychiatric evaluation, he failed to comply with Dr. McColloch’s recommendation for a full psychiatric evaluation, because he made it clear that he was unwilling to take any medications, which may be recommended as a result of the evaluation. The parenting psychological evaluation noted “personality difficulties,” including depressive, avoidant, and schizoid characteristics. Accordingly, we hold that clear, cogent, and convincing evidence supports the challenged findings of fact. *See id.*, 768 S.E.2d at 575.

C. Conclusion of Law

[2] Respondent next contends that the trial court erred in concluding that Respondent neglected May at the time of the termination hearing and that there was a likelihood of repetition of neglect. To terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), the trial court must conclude that the parent has abused or neglected the juvenile. N.C. Gen. Stat. § 7B 1111(a)(1). N.C. Gen. Stat. § 7B-101(15) defines a “neglected juvenile” as

[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile’s parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or *who lives in an environment injurious to the juvenile’s welfare*; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or *lives in a home where another juvenile has*

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been subjected to abuse or neglect by an adult who regularly lives in the home.

Id. § 7B-101(15) (2013) (emphasis added).

“A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding.” *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). The trial court must consider evidence of any changed circumstances since the time of a prior adjudication of neglect and the probability that the neglect will be repeated if the child is returned to the parent’s care. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). In predicting the probability of repetition of neglect, the court “must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.” *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999).

Here, the trial court made the following findings of fact in support of its conclusion of neglect:

36. Grounds exist to terminate the parental rights of [Respondent] pursuant to N.C.G.S. § 7B-1111(a)(1). [Respondent] has neglected the juvenile [May], the neglect continues to date, and there is a likelihood of the repetition of neglect if [May] were returned to [Respondent]. [Respondent’s] past neglect includes his use of inappropriate discipline on [May’s] older siblings with [May] in the home, including hitting the siblings with sandals and assisting [Mother] in holding [Carl’s] face close to a hot burner and his failure to protect [May] from the abusive environment of the home he shared with [Mother]. [Respondent] demonstrated a lack of protective instinct and allowed his relationship with [Mother] to dominate over the safety of his child and her siblings. [Respondent] demonstrated poor parenting judgment by leaving the residence during [Carl’s] beating and not taking protective measures such as contacting police or at least removing his own child. When [Respondent] was asked why he did not take the children or at least [May] with him, [Respondent] responded that he did not want to make [Mother] angry. [Respondent’s] own fear caused him to leave his daughter and her siblings alone with a violent perpetrator, revealing that his fear is greater than his protective instinct. [Respondent’s] neglect of [May] has been

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ongoing through the present and he is currently neglecting [May] as indicated below.

k. [(sic)] [Respondent] was not fully forthright and honest with Dr. McColloch or his therapist as required to adequately address his issues. In the report of the Parenting/Psychological Evaluation performed on [Respondent], Dr. McColloch noted that [Respondent] was convincing in his assertion that he could end his relationship with [Mother] and that he had no problem with not having contact with her. Despite appearing convincing to Dr. McColloch, [Respondent] did not cease his contact with [Mother]. Furthermore [Respondent] did not disclose to Dr. McColloch that he had participated in the abuse by hitting [May's] siblings with items such as a sandal and by assisting [Mother] in holding [Carl's] face close to a hot burner. [Respondent] also did not inform his individual therapist of his continued contact with [Mother] until after the Social Worker informed the therapist of the contact and the therapist confronted [Respondent].

l. From the outset of the case, [Respondent] was allowed to have supervised visitation with [May] for one hour once a week. Although [Respondent] requested that the Court increase his visits, the Court declined to do so during the two years [May] has been in custody. The Court in the underlying juvenile proceeding never increased [Respondent's] visits and never advanced [Respondent] to having unsupervised visits. It is clear that the Court in the underlying juvenile proceeding determined that [Respondent] had not reached a point where he could safely and effectively have unsupervised visits with [May].

m. It is clear that [Respondent] complied with the requirements of his service agreement in terms of attending appointments and completing tasks. However, the particular circumstances of this case require more than going through the motions of attending ten therapy sessions and interacting appropriately during one hour weekly supervised visitation sessions. When asked during this trial what he learned from his individual therapy, [Respondent's]

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response was only that he learned to be patient with the children and to give them things. [Respondent] has not learned that his first responsibility is to protect his daughter. While patience is an important parenting skill, the most crucial parenting skill for the children in this case is to be protected from harm and to be made to feel safe.

(1) Since [May] has been in custody, [Respondent] never demonstrated that he learned anything from therapy in terms of how he would keep [May] safe in the future. To the contrary, [Respondent] has continued to believe that allowing [Mother] to watch [May] while he works is a viable option. [Respondent's] explanation for his contact with [Mother] was that he felt sorry for her and that she "has been through enough." [Respondent's] conduct and statements reveal that his concern for [Mother] is greater than his desire to reunify with [May].

(2) The Court observed [Respondent] throughout all of the hearing dates for this trial and throughout all of the testimony that was relayed during this trial. [Respondent] showed no emotion and a complete lack of empathy during the testimony describing what the children went through in his home. At the close of the evidence on grounds, when the Court announced its decision that grounds exist to terminate the parental rights of each of the parents, [Respondent] smiled. Upon seeing this, the Court specifically asked [Respondent] if he understood the Court's decision and [Respondent] responded in the affirmative and offered no explanation for his inappropriate expression.

(3) It is clear that [Respondent] has not gained an adequate understanding of what unfolded during his relationship with [Mother], the seriousness of what transpired in that home, and the role he played in creating and fostering an injurious and abusive environment for his daughter.

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(4) [Respondent's] testimony and history reveal that he is unable or [un]willing to protect [May] from abuse and harm, particularly if doing so would require excluding [Mother] from [May's] life. [Respondent] does not have a protective instinct for his child that is strong enough to overcome his need to submit to a dominant personality. [Respondent] lacks the ability to protect [May] from a dominant personality such as that of [Mother].

n. There is a likelihood of the repetition of neglect by [Respondent]. It is reasonably foreseeable that [Respondent's] neglectful behaviors would continue and that he would again allow [May] to live in an injurious environment if [May] were returned to him. Prior to removal, [Respondent] did not believe that [Mother] or the abusive environment in his home posed a risk to [May's] physical or emotional well-being. It is clear from his testimony during this hearing that, despite the therapy he received and the juvenile court proceedings he has participated in, [Respondent] continues to believe that is true.

We hold that the above findings of fact support the trial court's conclusion of law that Respondent neglected May at the time of the termination hearing and that he was likely to repeat the neglect. DHHS removed May from Respondent and Mother's home, because Respondent and Mother severely abused May's siblings. But as discussed above, during an individual therapy session, Respondent denied that he had ever hit the children. From April 2013 to October 2013, Respondent repeatedly reported that he had no contact with Mother, when, in fact, he was calling, texting, and sending her photographs of May. Additionally, Respondent stated that he still believes that allowing Mother to watch May during the day is an appropriate option.

Respondent specifically asserts that the trial court's findings of fact that during the termination hearing, Respondent "showed no emotion and a complete lack of empathy" and that he inappropriately smiled do not support its conclusion of neglect. But "[a]ll of the findings of fact regarding respondent's in-court demeanor, attitude, and credibility . . . are left to the trial judge's discretion." *In re Oghenekevebe*, 123 N.C. App. 434, 440-41, 473 S.E.2d 393, 398-99 (1996). The trial court properly considered respondent's in-court demeanor in determining whether

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Respondent properly appreciated the harmfulness of his and Mother's prior abuse. In fact, in this particular case, the trial court's evaluation of Respondent's credibility and demeanor was crucial to the issues presented, but even upon our review of the cold written record, the reasons for the trial court's findings on these facts are entirely supported by the evidence.

Given the severity of Mother and Respondent's abuse of May's siblings, Respondent's dishonesty with respect to his role in the abuse and his continued contact with Mother, and Respondent's continued lack of understanding of the danger that Mother poses to May, we hold that the trial court did not err in determining that "there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *See McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127. Accordingly, we hold that the findings of fact support the trial court's conclusion of law that Respondent neglected May at the time of the termination hearing and that there was a likelihood of repetition of neglect.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order terminating Respondent's parental rights.

AFFIRMED.

Judge GEER concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

The first three pages of the majority's opinion recites the past actions of the mother, who is not before this Court. It is clear the sins of the mother are being heaped upon Respondent by DHHS and the trial court. Despite his best efforts and substantial progress, Respondent never was provided his natural human rights of care, custody and control of his child and any reasonable chance to reunify with his child, as required by law. The trial court's findings of fact are not supported by clear, cogent and convincing evidence and these findings do not support the trial court's conclusion to terminate Respondent's parental rights based upon neglect under N.C. Gen. Stat. § 7B-1111(a)(1) (2013). I respectfully dissent from the majority's opinion and vote to reverse the trial court's error when it terminated Respondent's parental rights.

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I. Standard of Review

As stated in the majority's opinion, "our standard of review for the termination of parental rights is whether the trial court's findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law." *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003) (citations and internal quotation marks omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re D.M.M.*, 179 N.C. App. 383, 385, 633 S.E.2d 715, 716 (2006) (citation and internal quotation marks omitted).

As petitioner, DHHS bears the burden of proving by clear, cogent and convincing evidence the adjudicatory facts to justify termination of parental rights. *In re Nolen*, 117 N.C. App. 693, 698, 453 S.E.2d 220, 223 (1995). Petitioner wholly failed to meet its burden under the statute and our case law.

II. Neglect

Respondent argues: (1) the trial court erred in finding he had not gained an appreciation of the seriousness of the mother's abuse of her four older children, and he would unlikely be able to protect May from harm from a person with a "strong personality" like the mother; and, (2) the trial court erred in concluding May was neglected at the time of the termination hearing and there was a likelihood of future neglect if she were returned to the father. I agree.

The majority's opinion sets forth some of the trial court's findings, but not others. Termination of parental rights based upon neglect may not be based solely upon past conditions, which no longer exist. *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). To terminate parental rights based upon neglect, the court must find evidence of neglect both at the time of the termination hearing and that repetition is likely to occur in the future. *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984).

The trial court may consider a prior adjudication of neglect, but cannot terminate parental rights on those past actions. It must also consider evidence of changed circumstances and the probability of future neglect. *In re J.G.B.*, 177 N.C. App. 375, 381-82, 628 S.E.2d 450, 455 (2006). Here, the uncontested evidence and the record does not support the finding of neglect existed at the time of the hearing or that there is a reasonable probability Respondent will neglect May in the future.

Respondent and May's mother met in May of 2010 and began living together shortly thereafter. The mother's four older children by other

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men were in foster care at that time. The four children were returned to their mother's home in November of 2010. May was born in February of 2011.

May and her four older half-siblings were adjudicated neglected and dependent on 6 December 2012. May's half-siblings were also adjudicated as abused. These adjudications were based upon the abuse perpetrated by the mother upon May's half-siblings. The mother was alone with the children most of the week, while Respondent worked out of town.

In the adjudication order, the trial court found that Respondent had acknowledged the mother needed help in parenting her other children and that he had intervened at times when the mother disciplined them. The mother testified she had hidden her abuse from Respondent and when he saw her questionable behavior, Respondent told her to seek help.

In the dispositional order, the trial court found that "[d]ue to the severe and continuous abuse which has resulted in multiple interventions by various Departments of Social Services with this family and the issues still not being resolved by the parents, this Court feels that the permanent plan of adoption should be considered very early in this case." The other multiple interventions by various departments of social services pertained solely to May's half-siblings, and all events occurred before Respondent met the mother and May was born.

At the first review hearing on 7 January 2013, only a month following the adjudication, the court established the permanent plan for the juveniles as adoption with a concurrent plan of reunification. The trial court ordered DHHS to proceed with termination of parental rights within sixty days. DHHS filed the petition to terminate parental rights on 20 March 2013, three months after the adjudication.

Despite the trial court's order directing DHHS to proceed with termination of parental rights just a month following the adjudication, the uncontested evidence shows Respondent continued to comply with and meet the goals of his case plan in order to reunify with his child.

Respondent entered into a case plan with DHHS in December of 2012, very soon after the adjudication. Under the case plan, Respondent agreed to: (1) obtain a parenting and psychological evaluation; (2) obtain a psychiatric evaluation and comply with mental health counseling if recommended; (3) participate in two sessions with the children's therapist for the purpose of determining whether an "apology session" would

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be in the children's best interest; (4) complete a parenting education program; (5) permanently discontinue his relationship with the mother; and, (6) maintain employment and independent housing.

Respondent promptly complied with all aspects of his case plan except number 5. He obtained a paternity test and established paternity of May within a few weeks of May's placement in the custody of DHHS. Respondent obtained a psychological evaluation following the adjudication. The clinical psychologist who administered the evaluation opined that Respondent displayed "some personality difficulties, having depressive, avoidant and schizoid characteristics," held a "generally adequate" knowledge of parenting, and "appeared willing to permanently separate from [Mother.]" The evaluator recommended Respondent undergo a psychiatric evaluation to assess his need for medications or therapy. The evaluator believed Respondent's reunification with May was reasonable, if he continued to refrain from contact with the mother. Respondent was found to be of average intelligence, possessed adequate judgement, and reported no substance abuse issues.

Respondent subsequently submitted to a psychiatric evaluation and met the criteria for "Major Depressive Disorder Recurrent Moderate." In the termination of parental rights order, the trial court found medication had been recommended for Respondent's depression, but he was unwilling to take it. According to the social worker's testimony at the hearing, Respondent's therapist did not believe his "unwillingness to take medication was a critical issue." With regard to Respondent's hesitation about taking medication, the social worker testified, "I have never heard anything from [Respondent] or seen anything that would suggest that he has not been able to function day-to-day," and "[h]is functioning has not been impaired as far as we know."

Respondent began participating in individual therapy in August of 2013 and was successfully discharged by his therapist. The court's findings state Respondent was not forthright with his therapist regarding his use of physical discipline and his ongoing contact with the mother.

Respondent moved out of the mother's home on 2 March 2013, shortly after the adjudication. After moving out of the mother's home, Respondent exchanged text messages with the mother, sent her photographs of May, their daughter, and spoke with her on the telephone. He acknowledged through a translator that his communication with the mother was "a failure on my part." At first, he stated he was "too embarrassed" to admit that he had any contact with the mother.

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In a letter dated 7 November 2013, Respondent's therapist wrote that he "demonstrates awareness of his inability to protect the children resulting in the separation of the family. The incidents have been revisited and feelings resolved." The therapist further wrote that "[t]he allegations of inappropriate use of discipline were discussed and resolved. During sessions, the incidents were revisited and [Respondent] was able to demonstrate appropriate use of discipline."

Respondent's therapist also noted that Respondent admitted to contact with the mother through text messages. The therapist noted, "[b]oundaries have been discussed during sessions and how these may affect the case and having access to the child. It is my understanding that [Respondent] does not have or intends to have a relationship with child's mother."

At the conclusion of Respondent's therapy, his therapist felt he had actively engaged with her and complied with the recommendations. He "demonstrated knowledge and ability to use appropriate parenting skills and discipline." This evidence is not contested.

The record shows any disclosures Respondent made or failed to make to his therapist regarding disciplining the children or maintaining contact with the mother were addressed and concluded in therapy. Uncontested evidence also shows the therapist specifically acknowledged having addressed these issues with Respondent prior to releasing him from therapy, and the issues were "resolved."

The trial court's authority over the parents of juveniles adjudicated as abused, neglected or dependent is set forth in N.C. Gen. Stat. § 7B-904 (2013). Under the statute, the court may order the parent to take the necessary steps to remedy the conditions which led to the removal of the child, including mental health treatment and parental responsibility classes. N.C. Gen. Stat. § 7B-904(c) and (d1).

In cases where there is no evidence of domestic violence or any history of severe discord between the parents, which led to the removal of the child, the statute does not authorize either the court or DHHS to order the parents to cease any and "gag" all contact between each other. Respondent entered into his case plan immediately after the adjudication prior to the permanent plan for the juveniles being established as adoption with a concurrent plan of reunification. While discontinuing Respondent's cohabitation and romantic relationship with the mother may have been "appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication," forbidding any and

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all types of communication between the parents was not. N.C. Gen. Stat. § 7B-904(d1)(3). Parents have a right to communicate concerning their mutual defense and the ongoing status and well-being of their children. In the absence of any history of violence between the parents, to impose such a “gag order” would deny the parents both their First Amendment and Due Process rights. *In re Cogdill*, 137 N.C. App. 504, 508, 528 S.E.2d 600, 603 (2000) (“trial court may not order a parent to undergo any course of conduct not provided for in [N.C. Gen. Stat. § 7B-904]”).

The trial court found Respondent stated that if May were returned to his care, he planned to leave her with the mother while he worked, if the mother had her “anger under control.” The court further found “[Respondent] never demonstrated that he learned anything from therapy in terms of how he would keep [her] safe in the future. To the contrary, [Respondent] has continued to believe that allowing [Mother] to watch [May] while he works is a viable option.”

These findings find no support in the evidence. The social worker testified:

Q: And did he indicate on that June date anything about the mother possibly watching the child if she could prove that she could control her anger?

A: That conversation occurred on April 4th, 2014 is referenced to being to consider [sic] leaving [May] with [Mother] during the day while he was working because she would never hurt her and to resuming a relationship with [Mother] if she could prove that she changed he said, meaning that her anger [sic].

Respondent testified through a translator:

Q: Now is it correct that as recently as May of 2014 you shared I think with the social worker if Miss Lebaron could get her anger under control you would let her visit with your daughter?

A: Well, she, the social worker, asked me a question, the therapist, and I said, well, maybe, if everybody could assure me that she was, she had changed her mind about how treating, about how to treat children maybe I would consider it.

No evidence shows Respondent intends to allow May to visit with the mother. Rather, Respondent stated he would only consider this

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possibility as an alternative in the unlikely event the therapist and DHHS believed it would be safe to leave May in the mother's care. Furthermore, when asked what Respondent would do with May while he worked, he testified, "like any other parents I would find daycare for her."

At the time of the termination of parental rights hearing, which was held in August, September and October of 2014, no evidence was presented of any communication between Respondent and the mother since the text messages were sent a year earlier in October of 2013.

When asked his plans, if he were reunited with his daughter, May, Respondent discussed moving to Pennsylvania to be nearer to his family or seeking the assistance of the mother of his grown children. Respondent also testified he would report the mother to the police or DHHS if confronted with the same conditions that led to the adjudication.

Respondent is Hispanic and an illegal alien. He attempted and was willing to participate in parenting classes, but the social worker was not able to find any bilingual classes for him to attend. The social worker testified that Respondent was allowed to address the parenting issues in individual counseling, which "often turns out to be more effective than classes." Respondent properly completed all of his therapy sessions and scheduled visits with his daughter.

Respondent has no drivers' license and depends on coworkers and others for transportation to work and his sessions and visitations. While maintaining independent employment and residence, Respondent attended all of his sessions and visit weekly with May, without his own vehicle or transportation. These actions clearly demonstrated the degree of care, concern, and love Respondent has for his daughter.

At the termination hearing, Respondent was questioned about the parenting skills he had learned during his therapy sessions. Through his interpreter, Respondent testified, "we talked a lot about being patient and how to educate children and the way you should deal with children when like they're having a tantrum for example." When asked what Respondent discussed with his therapist regarding discipline of a child, he responded, "[m]ore than anything she taught me that I need to talk to my children and be patient and teach them the things they shouldn't do." With regard to this response, the court found, "[w]hile patience is an important parenting skill, the most crucial parenting skill for the children in this case is to be protected from harm and to be made to feel safe."

Given the mother's anger and frustration with her other children prior to the adjudication, patience was an appropriate focus for Respondent's

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therapy and improving his parental skills. While the court's finding summarized Respondent's answers to this line of questioning, no evidence supports the conclusion that he was simply "going through the motions" with regard to his therapy, visitation with his daughter, or attendance at and compliance with all the valid requirements of his case plan.

When Respondent regularly visited with May, he brought food, diapers, clothing, and toys to her. The uncontroverted evidence also shows Respondent engaged in "appropriate, positive, affectionate" interactions with May. The court denied his requests for increased visitation without explanation. At the time of the termination of parental rights hearing, the court found May continued to "share a strong bond" with Respondent, a statutory factor the trial court ignored.

Under *de novo* review, the trial court's conclusions that Respondent "never demonstrated that he learned anything from therapy in terms of how he would keep [May] safe," "his concern for [Mother] is greater than his desire to reunify with [May]," he "had not gained an adequate understanding of . . . the seriousness of what transpired in [the] home, and the role he played in creating and fostering an injurious and abusive environment for his daughter," and, generally, that "he is unable or [un]willing to protect [May] from abuse and harm" is wholly subjective, and not supported by clear, cogent and convincing and objective evidence.

An objective case plan was established with objective criteria. Respondent completed all objective and lawful requirements of the plan. Respondent did have limited contact with the mother by telephone conversation, sending a photograph of the child, and exchanging text messages in contravention of an unlawful condition in the case plan. The last contact occurred almost a year prior to the termination of parental rights hearing. All of the objective evidence supports continued efforts by DHHS to reunify Respondent with his daughter.

The mother's abuse of her children and her significant history with child protective services led DHHS to remove May from the home. Respondent urged the mother to get help, tried to intervene, and moved out of the home shortly after the adjudication. No evidence shows he had resumed a romantic or close relationship with the mother. No evidence showed he had any communication with the mother after October of 2013, almost a year prior to the termination of parental right hearing. Due to the history of the mother with child protective services, the trial court ordered DHHS to file for termination of parental rights only a month after the adjudication, leaving Respondent little real hope of reunifying with May. No evidence or adjudication shows May was ever abused.

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Nevertheless, Respondent underwent multiple evaluations, completed therapy, established a separate residence, maintained employment, and visited, supported and maintained a strong appropriate bond with May without his own transportation. This objective evidence shows Respondent's compliance with his case plan, efforts to achieve reunification with his daughter, and to remedy of the conditions that led to May's adjudication. DHHS failed to present any clear, cogent and convincing evidence to show neglect at the time of the hearing or the probability Respondent will neglect May in the future. All of the findings of fact supporting the trial court's conclusion that Respondent is likely to neglect May in the future are speculative and subjective.

"[T]he law requires compelling evidence to terminate parental rights. The permanent removal of a child from its natural parent requires the highest level of scrutiny and should only occur where there is compelling evidence of potential risk of harm to the child or their well-being." *In re Nesbitt*, 147 N.C. App. 349, 361, 555 S.E.2d 659, 667 (2001). The trial court's determination that Respondent had "gone through the motions" of his case plan, but does not have the ability to keep May from harm, is also wholly subjective, speculative, unsupported by and is contrary to the record evidence. This unsupported notion does not support a conclusion to terminate parental rights under our statutes and case precedents.

The trial court's findings of fact are not supported by clear, cogent and convincing evidence, and no evidence supports the conclusion that there was neglect present at the time of the termination of parental rights hearing, or there is a likelihood of future neglect if May was reunited with her father. *Ballard*, 311 N.C. at 716, 319 S.E.2d at 232.

III. Conclusion

For these reasons, I vote to reverse the trial court's order terminating Respondent's parental rights based upon either neglect or dependency and remand for entry of an order to require DHHS to make continued efforts to reunify May with Respondent. I respectfully dissent.

IN RE R.D.

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IN THE MATTER OF R.D.

No. COA15-17

Filed 1 September 2015

Juveniles—sentencing—flexibility—maximum term

The trial court's disposition and commitment of juvenile for breaking or entering a motor vehicle was affirmed where he was committed to a youth development center for a maximum period just short of 24 months. Although the juvenile argued that the trial court could not sentence a juvenile to a term greater than the maximum sentence within the presumptive range, the Juvenile Code mandates flexibility in crafting a disposition suited to the individual and the trial court can commit a juvenile for the maximum period that any adult could be committed for the same offense without considering aggravating and mitigating factors or prior record levels. Under structured sentencing, the maximum period that any adult could be imprisoned for the offense was 24 months, which this juvenile's sentence did not exceed.

Appeal by juvenile from order entered 28 July 2014 by Judge Elizabeth Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 13 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Jason R. Rosser, for the State.

Leslie C. Rawls for juvenile-appellant.

McCULLOUGH, Judge.

The juvenile R.D. ("Ricky")¹ appeals from a disposition and commitment order in which the trial court imposed a level three disposition, committing Ricky to a youth development center ("YDC"). For the following reasons, we affirm.

I. Background

On 13 May 2014, the State filed juvenile petitions alleging Ricky committed felony breaking or entering a motor vehicle and misdemeanor

1. A pseudonym.

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larceny on or about 8 May 2014. At a hearing in Mecklenburg County District Court on 28 July 2014, Ricky admitted to breaking or entering a motor vehicle as part of a plea arrangement whereby the State voluntarily dismissed the misdemeanor larceny petition. The trial court accepted Ricky's admission, adjudicated Ricky delinquent, and then proceeded to disposition.

During the disposition stage, Ricky stipulated to three prior offenses which, when added to the current offense, resulted in seven points and placed him in the high classification of delinquency history. Consequently, Ricky was subject to a level two or three disposition for breaking or entering a motor vehicle, a Class I felony under N.C. Gen. Stat. § 14-46 (2013) and a serious offense under N.C. Gen. Stat. § 7B-2508(a)(2) (2013). Upon consideration of Ricky's history, Judge Elizabeth Trosch imposed a level three disposition, ordering that Ricky be committed to a YDC for an indefinite period of at least six months, but not to exceed his eighteenth birthday. As Ricky will turn eighteen in mid-July 2016, Ricky's maximum commitment was just short of twenty-four months. Ricky filed notice of appeal on 4 August 2014.

II. Discussion

On appeal, Ricky asserts that the disposition entered by the trial court violates N.C. Gen. Stat. § 7B-2513(a) (2013), which provides in pertinent part as follows:

No juvenile shall be committed to a youth development center beyond the minimum six-month commitment for a period of time in excess of the maximum term of imprisonment for which an adult in prior record level VI for felonies or in prior conviction level III for misdemeanors could be sentenced for the same offense[.]

Ricky argues that, in applying this provision, the trial court may not sentence a juvenile to a term greater than the maximum sentence *within the presumptive range* faced by a prior record level ("PRL") VI adult for the same conduct. Ricky notes that the highest presumptive sentence for a Class I felony and PRL VI is 10 months minimum to 21 months maximum under structured sentencing. *See* N.C. Gen. Stat. §§ 15A-1340.17(c) and (d) (2013). Although the aggravated range for a Class I felony and PRL VI allows for a sentence of 12 months minimum to 24 months maximum, Ricky points out that N.C. Gen. Stat. § 7B-2513(a) does not explicitly refer to the maximum *aggravated* term that may be imposed on an adult offender with a PRL VI. Claiming an

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“ambiguity in the current statute,” juvenile suggests that the maximum period of YDC commitment should be limited by the presumptive range of adult criminal sentences, based on the rule of lenity.

In *In re Carter*, this Court reviewed the trial court’s application of the statutory forebear to N.C. Gen. Stat. § 7B-2513, which provided that “in no event shall commitment of a delinquent juvenile be for a period of time in excess of that period for which an adult could be committed for the same act[.]” *In re Carter*, 125 N.C. App. 140, 141, 479 S.E.2d 284, 284 (1997) (quoting N.C. Gen. Stat. § 7A-652(c) (1987)). The juvenile in *Carter* construed the statute to limit his period of commitment to the maximum sentence that could be imposed upon “a similarly situated adult” – i.e., an adult misdemeanor with a prior conviction level corresponding to the juvenile’s own delinquency history. *Id.* In contrast, the State argued that the statute instead “allow[ed] a trial court to commit a juvenile for the maximum period of time that any *adult could* be committed for the same offense, without considering prior record levels and aggravating/mitigating factors as required under structured sentencing for adults.” *Id.* at 141, 479 S.E.2d at 285 (emphasis in original). This Court “elect[ed] to follow the State’s interpretation of N.C. Gen. Stat. § 7A-652, finding it to be supported by the purpose of disposition in juvenile actions and a recently clarifying amendment passed by the General Assembly.” *Id.*

In support of our holding in *Carter*, we noted that, unlike criminal sentencing’s emphasis on punishment and deterrence, the “primary purpose” of a delinquency disposition under the Juvenile Code is the development of “an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction.” 125 N.C. App. at 142, 479 S.E.2d at 285 (citation and internal quotation marks omitted). We therefore concluded that “the [J]uvenile [C]ode mandates judicial flexibility in dispositions[.]” and that its provisions should be interpreted in a manner that maximizes that flexibility. *Id.* We found additional support for the State’s maximalist interpretation of N.C. Gen. Stat. § 7A-652(a) in a “clarifying amendment” enacted by the General Assembly, which changed the relevant statutory language to the following:

“In no event shall commitment of a delinquent juvenile be for a period of time in excess of the maximum term of imprisonment for which an adult in prior record level VI for felonies or in prior record level III for misdemeanors could be sentenced for the same offense.”

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Id. at 142-43, 479 S.E.2d at 285-86 (quoting N.C. Gen. Stat. § 7A-652(c) (1996)). Although the effective date of the amendment made it inapplicable to the juvenile in *Carter*, we deemed it indicative of the legislature's intent to authorize a commitment period corresponding to the maximum possible sentence for the adult criminal offense, "regardless of the number of the juvenile's prior delinquent adjudications." *Id.* at 143, 479 S.E.2d at 286.

The rationale that underlay our interpretation of N.C. Gen. Stat. § 7A-652 in *Carter* applies equally to N.C. Gen. Stat. § 7B-2513(a). The purpose of a delinquency disposition under the current Juvenile Code continues to be "to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction, including the protection of the public." N.C. Gen. Stat. § 7B-2500 (2013); *see also* N.C. Gen. Stat. § 7B-2501(c) (2013). The Code thus continues to "mandate[] judicial flexibility" in the crafting of a disposition suited to the individual juvenile. *In re Carter*, 125 N.C. App. at 142, 479 S.E.2d at 285. "While protection of the public has received new emphasis, and accountability has become an integral part of rehabilitation, the Juvenile Code remains far from a punitive system." *State v. Tucker*, 154 N.C. App. 653, 659, 573 S.E.2d 197, 201 (2002). Moreover, we note that the language in the "clarifying amendment" cited in *Carter* appears verbatim in N.C. Gen. Stat. § 7B-2513(a).² Accordingly, we conclude that N.C. Gen. Stat. § 7B-2513(a) "allow[s] a trial court to commit a juvenile for the maximum period of time that *any adult could* be committed for the same offense, without considering prior record levels and aggravating/mitigating factors as required under structured sentencing for adults." *In re Carter*, 125 N.C. App. at 141, 479 S.E.2d at 285 (emphasis in original). As made clear by our ruling in *Carter*, we used the term "without considering" to mean "not limited by" either the offender's PRL or the existence or non-existence of aggravating and mitigating factors.

Under structured sentencing, the maximum period that "*any adult could*" be imprisoned for the Class I felony of breaking or entering a motor vehicle is 24 months. *Id.* (emphasis in original); N.C. Gen. Stat. §§ 15A-1340.17(c) and (d). Because the maximum period of Ricky's YDC commitment does not exceed 24 months, the trial court did not err.

2. The current statute further authorizes an extension of the juvenile's commitment period when the Division of Juvenile Justice "determines that the juvenile's commitment needs to be continued for an additional period of time to continue care or treatment under the plan of care or treatment developed under subsection (f) of this section." N.C. Gen. Stat. § 7B-2513(a).

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III. Conclusion

For the forgoing reasons, the disposition and commitment order by the trial court is affirmed.

AFFIRMED.

Judges STROUD and INMAN concur.

IN THE MATTER OF S.D.

No. COA 15-122

Filed 1 September 2015

Termination of Parental Rights—failure to make reasonable progress

The trial court erred by entering an order terminating respondent-mother's parental rights for failure to make reasonable progress on the conditions that led to the removal of her son, who was born while she was incarcerated for drug-related charges. Respondent complied in many ways with the numerous requirements set in the trial court's prior orders, and her few small failures did not support the conclusion that she had failed to make reasonable progress.

Appeal by respondent from order entered 8 October 2014 by Judge Monica Bousman in District Court, Wake County. Heard in the Court of Appeals 17 August 2015.

Roger A. Askew, for petitioner-appellee Wake County Human Services.

Deana K. Fleming, for guardian ad litem.

Miller & Audino, LLP, by Jay Anthony Audino, for respondent-appellant.

STROUD, Judge.

Respondent appeals from an order terminating her parental rights to her child. For the following reasons, we reverse and remand.

IN RE S.D.

[243 N.C. App. 65 (2015)]

I. Background

In September of 2012, while incarcerated on drug-related charges, respondent gave birth to Sam.¹ On 14 March 2013, Wake County Human Services, “WCHS,” filed a petition alleging Sam was a neglected and dependent juvenile and also received non-secure custody of Sam. On 9 April 2013, after a hearing, the trial court entered a consent adjudication and disposition order determining Sam was a neglected and dependent juvenile. The order contained various requirements for respondent to complete in order to be reunified with Sam, including that she consistently visit with Sam, obtain sufficient income and housing, obtain a substance abuse assessment, resolve her pending legal issues, and complete a psychological evaluation and parenting class. On 23 July 2014, WCHS filed a motion to terminate respondent’s parental rights. On 8 October 2014, after a hearing, the trial court entered an order terminating respondent’s parental rights for failure to make reasonable progress regarding the conditions which led to Sam’s removal from respondent.² Respondent appeals.

II. Standard of Review

A proceeding to terminate parental rights is a two step process with an adjudicatory stage and a dispositional stage. A different standard of review applies to each stage. In the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that one of the grounds for termination of parental rights set forth in N.C. Gen. Stat. § 7B-1111(a) exists. The standard for appellate review is whether the trial court’s findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law. *Clear, cogent,*

1. Pseudonyms will be used for both the children and parents to protect the identity of the minors involved.

2. WCHS’s brief does not properly note the disposition by the trial court. WCHS’s brief states, “The court ultimately concluded that both parents neglected the minor child and were incapable of providing appropriate care for the child in the future[.]” and then cites to DSS’s motion to terminate as its evidence. However, the trial court did not find that respondent had neglected Sam. The trial court specifically stated when rendering the order that it did not conclude there were grounds for termination based on respondent’s neglect, and the written order only finds grounds for the termination of respondent’s rights due to failure to make reasonable progress.

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and convincing describes an evidentiary standard that is stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt. If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under N.C. Gen. Stat. § 7B-1111(a), the court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interests of the child. The standard of review of the dispositional stage is whether the trial court abused its discretion in terminating parental rights.

The trial court's conclusions of law are reviewable *de novo* on appeal.

In re T.J.D.W., 182 N.C. App. 394, 400-01, 642 S.E.2d 471, 475 (emphasis added) (citations, quotation marks, and brackets omitted), *aff'd per curiam*, 362 N.C. 84, 653 S.E.2d 143 (2007). "Clear, cogent, and convincing evidence is evidence which should fully convince." *North Carolina State Bar v. Talford*, 147 N.C. App. 581, 587, 556 S.E.2d 344, 349 (2001) (citation and quotation marks omitted), *aff'd and modified*, 356 N.C. 626, 576 S.E.2d 305 (2003).

III. Reasonable Progress

Respondent contends that the trial court's findings of fact do not support the conclusion that she failed to make reasonable progress. We will address each of the requirements set by the trial court's prior orders and the trial court's findings of fact as to respondent's compliance with each item. The trial court had ordered respondent to (1) "consistently visit the child in accordance with a written visitation plan[.]" and the trial court found that "[s]ince her release from jail, the mother has consistently visited with the child. . . . Since June 2014 when her visits were changed to bi-weekly instead of weekly visits, . . . [respondent] has been consistent in attendance and in punctuality."

The trial court had ordered respondent to (2) "obtain and maintain suitable housing, sufficient for herself and the child[.]" The trial court found respondent "has been living in a friend's home where she does not pay rent, is not on the lease, and where she helps out the with groceries. She has [resided in that] home for approximately 9 months." The trial court did not address in the order whether the housing was "suitable" or "sufficient for herself and the [child.]" However, the findings of fact

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seem to indicate that the residence was stable, since she had resided in the same location for the 9 months since her release from jail. When rendering the ruling, the trial court addressed respondent's living arrangements in more detail:

I will be honest with you, the housing is concerning to me. It appears that she's been there for some time. I don't know anything about the financial arrangements. I don't know anything about how long she can stay. And apparently, she has no legal basis for being there, but [the social worker] says that the home appears to be appropriate. There are no concerns with the roommate. *So I'm not going to find that she can't -- that she doesn't have suitable housing.*

(Emphasis added.) We note that despite the absence of a direct finding as to "suitability" of respondent's housing in the written order, the trial court did state that respondent's housing was suitable, although by use of a double negative.

The trial court had ordered respondent to (3) "obtain and maintain legal employment sufficient to meet the needs of herself and the children" and found that

[t]he Court found at the June 2014 hearing that the mother had not been able to obtain employment, partially because of her pending criminal charges. At this hearing on the motion to terminate her parental rights, she testified that she secured a job with a cleaning service in May 2014, and has been working there 5 nights per week for 4 hours per night and receiving cash payment of about \$435.00 per month. She is not keeping records of her wages, and has not offered proof of employment or her wages. Regardless of the truth of her assertions, the worker has indicated to the mother that the wages are not adequate to meet the needs of she and [Sam]. The mother offered no evidence that she receives or will receive any other supports, except that she was waiting on . . . the appeal decision to receive SSI which she was receiving prior to her arrest.

Thus, the trial court found that respondent had found "legal employment," despite the impediment of pending criminal charges, and that she had applied for SSI. We would agree with the social worker that \$435.00 per month might not be sufficient income to support a mother and a child, but North Carolina General Statute § 7B-1111(a)(2) provides that "no parental rights shall be terminated for the sole reason

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that the parents are unable to care for the juvenile on account of their poverty.” N.C. Gen. Stat. § 7B-1111(a)(2) (2013).

The trial court had ordered respondent to (4) “submit to a substance abuse assessment and follow all recommendations[.]” Despite respondent’s arrest for drug charges, all of the evidence in our record seems to indicate that her criminal charges were a result of Sam’s father, Mr. Carl Smith’s, involvement in drug abuse and trafficking of drugs. Other than noting that respondent smoked marijuana in the past, respondent’s psychological evaluation did not note any involvement with illegal drugs and did not recommend any treatment for substance abuse. The trial court did not make a written finding of fact regarding the substance abuse assessment. During rendition, the trial court stated, “I have no concerns about the substance abuse assessment. She had one drug screen, and that’s apparently all that the County required of her, and that screen was negative.”

The trial court had ordered respondent to (5) “resolve all legal issues regarding her criminal charges” and found that respondent “is waiting for the disposition of the father’s criminal case before proceeding with the disposition of her case. The Court was not given any indication of when this would occur. It is still possible that the mother may be incarcerated if convicted of the pending charges.” Respondent’s unresolved criminal charges seem to be the primary reason for the trial court’s conclusion that respondent failed to make reasonable progress, but the trial court’s portion of the finding regarding the resolution of Mr. Smith’s criminal charges which stated, “The Court was not given any indication of when this would occur[.]” is not supported by the evidence.

All of the evidence tended to show an expectation that Mr. Smith would be pleading guilty and that as a result of his plea, respondent would then plead and not have to serve additional time in jail. The WCHS social worker testified that she had been in contact with respondent’s attorney for the criminal matter, and he had “basically confirmed everything” respondent told her regarding a possible plea for time served and also testified that respondent’s attorney “reiterated . . . that he would not intend on putting [respondent’s] case on the calendar until [Mr. Smith’s] case had gone on the calendar first.” The WCHS social worker further testified that Mr. Smith had a court date the following week, on September 24, so the evidence did provide some “indication” of when respondent’s criminal issues would be addressed. Even the trial court stated, when rendering the order, “I understand, from her standpoint, why she would want to wait to see what is going to happen with Mr. Smith, if there might not be any further significant jail time for her[.]”

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We realize that even if Mr. Smith's criminal charges were on the court calendar for the next week, there is always uncertainty about whether the case will be reached or if the intended resolution will actually happen; however, we are concerned that the respondent's parental rights seem to have been terminated in large part because of the "possibility" that she may be incarcerated. The trial court may not have found the evidence from the social worker or respondent to be credible, but there was an "indication" of when the criminal matters would be resolved, and it was expected to happen very soon. Certainly, we agree that it is not reasonable to wait for years for the criminal process to conclude, but the evidence here shows that respondent's criminal matters might be resolved the very next week.³ We cannot discern based upon the record why the trial court did not wait for Mr. Smith's court date to find out if respondent would actually be subject to further incarceration or if she would be able to resolve the criminal charges as anticipated. In any event, no evidence shows that respondent had acted in any way to delay the criminal matters or done anything other than follow her attorney's instructions.

The trial court had ordered respondent to (6) "complete a psychological evaluation and follow all recommendations" and found:

16. The mother completed a psychological evaluation while she was in jail, and when she was released in December 2013, she met with the worker to go over the evaluation and the expectations regarding recommendations. The mother is diagnosed with depression, ADD, and psychosis which requires her to take and manage medicines. The psychological [evaluation] recommended strongly that the mother have intensive

3. We realize that hindsight is 20/20, and this information was not before the trial court, but we can take judicial notice of the fact that the official records of the North Carolina Department of Public Safety, Division of Adult Correction show that Carl Smith is currently serving active time in prison for the crimes for which he was charged at the inception of this WCHS proceeding, committed on the same date that WCHS received an investigative assessment regarding Mr. Smith's arrest. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2013) (regarding judicial notice); *see also State v. Black*, 197 N.C. App. 373, 375, 677 S.E.2d 199, 201 (2009) ("Although not included in the record on appeal, we take judicial notice that defendant has completed this sentence[.]" Mr. Smith was sentenced for his crimes on 9 October 2014, within a month after the hearing on termination of parental rights, which is consistent with the evidence provided by respondent and the social worker of the expected timing for resolution of the criminal matters. The official records also show that respondent has never been committed to the Division of Adult Correction to serve any active sentence for any crime, which is consistent with the social worker's testimony that respondent expected not to serve any additional active sentence upon entering a plea.

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individual counseling, develop a support group to assist her in parenting the child and making some important decisions, and that intensive in-home services would have to be implemented prior to any placement of the child in her home.

. . . .

17. The mother was referred to Monarch for mental health services, but she has not sufficiently engaged in mental health counseling through Monarch. Prior to the June 2014 hearing, she had attended some sessions, but had missed at least 5 sessions, and was not making progress toward her treatment goals. The mother discovered during therapy that she was having a difficult time perceiving reality. She was prescribed medication for this schizophrenic-like symptom, which caused an allergic reaction and which had to be reviewed by a psychiatrist. She was attending therapy only one time per month, which she said was all her therapist is requiring. The Court found at the June 2014 hearing, more than 15 months from the filing of the petition and 21 months since her child was placed outside of her home, that . . . [respondent] did not seem to understand the importance of her engaging in intensive therapy to be able to safely parent her child. Counseled by her social worker that her current therapy regime did not meet the recommendation for intensive therapy made in her psychological evaluation, the mother did arrange with her therapist to have a session every three weeks, and she attended sessions under this schedule between June 2014 and this hearing on September 18, 2014. No evidence was offered by the mother to show any progress in her therapy. The social worker testified that the mother was not meeting the requirement of intensive therapy in light of her serious mental health problems and the recommendations of the psychological [evaluation].

Thus, the trial court's findings acknowledge that respondent submitted to the psychological evaluation and took medications as recommended.

Respondent's psychological evaluation actually did not recommend "intensive individual counseling[,]" and in that regard, the trial court's finding of fact is not supported by the evidence. The psychological evaluation actually recommended "individual counseling services[,]" and

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the trial court noted that respondent attended therapy, and although she had missed some sessions, once a month was the frequency required by her therapist. Furthermore, when respondent was informed that she would benefit from further therapy, she increased her sessions to once every three weeks and had regularly attended those sessions. It was also recommended that respondent take medication for her mental well-being, and according to the evidence, respondent took her medications as prescribed.

It seems that the trial court would have preferred that respondent receive more frequent therapy than she had, but our record does not support a finding that respondent failed to comply with the therapy as recommended by her therapist or required by the trial court's prior orders. Other than missing a few sessions, respondent complied with her therapist's initial recommendations regarding the frequency of therapy, and upon being informed she needed more therapy, she fully complied with her social worker's instructions in both having more therapy and faithfully attending her sessions. We also recognize that attending therapy and actually benefitting from it are two different things, but it is difficult to say that there was clear, cogent, and convincing evidence in this case that respondent was not making progress. While respondent may benefit from more frequent treatment, the evidence showed that she complied with the frequency of treatment required of her.

The trial court ordered respondent to (7) "complete a positive parenting class and demonstrate knowledge learned in her interactions with the children in her life choices[.]" The trial court found that respondent "attended the MOVE program with SAFEChild to learn more about the impact of domestic violence on children" and during rendition stated, "while I applaud the fact that she has completed the parenting class, again, I note she did not complete it within 12 months[.]" As to respondent's parenting skills, we also note that respondent had another child, Sue, who was seven years old at the time respondent was arrested. Our record indicates that respondent had never had any prior social services involvement regarding Sue.⁴

4. Our record indicates that Sue was a well-behaved and well-adjusted child with no apparent issues that needed to be addressed at the time of WCHS's intervention. While our record as to termination deals only with Sam, the initial order for adjudication did include Sue so our record includes information regarding her as well. Based upon our record, the permanent plan for Sue was custody with her maternal grandmother, and respondent's parental rights to Sue would not be terminated.

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The trial court ordered respondent to (8) “maintain regular contact with the assigned social worker, notifying WCHS of any change in situation or circumstances within 5 business days.” The trial court did not make a finding as to this requirement in its order, but all of the evidence, including the WCHS social worker’s testimony, indicated that respondent did maintain contact with her social worker throughout the case.

After addressing each of the requirements of respondent’s case plan, it appears that the possibility of respondent’s incarceration was the primary factor supporting the trial court’s conclusion that she had failed to make reasonable progress. Our concern about this factor is that it was only a possibility of incarceration which may not even come to pass, and the evidence indicated that respondent’s criminal matter would be disposed of quite soon. A secondary factor was respondent’s failure to make adequate progress in addressing her mental health issues, but in this regard respondent did essentially all that the trial court or her therapist had required. The only other factor which could support the trial court’s conclusion was respondent’s meager income, but again, poverty alone cannot be a basis for termination of parental rights. *See* N.C. Gen. Stat. § 7B-1111(a)(2). While “[e]xtremely limited progress is not reasonable progress[.]” *In re Baker*, 158 N.C. App. 491, 496-97, 581 S.E.2d 144, 148 (2003) (citations and quotation marks omitted), certainly perfection is not required to reach the “reasonable” standard. As noted above, some portions of the trial court’s findings of fact are not supported by the evidence, and although they are just portions of the findings, they are findings on the pivotal issues. In addition, when we consider the failures as addressed by the trial court in tandem with the numerous ways respondent did comply with her parenting plan, the findings of fact do not support the conclusion of law that respondent has failed to make reasonable progress. While we fully appreciate the importance of resolving this termination case as quickly as possible so that Sam may have a stable and safe home, we must reverse the order terminating respondent’s parental rights.

IV. Conclusion

For the foregoing reasons, we reverse and remand; for this reason, we need not address respondent’s other issues raised on appeal.

REVERSED and REMANDED.

Judges GEER and TYSON concur.

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[243 N.C. App. 74 (2015)]

JULIE LANCASTER AND BRANNON LANCASTER, PLAINTIFFS

v.

HAROLD K. JORDAN AND CO., INC., WITHERS & RAVENEL, INC., ARTHUR R.
COGSWELL, AND LIGHTHOUSE ENGINEERING, PA, DEFENDANTS

No. COA14-1413

Filed 1 September 2015

**1. Res Judicata and Collateral Estoppel—identity of parties—
Lassiter exception**

In a res judicata and collateral estoppel case arising from a failed real estate development involving multiple parties and prior arbitration, the trial court did not err by applying the *Lassiter* exception to the identity of parties rule (*Thompson v. Lassiter*, 246 N.C. 34, concerning control of the action by a person not a party) and granting summary judgment for defendant Harold K. Jordan and Co., Inc.

2. Jury—right to—civil action—issue of fact

Plaintiff’s argument concerning the right to trial by jury in a civil action failed where the trial court correctly granted summary judgment. The right to trial by jury accrues only where there is an issue of fact.

Appeal by plaintiffs from order entered 23 June 2014 by Judge John R. Jolly, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 21 May 2015.

Shipman & Wright, LLP, by W. Cory Reiss, for plaintiff-appellants.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Thomas M. Buckley, and Bugg & Wolf, P.A., by William J. Wolf, for defendant-appellee Harold K. Jordan and Co., Inc.

McCULLOUGH, Judge.

Plaintiffs Julie and Brannon Lancaster appeal from a summary judgment order entered in favor of defendant Harold K. Jordan and Co., Inc. Based on the reasons stated herein, we affirm the order of the trial court.

I. Background

On 26 February 2008, plaintiffs Julie Lancaster and Brannon Lancaster (“Mrs. Lancaster” and “Mr. Lancaster”) filed a complaint

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against defendants Harold K. Jordan and Co., Inc. (“HKJ”), Withers & Ravenel, Inc. (“W&R”), Arthur R. Cogswell, and Lighthouse Engineering, P.A. Plaintiffs advanced the following claims: Unfair and Deceptive Trade Practices (“UDTP”) by HKJ; fraud by HKJ; negligent misrepresentation by HKJ, Mr. Cogswell and W&R; and, negligence by all defendants. It was designated as a complex business case on 31 March 2008.

On 15 December 2009, plaintiffs filed an amended complaint. Plaintiffs alleged that in 1997, they purchased a tract of land located in Brunswick County (“the property”). In 2003, they formed a limited liability company known as Village Landing, LLC (“Village Landing”) and transferred the property to Village Landing. In 2005, plaintiffs met with Harold K. Jordan and John Zabriskie, both agents of HKJ, at HKJ’s offices in Wilmington, North Carolina. HKJ was a builder specializing in the construction and renovation of multi-family housing. HKJ recommended that plaintiffs construct apartments on the property and referred plaintiffs to Mr. Cogswell, an architect. Prior to 27 October 2005, Mr. Cogswell prepared preliminary sketch designs for an apartment complex, to be constructed by HKJ. Plaintiffs decided they did not want to own or manage an apartment complex, and on or about 27 October 2005, Mrs. Lancaster requested that Mr. Cogswell prepare plans for the construction of townhomes.

In the Fall of 2005, plaintiffs engaged W&R, a civil and environmental consulting engineering firm, to assist them in developing the property as a townhouse project, designing the utility and storm water management system, and obtaining requisite governmental approvals. In November 2005, W&R prepared and delivered to plaintiffs and HKJ a preliminary site layout for “Village Landing Townhomes.” In February 2006, W&R petitioned the Town of Leland council for allocation of sanitary sewer capacity for 60 townhome residences and submitted a “Commercial Zoning Compliance Permit Application” for the proposed use as townhomes.

On 14 February 2006, plaintiffs and Mr. Jordan incorporated Shady Grove (“Shady Grove”) with the intention that Shady Grove would purchase the property and plaintiffs and Mr. Jordan would each own 50% interest. On 21 February 2006, HKJ prepared and submitted to Mrs. Lancaster a “proposal for the construction of 60 condos.” Plaintiffs allege that Mrs. Lancaster inquired of Mr. Zabriskie the use of the term “condos” and was informed that “the terms condominiums and townhomes were one and the same.”

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On 26 February 2006, Shady Grove and HKJ executed a contract for “the new construction of 60 condos in Leland, NC” and provided the contract to Cooperative Bank in order to receive financing. HKJ had prepared the contract. Once again, plaintiffs allege they asked Mr. Zabriskie about the term “condos” in the contract and Mr. Zabriskie informed Mrs. Lancaster that for purposes of the contract, “condos” and townhouses were the same. By the end of March 2006, plaintiffs and Mr. Jordan decided to abandon the idea of proceeding with the project in the name of Shady Grove and Shady Grove never conducted any business. Thereafter, Mrs. Lancaster requested that Mr. Zabriskie prepare a new contract between HKJ and Village Landing, but no such contract was ever prepared.

During March and April of 2006, W&R, the Town of Leland, and the North Carolina Department of Environmental and Natural Resources proceeded to obtain approvals for townhomes. Plaintiff alleges that by April 2006, HKJ was well aware that it was to build townhouses under the residential building code. On 8 May 2006, Mr. Cogswell “sealed” the final construction drawings for “Grove Landing” (“the project”) which indicated the building of townhouse units. Plaintiffs, relying on the representations of HKJ, were billed for and became personally liable for all of the substantial “soft costs” for the project.

During a meeting with Cooperative Bank in May 2006 to discuss funding for the project, Mr. Zabriskie confirmed that the project was for the construction of townhomes. Cooperative Bank proposed to fund the project in phases, with the first loan from the bank to be in the amount of over \$2 million. On 16 May 2006, Cooperative Bank issued commitment letters to fund the project, “conditioned specifically on the Plaintiffs personally guaranteeing each loan.” Based on defendants’ representations, plaintiffs accepted the commitment from Cooperative Bank and were induced to personally guarantee millions of dollars of debt of Village Landing for the development of the project. On 22 May 2006, plaintiffs personally guaranteed the debt to Cooperative Bank.

Plaintiffs further alleged as follows: In June and July of 2006, HKJ provided the project plans to the Town of Leland for building permits to build townhouses. The Town of Leland’s Building Inspector informed HKJ that the project plans prepared by Mr. Cogswell could not be permitted for construction under the Residential Building Code because the project plans appeared to be for the construction of “apartments” or “condominiums.” The Building Inspector also informed HKJ that the project had not been approved for the construction of townhomes and that the Town of Leland could issue only one building permit per

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building in which three units or apartments would be contained as opposed to three separate building permits which would be required for the construction of townhomes. HKJ did not inform plaintiffs of the conversations it had with the Building Inspector nor of any deficiencies in Mr. Cogswell's project plans. Instead, HKJ remained silent and began construction although they had a duty to notify plaintiffs, Mr. Cogswell, and W&R of the issues with the Town of Leland.

During the course of construction, plaintiffs alleged Mr. Zabriskie informed Mrs. Lancaster that the townhouse units would be available in October or November 2006. In December 2006, HKJ told plaintiffs that the Town of Leland would not issue certificates of occupancy for the units as townhomes but failed to inform plaintiffs that it had known since building permits were issued that the units could not be issued certificates of occupancy as townhomes. Between December 2006 and March 2007, plaintiffs were informed by HKJ that HKJ continued to attempt to get certificates of occupancy for the units as townhouses. On 30 March 2007, the Town of Leland issued certificates of occupancy for the completed units as condominiums.

Plaintiffs alleged that had W&R submitted the project under the Town of Leland's subdivision ordinance; had Mr. Cogswell prepared the project plans for the construction of townhomes under the Residential Building Code; and, had HKJ constructed the project as townhomes pursuant to the Residential Building Code, the first twelve units of the project would have been sold and closed by March 2007. Instead, Village Landing was unable to pay off much of its loan from Cooperative Bank and unable to generate a profit of approximately \$350,000.00. In addition, Cooperative Bank would not fund the completion of the project because of the inability to sell the units. Mrs. Lancaster was forced to cash in her IRA in order to obtain the money necessary to continue to fund the interest payments to Cooperative Bank. Plaintiffs alleged that as a result of defendants' negligence and fraudulent representations, plaintiffs suffered personal injury, separate and distinct from Village Landing to support plaintiffs' personal liability to various lenders, including Cooperative Bank, and Village Landing did not have the assets, separate and distinct from Village Landing, to pay any of that liability.

On 19 January 2010, HKJ filed an answer to plaintiffs' amended complaint and included counterclaims. HKJ argued that an arbitration award in *Harold K. Jordan v. Village Landing, LLC and Shady Grove Development, Inc.* (American Arbitration Association Case No.: 31 110 Y 00204 07) constituted a full and proper adjudication of all the purported rights of plaintiffs' claims against Mr. Jordan, therefore, plaintiffs were

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barred by the arbitration award. HKJ raised the following defenses: *res judicata*; abatement; collateral estoppel; illegality; waiver; contributory negligence; intervening acts and negligence; credit or set-off; impossibility; economic loss rule; real party and interest; estoppel; laches; release; assumption of risk; failure to mitigate damages; breach of implied warrant of plans and specifications; and, reservation of rights. HKJ presented the following counterclaims: piercing the corporate veil; breach of contract; fraudulent conveyances; and, UDTP.

On 26 May 2011, plaintiffs filed notice of voluntary dismissal with prejudice as to its claims against Mr. Cogswell. On 2 May 2012, plaintiffs filed a notice of voluntary dismissal with prejudice as to its claims against W&R. The only defendant remaining was HKJ.

On 29 April 2013, HKJ moved for summary judgment based upon *res judicata* and collateral estoppel. On 23 July 2014, the trial court entered an order granting summary judgment in favor of HKJ.

The trial court noted that earlier, in July 2007, HKJ filed an action against Shady Grove and Village Landing alleging breach of the construction contract. Shady Grove and Village Landing filed an answer and counterclaim which sought to submit HKJ's claims against Shady Grove alone to arbitration based on an arbitration clause in the written contract between HKJ and Shady Grove. HKJ successfully moved to compel arbitration to all claims between HKJ and Village Landing as well, based on a ruling by a trial court judge that the contract at issue was effectively assigned from Shady Grove to Village Landing. In a 19 November 2007 order by the trial court, HKJ, Shady Grove, and Village Landing were ordered to "arbitrate all their pending claims in this action" including "*all* counterclaims of Village Landing" in the pending arbitration between HKJ and Shady Grove. Village Landing's arbitration counterclaims "were substantially similar if not substantively identical to the Claims asserted in Plaintiffs' Amended Complaint in the instant action." Village Landing alleged that HKJ had "failed to construct townhouse units on the subject property[,] causing Village Landing "great financial harm and damage." The arbitration hearing took place in March 2008. Plaintiffs were not named in their individual capacities as parties to the arbitration action, but were present and testified at the arbitration. Plaintiffs, through Village Landing, called an additional 16 witnesses to testify. The arbitrator rendered his judgment in April 2008 and found that Village Landing's counterclaims failed. In June 2008, a judgment confirming the arbitration award was entered in Wake County Superior Court. Village Landing's appeal of the trial court's order compelling arbitration was dismissed by the North Carolina Court of Appeals and a petition to the North Carolina

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Supreme Court for writ of certiorari was denied. Meanwhile, plaintiffs filed the current action in their individual capacities less than 20 days prior to the March 2008 arbitration hearing.

In its summary judgment order in favor of HKJ, the trial court concluded that plaintiffs are the same party as Village Landing for purposes of collateral estoppel, plaintiffs raised and litigated the same issues in the present case during the arbitration, and that the arbitrator's final judgment actually determined the propriety of HKJ's conduct. Based on the foregoing, the trial court concluded that plaintiffs were collaterally estopped "from relitigating the issue of whether HKJ made negligent or intentional misrepresentations during the construction process" and that there was "no triable fact that would serve as a basis for liability against HKJ."

On 3 July 2014, plaintiffs filed notice of appeal.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Peter v. Vullo*, __ N.C. App. __, __, 758 S.E.2d 431, 434 (2014) (citation omitted). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Sims v. Graystone Ophthalmology Assocs., P.A.*, __ N.C. App. __, __, 757 S.E.2d 925, 926 (2014) (citation omitted).

III. Discussion

[1] Plaintiffs argue that the trial court erred by granting HKJ's motion for summary judgment based on the doctrine of collateral estoppel. Specifically, plaintiffs argue that the trial court erred by relying on an exception recognized in *Thompson v. Lassiter*, 246 N.C. 34, 97 S.E.2d 492 (1957). Plaintiffs also assert that the trial court's summary judgment order deprived them of their constitutional right to a jury trial. After careful review, we find plaintiffs' arguments unconvincing.

"Under the collateral estoppel doctrine, parties and parties in privity with them . . . are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citation and quotation marks omitted). "[Collateral estoppel] is designed to prevent repetitious lawsuits overs

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matters which have once been decided and which have remained substantially static, factually and legally.” *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (citation omitted).

To successfully assert collateral estoppel as a bar to plaintiffs’ claims, defendant would need to show [(1)] that the earlier suit resulted in a final judgment on the merits, [(2)] that the issue in question was identical to an issue actually litigated and necessary to the judgment, and [(3)] that both [defendant] and [plaintiffs] were either parties to the earlier suit or were in privity with parties.

Turner, 363 N.C. at 558-59, 681 S.E.2d at 773-74 (citing *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986)).

Whether or not a person was a party to a prior suit must be determined as a matter of substance and not of mere form. The courts will look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions raised as they may affect the real party or parties in interest.

King, 284 N.C. at 357, 200 S.E.2d at 806 (citations and quotation marks omitted).

Here, plaintiffs conceded before the trial court that the arbitration award was a final judgment on the merits as to claims against HKJ, Village Landing, and Shady Grove. The trial court also held that there was an identity of issues: “at the very heart of Plaintiffs’ Claims against HKJ in this matter is the allegation that HKJ negligently or purposely misled Plaintiffs in constructing ‘condominiums, rather than townhouses.’ This exact issue was extensively litigated during the Arbitration.” The arbitration award “plainly spells out the arbitrator’s findings, in which he specifically absolved HKJ of any responsibility on the issues underlying Plaintiff’s Claims here.” The trial court held that because Village Landing’s arbitration counterclaims “rested almost entirely on the underlying allegation that HKJ either negligently or purposely misled Plaintiffs and their LLC[,] [d]etermining whether HKJ was guilty of such misrepresentations was absolutely essential to the Arbitration Action’s ‘purpose’ and the rendering of the Arbitration Award.” The portion of the trial court’s order that plaintiffs now challenge is its holding as to the identity of parties:

Taken as a whole, the North Carolina case law is inconclusive as to whether the facts in this matter unequivocally

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support a conclusion that Plaintiffs in substance were parties to the Arbitration Action or were in privity with Village Landing. As such, this court declines to reach a conclusion on either proposition. Instead, the court relies on the related “*Lassiter* exception” because it most clearly resolves this issue.

In *Lassiter*, the plaintiff filed an action against the defendant to recover damages suffered by him after a collision between a car driven by the defendant and a car owned by the plaintiff, but being driven by the plaintiff’s minor son. *Lassiter*, 246 N.C. at 35, 97 S.E.2d at 493. A few days prior to the institution of the plaintiff’s action, a third party instituted an action against the defendant. *Id.* The third party was a passenger in a third automobile that collided with the defendant’s car after the collision between the plaintiff and the defendant’s car. *Id.* at 35, 97 S.E.2d at 493-94. In the third party’s action, the defendant set up a cross-action against the plaintiff’s son and the driver of the third automobile, arguing that they were concurrently negligent with the defendant. The plaintiff was appointed as *guardian ad litem* for his son and filed an answer for and on behalf of his son, arguing that the negligence was solely on behalf of the defendant. *Id.* at 36, 97 S.E.2d at 494. A jury found the defendant guilty of negligence and that the negligence of the plaintiff’s son and the driver of the third automobile concurred with the negligence of the defendant in causing the third party’s injuries. A judgment was entered in accordance with the jury’s verdict and the defendant was permitted to amend his answer to allege that the judgment in the third party’s case “as a plea in bar or *res judicata*¹ with respect to the present action.” *Id.* at 36, 97 S.E.2d at 494. The trial court held that the prior action constituted a bar to the plaintiff’s present action. *Id.*

On appeal, the sole issue before the North Carolina Supreme Court was as follows:

Does the fact that a father acted as guardian *ad litem* for his minor son in defending a cross-action against the son (who was driving a family purpose automobile owned by the father), in an action in which a passenger

1. “The doctrines of *res judicata* and collateral estoppel are companion doctrines developed by the courts ‘for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation. . . . Like *res judicata*, collateral estoppel only applies if the prior action involved the same parties or those in *privity* with the parties and the same issues.” *Cline v. McCullen*, 148 N.C. App. 147, 149-50, 557 S.E.2d 588, 591(2001) (citations omitted).

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in a third automobile was the plaintiff, and the defendant in this action was also the original defendant in the former action, make the decision on the cross-action in the former litigation binding on the father in an action to recover in his individual capacity for medical expenses and loss of earnings and services of the son and damage to his automobile?

Id. The *Lassiter* Court noted that although “[o]rdinarily, the plea of res judicata may be sustained only when there is an identity of parties, of subject matter, and of issues[,]” there was a well-established exception to the general rule:

A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary interest or financial interest in the judgment or *in the determination of a question of fact or a question of law with reference to the same subject matter, or transactions*; if the other party has notice of his participation, the other party is equally bound.

Id. at 39, 97 S.E.2d at 496 (citation omitted) (emphasis in original). “Likewise, with respect to the rule ordinarily requiring identity of parties, . . . [t]hese rules have been denied application, however, where a party to one action in his individual capacity and to another action in his representative capacity, is in each case asserting or protecting his individual rights.’” *Id.* The *Lassiter* Court, affirming the trial court’s holding, reasoned that the plaintiff, acting as *guardian ad litem* for his son, took every action he could have taken as if he had been a defendant himself. The plaintiff exercised complete control over his son’s defense and in doing so, “he necessarily was defending the cross-action as much for his own protection as for that of his son.” *Id.* at 40, 97 S.E.2d at 497.

We will first consider plaintiffs’ “control” of the prior arbitration and the present action, “the threshold requirement of the exception to the rule requiring privity of identities.” *Williams v. Peabody*, 217 N.C. App. 1, 10, 719 S.E.2d 88, 95 (2011). The parties to the arbitration included HKJ, Village Landing, and Shady Grove. It is undisputed that Mr. and Mrs. Lancaster were the sole member-managers of Village Landing. At the arbitration hearing, Village Landing presented a total of 18 witnesses and plaintiffs themselves testified at the hearing. In the present action, Mr. and Mrs. Lancaster are the plaintiffs. Therefore, we hold that this is sufficient to satisfy the control element of the *Lassiter* exception.

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The second requirement of the *Lassiter* exception requires that plaintiffs have “a proprietary interest or financial interest in the judgment[.]” *Lassiter*, 246 N.C. at 39, 97 S.E.2d at 496. As the trial court properly found, Village Landing set forth counterclaims in the arbitration action against HKJ “for damages allegedly resulting from [HKJ’s] construction of Condominiums instead of Townhomes, and defects in construction of the sewer system.” Because plaintiffs were the sole member-managers of Village Landing, it necessarily follows that plaintiffs had a proprietary or financial interest in the outcome of the arbitration and any judgment affecting Village Landing. Plaintiffs were equally concerned in defending Village Landing and advancing its counterclaims in the arbitration action as plaintiffs are concerned with advancing their claims in the present action.

The third requirement of the *Lassiter* exception is whether plaintiffs have an interest “in the determination of a question of fact or a question of law with reference to the same subject matter, or transactions[.]” *Id.* In the present action, plaintiffs are bringing forth claims such as fraud and negligent misrepresentation against HKJ for intentionally and negligently misleading plaintiffs by constructing condominiums instead of townhomes. In the arbitration action, plaintiffs, through Village Landing, alleged that HKJ intentionally and negligently made false representations to Village Landing that the units being constructed were townhomes. We agree with the trial court that “[n]ot only did Plaintiffs have an ‘interest’ in the Arbitrator’s determination” of these issues, but that “it was central” to Village Landing’s case against HKJ in the arbitration action, “as it is in their individual action here. As such, this element of the *Lassiter* exception is plainly met.”

The last requirement of the *Lassiter* exception is that “if the other party has notice of his participation, the other party is equally bound.” *Id.* Under these circumstances, it is clear that plaintiffs had notice of the arbitration.

Based on the foregoing analysis, we hold that the trial court did not err by relying on the *Lassiter* exception to the rule requiring an identity of parties. Accordingly, an identity of parties existed between plaintiffs and Village Landing for purposes of the collateral estoppel doctrine and we affirm the trial court’s grant of summary judgment in favor of HKJ.

[2] Lastly, we note that our case law demonstrates that “summary judgment does not deprive [plaintiffs] of their right to a jury trial. The right to a jury trial accrues only when there is a genuine issue of fact to be decided at trial.” *State ex rel. Albright v. Arellano*, 165 N.C. App. 609,

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618, 599 S.E.2d 415, 421 (2004). Because we hold that the trial court did not err by granting summary judgment in favor of HKJ, plaintiffs' argument that they were deprived of the right to a jury trial necessarily fails.

IV. Conclusion

The order of the trial court, granting summary judgment in favor of HKJ, is affirmed.

AFFIRMED.

Judges STROUD and INMAN concur.

ERICA K. PARKER, INDIVIDUALLY, AS ADMINISTRATOR OF THE ESTATE OF CULLEN REECE PARKER, AND A. TRENT PARKER, PLAINTIFFS

v.

TOWN OF ERWIN, MARK BYRD, ERWIN PUBLIC WORKS DEPARTMENT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, WARREN M. MORRISETTE, FORMER ERWIN CHIEF OF POLICE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, BRYAN THOMPSON, FORMER ERWIN TOWN MANAGER, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, ERWIN AREA CHAMBER OF COMMERCE, ERWIN PARKING CENTER, INC., TIMOTHY C. MORRIS, JAMES DARRYL WEST, TAMMY RENEE WEST, AMERICAN MOBILE HOME SUPPLY, INC., ERWIN FIRE DEPARTMENT AND RESCUE SQUAD, INC. (D/B/A ERWIN FIRE & RESCUE DEPARTMENT), HARNETT COUNTY EMS, RICKY DENNING, EMS DIVISION CHIEF, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, HARNETT COUNTY ENHANCED 911 CENTER, AND L. JOHNSON, 911 CENTER UNIT OPERATOR #0754, IN HER INDIVIDUAL AND OFFICIAL CAPACITY, DEFENDANTS

No. COA14-1340

Filed 15 September 2015

1. Appeal and Error—appealability—sovereign immunity—Rule 12(b)(2) motion to dismiss

In an action arising from a pedestrian-auto accident after a Christmas parade, the trial court's denial of the Town's Rule 12(b)(2) motion to dismiss, premised on sovereign immunity, was immediately appealable.

2. Jurisdiction—motion to dismiss—documentary evidence submitted—court as fact finder

The trial court had the responsibility of acting as a fact-finder when considering a Rule 12(b)(2) motion to dismiss where the parties each submitted affidavits, depositions, and other documentary evidence.

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3. Immunity—sovereign—purchase of insurance—trial court as fact-finder

The trial court did not err when it determined that defendant Town did not waive sovereign immunity through the purchase of an insurance policy in an action arising from a pedestrian-auto accident after a Christmas parade. It was incumbent upon the trial court to act as fact-finder and to determine the weight and sufficiency of the evidence presented by the parties. There was competent evidence to support the court's determination.

4. Jurisdiction—sovereign immunity—Rule 12(b)(2) motion to dismiss

In an action arising from a pedestrian-automobile accident after a Christmas parade, the trial court erred by denying defendant Town's Rule 12(b)(2) motion to dismiss where the activities alleged against the Town Defendants were governmental functions and plaintiffs' claim was barred by sovereign immunity.

5. Immunity—sovereign—findings—remanded

In an action arising from a pedestrian-auto accident after a Christmas parade in which sovereign immunity was raised as a defense, the matter was remanded to the trial court for findings that reflected the trial court's assessment of the evidence presented and its determination of the weight and sufficiency of this evidence, not just a reiteration of plaintiffs' allegations. The trial court was required to determine whether the evidence established that the alleged violations of N.C.G.S. § 160A-296(a) directly and proximately caused the driver of the vehicle to strike the victim.

6. Immunity—sovereign—public official immunity—not considered

In an action arising from a pedestrian-auto accident after a Christmas parade, the issue of whether the Town Defendants' purported violations of N.C.G.S. § 160A-296(a) implicated the public official immunity doctrine was not considered because the case was remanded for a determination of the weight and sufficiency of the evidence concerning the alleged violations of N.C.G.S. § 160A-296(a).

7. Negligence—owner of building—lighting—adjacent parking lot—owned by third party

In an action arising from a collision between a pedestrian and an automobile after a Christmas parade, the trial court did not err by dismissing with prejudice claims against the owner of a building

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next to the site of the accident. Plaintiffs did not allege that the building owner had a duty to illuminate the next-door property, owned by a parking company, and so did not sufficiently allege that the building owner breached a duty owed to plaintiffs.

Appeal by Defendants Town of Erwin, Mark Byrd, Warren M. Morrisette, and Bryan Thompson from order entered 20 August 2014 by Judge Thomas H. Lock in Superior Court, Harnett County, and cross-appeal by Plaintiffs from amended order entered 30 September 2014 by Judge Thomas H. Lock in Superior Court, Harnett County. Heard in the Court of Appeals 20 April 2015.

The Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn and Catherine Cralle Jones, for Plaintiffs–Appellees/Cross-Appellants.

Teague, Campbell, Dennis & Gorham, L.L.P., by Bryan T. Simpson and Natalia K. Isenberg, for Defendants–Appellants/Cross-Appellees Town of Erwin, Mark Byrd, Warren M. Morrisette, and Bryan Thompson.

Brown, Crump, Vanore & Tierney, L.L.P., by O. Craig Tierney, Jr. and Michael W. Washburn, for Defendant–Appellee Timothy C. Morris.

McGEE, Chief Judge.

Town of Erwin (“the Town”), Mark Byrd, individually and in his official capacity as the director of the Erwin Public Works Department (“Mr. Byrd”), Warren M. Morrisette, individually and in his official capacity as the former Chief of Police of the Town (“Mr. Morrisette”), and Bryan Thompson, individually and in his official capacity as the former Town Manager (“Mr. Thompson”) (collectively “Town Defendants”) appeal from the trial court’s order denying their N.C. Gen. Stat. § 1A-1, Rules 12(b)(2) and (b)(6) motions to dismiss the complaint filed by Erika K. Parker (“Mrs. Parker”), individually and as administrator of the estate of her son Cullen Reece Parker (“Cullen”) and A. Trent Parker (“Mr. Parker”) (collectively “Plaintiffs”). Plaintiffs cross-appeal from the trial court’s amended order dismissing with prejudice Plaintiffs’ complaint as to Timothy C. Morris (“Mr. Morris”).

With respect to Town Defendants’ appeal and the trial court’s denial of Town Defendants’ Rule 12(b)(2) motions to dismiss Plaintiffs’ claim that Town Defendants negligently breached their duty of care to

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ensure the safety of residents and visitors to the 2011 Erwin Christmas parade, we reverse the trial court's denial of Town Defendants' motions on the grounds that this claim is barred by sovereign immunity. With respect to Town Defendants' appeal and the trial court's denial of Town Defendants' Rule 12(b)(2) motions to dismiss Plaintiffs' claim that Town Defendants violated N.C. Gen. Stat. § 160A-296(a), we remand this matter for further proceedings consistent with this opinion. With respect to Plaintiffs' cross-appeal and the trial court's order granting Mr. Morris's Rule 12(b)(6) motion to dismiss Plaintiffs' complaint as to Mr. Morris, we affirm the trial court's order.

I. Facts and Procedural History

The evidence in the record tends to show that a Christmas parade was held in Erwin, North Carolina, on 5 December 2011. The official parade route covered seven blocks and formed a horseshoe shape. The route ran east to west for three blocks along Denim Drive, south to north for one block along South 13th Street, and west to east for three blocks along East H Street. Denim Drive and East H Street run parallel to each other, and the parade crossed South 11th Street and South 12th Street, and began and ended at the intersection of South 10th Street. Barricades restricted vehicular traffic along the principal parade route, but traffic ingress and egress was permitted for a publicly-accessible, privately-owned parking lot ("the parking lot"), which was bordered by East H Street to the north, South 12th Street to the east, Denim Drive to the south, and South 13th Street to the west.

Mrs. Parker and her sons, almost-four-year-old Cullen and his older brother Colby Parker ("Colby") (collectively "the Parkers"), traveled to Erwin to participate in and view the parade. Mrs. Parker left Colby with his school choir, which was participating in the parade, and she and Cullen watched the parade with a small group of family and friends ("the group") from a viewing area on the sidewalk along the north side of Denim Drive to the west of its intersection with South 12th Street ("the viewing area"). After Colby's choir passed the viewing area, Mrs. Parker left Cullen with his grandmother, walked to the area where Colby's choir was disbanding, and returned with Colby to the viewing area to watch the remainder of the parade with the group.

When the last participants of the parade passed the viewing area, the group began walking to Tubby's, a nearby restaurant ("the restaurant"), which was located at the southwest corner of East H Street and South 12th Street, and was northeast of the viewing area from where the group watched the parade. The group, consisting of the Parkers and

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four other people, walked in a northeast direction across the parking lot before proceeding north along South 12th Street. The group then walked in front of a building owned by Mr. Morris. Between Mr. Morris's building and the rear of the restaurant, there is a privately-owned alley ("the alley") that allows ingress and egress onto South 12th Street, to and from the parking lot through which the group had walked.

The group stopped walking at the south side of the alley, just past Mr. Morris's building, and waited to cross the alley as a car exited the parking lot onto South 12th Street. The group then proceeded to walk north across the alley towards the restaurant. Just as most of the group cleared the alley, Mrs. Parker heard Colby scream at Cullen to "get out of the way." Mrs. Parker and the other members of the group then saw a car strike Cullen with its front left bumper. The driver reported that she did not see Cullen before hitting him with her vehicle. It was after 8:00 p.m., the sun had set at 5:01 p.m., and the alley was not illuminated by street lights, by lighting from the rear of the retail spaces including the restaurant, or by lighting from Mr. Morris's building.

After the witnesses alerted the driver that Cullen was under her vehicle, she backed up, "freeing Cullen from underneath the front driver's side wheel and leaving him conscious but severely injured." A Harnett County Sheriff's officer came upon the scene and alerted another officer, who reported the incident. The first 911 report was placed at 8:27 p.m. and emergency responders, including Erwin Fire & Rescue Department, Coats Fire & Rescue, and Harnett County EMS, were dispatched a minute later. However, the emergency responders were dispatched to *North* 12th Street, which was at least two blocks north of the incident site. Due to this confusion, the first EMS unit to arrive on scene — which was not among the first units dispatched — did not arrive at the incident site until fourteen minutes after the incident was reported. Although Cullen was "initially conscious, crying and responsive," at 8:34 p.m., he was reported to have become "unresponsive." The emergency responders requested a pediatric multi-system trauma medical air transport to Betsy Johnson Regional Hospital in Dunn, North Carolina, but this air transport did not arrive. Cullen was taken by ambulance to Betsy Johnson Regional Hospital, where emergency department personnel rendered treatment until approximately 9:45 p.m., when Cullen was pronounced dead as a result of the injuries he sustained.

Plaintiffs filed a complaint in December 2013 against Town Defendants, Mr. Morris, Erwin Area Chamber of Commerce ("the Chamber"), as well as the owners of the restaurant, the parking lot, the retail space adjoining the restaurant (collectively "the property

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owners”), and various emergency medical service providers and emergency responders. The woman who struck Cullen with her vehicle was not named as a party in Plaintiffs’ complaint. Plaintiffs asserted several claims of negligence and negligence *per se* against Town Defendants and the Chamber, a claim of negligence against the property owners, claims of negligence against various emergency medical service providers and emergency responders, and a claim of negligent infliction of emotional distress against all of the named defendants.

In their complaint, Plaintiffs alleged, in relevant part, that Town Defendants and the Chamber “worked together to plan and sponsor the event” and, in doing so, that they collectively failed to:

- a) Prevent vehicle ingress and egress from parking areas inside the parade route prior to, during and immediately after the parade. In particular, there were no barricades restricting traffic from entering or exiting the [parking] lot on South 12th Street, no police or safety personnel assisting pedestrians and drivers leaving the parade area at a specific ingress/egress point within the parade route;
- b) Provide safe walking paths for pedestrians to access and exit the parade route. In particular, there was no marked pedestrian walkway from Denim Drive to East H Street, and there was no police or public safety presence directing or preventing traffic flow along South 12th Street;
- c) Provide adequate police presence to manage public safety at the event. For example, there was a single Erwin Police Car positioned across from the [parking] lot exit on South 12th Street. However, the car was unmanned with no officer providing traffic control or pedestrian support in that area. The presence of the unmanned car presented a false and misleading impression of safety to the public; [and]
- d) Test and ensure proper function of street lights inside, along and surrounding the parade route. For example, the public street light on South 12th Street, located directly in front of [Mr. Morris’s building], was not lit[.]

Plaintiffs also alleged the Town had purchased liability insurance that was in effect on the dates relating to the claims alleged, and that by

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purchasing liability insurance, Town Defendants “ha[d] waived any defense of immunity from suit pursuant to N.C. Gen. Stat. § 160A-485(a), *et seq.*” In the alternative, Plaintiffs alleged that “the tortious acts and omissions alleged . . . arose in the course of proprietary or private activities by [Town Defendants].” Plaintiffs further alleged that “[t]he sponsoring, organizing, publicizing and carrying out of the logistics of the Christmas Parade by [the Town] and [the Chamber we]re proprietary activities, engaged in for the private advantage and commercial gain of the local Erwin community members and businesses,” and “[a]lternatively, [the Town] entered into a joint enterprise or joint venture with [the Chamber] to sponsor, organize, promote and carry out the 2011 Christmas Parade.” Plaintiffs also alleged that, by not submitting an application for a permit, Town Defendants and the Chamber violated §§ 6-2021 and 6-2023 of Part 6, Chapter 2, Article C of the Town’s ordinances, and breached the duties owed to Plaintiffs “by failing to apply for, obtain, and carry a permit pursuant to the Town Ordinance and by failing to require that a permit be obtained in order to ensure that the parade met the standards for a parade set forth in the Town Ordinance.” Plaintiffs also alleged that the Town breached its statutory duty to “keep streets, sidewalks[,] and alleys in proper repair, in a reasonably safe condition and free from unnecessary obstructions” in accordance with N.C. Gen. Stat. § 160A-296(a)(2), (4)–(5), and (7). With respect to Mr. Morris, Plaintiffs alleged that he “failed to maintain functioning lights on his building to light the alley, thus restricting visibility for the driver who struck Cullen.”

Town Defendants moved to dismiss Plaintiffs’ complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(2) and (b)(6), asserting that Plaintiffs lacked personal jurisdiction over Town Defendants on the basis of sovereign immunity, and failed to state a claim against Town Defendants upon which relief could be granted on the basis of public official immunity and the public duty doctrine. When they filed their motions to dismiss, Town Defendants also filed affidavits from Mr. Thompson and from the Town’s finance director. They also filed an affidavit from the senior underwriting manager of the Town’s insurance company, which affidavit consisted of the insurance policy — in its entirety — that was issued to the Town for the policy period of 1 July 2011 to 1 July 2012.

Upon Plaintiffs’ amended motion, the trial court entered an order on 30 April 2014 continuing the hearing on Town Defendants’ motions to dismiss and allowing discovery served on Town Defendants “limited in scope to only those issues raised in [Town Defendants’] Rule 12(b) (2) Motion[s] to Dismiss for lack of personal jurisdiction on the basis of

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sovereign immunity and public official immunity.” The trial court further ordered that the parties reserved the right to depose or serve discovery on Town Defendants and on the affiants in support of Town Defendants’ motions to dismiss “on other topics should [Town Defendants’] Motions to Dismiss be denied[.]”

Mr. Morris filed an amended answer to Plaintiffs’ complaint in which he alleged several defenses. Mr. Morris also moved to dismiss the claims brought against him pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on the grounds that he had no duty to “provid[e] illumination to adjacent property and that no active or passive conduct alleged to have been attributable to [Mr. Morris] was legally causative of any injuries to the Plaintiff individually or as administrator of the estate of the decedent either for claims of negligence[.]”

The respective motions to dismiss by Mr. Morris and Town Defendants were heard on 21 July 2014. In addition to the pleadings and affidavits previously filed, Town Defendants presented the following additional discovery materials to the trial court for consideration with respect to their motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2): (1) verified responses of each Town Defendant to Plaintiffs’ first set of interrogatories regarding sovereign immunity; (2) responses of the Chamber to Plaintiffs’ first set of interrogatories; (3) responses of the Town to Plaintiffs’ first requests for admissions regarding sovereign immunity; (4) responses of each Town Defendant to Plaintiffs’ first requests for production of documents regarding sovereign immunity; (5) almost 300 documents produced by the Town; and (6) the Rule 30(b)(6) deposition of the Town’s designated representative and accompanying exhibits in support of said deposition. Plaintiffs presented the following discovery materials to the trial court for consideration with respect to Town Defendants’ motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2): (1) an affidavit from an expert on risk management and safety for municipal parades; (2) an affidavit and accompanying exhibits in support of said affidavit from Mrs. Parker; (3) an affidavit and accompanying exhibits in support of said affidavit from Mr. Parker; and (4) almost 200 pages of documents produced by the Chamber.

In accordance with Town Defendants’ request that the trial court enter findings of fact and conclusions of law in accordance with N.C. Gen. Stat. § 1A-1, Rule 52(a)(2), in an order entered 20 August 2014, the trial court made the following findings regarding Town Defendants’ motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) for lack of personal jurisdiction on the basis of sovereign immunity:

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2. Among other claims, Plaintiffs' Complaint alleged that [Town Defendants] negligently organized the parade in a manner which failed to provide safe walking paths for parade attendees, and which resulted in obstructions of public streets and sidewalks, including in violation of N.C. Gen. Stat. § 160A-296, and that [Town Defendants] failed to require or issue a parade permit, in violation of [the Town's] ordinances.

....

4. Pursuant to an Order of this [c]ourt of April 30, 2014, Plaintiffs were permitted to conduct discovery from [Town Defendants] limited to the two issues of sovereign immunity and public official immunity.

....

6. In their Complaint, and at the hearing, Plaintiffs alleged that governmental immunity and public official immunity were waived by [Town Defendants'] purchase of liability insurance.

....

11. [The Town] insurance policy in effect on the date of Cullen Parker's death (December 5, 2011) contained an express non-waiver of sovereign immunity endorsement.
12. The language of this non-waiver endorsement is identical to the language of the non-waiver endorsement at issue in *Lunsford v. Renn*, 207 N.C. App. 298 (2010); in that case, the N.C. Court of Appeals ruled that this language did not waive sovereign immunity.
13. Notwithstanding the existence of this insurance policy, the [c]ourt has considered Plaintiffs' claim that the doctrine of sovereign immunity is inapplicable on the grounds that [the Town] was engaged in a proprietary, rather than a governmental, function.
14. In support of the allegation that the parade was proprietary in nature, Plaintiffs' Complaint alleged, in part, that the parade generated substantial income for [the Town]. Plaintiffs' Complaint also alleged, in part, that [the Town] was engaged in a joint venture

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with [the Chamber], which entity itself generated substantial income for organizing the parade. Further, Plaintiffs' Complaint alleged, in part, that [the Town] promoted the parade outside its territorial limits. [Town Defendants] deny these allegations.

15. The North Carolina General Assembly has never designated either the planning or sponsorship of a parade as a governmental or proprietary function.
16. The planning or sponsorship of a Christmas parade is not necessarily governmental in nature; that is, neither the planning nor sponsorship of a Christmas parade is an activity that can only be provided by a governmental agency.
17. The planning or sponsorship of a Christmas parade is an activity that can be performed both privately and publicly.
18. Moreover, Plaintiffs' Complaint alleged that [Town Defendants] failed to properly maintain public streets and sidewalks, which resulted in the injuries alleged. For example, the Complaint alleged that [Town Defendants] failed to properly light public streets and sidewalks, and that public streets and sidewalks were obstructed during the parade.
19. Moreover, the Complaint alleged that [the Town] and [Mr.] Byrd were negligent in violating N.C. Gen. Stat. § 160A-296, which imposes a positive duty upon a municipality to keep its public streets, sidewalks, and alleys open for travel and free from unnecessary obstructions.

The trial court then concluded that, because the General Assembly “has not designated a parade as a governmental activity,” and because parades “are not necessarily governmental in nature,” it needed to consider the third step of *Bynum v. Wilson County*, 367 N.C. 355, 758 S.E.2d 643, *reh'g denied*, 367 N.C. 530, 761 S.E.2d 904 (2014), which “set forth a three-step inquiry for determining whether an activity is governmental or proprietary in nature.” *See Bynum*, 367 N.C. at 358, 758 S.E.2d at 646. The trial court then stated that it was “unable to conclusively decide for the purposes of [Town Defendants'] Motions to Dismiss under Rule 12(b)(2) that [the Town] was engaged in a governmental, rather than a

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proprietary, activity,” because Plaintiffs and Town Defendants “ma[de] conflicting allegations and submit[ted] conflicting discovery materials concerning whether [Town Defendants] generated substantial income, over operating costs, from the parade directly and/or via a joint venture with [the Chamber].” Additionally, although the trial court recognized that “the doctrine of sovereign immunity does not protect a municipality from liability for a negligent breach of its statutory duties under N.C. Gen. Stat. § 160A-296 to keep public streets, sidewalks, and alleys in proper repair, open for travel, and free from unnecessary obstructions,” it further stated that it was “unable to conclusively determine for the purposes of [Town Defendants’] Rule 12(b)(2) motions that Plaintiffs’ claims based upon an alleged failure to maintain safe streets and sidewalks and alleged violation of N.C. Gen. Stat. § 160A-296 should be dismissed.” The trial court also stated that, although the complaint alleged Town Defendants violated N.C. Gen. Stat. § 160A-296 and the Town’s parade permit ordinance, it was “unable to conclusively determine for the purposes of [Town Defendants’] Rule 12(b)(2) motions that the Complaint against [Town Defendants] should be dismissed due to public official immunity.” The trial court then denied Town Defendants’ motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(2) and (b)(6). The trial court entered an amended order on 30 September 2014 dismissing Plaintiffs’ complaint with prejudice as to Mr. Morris and certified, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), that the dismissal was a final judgment and there was no just reason for delay of an appeal from the order. Town Defendants appeal from the trial court’s order denying their N.C. Gen. Stat. § 1A-1, Rules 12(b)(2) and (b)(6) motions to dismiss, and Plaintiffs cross-appeal from the trial court’s order dismissing their complaint with prejudice as to Mr. Morris.

II. Town Defendants’ Appeal

[1] Town Defendants appeal from the trial court’s denial of their Rule 12(b)(2) motions to dismiss on the grounds that the trial court lacked personal jurisdiction over Town Defendants on the basis of sovereign immunity. The parties do not dispute that the trial court’s order is interlocutory and “not immediately appealable.” *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245 (2001); see also *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (“An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.”), *reh’g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950).

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Our Supreme Court has long recognized that “[c]ourts have differed as to whether sovereign immunity is a matter of personal or subject matter jurisdiction,” *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982) (providing that “[a] viable argument may be propounded that . . . the particular forum of the State courts has no jurisdiction over the State’s person,” while “the doctrine may [also] be characterized as an objection that the State courts have no jurisdiction to hear the particular subject matter of tort claims against the State”), and has itself not yet “determine[d] whether sovereign immunity is a question of subject matter jurisdiction or whether the denial of a motion to dismiss on grounds of sovereign immunity is immediately appealable.” *Id.* at 328, 293 S.E.2d at 184. Nevertheless, this Court has “held consistently” that “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 [N.C. Gen. Stat. §] 1-277(b).” *Can Am S., LLC v. State*, __ N.C. App. __, __, 759 S.E.2d 304, 308, *disc. review denied*, __ N.C. __, 766 S.E.2d 624 (2014).

A. Standard of Review for a Rule 12(b)(2) Motion to Dismiss

[2] “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.”¹ *Banc of Am. Sec. LLC v. Evergreen Int’l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). Typically, the

1. Plaintiffs assert that the standard of review for a sovereign immunity defense under Rule 12(b)(2) is controlled by *Sperry Corp. v. Patterson*, 73 N.C. App. 123, 325 S.E.2d 642 (1985), which Plaintiffs insist stands for the proposition that, “for purposes of governmental immunity hearings under Rule 12(b)(2), conflicts between a defendant’s evidence and a plaintiff’s *complaint* are resolved in favor of the plaintiff.” (Emphases added.) However, Plaintiffs appear to have misinterpreted the scope of this Court’s review in *Sperry Corp.* In *Sperry Corp.*, this Court considered whether the trial court erred in denying the defendants’ motions to dismiss the plaintiff’s claims that “sought to enjoin performance of the contracts and set aside the contracts due to . . . [the] alleged violation of G.S. 143 52 [by a State employee, who was then Secretary of the Department of Administration], on the grounds that sovereign immunity barred the claims.” *Sperry Corp.*, 73 N.C. App. at 125–26, 325 S.E.2d at 644–45. This Court stated that the plaintiff’s complaint “raise[d] factual issues” as to whether the State employee “exceeded her authority” and “violated G.S. 143 52 by a pattern of awarding state computer contracts to one company, by deciding to award the contracts in question to [the] plaintiff’s competitor before bid invitations ever issued, and by restricting bid specifications so that only [the] plaintiff’s competitor could comply with them.” *Id.* at 126, 325 S.E.2d at 645. After reviewing “the entire record, *not* just the pleadings,” *id.* at 127, 325 S.E.2d at 646 (emphasis added), this Court determined that “[t]he record matters argued by [the] defendants provide[d] a persuasive defense of their actions but [fell] short of irrefutably establishing that [the State employee] acted completely within her statutory authority.” *Id.* After a brief recitation of the evidence presented by the defendants, the Court concluded that the defendants “tend[ed] to contradict [the]

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parties will present personal jurisdiction issues in one of three 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.*

“[W]hen neither party submits evidence, [t]he allegations of the complaint must disclose jurisdiction although the particulars of jurisdiction need not be alleged.” *Id.* (second alteration in original) (internal quotation marks omitted). “The trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court’s exercise of personal jurisdiction.” *Id.*

“[I]f 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.* (second and third alterations in original) (internal quotation marks omitted). 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; *see, e.g., Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615–16, 532 S.E.2d 215, 218 (“[W]here, as in this case, defendants submit some form of evidence to counter plaintiffs’ allegations, those allegations can no longer be taken as true or controlling and plaintiffs cannot rest on the allegations of the complaint. . . . In such a case, the plaintiff’s burden of establishing *prima facie* that grounds for personal jurisdiction exist can still be satisfied if some form of evidence in the record supports the exercise of personal jurisdiction. Thus, . . . we look to the uncontroverted allegations in the complaint and the uncontroverted facts in the sworn affidavit for evidence supporting the presumed findings of the trial court. (citations omitted)), *disc. review denied and*

plaintiff’s *allegations and affidavits* to the effect that [the State employee] was predisposed to buy IBM products and structured the bid invitations so as to give an unfair advantage to IBM.” *Id.* at 128, 325 S.E.2d at 646 (emphasis added). However, because the defendants did not show that the State employee acted within her authority, the Court determined that it could not hold “as a matter of law that [the State employee wa]s entitled to sovereign immunity.” *Id.* Therefore, contrary to Plaintiffs’ contention in the present case that *Sperry Corp.* sets forth a standard of review that supersedes the “scores of Rule 12(b) (2) cases seemingly requiring the weighing of competing evidence,” our reading of *Sperry Corp.*, in its entirety, belies Plaintiffs’ interpretation.

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appeal dismissed, 353 N.C. 261, 546 S.E.2d 90 (2000). In other words, where “unverified allegations in the complaint meet plaintiff’s initial burden of proving the existence of jurisdiction . . . and defendant[s] . . . d[o] not contradict plaintiff’s allegations[], such allegations are accepted as true and deemed controlling.” *Data Gen. Corp.*, 143 N.C. App. at 101, 545 S.E.2d at 246–47 (alterations and omissions in original) (internal quotation marks omitted). “However, to the extent the defendant offers evidence to counter the plaintiff’s allegations,” *id.* at 101, 545 S.E.2d at 247, since Rule 12(b)(2) permits a trial court to consider matters outside the pleadings, *see id.* at 102, 545 S.E.2d at 247, “those allegations may no longer be accepted as controlling, and *the plaintiff can no longer rest on such allegations in the complaint.*” *Id.* at 101, 545 S.E.2d at 247 (emphasis added).

Finally, if the parties “submit dueling affidavits[,] . . . the court may hear the matter on affidavits presented by the respective parties, . . . [or] the court may direct that the matter be heard wholly or partly on oral testimony or depositions.” *Banc of Am. Sec. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183 (second alteration and second omission in original) (internal quotation marks omitted); *see also Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217 (“If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits.”). “If the trial court chooses to decide the motion based on affidavits, [t]he trial judge must determine the weight and sufficiency of the evidence [presented in the affidavits] much as a juror.” *Banc of Am. Sec. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183 (alterations in original) (internal quotation marks omitted). Further, where parties “submit[] depositions to the trial court, and [the court’s] findings are replete with facts taken from these depositions,” after holding a hearing “on the question of personal jurisdiction” where “parties argue[] facts based on the depositions,” such a case has “moved beyond the procedural standpoint of competing affidavits to an evidentiary hearing.” *Deer Corp. v. Carter*, 177 N.C. App. 314, 322, 629 S.E.2d 159, 166 (2006). In such circumstances, the trial court must “act as a fact-finder, and decide the question of personal jurisdiction by a preponderance of the evidence,” *id.* (citation omitted), because a plaintiff then has “the ultimate burden of proving jurisdiction rather than the initial burden of establishing *prima facie* that jurisdiction [was] proper.” *Id.* (alteration in original) (internal quotation marks omitted).

“When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are

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supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.” *Banc of Am. Sec. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183 (internal quotation marks omitted). “Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party.” N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2013).

In the present case, pursuant to Plaintiffs’ motion, the trial court continued the hearing on Town Defendants’ motions to dismiss to allow discovery served on Town Defendants “limited in scope to only those issues raised in [Town Defendants’] Rule 12(b)(2) Motion[s] to Dismiss for lack of personal jurisdiction on the basis of sovereign immunity and public official immunity.” As referenced above, the record indicates that, on this issue, Town Defendants filed the following: affidavits from Mr. Thompson, the Town’s finance director, and the senior underwriting manager of the Town’s insurance company; responses to Plaintiffs’ interrogatories; responses to Plaintiffs’ requests for admissions; responses to Plaintiffs’ requests for production of documents; the Town’s Rule 30(b)(6) deposition; a copy of the more-than-115-page insurance policy issued to the Town for the policy period of 1 July 2011 to 1 July 2012 that included a “Sovereign Immunity Non Waiver Endorsement;” and more than 300 pages of documents that included e mail correspondence between the Chamber and Town Defendants related to the Town’s involvement in the planning of the parade, bank statements for the Town’s General Fund account from which parade-related expenses “would have been processed for the requested time period,” and applications for “privilege licenses” for which fees were paid to the Town “for peddlers to sell items on the street on the day of the parade.”

Moreover, contrary to Plaintiffs’ suggestion in its response to Town Defendants’ principal brief, the record further reflects that Plaintiffs did not rest on the allegations in their complaint in response to Town Defendants’ Rule 12(b)(2) motions to dismiss. Rather, the record indicates that Plaintiffs also presented almost 200 pages of additional discovery materials for the trial court’s consideration that included: an affidavit from an expert on risk management and safety for municipal parades who attested that the parade organizers “fail[ed] to properly manage, operate, and maintain the streets and sidewalks of [the Town;]” affidavits and accompanying exhibits from Mrs. Parker and Mr. Parker; numerous Christmas parade entry applications from 2011, 2012, and 2013; a 2011 monthly revenue expense report for the Chamber; a listing of the commercial floats for the 2011 Christmas parade; 2012 and 2013 Christmas parade sponsorship applications; 2013

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Christmas parade vendor applications; copies of advertising for the 2011 Christmas parade; copies of advertising “relating to parades and similar events held in other towns in the region[;]” a copy of the Commercial General Liability Coverage Part of the insurance policy issued to the Town for the policy period of 1 July 2010 to 1 July 2011; a copy of the Chamber’s bylaws; and a copy of the minutes taken from the Chamber’s board of directors’ meeting on 15 December 2011.

Thus, the record reflects the parties each submitted affidavits, depositions, and other documentary evidence to the trial court for consideration as to whether it had personal jurisdiction over Town Defendants. Therefore, upon considering the question of personal jurisdiction in light of the procedural posture of this case, we conclude that the trial judge had the responsibility of “act[ing] as a fact-finder,” *see Deer Corp.*, 177 N.C. App. at 322, 629 S.E.2d at 166, and was responsible for “determin[ing] the weight and sufficiency of the evidence.” *See Banc of Am. Sec. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183 (internal quotation marks omitted).

B. Sovereign Immunity Defined

[3] “Sovereign immunity ordinarily grants the [S]tate, its counties, and its public officials, in their official capacity, an unqualified and absolute immunity from law suits.” *Paquette v. Cty. of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). “The rule of sovereign immunity applies when the governmental entity is being sued for the performance of a governmental, rather than proprietary, function.” *Id.* “Any activity of [a town] which is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself comes within the class of governmental functions.” *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952). “When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.” *Id.* In other words, when a town is “acting in behalf of the State in promoting or protecting the health, safety, security, or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers.” *Id.* at 450–51, 73 S.E.2d at 293 (internal quotation marks omitted). “[G]enerally speaking, the distinction is this: If the undertaking of the [town] is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and private when any corporation, individual, or group of individuals could do the same thing.” *Id.* at 451, 73 S.E.2d at 293 (internal quotation marks omitted).

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C. Sovereign Immunity and Liability Insurance

However, “[a] town or municipality may waive sovereign immunity through the purchase of liability insurance.” *Lunsford v. Renn*, 207 N.C. App. 298, 308, 700 S.E.2d 94, 100 (2010), *disc. review denied*, 365 N.C. 193, 707 S.E.2d 244 (2011). Nonetheless, “[i]mmunity is waived only to the extent that the [municipality] is indemnified by the insurance contract from liability for the acts alleged.” *Id.* (alterations in original) (internal quotation marks omitted). Thus, “[a] governmental entity does not waive sovereign immunity if the action brought against them is excluded from coverage under their insurance policy.” *Id.* (internal quotation marks omitted).

In the present case, Plaintiffs alleged Town Defendants waived sovereign immunity because the Town purchased liability insurance, thereby waiving any defense of immunity from suit pursuant to N.C. Gen. Stat. § 160A-485(a). Town Defendants contend the trial court correctly determined that the Town’s purchase of liability insurance did not waive Town Defendants’ governmental and public official immunities because the insurance policy contained a non waiver endorsement² identical to that in *Lunsford*, 207 N.C. App. at 308–10, 700 S.E.2d at 100–01 (holding the record showed that the town defendants “ha[d] not waived governmental immunity through their insurance policy” because “the action brought against them [was] excluded from coverage under their insurance policy” (citations and internal quotation marks omitted)). However, in support of Plaintiffs’ assertion that the trial court erred with respect to this determination, Mr. Parker attested in his affidavit to the following:

6. Later, I went by Snipes Insurance and requested a copy of the [Town’s insurance] policy. Amy Goodwin gave me a copy of the policy, attached as Exhibit A, and wrote her name and number at the top in case we had any questions. Exhibit A is a true and complete copy of the policy as it was given to me and represented to be the policy that covered the Town at the time.

2. The “Sovereign Immunity Non Waiver Endorsement” in the present case, as in *Lunsford*, provided as follows: “In consideration of the premium charged, it is hereby agreed and understood that the policy(ies) coverage part(s) or coverage form(s) issued by us provide(s) no coverage for any ‘occurrence[,]’ ‘offense[,]’ ‘accident[,]’ ‘wrongful act[,]’ claim or suit for which any insured would otherwise have an exemption or no liability because of sovereign immunity, any governmental tort claims act or laws, or any other state or federal law. Nothing in this policy, coverage part or coverage form waives sovereign immunity for any insured.”

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7. [Mrs. Parker] later called Amy to ask about the policy term, and whether the policy effective in December 2011 was the same as the copy we were given, she was told that it was the same policy, just renewed for a new term. There was no endorsement with the policy that had anything to do with immunity.
8. I understand that counsel for [the Town] contends that the policy in effect at the time of Cullen's death included an endorsement for non waiver of governmental immunity. This is entirely inconsistent with what [the Town's] insurance agent informed me.

The exhibit accompanying Mr. Parker's affidavit consisted *entirely* of the Commercial General Liability Coverage Part of the Town's insurance policy for the policy period from 1 July 2010 to 1 July 2011. The declarations page from this policy indicates that this was a new policy, and indicated the cost of the advance premium for "*this coverage part.*" (Emphasis added.)

However, while the policy accompanying the affidavit from the senior underwriting manager of the Town's insurance company — which was submitted to the trial court by Town Defendants — included the Commercial General Liability Coverage Part of the Town's insurance policy for the policy period of 1 July 2011 to 1 July 2012, which was the policy in effect at the time that Cullen was struck by the vehicle in the alley, it also included four *additional* coverage parts (e.g., Commercial Automobile, Law Enforcement Liability, Public Officials Liability, Employment Practices Liability), as well as a Common Policy Declarations section that contained twelve forms, among which was the "Sovereign Immunity Non-Waiver Endorsement" described above. This endorsement expressly indicated that it "modifie[d] insurance provided under" *each* of the five coverage parts of the policy. The policy also indicated that it was a renewal of the policy number identified on the Commercial General Liability Coverage Part that accompanied Mr. Parker's affidavit. Because it was incumbent upon the trial court to act as fact-finder and to determine the weight and sufficiency of the evidence presented by the parties, and because there was competent evidence to support its determination, we conclude that the trial court did not err when, after weighing the evidence presented by the parties, it determined the Town did not waive sovereign immunity through the purchase of its insurance policy.

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D. Bynum Three-Step Inquiry Concerning Governmental and Proprietary Activities

[4] Town Defendants contend the trial court “misapplied the law regarding governmental immunity” when it considered whether the “acts and omissions” alleged by Plaintiffs against Town Defendants were governmental or proprietary activities.

Our Supreme Court has “set forth a three-step inquiry for determining whether an activity is governmental or proprietary in nature.” *Bynum*, 367 N.C. at 358, 758 S.E.2d at 646. “First, a court must consider whether the legislature has designated the activity as governmental or proprietary.” *Id.* “Second, 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.” *Id.* at 358–59, 758 S.E.2d at 646 (internal quotation marks omitted). “Finally, 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.” *Id.* at 359, 758 S.E.2d at 646 (internal quotation marks omitted). “Relevant to this [final] inquiry is whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider.” *Id.* (internal quotation marks omitted). While “this Court has held[] [c]harging a substantial fee to the extent that a profit is made is strong evidence that the activity is proprietary,” *Willett v. Chatham Cty. Bd. of Educ.*, 176 N.C. App. 268, 270, 625 S.E.2d 900, 902 (2006) (second alteration in original) (internal quotation marks omitted), “a profit motive is not the sole determinative factor when deciding whether an activity is governmental or proprietary.” *Id.* (internal quotation marks omitted). “Instead, courts look to see whether an undertaking is one traditionally provided by the local governmental units.” *Id.* (internal quotation marks omitted).

Nonetheless, our Supreme Court has further directed that “[g]overnmental immunity turns on *whether the alleged tortious conduct* of the county or municipality arose from an activity that was governmental or proprietary in nature.” *Bynum*, 367 N.C. at 358, 758 S.E.2d at 646 (emphasis added) (internal quotation marks omitted). Thus, “the analysis *should center upon the governmental act or service* that was allegedly done in a negligent manner,” *id.* at 359, 758 S.E.2d at 646 (emphasis added), and the focus of this three-step inquiry should be on “the importance of the character of the municipality’s acts, rather than the nature of the plaintiff’s involvement.” *Id.*

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In the complaint, Plaintiffs alleged that “[t]he sponsoring, organizing, publicizing and carrying out of the logistics of the Christmas Parade by [the Town] and [the Chamber] are proprietary activities, engaged in for the private advantage and commercial gain of the local [Town] community members and businesses,” and “[a]s sponsors of the Parade, [Town Defendants and the Chamber] . . . ha[d] a duty to ensure the safety of citizens and visitors who [came] to the Parade, including the duty to anticipate the presence of pedestrians, including children, in the parade area and safeguard them from harm from vehicular traffic.” However, Plaintiffs alleged, “[i]n particular, [Town] Defendants failed to” do the following:

- a) Prevent vehicle ingress and egress from parking areas inside the parade route prior to, during and immediately after the parade. In particular, there were no barricades restricting traffic from entering or exiting the [parking] lot on South 12th Street, no police or safety personnel assisting pedestrians and drivers leaving the parade area at a specific ingress/egress point within the parade route;
- b) Provide safe walking paths for pedestrians to access and exit the parade route. In particular, there was no marked pedestrian walkway from Denim Drive to East H Street, and there was no police or public safety presence directing or preventing traffic flow along South 12th Street;
- c) Provide adequate police presence to manage public safety at the event. For example, there was a single Erwin Police Car positioned across from the [parking] lot exit on South 12th Street. However, the car was unmanned with no officer providing traffic control or pedestrian support in that area. The presence of the unmanned car presented a false and misleading impression of safety to the public; [and]
- d) Test and ensure proper function of street lights inside, along and surrounding the parade route. For example, the public street light on South 12th Street, located directly in front of [Mr. Morris’s building], was not lit[.]

Plaintiffs further alleged that, as a result of “these breaches,” “vehicular and pedestrian traffic was disorganized, unmonitored and unsafe,” “lighting and visibility at and around the location of the incident was

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inadequate and unsafe,” and, “[a]s a direct and proximate result” of these “failures,” Cullen was struck by a vehicle in the alley.

In its order, after finding that the General Assembly “has never designated either the planning or sponsorship of a parade as a governmental or proprietary function,” and that “[t]he planning or sponsorship of a Christmas parade is an activity that can be performed both privately and publicly,” the trial court concluded that neither the first nor second steps of *Bynum* were determinative as to whether the Town was engaged in a governmental, rather than a proprietary activity. Thus, the trial court turned to the third step of the *Bynum* three-step analysis. After considering the complaint and the discovery materials submitted by the parties, the trial court concluded that, in light of the parties’ “conflicting allegations and . . . conflicting discovery materials concerning whether [Town Defendants] generated substantial income, over operating costs, from the parade directly and/or via a joint venture with [the Chamber],” the court was “unable to conclusively decide” whether Town Defendants were engaged in a governmental, rather than a proprietary, activity.

However, an examination of Town Defendants’ allegedly tortious conduct shows that such conduct arose from activities that have already been designated as governmental or are necessarily governmental in nature because they can only be provided by a governmental agency or instrumentality. Plaintiffs specifically alleged, among other things, that, at the time Cullen was struck in the alley, there was “an unoccupied police car parked nearby” but “no one was monitoring or directing traffic in and out of the [parking lot,]” and there were no barricades preventing the use of the parking lot during the course of the parade. Thus, Plaintiffs allege that Cullen was struck by the vehicle in the alley as a result of Town Defendants’ failure to do the following activities, each of which has been recognized as a governmental function: providing a law enforcement presence, *see, e.g., Hinson v. City of Greensboro*, __ N.C. App. __, 753 S.E.2d 822, 827 (2014), *disc. review withdrawn*, 367 N.C. 516, 761 S.E.2d 648 (2014); regulating traffic and “deciding which roads to keep open for vehicular traffic and which roads should not continue to be open for such travel,” *see, e.g., Kirkpatrick v. Town of Nags Head*, 213 N.C. App. 132, 142, 713 S.E.2d 151, 158 (2011); approving or denying permits, *see, e.g., Tabor v. Cty. of Orange*, 156 N.C. App. 88, 91, 575 S.E.2d 540, 543 (2003); and providing ambulance services, *see, e.g., Childs v. Johnson*, 155 N.C. App. 381, 386, 573 S.E.2d 662, 665 (2002).

Therefore, because the activities that are alleged against Town Defendants to have directly and proximately caused the vehicle to strike Cullen in the alley are governmental functions, we conclude that

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Plaintiffs' claim of negligence against Town Defendants with respect to those activities are barred by sovereign immunity. Consequently, we need not consider whether the trial court's application of the third step in *Bynum* to the question of whether "[t]he planning or sponsorship of a Christmas parade" is a governmental or proprietary function was erroneous,³ since an examination of whether "substantial fee[s]" were charged by, or accrued to, Town Defendants for this activity would only have been required if "the particular service[s] at issue could] be performed both privately *and* publicly," see *Bynum*, 367 N.C. at 358, 758 S.E.2d at 646 (emphasis added), which is not true of the challenged services enumerated above. Accordingly, we hold the trial court erred by denying Town Defendants' Rule 12(b)(2) motions to dismiss Plaintiffs' claim of negligence against Town Defendants on the grounds that Town Defendants breached their duty of care to ensure the safety of residents and visitors to the 2011 Christmas parade.

E. Alleged Violations of N.C. Gen. Stat. § 160A-296(a)

[5] Town Defendants next contend the trial court erred by denying its Rule 12(b)(2) motions to dismiss Plaintiffs' claim that the Town and Mr. Byrd breached their duties in violation of N.C. Gen. Stat. § 160A-296(a).

N.C. Gen. Stat. § 160A-296(a) provides in relevant part:

A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that authority and control over certain streets and bridges is vested in the Board of Transportation. General authority and control includes but is not limited to all of the following:

- (1) The duty to keep the public streets, sidewalks, alleys, and bridges in proper repair.

3. We note that the record includes affidavits and voluminous discovery materials submitted by both the moving and non moving parties for the trial court's consideration in response to Town Defendants' Rule 12(b)(2) motions to dismiss. Therefore, although the trial court stated it was "unable to conclusively decide" whether Town Defendants were engaged in a governmental, rather than a proprietary, activity — because the parties presented "conflicting allegations and . . . conflicting discovery materials concerning whether [Town Defendants] generated substantial income, over operating costs, from the parade directly and/or via a joint venture with [the Chamber]" — the trial court was responsible for "act[ing] as a fact-finder," see *Deer Corp.*, 177 N.C. App. at 322, 629 S.E.2d at 166, and for "determin[ing] the weight and sufficiency of the evidence." See *Banc of Am. Sec. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183 (internal quotation marks omitted).

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- (2) The duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary obstructions.

. . . .

- (4) The power to close any street or alley either permanently or temporarily.

- (5) The power to regulate the use of the public streets, sidewalks, alleys, and bridges.

. . . .

- (7) The power to provide for lighting the streets, alleys, and bridges of the city.

N.C. Gen. Stat. § 160A-296(a)(1), (2), (4), (5), and (7) (2013). Thus, although the “[m]aintenance of . . . public road[s and] highway[s] is generally considered a governmental function[, an] exception is made in respect to streets and sidewalks of a municipality.” *Kirkpatrick*, 213 N.C. App. at 140, 713 S.E.2d at 157 (alterations and omission in original) (internal quotation marks omitted). “This exception to the general rule that street and road maintenance is a governmental function . . . has been recognized and uniformly applied in this jurisdiction [so that] the maintenance of streets and sidewalks is [properly classified] as a ministerial or proprietary function.” *Id.* (alterations in original) (internal quotation marks omitted). The duty “is positive. While the municipal authorities have discretion in selecting the means by which the traveling public is to be protected against a dangerous defect in the street, provided the means selected are adequate, there is no discretion as to the performance or nonperformance of the duty itself.” *Id.* (internal quotation marks omitted). Accordingly, a town or municipality has an “obligation to protect individuals from injury resulting from defective street and roadway conditions without being allowed to avoid liability for negligently performing its street and road maintenance obligations by relying on a governmental immunity defense while retaining discretion over the manner in which streets and roads are actually maintained.” *Id.*

“[T]he extent to which particular municipal streets and roads are kept open for use by members of the public . . . is a governmental function and that governmental immunity is available to municipalities as a defense to damage claims arising from such discretionary road closure decisions.” *Id.* at 142, 713 S.E.2d at 158. In other words, “municipalities may exercise their discretion, while remaining subject to protection from liability by the doctrine of governmental immunity, in deciding

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which roads to keep open for vehicular traffic and which roads should not continue to be open for such travel.” *Id.* In the event that the municipality “decides to allow travel on a particular street or road, governmental immunity is not available as a defense to any claim arising from personal injuries or property damage sustained as a result of a defective condition in the maintenance of that street or road.” *Id.*

“[A]n obstruction can be anything . . . which renders the public passageway less convenient or safe for use.” *Sisk v. City of Greensboro*, 183 N.C. App. 657, 659, 645 S.E.2d 176, 179 (omission in original) (internal quotation marks omitted), *disc. review denied*, 361 N.C. 569, 650 S.E.2d 813 (2007). However, traffic on a crossing street is not a type of obstruction against which a municipality has a duty to protect its citizens, since such is not something over which a municipality has control and is not a fixture alongside a public road. *See id.* at 659–60, 645 S.E.2d at 179. To consider traffic as an obstruction “would lead to the absurd result of subjecting a municipality to potential liability every time there is a traffic accident on a city street. In short, a moving car that is being operated, even if negligently, cannot be considered an ‘obstruction’ within the meaning of N.C. Gen. Stat. § 160A-296(a)(2).” *Id.* at 660, 645 S.E.2d at 179. Nonetheless, “parked cars *could* constitute obstructions which might violate the requirements of N.C. Gen. Stat. § 160A-296.” *Beckles–Palomares v. Logan*, 202 N.C. App. 235, 244, 688 S.E.2d 758, 764 (emphasis added), *disc. review denied*, 364 N.C. 434, 702 S.E.2d 219 (2010).

In the present case, Plaintiffs alleged that the Town and Mr. Byrd breached their duties in violation of N.C. Gen. Stat. § 160A-296(a) in the following ways:

- a) [The Town] blocked or allowed the blocking of South 12th Street at the Denim Street entrance and the East H Street entrance to the Street, but failed to block traffic from using the alley or other entrances to [the parking lot] by the public before, during and after the parade;
- b) [The Town] allowed South 12th Street at the Incident Site to be obstructed by an 18 wheeled truck during the course of the parade and events, without providing traffic control for the truck or near the Incident Site;
- c) [The Town] allowed vehicles to be parked along the alley and used as observation stations for the parade, which further obstructed the view for pedestrians and drivers at the Incident Site;

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- d) [The Town] failed to maintain an existing public street light to ensure that it was functioning to illuminate South 12th Street near its intersection with the alley at the Incident Site; [and]
- e) [The Town] failed to otherwise provide adequate street lighting at the Incident Site[.]

Plaintiffs also alleged that an 18 wheeler truck “was parked or stopped in the middle of South 12th Street” as the group walked towards the restaurant, that trash receptacles were located along the north side of the alley behind the restaurant, and that cars were parked in areas “not designated for parking” near the restaurant. However, Plaintiffs did not allege that any of these conditions impeded the driver’s ability to see, or avoid striking, Cullen as Cullen crossed the alley in front of her vehicle along South 12th Street. Moreover, Plaintiffs alleged that, at the time the group was crossing the alley, the 18 wheeler truck was no longer “blocking cars” from exiting the parking lot through the alley onto South 12th Street, the receptacles were located north of the incident site, and Plaintiffs did not allege that any cars were obstructing the ingress/egress point of the alley onto South 12th Street.

In its order, the trial court expressly concluded that, after considering “the [c]omplaint *and* partial discovery materials submitted,” (emphasis added), the court was “unable to conclusively determine for the purposes of [Town Defendants’] Rule 12(b)(2) motions [whether] Plaintiffs’ claims based upon an alleged failure to maintain safe streets and sidewalks and alleged violation of N.C. Gen. Stat. § 160A-296 should be dismissed.” In other words, with respect to Plaintiffs’ claim that Town Defendants’ alleged violations of N.C. Gen. Stat. § 160A-296(a) directly and proximately caused Cullen to be struck by the vehicle, the trial court stated that it considered the affidavits and other discovery materials presented by the parties, but did not make specific findings about the evidence presented and did not “determine the weight and sufficiency of the evidence [presented].” *See Banc of Am. Sec. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183 (internal quotation marks omitted). Since the trial court’s order indicated that it considered evidence beyond the allegations in Plaintiffs’ complaint, we remand this matter to the trial court with instruction to make findings that do not just reiterate Plaintiffs’ allegations, but instead reflect its assessment of the evidence presented and its determination of the weight and sufficiency of this evidence, and to determine whether such evidence established that these alleged violations of N.C. Gen. Stat. § 160A-296(a) directly and proximately caused the driver of the vehicle to strike Cullen.

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F. Issues on Appeal Concerning Public Official Immunity and Public Duty Doctrine

[6] Town Defendants finally contend the trial court erred when it made the following conclusion:

Public official immunity does not apply where “conduct violates clearly established statutory or constitutional rights of which a reasonable person in their position would be aware.” *Rogerson v. Fitzpatrick*, 170 N.C. App. 387, 390 (2005). The Complaint alleged that [Town Defendants] violated several such laws, including N.C. Gen. Stat. § 160A-296 and a parade permit ordinance of [the Town]. At this point, the [c]ourt is unable to conclusively determine for the purposes of [Town Defendants’] Rule 12(b)(2) motions that the Complaint against [Town Defendants] should be dismissed due to public official immunity.

The record before us indicates that Town Defendants moved to dismiss Plaintiffs’ complaint on the basis of public official immunity and the public duty doctrine pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), and not pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2). Nevertheless, because we remand this matter to the trial court to determine the weight and sufficiency the evidence presented concerning alleged violations of N.C. Gen. Stat. § 160A-296(a) and to make findings and conclusions with respect to this evidence, we decline to undertake an examination of whether Town Defendants’ purported violations of N.C. Gen. Stat. § 160A-296(a) implicate the public official immunity doctrine. *See Little v. Wachovia Bank & Tr. Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960) (“The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, . . . deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions.”). Additionally, because we have determined that Plaintiffs’ claim of negligence against Town Defendants on the grounds that Town Defendants breached their duty of care to ensure the safety of residents and visitors at the 2011 Christmas parade were barred by sovereign immunity, we need not undertake an examination of whether the trial court erroneously denied Town Defendants’ 12(b)(6) motions to dismiss on the grounds that Plaintiffs’ allegations concerning the sufficiency of the police presence and the regulation of traffic in support of Plaintiffs’ claim of negligence were barred by the public duty doctrine.

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III. Plaintiffs' Cross-Appeal

[7] Plaintiffs cross-appeal from the trial court's amended order granting Mr. Morris's Rule 12(b)(6) motion and dismissing with prejudice Plaintiffs' complaint as to Mr. Morris. The parties do not dispute that this order is interlocutory and not immediately appealable. However, the record indicates that the trial court certified, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), that the dismissal was a final judgment and there was no just reason for delay of an appeal from such order. *See Sharpe v. Worland*, 351 N.C. 159, 161–62, 522 S.E.2d 577, 579 (1999) (“[I]mmediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay.”).

“A motion to dismiss made pursuant to G.S. 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint.” *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citing *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970)). “In order to withstand such a motion, the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must state allegations sufficient to satisfy the substantive elements of at least some recognized claim.” *Id.* “The question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.” *Id.* “In general, a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*” *Id.* at 670–71, 355 S.E.2d at 840 (internal quotation marks omitted). “Such a lack of merit may consist of the disclosure of facts which will necessarily defeat the claim as well as where there is an absence of law or fact necessary to support a claim.” *Id.* at 671, 355 S.E.2d at 840–41. “Our standard of review on a motion to dismiss for failure to state a claim is *de novo* review.” *Jackson v. Charlotte Mecklenburg Hosp. Auth.*, __ N.C. App. __, __, 768 S.E.2d 23, 24 (2014) (internal quotation marks omitted).

To make out a *prima facie* case of negligence, “a plaintiff must show that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) damages resulted from the injury.” *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 830, 562 S.E.2d 75, 79, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 192 (2002).

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Plaintiffs contend the allegations in their complaint were sufficient to defeat Mr. Morris's Rule 12(b)(6) motion to dismiss and assert that the trial court erred by granting Mr. Morris's motion. Although Plaintiffs concede that Cullen was struck by the vehicle in the alley adjacent to Mr. Morris's building, which alley was privately owned by Defendant Erwin Parking Center, Inc. ("Erwin Parking") and not by Mr. Morris,⁴ Plaintiffs assert that the "dangerous condition" "restricting visibility for the driver who struck Cullen" "originated on [Mr.] Morris's property, and was therefore caused by [Mr.] Morris." We disagree.

"A landowner in North Carolina owes to those on its land the duty to exercise reasonable care in the maintenance of [its] premises." *Lampkin ex rel. Lapping v. Hous. Mgmt. Res., Inc.*, 220 N.C. App. 457, 459, 725 S.E.2d 432, 434 (alteration in original) (internal quotation marks omitted), *disc. review denied*, 366 N.C. 242, 731 S.E.2d 147 (2012). "[T]he duty to protect from a condition on property arises from a person's control of the property and/or condition, and in the absence of control, there is no duty." *Id.* at 460, 725 S.E.2d at 435. Thus, "a landowner's duty to keep property safe (1) does not extend to guarding against injuries caused by dangerous conditions located off of the landowner's property, and (2) coincides exactly with the extent of the landowner's control of his property." *Id.* at 461, 725 S.E.2d at 435.

In support of Plaintiffs' assertion that they presented sufficient evidence of Mr. Morris's negligence, Plaintiffs direct our attention to *Marzelle v. Ski Land Manufacturing Co.*, 227 N.C. 674, 44 S.E.2d 80 (1947), *Dunning v. Forsyth Warehouse Co.*, 272 N.C. 723, 158 S.E.2d 893 (1968), and *Klassette v. Liggett Drug Co.*, 227 N.C. 353, 42 S.E.2d 411 (1947). Plaintiffs argue that, like *Marzelle*, *Dunning*, and *Klassette*, the present case concerns a circumstance in which a person was injured as a result of a dangerous condition that originated on property adjacent to the incident site property, and which properties did not share a common owner.

In *Marzelle*, the plaintiff sustained an injury when he slipped on syrup that was "flowing entirely across the sidewalk from the open doors [of the defendant's candy and confections manufacturing business] to the curb." *Marzelle*, 227 N.C. at 675, 44 S.E.2d at 80. The substance was

4. Plaintiffs alleged that Erwin Parking owned the property on which the incident occurred, and that Mr. Morris was the president of Erwin Parking. However, Plaintiffs made no allegations or claims against Mr. Morris in his capacity as president of Erwin Parking. Accordingly, we consider only those allegations and claims made against Mr. Morris as owner of the building located immediately adjacent to the site of the incident.

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being swept out of the doors of the defendant's business by the defendant's employees, there was "no sign or other warning of the slippery condition of the sidewalk," and the substance "looked like dirty water, off a dirty cement or wood floor." *Id.* at 675–76, 44 S.E.2d at 80–81. Because "there was nothing in the appearance or odor of the substance on the sidewalk, as [the plaintiff] approached, to indicate it was syrup or to import danger therefrom," *id.* at 676, 44 S.E.2d at 81, the Court determined there was sufficient evidence of the defendant's negligence to withstand a motion for judgment of nonsuit, even though the injury occurred on property that was not owned by the defendant. *See id.*

In *Dunning*, the plaintiff "was seriously injured when a metal covering over a drainage culvert broke under her foot as she walked along the sidewalk on which the defendant's property abutted." *Dunning*, 272 N.C. at 723, 158 S.E.2d at 894. The plaintiff alleged that the defendant, without first obtaining a permit that was required by city ordinance, "cut through and removed a narrow cross-section of the city's concrete sidewalk for the purpose of constructing a drainage culvert to carry surface water from its building under the sidewalk and into the city's drainage system," *id.*, and that, "[a]fter the excavation[,] the defendant placed over the culvert a thin metal sheet, and on top of this metal sheet poured a covering of concrete sufficient to make the surface conform to the undisturbed portion of the sidewalk." *Id.* "The metal sheet, weakened by corrosion, gave way when [the] plaintiff stepped on it." *Id.* The Court determined the evidence presented "was sufficient to permit the jury to find the defendant created the defective condition which resulted in [the] plaintiff's injuries," *id.* at 725, 158 S.E.2d at 895, even though the injury occurred on property that was not owned by the defendant. *See id.* at 724, 158 S.E.2d at 895.

Finally, in *Klassette*, the plaintiff was injured when she slipped on a greasy substance that was "running out of" the building leased to the defendant, a drug store company, and spreading over the sidewalk adjoining the defendant's building. *See Klassette*, 227 N.C. at 355, 42 S.E.2d at 413. Although the "greasy and oily substances and liquids" running out of the building across the sidewalk were residue from the aftermath of a fire in the building on the previous day, the plaintiff alleged that, by allowing the substances and liquids to remain on the sidewalk, the defendant "rendered said sidewalk in an unsafe and dangerous condition," *id.*, "took no measures to remedy the dangerous and unsafe condition of said sidewalk, or to guard against the risks and dangers arising from the risks of said greasy and oily substances and liquids thereon," *id.* at 355–56, 42 S.E.2d at 413, and "failed to take any precautions, or to notify persons attempting to use said sidewalk of the dangerous and unsafe condition thereof." *Id.* at 356, 42 S.E.2d at 413.

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However, in *Klassette*, our Supreme Court provided that, “in so far as pedestrians are concerned, any liability of owner, or of occupant of abutting property for hazardous condition existent upon adjacent sidewalk is *limited to conditions created or maintained by him*, and must be predicated upon his negligence in that respect.” *Id.* at 362, 42 S.E.2d at 418 (emphasis added). “[A]n owner, or an occupant is liable, if at all, for damage caused by the escape of substances from the premises only where some fault can be attributed to him.” *Id.* “The owner, or the occupant, is not liable for injuries caused others in the absence of proof of negligence, unless he is shown to have created a nuisance.” *Id.* Thus, contrary to the dispositions of *Marzelle* and *Dunning*, in *Klassette*, the Court affirmed the trial court’s judgment for nonsuit since there was “no evidence that the fire in the building was caused by the negligence of the owners or of the occupant,” *id.*, “the conditions resulting from extinguishing the fire were brought about by the city in the exercise of a governmental function, over which the owners, or the occupant had no control, and for which they, or it, may not be held responsible,” *id.*, and “[i]f oil from the drug store escaped in the water, the evidence fail[ed] to show that it was due to any fault on the part of the owners or of the occupant.”⁵ *Id.*

Mr. Morris, however, contends the present case is controlled by *Lampkin ex rel. Lapping v. Housing Management Resources, Inc.*, 220 N.C. App. 457, 725 S.E.2d 432 (2012). In *Lampkin*, the plaintiff was a four-year-old child who sustained permanent brain injury when she was playing on a playground in the common area of an apartment complex that was located on land owned, operated, and managed by the defendants, “passed through a broken portion of a chain-link fence owned by the apartment complex to play on a frozen pond on adjacent property,” which property was not owned by the defendants, and fell through the ice into the water. *Lampkin*, 220 N.C. App. at 458, 725 S.E.2d at 433–34. Prior to the plaintiff’s injury, the owner of the adjacent property notified the apartment complex that “‘children were coming through the fence onto her property’ and that she ‘was concerned someone would get hurt.’” *Id.* at 458, 725 S.E.2d at 434. The plaintiff contended that a “reciprocal duty should be imposed on landowners whose property abuts property on which a third party maintains a pond, . . . where a

5. Plaintiffs concede that the disposition of *Klassette* is contrary to the disposition they seek in the present case. However, Plaintiffs assert that *Klassette* is relevant to their argument regarding this issue on appeal because the Court recognized the principle “that landowners can be held liable where their negligent actions create a dangerous condition that resulted in personal injury to someone off-site.”

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landowner knows that children from his property are gathering and playing on or near a dangerous condition on neighboring property,” and that “the landowner ha[d] a duty to protect those children from injury by that condition.” *Id.* at 460, 725 S.E.2d at 434.

This Court “disagree[d] with [the p]laintiffs’ contention that a landowner’s duty of reasonable care extend[ed] to guarding against injury caused by a dangerous condition on neighboring property, and . . . conclude[d] that the imposition of such a duty would be contrary to public policy and the established law of this State,” *id.*, because imposing such a reciprocal duty would necessarily “impermissibly shift the burden of making that condition safe from the owner of that condition, who has exclusive control over the use of her land, to the owner of the adjacent property, who has no control.” *Id.* at 460, 725 S.E.2d at 434–35. “[B]ecause [the d]efendants did not control the pond on the adjacent property, their duty to keep their premises safe did not include an obligation to make the pond safe by preventing children on their land from accessing the pond.” *Id.* at 461, 725 S.E.2d at 435. “Rather, the adjacent landowner, with exclusive control over the pond, had the sole duty to keep the pond safe, the only obligation to act, and the only possible liability.” *Id.*

Plaintiffs assert that the present case is distinguishable from *Lampkin* because — unlike the frozen pond in *Lampkin*, which was not located on the property of the defendants and was the dangerous condition at issue in that case — Plaintiffs contend “the dangerous condition originated on [Mr.] Morris’s property” when Mr. Morris “negligently failed to maintain the light which he installed and owned, . . . [which rendered] the incident site . . . dangerously dark[, and t]his dark condition . . . resulted in Cullen’s death.” In other words, Plaintiffs insist that, like the confectioner’s syrup in *Marzelle*, the greasy, oily, firehose residue in *Klassette*, and the weakened metal sheet covering the drainage culvert in *Dunning*, the nonfunctioning light on Mr. Morris’s building itself, and *not* the darkness, was the dangerous condition that spread across the alley and caused the vehicle to strike Cullen. Nonetheless, we are unpersuaded that the nonfunctioning light on the South 12th Street side of Mr. Morris’s building was, itself, a dangerous condition that *created* “th[e] dark condition” of the nighttime sky. As the owner of the property adjacent to the alley on which the incident occurred, Mr. Morris’s liability, if any, was “limited to [hazardous conditions existent that were] created or maintained by him,” *see Klassette*, 227 N.C. at 362, 42 S.E.2d at 418, and Mr. Morris “[wa]s not obligated to protect against injury from a dangerous condition over which [he] ha[d] no control.” *See Lampkin*, 220 N.C. App. at 464, 725 S.E.2d at 437. Because Plaintiffs did

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not allege that Mr. Morris had a duty to illuminate the property that was owned by Erwin Parking, we conclude that Plaintiffs' complaint failed to sufficiently allege that Mr. Morris breached a duty owed to Plaintiffs, and, thus, Plaintiffs failed to set forth a *prima facie* claim of negligence. Accordingly, we hold the trial court did not err by dismissing with prejudice Plaintiffs' claims against Mr. Morris.

Because Plaintiffs did not allege any claim for negligence *per se* against Mr. Morris, we decline to address Plaintiffs' argument on appeal concerning Mr. Morris's negligence based on his purported violations of the Town's zoning ordinances. Additionally, because Plaintiffs' allegations were insufficient to support the application of the voluntary undertaking doctrine, *cf. Lampkin*, 220 N.C. App. at 466–67, 725 S.E.2d at 437–39, we decline to address Plaintiffs' argument on appeal that Mr. Morris “voluntarily assumed a duty of care when he affirmatively acted by installing and operating a light at the incident site.”

IV. Conclusion

In sum, we conclude that the trial court did not err when, after weighing the evidence presented by the parties, it determined the Town did not waive sovereign immunity through the purchase of its insurance policy. Because the activities that are alleged against Town Defendants to have directly and proximately caused the vehicle to strike Cullen in the alley are governmental functions, we conclude that Plaintiffs' claim of negligence against Town Defendants with respect to those activities are barred by sovereign immunity, and that the trial court erred by denying Town Defendants' Rule 12(b)(2) motions to dismiss Plaintiffs' claim of negligence against Town Defendants on the grounds that Town Defendants breached their duty of care to ensure the safety of residents and visitors to the 2011 Christmas parade. We remand this matter to the trial court with instruction to make findings reflecting its assessment of the evidence presented and its determination of the weight and sufficiency of this evidence, and to determine whether such evidence established that the alleged violations of N.C. Gen. Stat. § 160A-296(a) directly and proximately caused the vehicle to strike Cullen. Finally, because Plaintiffs' complaint failed to sufficiently allege that Mr. Morris breached a duty owed to Plaintiffs, and, thus, that Plaintiffs failed to set forth a *prima facie* claim of negligence, we hold the trial court did not err by dismissing with prejudice Plaintiffs' claims against Mr. Morris.

AFFIRMED IN PART; REVERSED IN PART; REMANDED IN PART.

Judges HUNTER, JR. and DIETZ concur.

RICHMOND CNTY. BD. OF EDUC. v. COWELL

[243 N.C. App. 116 (2015)]

RICHMOND COUNTY BOARD OF EDUCATION, PLAINTIFF

v.

JANET COWELL, NORTH CAROLINA STATE TREASURER, IN HER OFFICIAL CAPACITY ONLY,
 DAVID T. McCOY, NORTH CAROLINA STATE CONTROLLER, IN HIS OFFICIAL CAPACITY
 ONLY, ART POPE, NORTH CAROLINA STATE BUDGET DIRECTOR, IN HIS OFFICIAL CAPAC-
 ITY ONLY, FRANK L. PERRY, SECRETARY OF THE NORTH CAROLINA DEPARTMENT
 OF PUBLIC SAFETY, IN HIS OFFICIAL CAPACITY ONLY, ROY COOPER, ATTORNEY GENERAL
 OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY ONLY, DEFENDANTS

No. COA14-1115

Filed 1 September 2015

1. Constitutional Law—North Carolina—Article IX, Section 7(a)—surcharge for improper equipment offenses—must fund education

The Court of Appeals affirmed the trial court's conclusion that the \$50.00 surcharge for improper equipment offenses must be used to fund education pursuant to Article IX, Section 7(a) of the state constitution rather than contributed to the State Confinement Fund. The \$50.00 surcharge imposed by N.C.G.S. § 7A-304(a)(4b) is punitive and imposed for breach of the penal laws of our state.

2. Constitutional Law—North Carolina—Article IX, Section 7(a)—surcharge for improper equipment offenses—remedy

The Court of Appeals affirmed the trial court's order requiring that all of the proceeds received in the State Confinement Fund from surcharges for improper equipment offenses in Richmond County be paid to Richmond County. It was appropriate for the clerk of superior court of Richmond County to receive the funds and distribute them according to N.C.G.S. § 115C-452.

Appeal by Defendants from orders entered 23 May 2012 by Judge W. Osmand Smith, III, and 27 June 2014 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 16 March 2015.

George E. Crump, III, for the Plaintiff-Appellee.

Attorney General Roy A. Cooper, III, by Solicitor General John F. Maddrey, Assistant Solicitor General Gary R. Govert, and Special Deputy Attorney General Joseph Finarelli, for the Defendants-Appellants.

DILLON, Judge.

RICHMOND CNTY. BD. OF EDUC. v. COWELL

[243 N.C. App. 116 (2015)]

I. Background

The question presented in this appeal is whether N.C. Gen. Stat. § 7A-304(a)(4b) violates Article IX, Section 7(a) of the North Carolina Constitution.

Article IX, Section 7(a) mandates that the “clear proceeds” of all fines, penalties and forfeitures collected for the breach of the penal laws of the State “shall belong to” the counties and be “used exclusively for maintaining” our public schools. N.C. Const. art. IX, § 7(a) (2011).

N.C. Gen. Stat. § 7A-304(a)(4b) requires that individuals convicted of an improper equipment offense under our motor vehicle laws pay a \$50.00 surcharge, in addition to any other penalty or cost authorized by law, and directs that the proceeds from the collection of this \$50.00 surcharge be remitted to a fund administered by the State and used to pay counties to house certain misdemeanor offenders in their jails (the “State Confinement Fund”). *See also Justice Reinvestment Act of 2011*, 2011 N.C. Sess. Laws 192, §§ 7(a)-(c), (e) (codified at N.C. Gen. Stat. §§ 15A-1352, 148-32.1(b1), (b2) (2011)) (providing for inmate housing in county jails for misdemeanants whose sentences exceed ninety days).

The Richmond County Board of Education (“Plaintiff”) commenced this action, contending that the \$50.00 surcharge falls within the ambit of Article IX, Section 7(a) of our State Constitution and, therefore, the clear proceeds therefrom must be used to fund education rather than be contributed to the State Confinement Fund. In this action, Plaintiff seeks a declaratory judgment that it is entitled to the \$50.00 surcharge revenue collected in Richmond County and a monetary judgment in the amount equal to the total \$50.00 surcharge revenue collected in Richmond County that has been remitted to the State Confinement Fund. Defendants are executive officers of the State of North Carolina involved in the administration of State funds and are being sued in their official capacities only.¹

All parties moved for summary judgment. The trial court granted summary judgment in favor of Plaintiff and denied Defendants’ motion for summary judgment. Defendants appeal.² For the following reasons, we affirm.

1. We granted Plaintiff’s uncontested motion for substitution of parties replacing David T. McCoy and Art Pope as Defendants with Linda Combs and Lee Roberts, respectively.

2. This appeal is the second in this proceeding. In the first appeal, we affirmed the trial court’s denial of Defendants’ motion to dismiss based on sovereign immunity and on lack of standing. *Richmond Cnty. Bd. of Educ. v. Cowell*, ___ N.C. App. ___, 739 S.E.2d 566 (2013).

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II. Standard of Review

As this case is factually uncontested and involves the interpretation of statutes and our State Constitution, our review is *de novo*. *Shavitz v. City of High Point*, 177 N.C. App. 465, 473-74, 630 S.E.2d 4, 11 (2006).

III. Analysis

Our courts have “the authority and responsibility to declare a law unconstitutional,” but only “when the [constitutional] violation is plain and clear.” *Hart v. State*, No. 372A14 at 3, 2015 N.C. LEXIS 655 *3, 2015 WL 4488553 *1 (N.C. July 23, 2015). In determining whether our General Assembly has exceeded its constitutional authority in the enactment of legislation, we must be mindful – as our Supreme Court has recently held – that the North Carolina Constitution “is not a grant of power, but a limit on the otherwise plenary police power of the State.” *Id.* at 11, 2015 N.C. LEXIS 655 *13, 2015 WL *5.

On appeal, Defendants argue (1) that the trial court erred in concluding that the \$50.00 surcharge falls within the ambit of Article IX, Section 7; and, (2) assuming the trial court did not so err, that the trial court otherwise erred in ordering Defendants to repay “all sums” generated by the \$50.00 surcharge in Richmond County rather than some lesser amount representing the “clear proceeds” of the \$50.00 surcharge revenue.³ We address each argument in turn.

A. The North Carolina Constitution Prohibits our General Assembly from Appropriating the \$50.00 Surcharge Revenue to House Prisoners

[1] We hold that the trial court correctly concluded that the \$50.00 surcharge falls within the ambit of Article IX, Section 7(a). Therefore, our General Assembly exceeded its constitutional powers by enacting legislation which directs that the revenue from the \$50.00 surcharge collected in Richmond County be remitted to the State Confinement Fund to pay for the housing of prisoners.

3. In its brief, Plaintiff argues that the trial court erred in limiting its award to the \$50.00 surcharges collected in Richmond County, and not granting relief to the local school administrative units in all 100 counties. However, Plaintiff has not cross-appealed. Therefore, this argument has been not been properly preserved for our review. *See, e.g., Bd. of Dirs. of Queens Towers Homeowners' Ass'n, Inc. v. Rosenstadt*, 214 N.C. App. 162, 169, 714 S.E.2d 765, 770 (2011) (“[T]he proper procedure for presenting alleged errors that purport to show that the judgment was erroneously entered and that an altogether different kind of judgment should have been entered is a cross-appeal.”). Furthermore, the local school administrative units of the other 99 counties in our State are not parties to this action.

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We begin this portion of our analysis with a brief review of the historical context surrounding the adoption of Article IX, Section 7(a) of our Constitution. We then turn to our Supreme Court's watershed decision in *Mussallam v. Mussallam*, 321 N.C. 504, 364 S.E.2d 364 (1988), in which it interpreted the phrase "penal law" within the meaning of Article IX, Section 7(a) expansively, to include not only criminal laws, but all "[punitiv] laws that impose a monetary payment for their violation." *Id.* at 509, 364 S.E.2d at 367. Applying the interpretation established by *Mussallam* to the present case, we then conclude that the \$50.00 surcharge imposed by N.C. Gen. Stat. § 7A-304(a)(4b) is punitive in nature and, furthermore, that the surcharge is imposed for a breach of the penal laws of our State, notwithstanding that violating the statute is not a crime. Therefore, we hold that the \$50.00 surcharge falls within the ambit of Article IX, Section 7(a).

The pertinent language in Article IX, Section 7(a) became part of our State Constitution in 1875. *See* David M. Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C. L. Rev. 49, 60 (1986). Article IX, Section 7(a) specifically states as follows:

[T]he clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

N.C. Const. art. IX, § 7(a) (2011). Troubled by the historic disregard displayed by our General Assembly in failing to fund public education adequately, the framers of Article IX, Section 7(a) adopted the provision for the purpose of dedicating certain revenue to education, thereby limiting the power of the General Assembly to appropriate said revenue for any other purpose. *See* Lawrence, *supra* at 59-60.

Prior to the Civil War, public school funding was left entirely to legislative control, with no constitutional restrictions placed on our General Assembly. *Bd. of Educ. of Vance Cnty. v. Town of Henderson*, 126 N.C. 689, 698, 36 S.E. 158, 161 (1900) (Faircloth, J., concurring in result). In 1825, the General Assembly established a statewide Literary Fund, directing that the profits derived therefrom pay "for the support of the common and convenient Schools" of our State.⁴ Lawrence, *supra*

4. The Literary Fund was largely comprised of stock in North Carolina-chartered banks, including the Bank of Newbern and the Bank of Cape Fear, the first banks chartered in our State. *See* M.C.S. Noble, *A History of the Public Schools of North Carolina* 45-48 (1930). In fact, the Bank of Newbern's Raleigh branch was located adjacent to our Capitol

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at 53. However, during the Civil War, the General Assembly regularly raided the Literary Fund; and, as recently noted by our Supreme Court, the Fund “was almost completely depleted by war’s end.” *Hart* at 15, 2015 N.C. LEXIS 655 *18, 2015 WL *7.

Following the Civil War, the framers of the Constitution of 1868 were interested in establishing a *constitutionally*-protected fund dedicated to public education. *Id.* Accordingly, the framers incorporated a provision requiring that certain sources of revenue – including, among other sources, the net proceeds of fines, penalties, and forfeitures – be placed in a State “irreducible educational fund.” N.C. Const. art. IX, § 4 (1868) (stating further that this fund was to be “sacredly preserved” and “faithfully appropriated for establishing and perfecting . . . a system of Free Public Schools”). The framers also included a provision requiring the respective counties to support the public schools, in recognition of the importance of their role in our State’s public education system. *See id.* § 3 (providing that each county must maintain the public schools therein for at least four months of each year, and that county commissioners who fail in this requirement “shall be liable to indictment”).

However, despite strong language prohibiting the use of the money in the newly constitutionalized education fund for any other purpose, its diversion by our General Assembly continued, and because the assets in the fund were meager to begin with, little money from it ever reached our State’s public schools. *See* Lawrence, *supra* at 59. Furthermore, many counties struggled to meet their obligations under the new constitutional provisions because county commissioners could not levy taxes without voter approval. *See Lane v. Stanly*, 65 N.C. 153, 156 (1871). Thus, against the backdrop of a history of inadequate public school funding, legislative diversion of constitutionally dedicated funds, and the impotence of local government, the framers of the Constitution of 1875 adopted the language in Article IX, Section 7(a) for the purpose of securing *to each county* a constitutionally-protected source of revenue to aid in meeting its obligation to support our State’s public schools. *See* Lawrence, *supra* at 58-60.

In *Mussallam v. Mussallam*, 321 N.C. 504, 364 S.E.2d 364 (1988), our Supreme Court – recognizing that the scope of Article IX, Section 7(a) only extends to the clear proceeds of fines, penalties, and forfeitures

in a building that was eventually torn down in 1911 to make way for the Ruffin Building, which housed our Supreme Court from 1913 to 1938, and houses our Court today. *See E.C. Waugh, North Carolina’s Capital, Raleigh* 38 (1967).

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collected “for [] breach of the penal laws of the State” – interpreted the phrase “penal laws” within the meaning of this provision broadly, to include not only fines imposed for violations of criminal law, but also other noncriminal “laws that impose a monetary payment for their violation.” *Id.* at 509, 364 S.E.2d at 367. Specifically, the Court held that the constitutional provision creates “two distinct funds for the public schools.” *Id.* at 509, 364 S.E.2d at 366. First, the Court identified the revenue derived from the collection of fines for violation of our State’s *criminal* laws as subject to the provision, observing that “[o]ne could not legitimately argue that the violation of a criminal law is not a ‘breach of the penal laws.’” *Id.* at 509, 364 S.E.2d at 367. However, the Court went on to interpret the phrase “penal laws” to include all “laws that impose a monetary payment for their violation,” provided that “[t]he payment is punitive rather than remedial in nature and is intended to penalize the wrongdoer rather than compensate a particular party.” *Id.* Accordingly, under *Mussallam*, the test is whether the imposition of payment for the violation of a statute is punitive or remedial in nature. *Id.*

Applying *Mussallam* to the present case, we note initially that the \$50.00 surcharge is imposed on individuals “convicted” of an improper equipment “offense.” See N.C. Gen. Stat. § 7A-304(a)(4b) (2011). Specifically, N.C. Gen. Stat. § 7A-304(a)(4b) provides:

To provide for contractual services to reduce county jail populations, the sum of fifty dollars (\$50.00) for all offenses arising under Chapter 20 of the General Statutes and resulting in a *conviction* of an improper equipment *offense*, to be remitted to the [Statewide Confinement Fund].

Id. (emphasis added). Improper equipment offenses are found generally in Chapter 20, Article 3, Part 9 of our General Statutes, entitled “The Size, Weight, Construction and Equipment of Vehicles.” See, e.g., *id.* § 20-115 (“It shall be unlawful for any person to drive . . . any vehicle . . . which are not so . . . equipped as required in this title”). Improper equipment offenses are infractions. *Id.* § 20-176(a). As such, they are not crimes. *Id.* § 14-3.1 (defining “infraction” as “a noncriminal violation of law not punishable by imprisonment”). However, though violations of these statutes do not constitute crimes, such violations nonetheless constitute “breach[es] of the penal laws of the State” within the meaning of Article IX, Section 7(a). See, e.g., *id.* (imposing “a penalty of not more than one hundred dollars”). We note that the additional \$50.00 surcharge is imposed *only* on those individuals who have been found responsible for an improper equipment offense. See *id.* § 7A-304(a)(4b).

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Furthermore, the monetary penalty imposed for committing an improper equipment offense under Chapter 20 of the General Statutes is punitive rather than remedial in nature. The imposition of this payment, therefore, falls within the ambit of Article IX, Section 7(a). *See Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367. We are mindful that the General Assembly has affixed the label “cost” to this surcharge, suggesting that it is remedial. *See* N.C. Gen. Stat. § 7A-304(a) (2011). Our Supreme Court, however, has held that “the label attached . . . does not control,” *see Cauble v. City of Asheville*, 301 N.C. 340, 344, 271 S.E.2d 258, 260 (1980), though we are to *consider* the label used by the General Assembly in deciding “whether the payment . . . comes within the purview of Article IX, Section 7,” *see North Carolina Sch. Bds. Ass’n v. Moore*, 359 N.C. 474, 488, 614 S.E.2d 504, 512 (2005). However, based on how our General Assembly has directed that the proceeds from the \$50.00 surcharge are to be used and based on our Supreme Court’s decisions interpreting the language in Article IX, Section 7(a), we hold that the \$50.00 surcharge is punitive, rather than remedial, in nature. While not all monetary payments imposed on those who violate our State’s noncriminal laws fall within the ambit of Article IX, Section 7(a), our Supreme Court has recognized that there are limitations “as to the purposes for which monies may be used and still be considered ‘remedial.’” *Id.* at 496, 614 S.E.2d at 517. It is “plain *and* clear,” here, that the \$50.00 surcharge is not remedial because the revenue generated therefrom is not used to reimburse the State for an expense incurred because of improper equipment violations. Instead, the revenue is used to house prisoners, *see* N.C. Gen. Stat. § 7A-304(a)(4b), and imprisonment is not even a possible punishment for the commission of an improper equipment offense, *see id.* § 14-3.1.

Based on our conclusion that the \$50.00 surcharge authorized by N.C. Gen. Stat. § 7A-304(a)(4b) falls within the ambit of Article IX, Section 7(a) of the North Carolina Constitution, Defendants’ first argument is overruled.

B. Defendants Must Repay “All Sums”

[2] Defendants next argue that the trial court erred in ordering it to pay back “all” of the proceeds received into the State Confinement Fund from the \$50.00 surcharge revenue collected in Richmond County, contending that Plaintiff is only entitled to the “clear proceeds” therefrom. We disagree.

Defendants are correct that Article IX, section 7(a) requires *only* the “clear proceeds” from fines, penalties, and forfeitures within its ambit be

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used for public education. *See, e.g., Cauble*, 301 N.C. at 345, 271 S.E.2d at 261. Defendants, therefore, argue that “the remedy ordered by the [trial] court was incorrect[.]” citing N.C. Gen. Stat. § 115C-437, which provides a definition of “clear proceeds” as the full amount “diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected.”

The trial court, however, did not order “all sums” to be paid to Plaintiff (Richmond County Board of Education), but rather to “Richmond County.” We construe “Richmond County” in the trial court’s order as its clerk of superior court. The \$50.00 surcharges were originally paid by the improper equipment offenders into the clerk’s office. That office was required to remit the money to the State Confinement Fund pursuant to N.C. Gen. Stat. § 7A-304(a)(4b). However, as we have declared that the remittance of the \$50.00 surcharges collected in Richmond County to the State Confinement Fund is unconstitutional, we hold it is appropriate – as the trial court ordered – that this money be paid back to the clerk’s office in Richmond County. It will then be the duty of the clerk’s office to disburse this money properly pursuant to N.C. Gen. Stat. § 115C-452, which provides that “[t]he clear proceeds of all penalties and forfeitures and of all fines collected in the General Court of Justice in each county shall be remitted *by the clerk of the superior court* to the county finance officer [to be further remitted to the local school administrative unit(s) in the county.]” *Id.* (emphasis added).⁵ We note that Plaintiff is the sole local school administrative unit in Richmond County.

IV. Conclusion

For the foregoing reasons, we affirm the trial court’s order denying Defendants’ motion for summary judgment and granting summary judgment in favor of Plaintiff.

AFFIRMED.

Judges STROUD and DAVIS concur.

5. Another statute – N.C. Gen. Stat. § 115C-457.1 – addresses the proper disposition of civil fines, penalties, and forfeitures collected *by a State agency*, as opposed to those collected in the General Court of Justice. Specifically, pursuant to authority granted by Article IX, Section 7(b) of our State Constitution, our General Assembly directs that these civil fines, penalties, and forfeitures are not to be remitted to the finance officer of the county where collected, but rather to the State to be placed into the Civil Penalty and Forfeiture Fund.

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STATE OF NORTH CAROLINA

v.

MELISSA AMBER DALTON, DEFENDANT

No. COA14-1329

Filed 15 September 2015

1. Appeal and Error—objection to closing statement overruled—immediate reiteration of statement—preserved for appeal

In defendant’s trial for first-degree murder, where the prosecutor stated that defendant could be released from civil commitment after fifty days if found not guilty by reason of insanity and the trial court overruled defense counsel’s objection, the Court of Appeals rejected the State’s argument that the prosecutor’s statement immediately following the objection was unpreserved for appeal. When the prosecutor subsequently stated, “She very well could be back home in two months,” the prosecutor was merely reiterating his prior statement. Both statements—immediately before and immediately after the objection—therefore were preserved for appeal.

2. Homicide—closing arguments—by prosecution—likelihood of release from civil commitment after 50 days

In defendant’s trial for first-degree murder, where the prosecutor stated during closing argument, “[I]t is very possible that in 50 days . . . [defendant] will be back home,” if found not guilty by reason of insanity, the trial court erred by overruling defendant’s objection. The extent of defendant’s mental illness and the gravity of her crimes made it highly unlikely that defendant could be released from civil commitment after only fifty days. The Court of Appeals held that, given the brutality of defendant’s crimes, it was likely that the prosecutor’s improper statement motivated the jury to render a guilty verdict. Defendant was awarded a new trial.

Appeal by defendant from judgments entered on or about 14 April 2014 by Judge Marvin P. Pope, Jr. in Superior Court, Transylvania County. Heard in the Court of Appeals on 4 June 2015.

Attorney General Roy A. Cooper III, by Assistant Attorney General Jess D. Mekeel, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

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STROUD, Judge.

Melissa Amber Dalton (“defendant”) appeals from judgments entered on jury verdicts finding her guilty of first-degree murder, first-degree burglary, and assault with a deadly weapon inflicting serious injury. Defendant contends that during the State’s closing argument, the trial court erred in (1) overruling defendant’s objection to the prosecutor’s statements that if the jury found defendant not guilty by reason of insanity, it was “very possible” that she could be released from civil commitment in fifty days; and (2) failing to intervene *ex mero motu* when the prosecutor argued that defendant’s request for counsel during a police interview was evidence that she was sane. Finding prejudicial error, we hold that defendant is entitled to a new trial.

I. Background

Defendant suffers from bipolar disorder and borderline personality disorder. She has received mental health treatment since approximately 2005. Defendant is also an active drug user. Starting in her teenage years, she experimented with marijuana, crack cocaine, ecstasy, methamphetamine, mushrooms, and LSD. She eventually developed an addiction to crack cocaine.

In approximately 2005, defendant sought mental health treatment in Tennessee. There, one of defendant’s doctors prescribed her Prozac. Prozac is a selective serotonin reuptake inhibitor (“SSRI”) antidepressant. Defendant reacted negatively to the medication. She cut her face and legs and reported that she felt more belligerent and angry.

Defendant eventually moved to an apartment in Brevard, North Carolina. Naomi Jean Barker, and her fiancé, Richard Holden, were her neighbors who lived across the street. Defendant once visited Barker and Holden’s apartment when she needed to use their telephone. During the summer of 2009, Barker and Holden lent some money to defendant so that she could buy some milk for her infant daughter.

In late July 2009, defendant checked into the psychiatric ward at Mission Hospital and was subsequently transferred to the Neil Dobbins Crisis Center. She was four months’ pregnant at the time. Her treating physicians gave her an initial diagnosis of cocaine dependence, cannabis abuse, substance-induced mood disorder, and borderline personality disorder. Dr. Johnson prescribed defendant Lexapro, an antidepressant, and Seroquel. Like Prozac, Lexapro is an SSRI.

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On or about 1 August 2009, defendant returned to her apartment and continued to follow her medication regimen from Neil Dobbins. Approximately two or three weeks later, defendant's boyfriend, Corey Howell, noticed that defendant was acting unpredictably. He removed their infant daughter from the apartment and went to the Transylvania County Department of Social Services ("DSS") to seek custody of her.

Between 6:30 p.m. and 8:30 p.m. on 20 August 2009, Howell returned to the apartment to give defendant a note from DSS. When defendant opened the door, Howell noticed that she had been sleeping and appeared to be depressed. She was upset that Howell had taken their daughter away and did not want to speak with him. He called defendant's mother, Kimberly Dalton, for help. Kimberly spoke with defendant, observed her strange behavior, and went to the magistrate's office to request that she be committed to a mental health hospital. Kimberly met with the magistrate around 9:30 p.m. or 10:00 p.m., and the magistrate told her to speak with a social worker and return the following day. Later that evening, defendant exchanged her television, DVD player, and DVDs for one gram of crack cocaine.

In the early hours of 21 August 2009 while Barker and Holden were asleep in their living room, defendant knocked on Barker and Holden's front door and said, "Jean, Jean, open the door. I got Richard's money." Barker told Holden to not open the door. When Holden unlocked the door, defendant immediately entered, pushed Holden against a wall, and stabbed him with a knife. Defendant stabbed Holden repeatedly until he succumbed to his injuries.

Defendant then approached Barker and said, "I want my money Dorothy. And I want it now." Barker responded, "Amber, Amber, I'm not Dorothy. My name is Jean." Defendant then stabbed Barker six times. Barker called 911 and noticed that the contents of Holden's wallet were scattered on the floor. She suffered serious cervical and spinal injuries, but survived.

Shortly thereafter, a rescue squad member noticed defendant trying to hail cars on the side of a road and alerted police. When the police approached, defendant, who was still wearing bloody clothes from the crime scene, hailed the police car. Agent Ammons interviewed defendant at the police station. When Agent Ammons recited defendant's *Miranda* rights, she refused to speak and requested an attorney. See *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

On or about 5 October 2009, a grand jury indicted defendant for first-degree murder, first-degree burglary, and assault with a deadly weapon

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with intent to kill inflicting serious injury. *See* N.C. Gen. Stat. §§ 14-17, -32(a), -51 (2009). On 27 August 2012, defendant notified the State of her intent to raise the defense of insanity, among other defenses. On 8 November 2012, the State moved to commit defendant to Central Regional Hospital in Butner, North Carolina to examine her capacity to proceed and to evaluate her capacity at the time of the homicide. In February 2013, defendant was evaluated by Dr. Bartholomew at Central Regional Hospital.

At trial, defendant raised the defense of insanity and stated that she did not remember any of the events pertaining to her attack or the police interview. Dr. Johnson, who prescribed defendant Lexapro, testified that he was aware of the warnings against prescribing SSRIs to people with bipolar disorder. But he also noted that defendant had been admitted to Neil Dobbins only on a short term basis, to do a “crisis intervention” and he expected that upon release, she would “continue her treatment as an outpatient.” He testified: “The idea is that the crisis center is where things get started. But almost always when folks leave there’s a lot of work left to do to get things in better order, pick up the pieces, so to say, so to speak.”

Defendant’s first expert witness, Dr. Wilson, was tendered and accepted without objection to testify as an expert in neuropharmacology and to testify regarding the “effects of drugs, possible drugs on her behavior at the time of this crime.” He testified that she had been prescribed Seroquel and Lexapro. He further testified: “Seroquel is an antipsychotic agent. But it was apparently administered at a very, very low dose.” Although he noted that the exact chemistry is not well understood, he testified: “What we do know, though, is that somehow these drugs [(SSRIs, including Lexapro)] in special people produce really bizarre behavior and activate mania, activate the hyperactivity, the craziness of people with bipolar disorder. And it is well known. It’s even in the prescribing literature.” For these reasons, he opined that it was imprudent to prescribe Lexapro to people with bipolar disorder because it can trigger mania and disorganized thinking. Dr. Wilson opined that at the time of the homicide, defendant was in a manic state.

The prosecution’s cross-examination of Dr. Wilson was brief. Primarily, the State elicited that Dr. Wilson had not talked to Dr. Johnson and that he had met with defendant only twice. The prosecutor also asked Dr. Wilson, “Would it change your opinion or surprise you in any way if—if Dr. Bartholomew reported that the defendant never reported a manic episode previously to them?” He answered that it would not, since it was his understanding that defendant “carries this diagnosis”

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of “manic episodes” from other doctors who had previously treated defendant. The prosecution finished cross-examination by asking Dr. Wilson about his fee, which he answered was “about \$11,000” for “a lot of hours.”

Defendant’s second expert witness, Dr. Corvin, was tendered and accepted without objection as an expert in “the field of clinical and forensic psychiatry.” He had begun his evaluation of defendant only a few weeks after the crime, in 2009, and spent about nine hours interviewing defendant. He noted that he had reviewed defendant’s records from her prior psychiatric treatment over many years:

I’ve read all of the records that have been made available. And they are from numerous facilities, occurring over a long period of time. And some of the facilities have very detailed descriptions of her psychosocial history, the history of her life as we’ve discussed. And I have read all of them and [have] taken extensive notes from them. And the reason to do that is to then try to take a step back and look at the universe of her psychiatric history and come to what I hope and believe is an accurate formulation.

He opined that defendant’s history with antidepressants revealed that they made her more combative and explosive and that the prescription drugs, crack cocaine, and defendant’s underlying mental illness all affected her state of mind at the time of the homicide. He also opined that defendant’s choice to hail a police car while still wearing bloody clothes from the crime scene demonstrated a lack of understanding about the significance of her actions. Dr. Corvin further opined that defendant did not understand what occurred in the police interview and did not understand that she had just committed a serious felony. The State cross-examined Dr. Corvin, particularly regarding defendant’s past psychiatric history and her prescribed medications and illegal drug use. The State also asked Dr. Corvin about his review of the report by Dr. Bartholomew, who had evaluated defendant more than three years after the homicide, and focused mainly on things that defendant had or had not reported to Dr. Bartholomew.

The State did not present any expert witnesses to address defendant’s mental condition. The State did not seek to introduce Dr. Bartholomew’s report and there was no evidence of his ultimate conclusions. Thus, the evidence noted above from defendant’s expert witnesses was the only evidence before the trial court on these issues.

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Defendant testified that Holden had loaned her \$20 and that Howell had paid him back on her behalf. But Barker testified that defendant owed \$55 to Holden at the time of the homicide.

During the jury charge conference, the prosecutor asked if he could comment on the civil commitment procedures that would take effect if the jury returned a verdict of not guilty by reason of insanity. The trial court cautioned the prosecutor to not exaggerate defendant's chance of being released after fifty days. During the State's closing argument, the prosecutor subsequently made the following argument:

[Prosecutor]: . . . [Defendant] doesn't remember, so she says you can't hold me accountable, so find me not guilty by reason of insanity.

And that way, as one of the lawyers mentioned, then she can be committed to a hospital if you find that verdict. *And it is very possible that in 50 days, if she shows by a preponderance of the evidence that she is not a threat to anyone else or herself, she will be back home.*

[Defendant's counsel]: Objection.

THE COURT: Overruled.

[Prosecutor]: *She very well could be back home in less than two months.* She is asking you, ladies and gentlemen, to look at Ms. Barker, Naomi Jean Barker, to look her in the face and say, Ms. Barker, we are sorry that the sanctity and security of your home was violently violated on August 21, 2009, that your fiance was diced up like a tomato, left in a fetal position dead. Sorry, Ms. Barker.

(Emphasis added). The prosecutor also argued, without objection, that defendant's request for a lawyer during the police interview was evidence of sanity.

On or about 14 April 2014, the jury found defendant guilty of first-degree murder under a theory of felony murder, first-degree burglary, and assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant to a term of life imprisonment without parole for the first-degree murder conviction and a term of 26 to 41 months' imprisonment for the assault with a deadly weapon conviction. The trial court arrested judgment on the first-degree burglary conviction. Defendant gave notice of appeal in open court.

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II. Closing Argument

Defendant argues that during the State's closing argument, the trial court erred in (1) overruling defendant's objection to the prosecutor's statements that if the jury found defendant not guilty by reason of insanity, it was "very possible" that she could be released from civil commitment in fifty days; and (2) failing to intervene *ex mero motu* when the prosecutor argued that defendant's request for counsel during a police interview was evidence that she was sane. Because we find prejudicial error on the first issue, we need not address the second issue.

A. Preservation of Error

[1] The State argues that defendant failed to preserve error with respect to the prosecutor's statement: "She very well could be back home in less than two months." But the prosecutor made this statement *immediately* after the trial court overruled defendant's objection to the prosecutor's statement: "And it is very possible that in 50 days, if she shows by a preponderance of the evidence that she is not a threat to anyone else or herself, she will be back home." The prosecutor simply returned to his argument and reiterated his statement after the trial court overruled defendant's objection to the first statement. Accordingly, we hold that defendant has preserved error as to both statements.¹

B. Standard of Review

In addressing a closing argument by the State regarding the possibility that a defendant who is found not guilty by reason of insanity may be released, our Supreme Court has set forth the proper standard of review:

[C]ounsel must be allowed wide latitude in the argument of hotly contested cases. He may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case. Whether counsel abuses his privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury.

1. We note that the ground for defendant's objection was apparent from the context, especially in light of the trial court's warning to the prosecutor during the jury charge conference not to exaggerate defendant's chance of release from civil commitment. *See* N.C.R. App. P. 10(a)(1).

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State v. Allen, 322 N.C. 176, 195, 367 S.E.2d 626, 636 (1988) (citations omitted).

C. Analysis

[2] Defendant contends that during the State’s closing argument, the trial court erred in overruling defendant’s objection to the prosecutor’s statement that if the jury found defendant not guilty by reason of insanity, it was “very possible” that she could be released from civil commitment in fifty days. She argues that these statements were improper because they were based on information outside of the evidence and contrary to the law. 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.” *State v. Jones*, 355 N.C. 117, 135, 558 S.E.2d 97, 108 (2002). An incorrect statement of law in closing argument is improper. *State v. Sanders*, 201 N.C. App. 631, 642, 687 S.E.2d 531, 539, *disc. review denied*, 363 N.C. 858, 695 S.E.2d 106 (2010).

The prosecutor’s statements refer to civil commitment procedures that take effect after a verdict of not guilty by reason of insanity. *See* N.C. Gen. Stat. §§ 15A-1321, 122C-268.1 (2013). If a jury finds a defendant not guilty by reason of insanity, the trial court must order that the defendant be civilly committed. N.C. Gen. Stat. § 15A-1321. Within fifty days of the date of commitment, the trial court will provide a hearing to defendant. *Id.* § 122C-268.1(a). At that hearing, if a defendant shows by a preponderance of the evidence that she (1) no longer has a mental illness; or (2) is no longer dangerous to others, the court will release the defendant. *Id.* § 122C-268.1(i). An adult is mentally ill when she has “an illness which so lessens the capacity of the individual to use self-control, judgment, and discretion in the conduct of [her] affairs and social relations as to make it necessary or advisable for [her] to be under treatment, care, supervision, guidance, or control[.]” *Id.* § 122C-3(21) (2013). “Dangerous to others” means that

within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining

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reasonable probability of future dangerous conduct. *Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.*

Id. § 122C-3(11)(b) (emphasis added).

In *State v. Millsaps*, this Court addressed the scope of a proper argument concerning civil commitment procedures. 169 N.C. App. 340, 610 S.E.2d 437 (2005). There, the defendant raised the defense of insanity to charges of first-degree murder, felonious breaking and entering, assault with a deadly weapon with intent to kill inflicting serious injury, and three counts of assault with a firearm on a law enforcement officer. *Id.* at 341, 610 S.E.2d at 438. During the State's closing argument, the prosecutor argued, "We submit it's 99 percent certain that [a judge] someday can and will say that, oh that conviction was six or eight or ten years ago, that's irrelevant, release him." *Id.* at 345, 610 S.E.2d at 441. This Court held that this argument was improper and noted that the defendant had proffered expert testimony that he would never overcome his mental illness, and that even in ten years, *prima facie* evidence of a homicide would remain relevant in determining whether the defendant posed a danger to others. *Id.* at 348, 610 S.E.2d at 442-43. This Court held that the error was prejudicial and awarded a new trial. *Id.* at 348-49, 610 S.E.2d at 443.

Similarly, here, no evidence suggests that defendant's release in fifty days was "very possible"; rather, the evidence shows the opposite. First, Dr. Corvin testified that defendant would suffer from bipolar disorder and borderline personality disorder for the rest of her life. Thus, it is highly unlikely that after fifty days, defendant could show that she was no longer mentally ill. Second, the State's uncontroverted evidence that defendant committed a homicide is "prima facie evidence of dangerousness to others." *See* N.C. Gen. Stat. § 122C-3(11)(b). The gravity of defendant's offenses makes it extremely unlikely that defendant could overcome this presumption in such a short time. Indeed, based upon all of the evidence presented, such a quick release would appear to be virtually impossible.

The State responds that a judge would likely find that defendant is no longer dangerous to others because her violent act was caused by a "perfect storm" of illegal drug use, mental illness, and improper prescription drugs, and with proper treatment, her chances of recidivism are low. But Dr. Corvin testified that defendant's risk of recidivism would significantly increase if she were untreated and resumed her highly unstable

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lifestyle. Furthermore, Dr. Corvin testified that defendant would always be a drug addict. We also note that in making this argument, the State is essentially accepting defendant's evidence regarding her drug use and mental illness as true but is arguing that we should ignore the uncontroverted expert evidence regarding defendant's actual risk of recidivism based upon these factors. Therefore, we hold that the prosecutor's argument goes beyond "the facts in evidence and all reasonable inferences to be drawn therefrom" and was therefore improper. *See Allen*, 322 N.C. at 195, 367 S.E.2d at 636. As noted above, the State did not present *any* expert medical or psychiatric evidence to refute the testimony of Dr. Corvin and Dr. Wilson regarding defendant's long-term, serious mental disorders and drug addiction.

The State attempts to distinguish *Millsaps*. But the prosecutor's statements here are even more improper than the statements in *Millsaps*. There, the prosecutor argued that it was "99 percent certain" that the defendant would be released *after six or eight or ten years*, but, here, the prosecutor argued that defendant's release was "very possible" *after fifty days*. *See Millsaps*, 169 N.C. App. at 345, 610 S.E.2d at 411. Accordingly, we do not distinguish *Millsaps*.

The State's reliance on *State v. Allen* is misplaced. *See* 322 N.C. at 195, 367 S.E.2d at 636-37. In *Allen*, the defendant raised the defense of insanity to charges of first-degree murder and first-degree arson. *Id.* at 181-82, 367 S.E.2d at 628-29. During closing argument, the prosecutor misstated the maximum recommitment period. *Id.* at 195, 367 S.E.2d at 636-37. Our Supreme Court held that this mistake did not amount to a grossly improper argument. *Id.* at 195, 367 S.E.2d at 636-37. The Supreme Court also noted that "[w]hen considered in the totality of the argument, this misstatement did not rise to the level of prejudicial error." *Id.*, 367 S.E.2d at 637. In contrast, here, the prosecutor mischaracterized defendant's chances of release by stating that it was "very possible" that defendant would be released in fifty days, even after being warned by the trial court not to exaggerate defendant's chances of release. Even taken within the context of the entire argument, the prosecutor's argument rises to the level of error.

The State next argues that a judge could allow defendant to go "back home" after fifty days by allowing her an outside visit, even if she were committed for a longer time. Considering the prosecution's argument in context, it is doubtful that any juror would have understood the argument in this way. But even if that were possible, a defendant generally cannot make an outside visit if "[c]ommitment proceedings were initiated as the result of the [defendant's] being charged with a violent crime,

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including a crime involving an assault with a deadly weapon, and the [defendant] was found not guilty by reason of insanity or incapable of proceeding[.]” N.C. Gen. Stat. § 122C-62(b)(4)(a) (2013). Because defendant was charged with first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, defendant would have no right to an outside visit. *See id.* Although it is true that a “court order may expressly authorize visits otherwise prohibited[.]” the State proffers no reason in either the evidence or the law why it is “very possible” that a court would elect to override this general prohibition after fifty days given the particular circumstances of this case. *See id.* § 122C-62(b) (4). The prosecutor stated that it was very possible that she could “be back home” in only fifty days and did not qualify that defendant’s return would be for just a temporary outside visit. The prosecutor’s statements thus were contrary to the law as applied to these facts.

The State further argues that the prosecutor’s statements were proper because a judge could conditionally release defendant after fifty days pursuant to N.C. Gen. Stat. § 122C-277 (2013). The State argues that defendant’s attending physician could recommend that she receive outpatient treatment or be released on “specified medically appropriate conditions.” *Id.* § 122C-277(a). But in order to conditionally release a patient found not guilty by reason of insanity, the judge must apply the same standards and follow the same procedures as if he were determining whether to unconditionally release the patient. *Id.* § 122C-277(b1). In other words, defendant would still have to show by a preponderance of the evidence that she (1) no longer has a mental illness; or (2) is no longer dangerous to others. *Id.* §§ 122C-268.1(i), -277(b1). Because it is highly unlikely that defendant would be able to bear this burden, the prosecutor’s argument was contrary to the law as applied to these facts.

The State finally contends that the prosecutor’s argument was proper because a physician or eligible psychologist could recommend defendant for outpatient treatment after fifty days pursuant to N.C. Gen. Stat. § 122C-263(d) (2013). Again, it is highly unlikely that the jury would have understood the prosecutor’s statement as referring to outpatient treatment. But even if they did, the law does not support this argument either. N.C. Gen. Stat. § 122C-263(d) governs admission procedures and describes the findings that a physician or eligible psychologist must make in determining whether to recommend a patient for inpatient commitment or outpatient treatment or no treatment, and thus does not apply to defendant, because, had she been found not guilty by reason of insanity, she would have been automatically committed pursuant to N.C. Gen. Stat. § 15A-1321. We also note that the physician or

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eligible psychologist must recommend inpatient commitment if he finds that the patient is mentally ill and is dangerous to self, as defined in N.C. Gen. Stat. § 122C-3(11)(a), or others, as defined in N.C. Gen. Stat. § 122C-3(11)(b). *See* N.C. Gen. Stat. § 122C-263(d)(2). Accordingly, the prosecutor's closing argument that it was "very possible" that defendant would be released from civil commitment after fifty days was contrary to the law as applied to these facts. We thus hold that the prosecutor's argument was improper.

D. Prejudice

Defendant argues that the prosecutor's improper argument prejudiced her. When a court determines that an argument is improper, a defendant must prove that the statements were "of such a magnitude that their inclusion prejudiced [the] defendant" and that "a reasonable possibility exists that a different result would have been reached had the error not occurred." *Millsaps*, 169 N.C. App. at 347, 610 S.E.2d at 442 (quotation marks omitted); *see also* N.C. Gen. Stat. § 15A-1443(a) (2013).

Here, two witnesses testified that defendant was behaving extremely unpredictably immediately before the homicide. Howell testified that he was concerned about defendant's behavior and decided to remove their infant daughter from their apartment. Defendant's mother sought to have her committed to a mental hospital less than twenty-four hours before the homicide. Defendant also presented evidence that she reacted negatively to SSRIs. In 2005, while taking Prozac, she cut her face and legs and reported that she felt more belligerent and angry. During the weeks before the homicide, defendant had been taking Lexapro, an SSRI.

During the attack, defendant mistakenly called Barker "Dorothy," even though they knew each other. After defendant left the apartment, she hailed a police car while still wearing bloody clothing. Dr. Corvin opined that during the police interview, defendant did not appreciate the nature of her actions and did not appear to understand the gravity of her crimes. Both Dr. Wilson and Dr. Corvin opined that at the time of the homicide, defendant was in a manic state.

We also note that during the jury's deliberations, the jury sent a note requesting Dr. Bartholomew's report. The trial court denied this request because the State had not introduced Dr. Bartholomew's report into evidence. The jury note indicates that during its deliberations, the jury wrestled with defendant's argument of insanity.

Given the brutality of defendant's attack, we believe it likely that the prosecutor's statements about the likelihood of defendant's release in

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fifty days alarmed jurors and motivated them to render a guilty verdict. The evidence raised no dispute that defendant committed serious and extremely violent crimes, and there was no real dispute that defendant suffered from long-standing psychiatric and substance abuse problems. The only real question presented to the jury was whether defendant would spend the rest of her life in prison or be committed to a psychiatric facility. It is difficult to imagine any reasonable juror accepting defendant's argument of insanity if that may result in her "very possible" release in only fifty days. Defendant presented abundant evidence supporting an inference that she was insane, and the State presented no evidence to the contrary, other than its cross-examination of her expert witnesses. Although we recognize that the credibility and weight of all evidence must be determined by the jury, no evidence supported the State's argument about defendant's "very possible" release in less than two months. We therefore hold that a "reasonable possibility exists that a different result would have been reached had the error not occurred" and thus the prosecutor's improper argument prejudiced defendant. *See Millsaps*, 169 N.C. App. at 347, 610 S.E.2d at 442 (quotation marks omitted).

III. Conclusion

For the foregoing reasons, we hold that the trial court committed prejudicial error in overruling defendant's objection during the State's closing argument. Accordingly, we hold that defendant is entitled to a new trial.

NEW TRIAL.

Judges McCULLOUGH and INMAN concur.

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[243 N.C. App. 137 (2015)]

STATE OF NORTH CAROLINA

v.

KIM LAMONT HARRIS

No. COA 15-13

Filed 15 September 2015

Appeal and Error—guilty plea—appeal from denial of motion to exclude search results—no notice

Petitions for certiorari and a pro se appeal from the denial of a motion to suppress cocaine seized in a pat-down search were denied where defendant did not file a notice of intent to appeal before filing a guilty plea. A petition for certiorari in these circumstances may be allowed only if the right to appeal was lost by failure to take timely action; there was Court of Appeals precedent that the right of appeal was lost because the defendant pleaded guilty, not because he failed to take timely action. Although there was an opinion that allowed a writ of certiorari, the earlier precedent had to be followed.

Appeal by defendant from order entered 23 April 2014 by Judge Richard E. Boner in Richmond County Superior Court. Heard in the Court of Appeals 2 June 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Michael T. Wood, for the State.

Sarah Holladay for defendant-appellant.

DIETZ, Judge.

In 2014, Defendant Kim Lamont Harris entered into a plea agreement with the State and pleaded guilty to possession with intent to sell or distribute cocaine and to attaining the status of a habitual felon.

Earlier in his criminal proceeding, Harris moved to suppress a bag of cocaine that law enforcement recovered from him during a pat-down search. The trial court denied the motion. During the plea negotiations, Harris did not inform the State that he intended to appeal the motion to suppress, and Harris did not file a notice of intent to appeal on that issue, a mandatory requirement to preserve the right to appeal a suppression ruling following a guilty plea.

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After the time to appeal had expired, Harris filed an untimely, *pro se* notice of appeal, seeking to appeal the denial of his motion to suppress and also a separate denial of a motion for continuance. Harris's court-appointed appellate counsel later filed two petitions for writ of certiorari, asking this Court to review those same rulings by writ of certiorari.

For the reasons discussed below, we dismiss this appeal and deny the petitions for writ of certiorari. A petition for a writ of certiorari may be allowed in this context only if the defendant's right to prosecute the appeal "has been lost by failure to take timely action." N.C. R. App. P. 21(a) (2014). This Court has held that when a defendant pleads guilty without first notifying the State of the intent to appeal a suppression ruling, the defendant "has not failed to take timely action," and thus "this Court is without authority to grant a writ of certiorari." *State v. Pimental*, 153 N.C. App. 69, 77, 568 S.E.2d 867, 872 (2002). Rather, as in other cases involving a guilty plea, the right to appeal was lost because the defendant pleaded guilty, thereby waiving the right to appeal. *Id.* 75-77, 568 S.E.2d at 871-72.

We acknowledge that a more recent case, with no analysis and without addressing *Pimental*, allowed a writ of certiorari in this same circumstance. *State v. Davis*, ___ N.C. App. ___, 763 S.E.2d 585, 589 (2014). But our Supreme Court has addressed what this Court must do when faced with two arguably inconsistent opinions from separate panels: we must follow the earlier opinion. *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 133-34 (2004). Accordingly, under *Pimental*, we dismiss this appeal and deny Harris's two petitions for writ of certiorari.

Facts and Procedural History

In December 2012, law enforcement stopped a car in which Defendant Kim Lamont Harris was a passenger, based on a tip from the driver. The driver told police that Harris had recently bought cocaine and that he had two bags of cocaine stuffed down the back of his pants.

An officer searched Harris and discovered the cocaine. Harris later moved to suppress the search on the ground that police were required to obtain a warrant to search him, and that the search was unreasonable because it briefly revealed his naked buttocks to passers-by on the highway. Harris also moved for a continuance on the ground that he was hearing voices and was not competent to stand trial.

The trial court denied the motion to suppress in an order with detailed findings of fact and conclusions of law. The court also denied

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the motion for a continuance, but ordered that Harris's mental state be evaluated to determine if he was competent to stand trial.

On 4 June 2014, Harris entered into a plea agreement with the State and pleaded guilty to intent to sell or distribute cocaine and to obtaining the status of a habitual felon. During the plea negotiations, Harris did not inform the State that he intended to appeal the motion to suppress, and Harris did not file a notice of intent to appeal on that issue, a mandatory requirement to preserve the right to appeal a suppression ruling following a guilty plea.

The trial court sentenced Harris to 100 to 132 months imprisonment with 549 days jail credit. Harris later filed two untimely, *pro se* notices of appeal. His court-appointed appellate counsel then filed a petition for writ of certiorari, asking this Court to review the ruling on the motion to suppress. Counsel later filed a second petition for a writ of certiorari seeking review of the denial of the motion for continuance.

Analysis**I. Appeal from the Denial of Motion for Continuance**

We begin by addressing Harris's appeal from the denial of his motion for a continuance, filed at the same time as his motion to suppress. We must dismiss this portion of the appeal because we lack jurisdiction over it and cannot allow the petition for a writ of certiorari.

When a defendant pleads guilty, he waives his right to appeal on all grounds except for a narrow set of specific issues enumerated by statute. *See* N.C. Gen. Stat. § 15A-1444(e) (2014). The denial of a motion for a continuance is not one of the narrow exceptions to the general rule, and thus Harris waived his right to appeal that issue by pleading guilty.

Moreover, a petition for a writ of certiorari in this context may be allowed only if the right to appeal "has been lost by failure to take timely action." N.C. R. App. P. 21(a). Here, Harris did not lose his right to appeal the motion for continuance because he failed to take timely action—he lost that right because he chose to plead guilty. Accordingly, we dismiss Harris's appeal from the order denying his motion for continuance and deny his petition for a writ of certiorari on this issue.

II. Appeal from Denial of Motion to Suppress

Our authority to hear Harris's appeal from the denial of his motion to suppress is more complicated than it is for his motion for continuance.

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The denial of a motion to suppress is one of the narrow categories of issues that may be appealed even after the defendant pleads guilty. N.C. Gen. Stat. § 15A-979(b) (2014). But “[t]his statutory right to appeal is conditional, not absolute.” *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995), *aff’d* 344 N.C. 623, 476 S.E.2d 106 (1996). “Pursuant to this statute, a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty.” *Id.* “The rule in this state is that notice must be *specifically* given.” *Id.*

Here, Harris concedes that he did *not* give notice of intent to appeal the suppression ruling before he pleaded guilty. But he asks this Court to allow his petition for a writ of certiorari on the grounds that he *intended* to file notice of intent but did not do so in a timely manner. Thus, Harris argues that his right to appeal “has been lost by failure to take timely action” and qualifies for discretionary review in this Court by writ of certiorari. *See* N.C. R. App. P. 21(a).

The parties point to conflicting precedent from this Court concerning our authority to allow a writ of certiorari in this circumstance. In 2014, this Court allowed a petition for a writ of certiorari to review a suppression ruling despite the fact that the defendant “failed to give notice during plea negotiations as to her intent to appeal the denial of her motion to suppress.” *State v. Davis*, ___ N.C. App. ___, 763 S.E.2d 585, 589 (2014). There is no analysis in *Davis*; the Court simply granted the petition without citing any precedent or explaining *why* it had the authority to allow the petition. *Id.*

More than a decade earlier, in 2002, this Court held the opposite, denying a petition for a writ of certiorari because, in failing to file a notice of intent to appeal before pleading guilty, “defendant has not failed to take timely action” and therefore did not satisfy the requirement for review by writ of certiorari. *State v. Pimental*, 153 N.C. App. 69, 77, 568 S.E.2d 867, 872 (2002). *Pimental* plainly holds that because the failure to file a notice of intent to appeal the suppression ruling before pleading guilty is not “fail[ure] to take timely action . . . this Court does not have the authority to issue a writ of certiorari.” *Id.*

Under well-settled Supreme Court precedent, we must ignore *Davis* and follow *Pimental* as the earlier, binding precedent. *See State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 133-34 (2004). In *Jones*, our Supreme Court held that, when faced with two or more inconsistent panel opinions, this Court must follow the earliest opinion because one panel of

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this Court cannot overrule another. *Id.* The Supreme Court explained that although “a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher court.” *Id.*

Simply put, unless the *Pimental* holding is overturned by our Supreme Court, we are bound to follow it in all future cases, even if other panels of our Court have not. Under *Pimental*, we lack authority to allow the petition for a writ of certiorari to review the suppression ruling.

We also note, however, that in our view, *Pimental* is correct. In previous cases, we have stressed the importance of the notice of intent to appeal as a way to alert the State, during the plea bargaining process, that the defendant may seek to appeal the denial of the motion to suppress. As we previously have observed, it could damage the integrity of the plea bargaining process if defendants could so easily circumvent the requirement that the State be informed of the intent to appeal:

Once a defendant strikes the most advantageous bargain possible with the prosecution, that bargain is incontestable by the state once judgment is final. If the defendant may first strike the plea bargain, “lock in” the State upon final judgment, and then appeal a previously denied suppression motion, it gets a second bite at the apple, a bite usually meant to be foreclosed by the plea bargain itself.

McBride, 120 N.C. App. at 626, 463 S.E.2d at 405. Thus, even if *Pimental* were not binding here—and it is—we would follow its reasoning. Accordingly, we must deny Harris’s petition for a writ of certiorari on this ground.

Conclusion

We dismiss Defendant Kim Lamont Harris’s appeal and deny his two petitions for writ of certiorari.

DISMISSED.

Judges BRYANT and STEPHENS concur.

STATE v. PENDER

[243 N.C. App. 142 (2015)]

STATE OF NORTH CAROLINA
v.
ISSAC J. PENDER, JR., DEFENDANT

No. COA14-829

Filed 1 September 2015

1. Appeal and Error—defective notice of appeal—appellate writ of certiorari

A pro se criminal defendant's petition for writ of certiorari was granted by the Court of Appeals where his notice of appeal was untimely, technically defective, and not served upon the State; the State did not respond to defendant's petition; and the State filed its brief with no reference to defendant's notice of appeal.

2. Kidnapping—indictments—minor victims—consent

Defendant's indictments for kidnapping were sufficient for victims who were allegedly under 16 even though they alleged that the victims rather than the parents did not consent. Age was not an essential element of the crime of kidnapping but a factor relating to the State's burden of proof.

3. Appeal and Error—unpreserved argument—circumstances not exceptional

The Court of Appeals declined to invoke Rule 2 of the Appellate Rules to address an unpreserved argument where defendant contended that there were fatal variances between indictments for kidnapping and the evidence presented at trial. Exceptional circumstances were not involved.

4. Constitutional Law—representation of counsel—prejudice not shown

A defendant bringing an inadequate representation of counsel claim could not show the requisite prejudice, even assuming that trial counsel's performance was deficient, where the claim involved the age of a kidnapping victim and a fatal variance in the evidence. The age of the victim was not an essential element of kidnapping, and any alleged variance could not have been fatal.

5. Indictment and Information—fatal variance—name of victim

There was no fatal variance in an indictment that named "Vera Alston" as a victim where the undisputed evidence was that her last name was "Pierson." Fatal variances have not been found where the

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discrepancy in the victim's name was inadvertent and the individual referred to in the indictment was the same person alleged to be the victim at trial. Here, there was no uncertainty that the identity of the alleged victim was actually "Vera Pierson," and defendant at no time indicated any confusion or surprise as to whom he was charged with kidnapping and assaulting.

6. Criminal Law—sufficiency of evidence—all charges

Defendant preserved his insufficient evidence arguments where the State contended his trial counsel specifically argued insufficient evidence regarding only two elements of all of the crimes defendant was charged with and that defendant's motion to dismiss encompassed only those arguments he specifically made. Defendant's motion to dismiss encompassed all of the charges at issue because defendant's initial motion to dismiss was based on insufficient evidence, defendant referenced each of the crimes with which he was charged, and defendant renewed his motions after the first-degree kidnapping charge was dismissed.

7. Assault—by pointing a gun—sufficiency of the evidence

Each of defendant's convictions for assault by pointing a gun was supported by the evidence where defendant contended that the State's evidence was too vague for the jury to infer that he pointed a gun at any particular individual. There was evidence from which the jury could reasonably have inferred that defendant pointed his shotgun at each person corralled into a single bedroom.

8. Kidnapping—sufficiency of evidence—terrorizing victims

There was sufficient evidence of kidnapping where the State presented evidence that the victims were frightened and that defendant intended to terrorize his estranged wife, along with other evidence from which a jury could infer that defendant's purpose was to terrorize each of the other alleged kidnapping victims.

9. Kidnapping—parent—his own sons

Two kidnapping convictions were overturned where defendant forced a group of people, including his minor sons, into a single room at the point of a shotgun while he sought his estranged wife. N.C.G.S. § 14-39(a) provides that a person is criminally liable for unlawfully confining a person under the age of 16 without the consent of a parent or legal guardian, which means that a parent cannot kidnap his own child.

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[243 N.C. App. 142 (2015)]

Appeal by defendant from judgments entered 15 November 2013 by Judge George B. Collins, Jr. in Franklin County Superior Court. Heard in the Court of Appeals 8 January 2015.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.

W. Michael Spivey for defendant-appellant.

GEER, Judge.

Defendant Issac J. Pender, Jr. appeals from judgments sentencing him based on convictions of violating a domestic violence protection order (“DVPO”), possession of a firearm by a felon, first degree burglary, multiple counts of second degree kidnapping, and multiple counts of assault by pointing a gun. We find defendant’s arguments on appeal unpersuasive with one exception. We agree with defendant that the judgments based on his convictions of second degree kidnapping of his own sons must be vacated. The plain language of N.C. Gen. Stat. § 14-39 (2013) does not permit prosecution of a parent for kidnapping, at least when that parent has custodial rights with respect to the children. We find no error as to the remaining judgments.

Facts

The State’s evidence tended to show the following facts. Defendant and his wife Nancy Alston were married in 2007 or 2008 and had two children together, J.P. and E.P.¹ Nancy has two older children from a different relationship, D.M. and A.M. After they were married, Nancy and defendant lived with all four children at their house in Franklinton, North Carolina. However, at some point, Nancy “put [defendant] out” of the house. On or about 10 March 2011, defendant broke into Nancy’s house, assaulted and threatened her and then fled. Nancy filed for a DVPO against defendant. Defendant was arrested, and on 29 August 2011, he was convicted of felony assault by strangulation and imprisoned for eight months. Nancy continued to live at the house in Franklinton.

Following defendant’s release from prison, he went to Nancy’s house, cut her phone line, broke in, and sexually assaulted her. After this incident, Nancy and her children moved in with Vera Pierson, Nancy’s mother, at Vera’s house in Louisburg, North Carolina.

1. Initials are used in this opinion to protect the juveniles’ privacy.

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On 6 July 2012, defendant obtained a shotgun, called J.P. and told him that he loved him and that he was going to kill Nancy. After the call, defendant, who had been drinking vodka, left with the shotgun in the trunk of his car.

That evening at Vera's house, while Nancy was giving J.P. a bath, J.P. disclosed that defendant had said he was going to kill Nancy. Later, after Nancy's children were in bed, Nancy was at her aunt's neighboring house playing cards when some family members who were staying at Vera's house told Nancy that she needed to come back to Vera's because defendant was on his way over. Nancy returned to Vera's house.

Later that evening, defendant arrived clandestinely at Vera's house. While Nancy's sister Octavia Tewanda Alston ("Tewanda") was using the phone, defendant cut the phone line and the phone went dead. Moments later, after investigating outside, Tewanda ran into the house and yelled to Nancy that defendant was there. Nancy ran into a bedroom where Vera was watching television, and she begged Vera to hide her. Vera hid Nancy in a small closet in that room, and Vera sat in a chair in front of the closet and continued to watch television. Inside Vera's house, along with Vera, Nancy, and Nancy's children, were Tewanda and Tewanda's children M.A., D.A., and K.A.; Nancy's other sister Takita Alston and Takita's daughter S.A.; and Nancy's brother Nathaniel. At this time, S.A., D.A., E.P., J.P., and K.A. were all under 16 years of age. In total, there were 13 people in Vera's house when defendant broke into the house.

While still outside the house, defendant shot Nancy's truck, which Nancy and the others inside the house heard, and defendant broke in by shooting through a side window of the house. After defendant was in the house, he yelled, "Where's that bitch at? . . . I'm going to kill her." Waving his shotgun, and without knowing whether Nancy was there, defendant ordered every occupant in the house into the bedroom where Vera was watching television and said that he was going to stay until he got "the last breath out of [Nancy]." Nancy's children and nieces and nephews were crying, and Vera complained of her chest hurting. Defendant pointed his shotgun back and forth at every person in the bedroom and repeatedly asked where Nancy was. Vera told him that Nancy had gone out for the evening, and others similarly answered that she was not there.

Defendant searched the house, but he did not find Nancy. Defendant then called out his sons, J.P. and E.P., to give him a hug. About 30 to 45 minutes after defendant's break-in, defendant left. Because defendant had cut the phone line to Vera's house, D.A. ran next door to Nancy's

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aunt's house and used the phone there to call 911. When the police arrived, it was morning, and an officer had to pull Nancy out of the closet because she was petrified from fear.

Defendant was indicted for 12 counts of first degree kidnapping and 12 counts of assault by pointing a gun. Defendant was not charged with kidnapping or assaulting Nancy. Defendant was also indicted for violating a DVPO, possession of a firearm by a felon, and first degree burglary.

At trial, the State's evidence included testimony from witnesses including Nancy, Vera, Tewanda, D.A., and D.M. At the close of the State's evidence, defense counsel made a motion to dismiss which the trial court granted in part by dismissing the first degree kidnapping charges. However, the trial court permitted the State to proceed against defendant on 12 counts of second degree kidnapping. Defendant presented no evidence.

[1] The jury convicted defendant of 12 counts of second degree kidnapping, 12 counts of assault by pointing a gun, violation of a DVPO, possession of a firearm by a felon, and first degree burglary. Defendant filed a pro se notice of appeal on 3 December 2013 from the judgments entered on his convictions. Defendant admits that this notice was untimely, technically defective, and not served upon the State. However, defendant also filed a petition for writ of certiorari on 9 September 2014. The State has not responded to defendant's petition. The State filed its appellee brief on 10 November 2014, after defendant's petition was filed, but made no reference to the defects of defendant's notice of appeal. In our discretion, we grant defendant's petition for writ of certiorari. *See State v. Rowe*, ___ N.C. App. ___, ___, 752 S.E.2d 223, 225 (2013) (granting defendant's petition for writ of certiorari when pro se notice of appeal not served on State and it contained "a number of other deficiencies").

I

[2] Defendant first argues that there were fatal deficiencies in certain of the kidnapping indictments that deprived the trial court of jurisdiction over those charges. "This Court reviews the sufficiency of an indictment *de novo*. 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.'" *State v. Justice*, 219 N.C. App. 642, 643, 723 S.E.2d 798, 800 (2012) (internal citation omitted) (quoting *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011)). Although the State points out that defendant raises these arguments for the first time on appeal, a criminal defendant may challenge the jurisdiction of the trial court at any time by arguing the insufficiency of an indictment, "notwithstanding [the] defendant's

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failure to contest [the indictment's] validity in the trial court." *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208 (2001).

" [A]n indictment is not facially invalid as long as it notifies an accused of the charges against him sufficiently to allow him to prepare an adequate defense and to protect him from double jeopardy.' " *State v. McKoy*, 196 N.C. App. 650, 656, 675 S.E.2d 406, 411 (2009) (quoting *State v. Haddock*, 191 N.C. App. 474, 476-77, 664 S.E.2d 339, 342 (2008)). However, an indictment is fatally deficient when it fails on its face to allege "all of the essential elements of the offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996).

A person is guilty of kidnapping when the State proves that he

unlawfully confine[ed], restrain[ed], or remove[ed] from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, . . . if such confinement, restraint or removal is for the purpose of:

- (1) Holding such other person for a 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; or
- (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.12.
- (5) Trafficking another person with the intent that the other person be held in involuntary servitude or sexual servitude in violation of G.S. 14-43.11.
- (6) Subjecting or maintaining such other person for sexual servitude in violation of G.S. 14-43.13.

N.C. Gen. Stat. § 14-39(a).

Defendant challenges the indictments for the kidnapping victims who were under 16 years old. Each indictment naming as victims S.A., D.A., E.P., J.P., A.M., and K.A., stated that defendant "unlawfully, willfully, and feloniously did kidnap [the victim], a person under the age of

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16 years by unlawfully confining the victim and restraining the victim *without the victim's consent . . .*” (Emphasis added.) Defendant contends that because the kidnapping indictments for those victims did not allege a lack of parental or custodial consent, those indictments were fatally defective.

Our Supreme Court has explained, however, that “the victim’s age is not an essential element of the crime of kidnapping itself, but it is, instead, a factor which relates to the state’s *burden of proof* in regard to consent. If the victim is shown to be under sixteen, the state has the burden of showing that he or she was unlawfully confined, restrained, or removed from one place to another without the consent of a parent or legal guardian. Otherwise, the state must prove that the action was taken without his or her own consent.” *State v. Hunter*, 299 N.C. 29, 40, 261 S.E.2d 189, 196 (1980) (emphasis added).

Because age is not an essential element of the crime of kidnapping, and whether the State must prove a lack of consent from the victim or from the parent or custodian is contingent upon the victim’s age, we hold that the indictments at issue are adequate even though they allege that the victim – and not the parent – did not consent. *See also State v. Sturdivant*, 304 N.C. 293, 310, 283 S.E.2d 719, 731 (1981) (holding kidnapping indictment sufficient when it alleged that defendant kidnapped victim “*by unlawfully restraining her,*” even though indictment did not specifically allege lack of consent for victim older than 16, because “common sense dictates that one cannot unlawfully kidnap . . . another with his consent”). We conclude, therefore, that defendant’s kidnapping indictments were sufficient for the victims who were allegedly under 16 at the time of the incident.

II

[3] Defendant also argues that there were fatal variances between the indictments naming D.M. and Vera as victims and the evidence presented at trial. Defendant acknowledges that his argument is not properly preserved because he did not argue the existence of a fatal variance at trial. *See State v. Mason*, 222 N.C. App. 223, 226, 730 S.E.2d 795, 798 (2012) (holding defendant failed to preserve fatal variance argument when “[f]atal variance was not a basis of his motions to dismiss”). However, defendant asks that we invoke Rule 2 of the Appellate Rules to suspend or vary the preservation requirements “to prevent injustice.” Alternatively, defendant argues that his trial counsel provided ineffective assistance of counsel (“IAC”) when he failed to make the fatal variance argument at trial.

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Rule 2 provides that an appellate court may address an unpreserved argument “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]” However, the authority to invoke Rule 2 is “discretionary,” *State v. Everette*, ___ N.C. App. ___, ___, 764 S.E.2d 634, 639 (2014), and this discretion should only be exercised in “exceptional circumstances . . . in which a fundamental purpose of the appellate rules is at stake.” *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (internal quotation marks omitted). Because this case does not involve exceptional circumstances, we, in our discretion, decline to invoke Rule 2.

[4] To prevail on a claim for IAC, a defendant must satisfy a two-part test:

“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.”

State v. Banks, 367 N.C. 652, 655, 766 S.E.2d 334, 337 (2014) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984)).

Even assuming, without deciding, that defendant’s trial counsel’s performance was deficient, defendant cannot show the requisite prejudice since, even if the alleged variances were made the basis for his motion to dismiss, the motion should have in any event been denied.

A variance occurs where the allegations in an indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial. [The issue of a fatal variance is] based upon the same concerns [as the issue of a sufficient indictment]: to insure that the defendant is able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident.

In order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged.

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State v. Norman, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (internal citation omitted).

Defendant first contends that the indictment naming D.M. had a fatal variance because, while the indictment alleged that D.M. was at least 16 years old at the time of the incident, the evidence conclusively established that D.M. was 16 at the time. However, because D.M.'s age does not involve an essential element of the crime of kidnapping, any alleged variance in this regard could not have been fatal. *See State v. Tollison*, 190 N.C. App. 552, 557, 660 S.E.2d 647, 651 (2008) (holding variance between indictment alleging victim attained age of 16 and evidence presented at trial that victim was younger than 16 not fatal).

[5] Defendant also contends that a fatal variance occurred with respect to the indictment naming "Vera Alston" as a victim, because the undisputed evidence showed that Vera's last name was "Pierson." In *State v. Bowen*, 139 N.C. App. 18, 27, 533 S.E.2d 248, 254 (2000) (quoting *State v. Abraham*, 338 N.C. 315, 340, 451 S.E.2d 131, 144 (1994)), this Court explained that "our case law precedent is clear, that '[w]here an indictment charges the defendant with a crime against someone other than the actual victim, such a variance is fatal.'" Nonetheless, our Courts have not found fatal variances where a discrepancy in the victim's name was inadvertent and the individual referred to in the indictment was the same person alleged to be the victim at trial.

In *State v. Bumper*, 5 N.C. App. 528, 535, 169 S.E.2d 65, 69 (1969), this Court addressed whether an indictment fatally varied from evidence at trial, where the evidence established that the victim was referred to in the indictment by his nickname, Monty Jones, rather than by his real name, Manson Marvin Jones, Jr. In concluding that there was no fatal variance, *Bumper* relied on the United States Supreme Court's decision, *Bennett v. United States*, 227 U.S. 333, 57 L. Ed. 531, 33 S. Ct. 288 (1913), in which the "[d]efendant was indicted for having caused the transportation of Opal Clarke; and . . . the testimony showed that her correct name was Jeanette, but that she had gone by the names of Opal and Nellie, her real name, however, being Jeanette Laplante.'" 5 N.C. App. at 535, 169 S.E.2d at 70 (quoting *Bennett*, 227 U.S. at 338, 57 L. Ed. at 533, 33 S. Ct. at 288).

Bumper noted the Supreme Court's reasoning that the variance in *Bennett* was not fatal because "the essential thing in the requirement of correspondence between the allegation of the name of the woman transported and the proof is that the record be in such shape as to inform the defendant of the charge against her and to protect her against another

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prosecution for the same offense.’ ” *Id.* (quoting *Bennett*, 227 U.S. at 338, 57 L. Ed. at 533-34, 33 S. Ct. at 289). Since in *Bumper* “[t]he record of defendant’s trial clearly show[ed] that Monty Jones and Manson Marvin Jones, Jr., are one and the same person[,]” this Court found, as was the case in *Bennett*, that “[t]here was no uncertainty as to the identity of the prosecuting witness” and, therefore, the *Bumper* defendant was “protected against a second prosecution for the same offense.” *Id.*, 169 S.E.2d at 69, 70.

Here, the evidence is undisputed that one of defendant’s victims for kidnapping and assault on the date alleged in the indictment naming “Vera Alston” as the victim was defendant’s mother-in-law, Vera Pierson. Given this, there was no uncertainty that the identity of the alleged victim “Vera Alston” was actually “Vera Pierson.” Further, “[a]t no time in the proceeding [below] did Defendant indicate any confusion or surprise as to whom Defendant was charged” with having kidnapped and assaulted. *State v. Hewson*, 182 N.C. App. 196, 212, 642 S.E.2d 459, 470 (2007). We, therefore, hold that there was no fatal variance. *See id.* at 211, 642 S.E.2d at 469-70 (explaining “changes to the surname of a victim” in indictment do not substantially alter murder charges against defendant, especially where defendant did not indicate confusion or surprise regarding identity of alleged murder victim). *See also State v. Chavis*, 207 N.C. App. 264, 699 S.E.2d 478, 2010 WL 3633610, at *2, 2010 N.C. App. LEXIS 1853, at *6 (2010) (unpublished) (“The names ‘Margarita Isabel Garcia’ [name proven at trial] and ‘Margarita Isabella Garcia Bahena’ [alleged name] are sufficiently similar to identify the victim of the crime. No fatal variance exists between the allegation of the victim’s name in the indictment and the identity of the victim as proven at trial.”).

III

[6] Defendant additionally argues that the State presented insufficient evidence with respect to several of his convictions. “ ‘This Court reviews the trial court’s denial of a motion to dismiss *de novo*.’ ” *State v. Marley*, ___ N.C. App. ___, ___, 742 S.E.2d 634, 635 (2013) (quoting *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007)). “ ‘Upon defendant’s motion for dismissal, the question for the 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

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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 State, however, argues that these issues were not preserved for appellate review. Rule 10(a)(3) of the Appellate Rules provides,

In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant’s motion for dismissal or judgment in case of nonsuit made at the close of State’s evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

At the close of the State’s evidence, defense counsel moved “the Court to dismiss these actions because the State ha[d] not met their burden.” Defense counsel then referred to the charges of kidnapping, assault, possession of a firearm by a felon, and first degree burglary as those for which he believed the State did not produce enough evidence. The trial court asked defense counsel if he “ha[d] any specific element of any individual crime that [he] would like to make an argument about[,]” after which defense counsel brought up the issue that, for first degree kidnapping, there was insufficient evidence that the victims were not released in a safe place. After hearing that argument, the trial court asked defense counsel if he “ha[d] any other specific elements of any specific crimes that [he] would like to be heard on[,]” after which defense counsel argued there was insufficient evidence on the burglary charge that the breaking and entering happened at night. After allowing the State to proceed on second degree kidnapping charges instead, the trial court denied dismissal of the burglary charge. Then, after the trial court determined that defendant would not testify or present any evidence, defense counsel “renewed [his] motions[,]” to which the trial court responded, “my rulings are the same.”

The State contends that because defendant’s trial counsel specifically argued that the State presented insufficient evidence regarding only two elements of all of the crimes defendant was charged with, defendant’s motion to dismiss encompassed only those arguments with respect to which he specifically made. However, because defendant’s initial motion to dismiss was based on insufficient evidence and defendant

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referenced each of the crimes with which he was charged, and, even after the trial court dismissed the first degree kidnapping charges he “renewed [his] motions[,]” defendant’s motion to dismiss encompassed all of the charges at issue and, therefore, preserved his insufficient evidence arguments with respect to all of his convictions. *See State v. Mueller*, 184 N.C. App. 553, 559, 647 S.E.2d 440, 446 (2007) (holding defendant’s general motion to dismiss based on insufficient evidence, which was renewed after defendant presented evidence, was sufficient to preserve insufficient evidence arguments as to all 36 of defendant’s charges, even though after making his initial motion, defendant only made specific arguments to trial court as to five charges). Consequently, we address the merits of defendant’s arguments.

[7] Defendant first argues that there was insufficient evidence for his convictions of assault by pointing a gun. N.C. Gen. Stat. § 14-34 (2013) provides that a defendant is guilty of assault by pointing a gun “[i]f [he] point[s] any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded” Defendant contends that the State’s evidence was too vague for the jury to infer that he pointed a gun at any particular individual.

However, at trial, D.A. testified that upon defendant’s orders, “*everybody* ran in the room with us . . . and he was waiving [sic] the gun *at us*[.]” (Emphasis added.) Vera testified that “[w]hen [defendant] came down the hall, when he told *everyone* to get into one room, *all of them* came in there. . . [e]ven the two little ones” (Emphasis added.) Tewanda testified that once everybody was in the same bedroom, defendant pointed the shotgun outward from his shoulder. Vera also testified, “I was nervous for the kids was down there hollering and carrying on, and he hollered – he point [sic] the gun toward everybody in one room. One room. And told them come on in here with me.” Based on this evidence, the jury could reasonably have inferred that each individual besides Nancy who was in the house that evening was corralled by defendant into a single bedroom and that defendant pointed his shotgun at each of these people. We hold that each conviction for assault by pointing a gun was supported by the evidence.

[8] Defendant also argues that his kidnapping charges should have been dismissed because there was insufficient evidence that his purpose in confining the victims was to terrorize them. A defendant intends to terrorize another when the defendant intends to place that person “ ‘in some high degree of fear, a state of intense fright or apprehension.’ ” *State v. Davis*, 340 N.C. 1, 24, 455 S.E.2d 627, 639 (1995) (quoting *State v. Moore*, 315 N.C. 738, 745, 340 S.E.2d 401, 405 (1986)). “ ‘A defendant’s

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intent is rarely susceptible to proof by direct evidence; rather, it is shown by his actions and the circumstances surrounding his actions.’” *State v. Boozer*, 210 N.C. App. 371, 375, 707 S.E.2d 756, 761 (2011) (quoting *State v. Rodriguez*, 192 N.C. App. 178, 187, 664 S.E.2d 654, 660 (2008)). Evidence of “the victim’s subjective feelings of fear, while not determinative of the defendant’s intent to terrorize, are relevant.” *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000).

Defendant contends that “[t]he State proceeded under the misapprehension that [defendant] would be guilty of kidnapping if the victims were terrorized rather than if he intended to terrorize them.” Defendant concedes on appeal that the State offered substantial evidence that the victims were frightened and that he intended to terrorize Nancy.

This evidence, however, was sufficient when combined with the following evidence from which a jury could infer defendant’s purpose was to terrorize each of the other alleged kidnapping victims, as well: That defendant shot Nancy’s truck parked outside the house so that everyone could hear it, cut the telephone line to the house at night, shot through the windows multiple times to break into the house, yelled multiple times upon entering the house that he was going to kill Nancy, corralled the occupants of the house into a single bedroom, demanded of those in the bedroom to know where Nancy was, exclaimed that he was going to kill Nancy, and pointed his shotgun at them. *See Williams v. State*, 271 Ga. App. 755, 756, 610 S.E.2d 704, 705 (2005) (“The evidence shows that [defendant] told a seven-year-old child that she was going to kill her mother. We can conceive of no purpose for saying such thing other than to terrorize the child.”); *State v. Van Vleck*, 805 S.W.2d 297, 299 (Mo. App. 1991) (“The appellant’s repeated threats to kill Johnson’s child coupled with his demand that Johnson get into her car inferred [sic] that he intended, at the least, to unlawfully confine them with the purpose to terrorize Johnson by threatening violence to her small child.”).

IV

[9] Finally, defendant challenges his convictions of kidnapping his sons, J.P. and E.P. Defendant argues that “[e]ither parent has the right to consent to their child’s removal or confinement” and, therefore, “[a] parent cannot kidnap [his] own child.” We agree that the trial court should have dismissed these two kidnapping counts. N.C. Gen. Stat. § 14-39(a) provides that a person is criminally liable for kidnapping if he “unlawfully confine[s] . . . any other person under the age of 16 years without the consent of a parent or legal custodian of such person[.]” (Emphasis added). Accordingly, there is no kidnapping when a parent or

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legal custodian consents to the unlawful confinement of his minor child, regardless whether the child himself consents to the confinement. The plain language requires that only one parent -- “a parent” -- consent to the confinement.

There is no dispute that if someone other than defendant had, with defendant’s consent, confined defendant’s sons, then there would be no kidnapping under N.C. Gen. Stat. § 14-39.² The State has provided no basis for construing N.C. Gen. Stat. § 14-39 to preclude a kidnapping charge against a third person when defendant consented to confinement of his sons, but to allow the State to prosecute defendant for confining his sons.

Our Supreme Court has held that “the victim’s age is not an essential element of the crime of kidnapping itself, but it is, instead, a factor which relates to the state’s burden of proof in regard to [the element of] consent.” *Hunter*, 299 N.C. at 40, 261 S.E.2d at 196. Continuing, the Court concluded that “[i]f the victim is shown to be under sixteen, the state has the burden of showing that [the victim] was unlawfully confined, restrained, or removed from one place to another without the consent of a parent or legal guardian.” *Id.* In this case, it was shown that defendant’s children were under 16 years of age. Therefore, under *Hunter*, the State had the burden to show that the confinement of defendant’s children was without his consent, a burden that it obviously could not meet since it was defendant who was doing the confining. *Cf. State v. Walker*, 35 N.C. App. 182, 184, 241 S.E.2d 89, 91 (1978) (“It is clear, then, that at least in the absence of a custody order in favor of the mother, the father of the child taken cannot be guilty of the crime of child abduction.”).

While the facts of this case suggest that the General Assembly may wish to consider amending the kidnapping statute to permit a parent to be charged with kidnapping under certain circumstances, given the current plain language of N.C. Gen. Stat. § 14-39, we must assume that the General Assembly has chosen to punish this type of conduct by a parent under other statutes.³ It may be that the General Assembly chose not to

2. There is nothing in the record to indicate that any order had been entered stripping defendant of his custodial rights. We do not address the question whether a parent without custodial rights may be held criminally liable for kidnapping.

3. For example, misdemeanor child abuse, N.C. Gen. Stat. § 14-318.2(a) (2013), would apply if defendant “inflict[ed] physical injury” or “created a substantial risk of physical injury.” Defendant’s conduct could also fall within N.C. Gen. Stat. § 14-33(d) (2013), providing that “[a]ny person who, in the course of an assault, assault and battery, or affray, . . . uses a deadly weapon, in violation of subdivision (c)(1) of this section, on a person with whom the person has a personal relationship, and in the presence of a minor, is guilty of a Class A1 misdemeanor.”

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include confinements with parental consent within the definition of kidnapping in recognition of the authority parents have over their children. As our Supreme Court observed in the seminal kidnapping case in North Carolina, “[i]t is . . . for the Legislature, not this Court, to determine the advisability of [any] change in the law as now declared in G.S. 14-39.” *State v. Fulcher*, 294 N.C. 503, 527, 243 S.E.2d 338, 354 (1978). Therefore, unless and until the General Assembly amends N.C. Gen. Stat. § 14-39, it is our duty to apply the statute’s plain words and require the State to prove the requisite lack of parental consent when the victim is shown to be under 16 years of age. We, therefore, hold that the State failed to prove that defendant kidnapped J.P. and E.P. We vacate the judgments based on those convictions and remand for resentencing.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges STEPHENS and DILLON concur.

STATE OF NORTH CAROLINA
v.
PAUL GREGORY PERRY

No. COA14-1328

Filed 15 September 2015

1. Search and Seizure—Stored Communications Act—cell phone location—historical information

Where defendant’s cell phone carrier (AT&T) gave law enforcement the location of defendant’s cell phone tower “pings” within minutes of calls to or from his cell phone, the Court of Appeals rejected defendant’s argument that his constitutional rights were violated because the information was obtained without a search warrant based on probable cause. The Court of Appeals concluded that the records were obtained by court order pursuant to the Stored Communications Act and the information was historical rather than real-time.

2. Search and Seizure—cell phone location—historical information—reasonable expectation of privacy

Where defendant’s cell phone carrier (AT&T) gave law enforcement the location of defendant’s cell phone tower “pings” within minutes of calls to or from his cell phone, the Court of Appeals

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concluded that defendant had no reasonable expectation of privacy in that information. Defendant voluntarily used his cell phone, thereby transmitting his location information to AT&T, a third party, which stored the information as a business record and transmitted it to law enforcement by court order.

3. Search and Seizure—cell phone location—Stored Communications Act—court order—good-faith exception to warrant requirement

Where defendant's cell phone carrier (AT&T) gave law enforcement the location of defendant's cell phone tower "pings" within minutes of calls to or from his cell phone, the Court of Appeals held that, even assuming a search warrant based on probable cause was required, the good-faith exception to the Fourth Amendment warrant requirement applies. The officers reasonably relied upon the court order they received pursuant to the Stored Communications Act to obtain defendant's historical stored cell tower site location records from AT&T.

Chief Judge McGEE, concurring.

Appeal by defendant from judgments entered 6 February 2014 by Judge Henry W. Hight in Wake County Superior Court. Heard in the Court of Appeals 1 June 2015.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth Jill Weese and Assistant Attorney General Derrick C. Mertz, for the State.

W. Michael Spivey for defendant-appellant.

Hatch, Little & Bunn, LLP, by Laura E. Beaver, Graebe Hanna & Sullivan, PLLC, by Mark R. Sigmon, and ACLU of North Carolina Legal Foundation, by Christopher A. Brook, for amici curiae American Civil Liberties Union of North Carolina Legal Foundation and American Civil Liberties Union.

TYSON, Judge.

Paul Gregory Perry ("Defendant") appeals from judgment entered after a jury convicted him of: (1) trafficking heroin by possession; (2) trafficking heroin by sale; (3) maintaining a dwelling place for the sale of

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a controlled substance; (4) trafficking heroin by transportation; and (5) conspiracy to traffic heroin by possession, transportation, and sale. We find no error in Defendant's conviction or judgments entered thereon.

I. Factual BackgroundA. State's Evidence

The State's evidence tended to show that on 10 December 2012, Raleigh Police Department detective M.K. Mitchell ("Detective Mitchell") arrested Kenneth Holderfield ("Holderfield") for possession of marijuana. Holderfield provided Detective Mitchell with the telephone number of his drug supplier, whom Holderfield referred to as "Sincere." Holderfield also called the number and placed the call on the speaker while in the presence of Detective Mitchell. Detective Mitchell testified he heard Sincere state "he was in Charlotte and would be coming to Raleigh tomorrow." Detective Mitchell also testified Holderfield asked Sincere if he would "front [Holderfield] eight grams." Sincere replied, "We'll talk about it when I get to Raleigh tomorrow."

The following day, Detective Mitchell submitted a sworn application for a phone records production order to access records associated with the telephone number provided by Holderfield, pursuant to 18 U.S.C. § 2703(d) and N.C. Gen. Stat. §§ 15A-261, 15A-262, and 15A-263, to the Wake County Superior Court. The application sought complete account and billing information, and complete call detail records "with cell site information including latitude, longitude, sector azimuth and orientation information for the target telephone number(s)" for the period from 13 November 2012 through 12 December 2012. Detective Mitchell's application also requested "precision location/GPS, E911 locate or Mobile Locate Service if applicable from December 11, 2012 through December 12, 2012."

Detective Mitchell's duly sworn statement stated:

The Raleigh Police Department is conducting an investigation of a Drug Trafficking case that occurred in Raleigh. There is probable cause to believe that records for [Defendant's telephone number] constitute evidence of a crime and/or the identity of a person participating in this crime, to wit:

This cellular telephone number was obtained from a cooperating defendant who was arrested as a result of drug trafficking. The possessor of the phone . . . is being investigated as a major drug trafficker in the Raleigh area.

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This information has been corroborated by this Detective. It is believed that information received in the records requested in this court order will be crucial in the progression of this investigation.

Superior Court Judge Lucy N. Inman signed the order and Detective Mitchell submitted it to AT&T, the cellular phone service provider and holder of the account associated with the phone number. AT&T provided the records of the location of the cell phone tower “hits” or “pings” whenever a call was made to or from the cell phone. AT&T sent emails of the longitude and latitude coordinates of these historical cell tower “hits” to Detective Mitchell every fifteen minutes. Detective Mitchell testified an approximately five- to seven-minute delay occurred between the time the phone “pinged” a cell phone tower and the time AT&T received and calculated the location and sent the latitude and longitude coordinates to him.

After receiving the emails of the records from AT&T, Detective Mitchell entered the coordinates into a Google Maps search engine to determine the physical location of the last tower “pinged” from Defendant’s phone. Detective Mitchell testified “the hits can range from . . . [a] five or seven meter hit to a couple hundred meter hit,” which alerts law enforcement to the general area of the phone’s last “pinged” location.

On 11 December 2012, at approximately 4:00 p.m., Detective Mitchell received a record of a “hit” from one of AT&T’s cell towers, which placed the phone within a few meters of the Red Roof Inn, located on South Saunders Street, near Interstate 40 in Raleigh, North Carolina. Detective Mitchell and other law enforcement officers from the Criminal Drug Enterprise Unit of the Raleigh Police Department began conducting surveillance from unmarked vehicles stationed around the Red Roof Inn. Detective Mitchell testified he received a record, which allowed him to further “pinpoint” the phone’s location “down to a certain amount of rooms” in the hotel.

Lieutenant Norris Quick (“Lieutenant Quick”) received confirmation from the hotel’s front desk clerk that “someone had just checked into” one of the rooms located within the block of rooms Detective Mitchell had identified. The front desk clerk gave the officers the key to the room next to the room recently occupied.

Lieutenant Quick and another officer conducted surveillance from the adjacent room. Lieutenant Quick observed two men enter the adjoining hotel room and leave after approximately five minutes. The officers

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inside the hotel room transmitted a description of the men leaving the room to officers stationed outside of the hotel. Detective Mitchell and Detective Bruce Richard Bizub (“Detective Bizub”) were inside an unmarked patrol car and saw one of the men enter a Toyota Corolla and drive away. The officers followed the vehicle and “started calling on the radio for marked units in the area.”

Eventually, a marked patrol vehicle initiated a traffic stop within two miles of the Red Roof Inn. The driver of the Toyota Corolla was identified as Kenneth Wheeler (“Wheeler”). The officers found ten bindles of heroin on Wheeler’s person. Wheeler was arrested and told the officers he had obtained the heroin from the Red Roof Inn. Detective Mitchell began preparing an application for a search warrant for Defendant’s hotel room.

Before Detective Mitchell could complete the search warrant, Lieutenant Quick transmitted a request for backup at the hotel. Four individuals were leaving the adjoining room in a hurry. Someone had apparently called the occupants to warn them Wheeler had been stopped and arrested. The officers detained three males, including Defendant, and one female in the hallway.

The officers observed two black plastic grocery bags located on the floor near the four individuals. The bags were open to allow the officers to see inside. The bags contained brown boxes, rubber bands, and digital scales. Detective Mitchell testified, based on his training and experience, he recognized the brown boxes as the type used to contain plastic bags of heroin.

While the four individuals were standing in the hallway, the female suspect, Kiara Ledbetter (“Ledbetter”), voluntarily removed a large bag from inside her pants and gave it to Lieutenant Quick. Lieutenant Quick testified Ledbetter told him, “Oh, no, I’m not going down for this. This isn’t mine. It’s Paul’s.” The bag appeared to contain heroin.

Defendant, Ledbetter, and the two other individuals, Keyondre Owens (“Owens”) and Paul Shell (“Shell”), were taken into custody, advised of their *Miranda* rights, and searched by Detectives Mitchell and Bizub. Shell possessed ten bindles of a substance believed to be heroin in the front pocket of his jeans. Defendant possessed \$1,620 in cash, but no heroin on his person. A forensic drug chemist with the City-County Bureau of Identification subsequently confirmed the identity of the substances as heroin, including the bindles found on Wheeler during the traffic stop.

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On 11 March 2013, a grand jury indicted Defendant for: (1) trafficking by possession, 28 grams or more of heroin; (2) trafficking heroin by sale; and (3) maintaining a dwelling used for keeping or selling controlled substances. On 8 July 2013, Defendant was also indicted for: (1) trafficking heroin by transportation; and (2) conspiracy to traffic heroin by possession, transportation, and sale.

B. Defendant's Motion to Suppress

On 13 November 2013, Defendant filed a pretrial motion to suppress the search of telephone records and determination of the location of his cell phone, and any evidence seized as a result of these searches. He argued law enforcement's receipt of the records of the coordinates of the towers his cell phone had "pinged" constituted an unreasonable search without a warrant based upon probable cause in violation of the Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States, and under Article I, Section 20 of the Constitution of North Carolina. Defendant also moved to suppress statements he made to officers on 11 and 12 December 2012, and to suppress evidence obtained as a result of an unconstitutional search and seizure.

The trial court heard Defendant's motions prior to trial on 3 February 2014 and entered a written order denying Defendant's motions to suppress on 20 February 2014. In its order, the trial court made the following findings of fact:

11. That on December 11, 2012, M. K. Mitchell appeared before the Honorable Lucy N. Inman, Superior Court Judge, and presented to her an Application For Phone Records together with a proposed Order concerning [Defendant's] cell phone number

. . . .

20. That Detective Mitchell was possessed of sufficient facts to conclude that violations of the North Carolina controlled substances laws were being committed and were about to be committed by the person possessing the cell phone . . . at the time he made the Application.

21. That the Application contained a sufficient factual basis from which a neutral magistrate could conclude that the issuance of the Order was appropriate in order to assist in the investigation of violation of drug trafficking laws.

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22. That the contents of the Application contained the identity of the law enforcement officer making the application . . . and the identity of the Law Enforcement Agency conducting the investigation

23. That the contents of the Application also contained a certification that the information sought in the Phone Records Production Order will assist with the investigation of this drug trafficking case.

24. That the contents of the Application in the Order tendered to Judge Inman complies with [N.C. Gen. Stat. §§] 15A-262 and 263 and with 18 U.S.C. [§] 2703.

C. Defendant's Testimony at Trial

Defendant's case proceeded to trial before a jury on 3 February 2014. Defendant testified he was a heroin user, and Ledbetter sold heroin. He stated he had traveled to Raleigh with Shell and Owens to purchase heroin from Ledbetter. Defendant stated he rented a room at the Red Roof Inn. He traveled to the train station to pick up Ledbetter and drove her back to the Red Roof Inn. Shell and Owens were inside the hotel room "bagging up" heroin. Defendant testified the heroin was already in the hotel room when he arrived, but he helped Shell and Owens bag it. Defendant also testified he did not sell heroin to anyone from the hotel room, and only Shell and Ledbetter had brought heroin into the hotel room.

The jury returned a verdict of guilty on all five charges. The trial court sentenced Defendant to mandatory minimum sentences of 225 to 282 months imprisonment for his three trafficking convictions, to run consecutively. The trial court also sentenced Defendant to 14 to 26 months imprisonment for sale of heroin, and 6 to 8 months imprisonment for intentionally maintaining a dwelling for keeping or selling controlled substances, to run concurrently with the mandatory sentences.

Defendant gave notice of appeal in open court.

II. Issues

Defendant argues the trial court erred by: (1) denying his motion to suppress evidence obtained by using "real-time tracking" of his cell phone without a warrant; and (2) reviewing and sealing relevant documents without disclosure to Defendant.

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III. Fourth Amendment Analysis

Defendant argues the trial court erred by denying his motion to suppress any evidence obtained as a result of an unlawful search of his cell phone records and location of his phone. He contends his Fourth and Fourteenth Amendment rights under the Constitution of the United States, and under N.C. Const. art I, § 20, the analogous provision of the Constitution of North Carolina, were violated because law enforcement obtained this information without a search warrant based on probable cause.

A. Standard of Review

Appellate review of a suppression 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) (citations omitted). Whether the findings of fact support the conclusions of law is reviewed *de novo*. *State v. Baublitz*, 172 N.C. App. 801, 806, 616 S.E.2d 615, 619 (2005). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citations and internal quotation marks omitted).

B. The Stored Communications Act

[1] Third-party records pertaining to Defendant’s cell phone were obtained from AT&T, pursuant to a judicial order issued under the Stored Communications Act (“the SCA”), as codified in 18 U.S.C. § 2703 (2013), and N.C. Gen. Stat. §§ 15A-261, 15A-262, and 15A-263. The SCA authorizes a governmental entity to “require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service[.]” 18 U.S.C. § 2703(c)(1) (2013). The SCA requires the governmental entity to obtain one of the following prior to disclosure: (1) a warrant; (2) a court order; or (3) the consent of the subscriber or customer. 18 U.S.C. § 2703(c)(1)(A)-(C). 18 U.S.C. § 2703(c)(1) specifically excludes the contents of communications from being disclosed. *Id.*

A court order compelling disclosure pursuant to 18 U.S.C. § 2703(d) “shall issue only if the governmental entity offers *specific and articulable facts* showing that there are reasonable grounds to believe

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that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.” 18 U.S.C. § 2703(d) (emphasis supplied).

C. Historical Versus “Real-time” Information

Defendant asserts the AT&T records obtained via his cell phone constituted “real-time” information, and argues a search warrant supported by probable cause was required. We disagree. Courts in other jurisdictions, which have considered disclosure of records under the SCA, have concluded the federal statute permits the disclosure of “historical,” as opposed to “real-time,” information.

The majority of federal courts which have considered the issue have concluded that “real-time” location information may only be obtained pursuant to a warrant supported by probable cause. *See United States v. Espudo*, 954 F. Supp. 2d 1029, 1034-35 (S.D. Cal. 2013). The distinguishing characteristic separating historical records from “real-time” information is the former shows where the cell phone has been located at some point in the past, whereas the latter shows where the phone is presently located through the use of GPS or precision location data. *See In re Application of U.S. for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013) (holding the receipt of cell site location information under the SCA does not categorically violate the Fourth Amendment as to historical information, but expressly limiting this holding to historical information only); *In re Application of U.S. for an Order Directing a Provider of Elec. Comm’n Serv. to Disclose Records to Gov’t*, 620 F.3d 304, 307-08 (3rd Cir. 2010) (“[T]here is no dispute that historical [cell site location information] is a ‘record or other information pertaining to a subscriber . . . or customer[.]’”).

Several courts have held the SCA permits a government entity to obtain cell tower site location information from a third-party service provider in situations where the cell tower site location information sought pre-dates the court order *and* where the cell tower site location information is collected after the date the court order issues. Although the former may technically be considered “historical” while the latter is “prospective” in relation to the date of the court order, both are considered “records” under the SCA. The government entity only receives this information *after* it has been collected and stored by the third-party service provider. *See United States v. Booker*, No. 1:11-CR-255-1-TWT, 2013 WL 2903562, at *6 (N.D.Ga. June 13, 2013) (holding “[t]he SCA makes no distinction between historical and prospective cell site location information”); *In re Application of the U.S. for an Order for Disclosure of*

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Telecomms. Records & Authorizing the Use of a Pen Register and Trap and Trace, 405 F. Supp. 2d 435, 444 (S.D.N.Y. 2005) (holding prospective cell site data is “information” under the SCA “inasmuch as cell site information is transmitted to the Government only after it has been in the possession of the cell phone company” and noting nothing in the SCA limits when “information may come into being” leaving it “susceptible to an interpretation that the ‘information’ sought might come into being in the future”); *In re Application of the U.S. for an Order Authorizing the Use of Two Pen Register and Trap and Trace Devices*, 632 F. Supp. 2d 202, 207 n.8 (E.D.N.Y. 2008) (“The prospective cell-site information sought by the Government . . . becomes a[n] ‘historical record’ as soon as it is recorded by the [third-party] provider.”).

Defendant cites two cases in his brief from the state courts of New Jersey and Florida, which held an individual’s reasonable expectation of privacy is implicated by “real-time” cell phone tracking, and a warrant is required. *See Tracey v. Florida*, 152 So. 3d 504 (2014) (holding police officers’ use of “real-time” cell tower site location information to track defendant was a search falling under the purview of the Fourth Amendment); *State v. Earls*, 70 A.3d 630 (2013) (holding a warrant is required for the use of “real-time” cell tower site location information because Article I, Paragraph 7 of the New Jersey Constitution provides greater protection against unreasonable searches and seizures than the Fourth Amendment).

After careful review of the record and trial transcripts, we conclude the cell tower site location information acquired and stored by AT&T and provided to the officers were historical records. The cases Defendant relies on are inapplicable to the facts before us. North Carolina appellate courts have held Article I, Section 20 of the Constitution of North Carolina provides the same protections against unreasonable search and seizure as the Fourth Amendment to the Constitution of the United States. *See State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984) (citation omitted).

Detective Mitchell testified the emails he received of records from AT&T consisted of latitudinal and longitudinal coordinates of the cell towers Defendant’s cell phone “pinged” when connected. He further testified “[t]hey’re historical hits; they’re not active [or] right on time” and there is “probably a five- or seven-minute delay.” Other evidence shows AT&T emailed the delayed recorded information to Detective Mitchell every fifteen minutes.

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Detective Mitchell and the other officers followed Defendant's historical travel by entering the coordinates of cell tower "pings" provided by AT&T into a Google Maps search engine to determine the physical location of the last tower "pinged." Defendant's cell phone was never contacted, "pinged," or its precise location directly tracked by the officers. The officers did not interact with Defendant's cell phone, nor was any of the information received either directly from the cell phone or in "real time." All evidence shows the cell tower site location information provided by AT&T was historical stored third-party records and properly disclosed under the court's order as expressly provided in the SCA. 18 U.S.C. § 2703(d). This argument is overruled.

D. Reasonable Expectation of Privacy

[2] Since the location information acquired from Defendant's cell phone was "historical," rather than "real-time," we address whether the retrieval of this information constituted a search under the Fourth Amendment, and required a warrant. Whether the retrieval of cell tower site location information, triggered by Defendant's use of his cell phone, constituted a "search" hinges on whether Defendant can show either a trespass or a reasonable expectation of privacy in the information his cell phone transmitted to AT&T. The Supreme Court of the United States has not decided whether historical cell tower site location information raises Fourth Amendment issues. Similarly, this issue appears to be a case of first impression for North Carolina appellate courts.

The Fourth Amendment to the Constitution of the United States, as made applicable to the sovereign states through the Fourteenth Amendment, provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Subject to "a few specifically established and well-delineated exceptions," the Fourth Amendment protects privacy interests by prohibiting officers from conducting a search without a valid warrant based on probable cause. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 29 L. Ed. 2d 564, 576 (1971); *see also State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979).

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The analogous provision in the Constitution of North Carolina, Article I, the Declaration of Rights, Section 20, provides “[g]eneral warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.” N.C. Const. art. I, § 20. Our Supreme Court has held Article I, Section 20 provides the people the same protection against unreasonable searches and seizures as the Fourth Amendment of the Constitution of the United States. *Arrington*, 311 N.C. at 643, 319 S.E.2d at 260 (holding Article I, Section 20 of the Constitution of North Carolina provides the same protections against unreasonable searches and seizures as the Fourth Amendment); *State v. Garner*, 331 N.C. 491, 506, 417 S.E.2d 502, 510 (1992) (citations omitted) (holding “there is nothing to indicate anywhere in the text of Article I, Section 20 any enlargement or expansion of rights beyond those afforded in the Fourth Amendment as applied to the states by the Fourteenth Amendment”).

Defendant argues his Fourth Amendment rights were violated when law enforcement obtained historical cell tower site location information transmitted from his cell phone, without a warrant and without probable cause, in order to locate him. We disagree.

A “search” occurs under the Fourth Amendment in one of two circumstances. Under the common law “trespass theory,” a search occurs upon a physical intrusion by government agents into a constitutionally protected area in order to obtain information. *United States v. Jones*, ___ U.S. ___, ___, 181 L. Ed. 2d 911, 918 (2012). Without a physical trespass and under the more commonly employed “reasonable expectation of privacy theory,” a search occurs when the government invades reasonable expectations of privacy to obtain information. *Katz v. United States*, 389 U.S. 347, 351, 19 L. Ed. 2d 576, 582 (1967) (holding “the Fourth Amendment protects people, not places” and finding an unconstitutional search in the attachment of an eavesdropping device to a public telephone booth without a warrant).

Under *Katz* and subsequent cases, the test for whether an unreasonable search occurred depends on whether: (1) “the individual manifested a subjective expectation of privacy in the object of the challenged search[;]” and, (2) “society is willing to recognize that expectation as reasonable.” *Kyllo v. United States*, 533 U.S. 27, 33, 150 L. Ed. 2d 94, 101 (2001) (citation and internal quotation marks omitted).

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The State argues Defendant cannot assert any reasonable expectation of privacy in the non-content information his phone transmitted to, and which became a record stored by, AT&T, a third party. The State contends no “search” occurred, and neither the Fourth Amendment nor the analogous provision in the Constitution of North Carolina are implicated by these facts. The State relies on several Supreme Court of the United States cases, which held a defendant lacked a reasonable expectation of privacy in information he provided to a third party, which the third party later provided to a government entity.

In *United States v. Miller*, the Supreme Court of the United States held the defendant had no reasonable expectation of privacy in his bank records, maintained by the bank and procured by governmental subpoena. 425 U.S. 435, 442-43, 48 L. Ed. 2d 71, 79 (1976). The Court stated:

[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

Id. at 443, 48 L. Ed. 2d at 79 (citations omitted).

In *Smith v. Maryland*, the Supreme Court of the United States considered whether the defendant had a reasonable expectation of privacy in the telephone numbers he dialed on his home telephone. 442 U.S. 735, 737, 61 L. Ed. 2d 220, 225 (1979). At the government’s request, the telephone company installed a pen register to obtain the defendant’s call history.

Applying the reasoning set forth in *Miller*, the Court held the acquisition of this information by the government did not constitute a search, because the defendant had no “legitimate expectation of privacy” in the numbers he dialed on his phone. *Id.* at 742, 61 L. Ed. 2d at 227. The Court explained “even if [the defendant] did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not one that society is prepared to recognize as reasonable,” and explicitly held “a person has no legitimate expectation of privacy in information he *voluntarily turns over to third parties.*” *Id.* at 743-44, 61 L. Ed. 2d at 229 (emphasis supplied) (citations and internal quotation marks omitted).

This Court has expressly recognized the third-party doctrine discussed in *Miller* and *Smith* as an exemption from the requirement of a

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warrant based upon probable cause. *See State v. Suggs*, 117 N.C. App. 654, 659-60, 453 S.E.2d 211, 214-215 (1995) (holding “the defendant’s constitutional protection against unreasonable search and seizure is not implicated” where telephone records were obtained from third-party telephone company); *State v. Melvin*, 86 N.C. App. 291, 295-96, 357 S.E.2d 379, 382-83 (1987) (holding SBI obtaining defendant’s bank records from the bank “could not constitute a governmental ‘search’ for Fourth Amendment purposes” because defendant had no Fourth Amendment privacy interest in records maintained by third party); *State v. Overton*, 60 N.C. App. 1, 31, 298 S.E.2d 695, 713 (1982) (holding *Miller* was controlling and defendant’s Fourth Amendment rights were not violated when the government obtained information from his bank account, credit union account, and telephone records maintained by third party).

In a case decided after *Miller* and *Smith*, but prior to the present technological state of cellular communications, the Supreme Court of the United States addressed electronic tracking of individuals. In *United States v. Knotts*, government agents located an illegal drug lab by installing an electronic “beeper” into a container of chemicals. 460 U.S. 276, 75 L. Ed. 2d 55 (1983). The battery-operated radio transmitter emitted a signal that could be retrieved and tracked with a radio receiver. The beeper was installed with the consent of the owner of the container prior to its sale to the defendant. Law enforcement received the signals from the beeper to track the defendant to his cabin. The Court held neither a search nor a seizure had occurred, because tracking the vehicle carrying the container on public roads and into an open field did not invade any reasonable expectation of privacy. *Id.* at 285, 75 L. Ed. 2d at 64.

The Supreme Court of the United States has not ruled on whether citizens have a reasonable expectation of privacy in the disclosure of their approximate and historical locations by cell tower site location data under the Fourth Amendment. However, the Court has recognized serious privacy interests are involved in locating, monitoring, and tracking individuals through the use of technological advances. In *United States v. Jones*, the Supreme Court held the physical attachment of a GPS tracking device to the defendant’s vehicle is a trespass and constitutes a search under the Fourth Amendment. __ U.S. __, 181 L. Ed. 2d 911 (2012).

The majority’s opinion in *Jones* relied upon a trespass-based rationale and held “the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’” *Id.* at __, 181 L. Ed. 2d at 918. Justice Sotomayor’s concurring opinion in *Jones* reaffirmed the Court’s continued adherence

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to *Katz*, stating “even in the absence of a trespass, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.” *Id.* at ___, 181 L. Ed. 2d at 924 (Sotomayor, J., concurring) (citations and internal quotation marks omitted).

Justice Sotomayor’s opinion also warns of inevitable changes in society’s reasonable expectations of privacy as technology advances. *Id.* at ___, 181 L. Ed. 2d. at 925 (“[T]he same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations.”).

In his separate concurring opinion, Justice Alito noted:

[T]he *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.

Id. at ___, 181 L. Ed. 2d at 932 (Alito, J., concurring).

Justice Alito’s opinion also made keen observations about technological advances, which hold particular relevance at bar. He referred to the emergence of new devices, which permit greater monitoring of an individual’s movements in recent years, and stated:

Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users For older phones, the accuracy of the location information depends on the density of the tower network, but new “smart phones,” which are equipped with a GPS device, permit more precise tracking. For example, when a user activates the GPS on such a phone, a provider is able to monitor the phone’s location and speed of movement Similarly, phone-location-tracking services are offered as “social” tools, allowing consumers to find (or to avoid) others who enroll in these

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services. The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements.

Id. at ___, 181 L. Ed. 2d at 933.

The facts in the case before this Court are distinguishable from the facts and ultimate holding in *Jones*. Unlike in *Jones*, no physical trespass onto Defendant's person or property occurred. Defendant has not shown any evidence of any GPS or "real-time" tracking. The officers only received the coordinates of historical cell tower "pings" after they had been recorded and stored by AT&T, a third party.

Additionally, the physical trespass in *Jones* was not authorized by a warrant or court order of any kind. Most importantly, *Jones* did not rely upon the long-standing principle repeatedly affirmed by the Supreme Court of the United States, the federal courts, and this Court that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." *Miller*, 425 U.S. at 443, 48 L. Ed. 2d at 79. *See also Ostergren v. Cuccinelli*, 615 F.3d 263, 282 (4th Cir. 2010); *Doe v. Broderick*, 225 F.3d 440, 449 (4th Cir. 2000); *United States v. Horowitz*, 806 F.2d 1222, 1226 (4th Cir. 1986).

E. Recent Cases from the U.S. Court of Appeals for the Third, Fifth, and Eleventh Circuits

In examining whether Defendant showed a reasonable expectation of privacy in the cell tower site location information stored and transmitted by AT&T, we find several recent decisions from the United States Court of Appeals for the Third, Fifth, and Eleventh Circuits persuasive and instructive.

In *In re Application of the United States for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government* ("*In re Application (Third Circuit)*"), the Third Circuit held "[cell site location information] from cell phone calls is obtainable under a § 2703(d) order," which "does not require the traditional probable cause determination" necessary for a warrant. 620 F.3d at 313.

In *In re Application of the United States for Historical Cell Site Data* ("*In re Application (Fifth Circuit)*"), the Fifth Circuit held a court order issued under 18 U.S.C. § 2703(d) compelling production of a cellular provider's business records showing historical cell tower site location information did not implicate the Fourth Amendment, and no search warrant was required. 724 F.3d at 614-15.

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The Fifth Circuit's decision emphasized the cellular company, *not* the government, was responsible for the initial collection and storage of the cell tower information. *Id.* at 609-10. The Fifth Circuit's decision stated:

The Government does not require service providers to record this information or store it. The providers control what they record and how long these records are retained. . . . In the case of such historical cell site information, the Government merely comes in after the fact and asks a provider to turn over records the provider has already created.

Id. at 612.

Their decision also noted these business records do not contain any content of the user's communications and concluded no reasonable privacy was expected in these records because

[a] cell service subscriber, like a telephone user, understands that his cell phone must send a signal to a nearby cell tower in order to wirelessly connect his call. . . . [and] cell service providers' and subscribers' contractual terms of service and providers' privacy policies expressly state that a provider uses a subscriber's location information to route his cell phone calls. In addition, these documents inform subscribers that the providers not only use the information, but collect it.

Id. at 613.

The Fifth Circuit's decision also analogized the lack of a reasonable expectation of privacy in this case to that in *Smith v. Maryland, supra*, and stated: "Cell phone users, therefore, understand that their service providers record their location information when they use their phones at least to the same extent that the landline users in *Smith* understood that the phone company recorded the numbers they dialed." *Id.*

This decision also agreed with some of the concerns expressed by the concurring Supreme Court Justices in *Jones* "that technological changes can alter societal expectations of privacy." *Id.* at 614. *See Jones*, ___ U.S. at ___, 181 L. Ed. 2d at 932. However, the Fifth Circuit stated, "[a]t the same time, law enforcement tactics must be allowed to advance with technological changes, in order to prevent criminals from circumventing the justice system." *Id.* at 614 (citation and internal quotation marks omitted).

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The United States Court of Appeals for the Eleventh Circuit, *en banc*, followed the Fifth Circuit's reasoning and held the defendant did not hold a reasonable expectation of privacy in third-party cell tower records created by the telephone company and turned over to the government. *United States v. Davis*, 785 F.3d 498, 511 (11th Cir. 2015) (*en banc*). See also *United States v. Skinner*, 690 F.3d 772, 778 (6th Cir. 2012) (holding "[t]here is no inherent constitutional difference between trailing a defendant and tracking him via [cell site location information] technology").

The Eleventh Circuit's *en banc* decision reiterated long-standing Fourth Amendment principles.

[L]ike the bank customer in *Miller* and the phone customer in *Smith*, [the defendant] can assert neither ownership nor possession of the third-party's business records he sought to suppress. . . .

More importantly, like the bank customer in *Miller* and the phone customer in *Smith*, [the defendant] has no subjective or objective reasonable expectation of privacy in MetroPCS's business records showing the cell tower locations that wirelessly connected his calls at or near the time of six of the seven robberies.

Davis, 785 F.3d at 511.

The facts at bar are consistent with the holdings in *In re Application (Third Circuit)*, *In re Application (Fifth Circuit)*, and *Davis*. The officers investigating Defendant received historical cell tower site location information, stored as a business record by AT&T, a third party, pursuant to a court order. Defendant voluntarily conveyed this information to AT&T, his service provider.

Law enforcement did not use GPS, "real-time" information, or "ping," track, trace, or otherwise contact Defendant's cell phone. No physical trespass occurred on any of Defendant's person or property, nor was the content of any of Defendant's communication disclosed. Officer Mitchell testified there was a five- to seven-minute delay in the cell tower site information he received from AT&T. Defendant failed to show any reasonable expectation of privacy in these third-party stored records. The acquisition of this information did not constitute a "search" under the Fourth Amendment to the Constitution of the United States or Article I, Section 20 of the Constitution of North Carolina. Defendant's argument is overruled.

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F. *United States v. Graham*

Defendant has filed a Memorandum of Additional Authority citing the United States Court of Appeals for the Fourth Circuit's recent opinion, *United States v. Graham*. After careful review, we find it clearly distinguishable from the facts at bar. The Fourth Circuit held "the government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user's historical [cell site location information] for an extended period of time." *Graham*, Nos. 12-4659, 12-4825, 2015 WL 4637931, at *8 (4th Cir. Aug. 5, 2015) (emphasis supplied).

In *Graham*, the government sought cell tower site location information for multiple defendants for a period of 221 days. To the contrary, the officers at bar sought cell tower site location information for only portions of *two* days, and after Detective Mitchell overheard Defendant tell Holderfield he would be traveling from Charlotte to Raleigh the following day. It cannot reasonably be argued that portions of two days constitutes an "extended period of time," to implicate the Fourth Amendment or Article I, Section 20 of the Constitution of North Carolina. *Id.* See *Jones* __ U.S. at __, 181 L. Ed. 2d at 934 (Alito, J., concurring) (citation omitted) ("[R]elatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable."); *Skinner*, 690 F.3d at 780 (holding DEA agents tracking defendant's cell phone for three days did not rise to "a level of comprehensive tracking that would violate the Fourth Amendment").

The Fourth Circuit's majority opinion purported to distinguish the long-standing tenet of the third-party doctrine that an individual cannot claim a legitimate expectation of privacy in information he has voluntarily turned over to a third party. *Smith*, 442 U.S. at 743-44, 61 L. Ed. 2d at 229. The Fourth Circuit's majority opinion relied on the notion that the defendants did not "voluntarily disclose" their cell tower site location information to their service providers, and found the third-party doctrine to be inapplicable. This supposition directly contradicts the conclusions reached by all other federal appellate courts, who have considered this question. See *Davis*, 785 F.3d at 511 (holding defendant had no "objective reasonable expectation of privacy in . . . business records showing the cell tower locations that wirelessly connected his calls"); *Skinner*, 690 F.3d at 777 (holding defendant "did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay-as-you-go cell phone"); *In re Application (Fifth Circuit)*, 724 F.3d at 615 (holding the government can use "[s]ection 2703(d) orders to obtain . . . cell site information" without implicating the Fourth Amendment);

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In Re Application (Third Circuit), 620 F.3d at 313 (holding that cell tower site location information “is obtainable under a § 2703(d) order and that such an order does not require the traditional probable cause determination”).

Judge Motz’s dissenting opinion in *Graham* notes the majority’s holding that “cell phone users do not voluntarily convey [cell site location information] misapprehends the nature of [cell site location information], attempts to redefine the third-party doctrine, and rests on a long-rejected factual argument and the constitutional protection afforded a communication’s *content*.” *Graham*, at *41 (Motz, J., dissenting) (emphasis supplied).

As most cell phone users know all too well, however, proximity to a cell tower is necessary to [place outgoing calls, send text messages, and route incoming calls and messages.] Anyone who has stepped outside to “get a signal,” or has warned a caller of a potential loss of service before entering an elevator, understands on some level, that location matters.

A cell phone user thus voluntarily enters an arrangement with his service provider in which he knows that he must maintain proximity to the provider’s cell towers in order for his phone to function. Whenever he expects his phone to work, he is thus permitting—indeed, requesting—his service provider to establish a connection between his phone and a nearby cell tower. A cell phone user therefore voluntarily conveys the information necessary for his service provider to identify the [cell site location information] for his calls and texts.

Id. at *41-*42 (citation omitted).

G. Good-Faith Exception

[3] Even if we were to accept Defendant’s arguments and find a search warrant based upon probable cause was required under these facts, we hold the good-faith exception to the Fourth Amendment warrant requirement applies, as all three judges on the Fourth Circuit concluded in *Graham*.

The exclusionary rule “generally prohibits the introduction at criminal trial of evidence obtained in violation of a defendant’s Fourth Amendment rights[.]” *United States v. Stephens*, 764 F.3d 327, 335 (4th Cir. 2014) (citation and quotation marks omitted). However, the Supreme

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Court of the United States recognizes a good-faith exception to the exclusionary rule where law enforcement acts “with an objectively reasonable good-faith belief that their conduct is lawful[.]” *Davis v. United States*, __ U.S. __, __, 180 L. Ed. 2d 285, 295 (2011) (citation and internal quotation marks omitted). The Court has held the good-faith exception applies where law enforcement relies on a search warrant or other court order issued by a neutral magistrate. *United States v. Leon*, 468 U.S. 897, 922-23, 26, 82 L. Ed. 2d 677, 698-99 (1984).

The majority opinion in *Graham* held:

[T]he government is entitled to the good-faith exception because, in seeking Appellants’ [cell tower site location information], the government relied on the procedures established in the SCA and on two court orders issued by magistrate judges in accordance with the SCA. . . . Appellants do not claim that the government was dishonest or reckless in preparing either application. Upon consideration of each of the government’s applications, two magistrate judges of the district court respectively issued § 2703(d) orders to Sprint/Nextel for the disclosure of Appellants’ account records. There is nothing in the record to suggest that either magistrate abandoned her or his detached and neutral role such that a well trained [sic] officer’s reliance on either order would have been unreasonable.

Id. at *21 (citations and internal quotation marks omitted).

The circumstances surrounding the issuance of the court order at bar are nearly identical to those in *Graham*. Detective Mitchell relied on the procedures established in the SCA when he submitted his sworn application for a phone records production order pursuant to 18 U.S.C. § 2703(d) (2013). Defendant does not argue Detective Mitchell was “dishonest or reckless” in preparing his application. *Graham*, at *21. There is also nothing in the record to suggest Judge Inman “abandoned her . . . detached and neutral role such that a well trained [sic] officer’s reliance on either order would have been unreasonable.” *Id.*

The law enforcement officers reasonably relied on the SCA in exercising their option to seek a § 2703(d) order and obtain Defendant’s historical stored cell tower site location records from third-party AT&T. The good-faith exception applies to Defendant’s Fourth Amendment claims.

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IV. Disclosure of Sealed Documents

Defendant also argues the State provided documents to the trial court *in camera* during his trial. Defendant requests this Court to review the documents and determine whether they are material to his guilt, sentencing, or arguments raised on appeal.

A. Standard of Review

The proper standard of review for reviewing sealed documents from the trial court is *de novo*. *State v. Scott*, 180 N.C. App. 462, 463-64, 637 S.E.2d 292, 293 (2006) (citations omitted), *disc. review denied*, 361 N.C. 367, 644 S.E.2d 560 (2007). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citations and internal quotation marks omitted).

B. Analysis

The trial court sealed the documents for appellate review. The documents were not disclosed to Defendant or his counsel. Pursuant to defense counsel’s request, the Wake County Clerk of Superior Court provided the sealed documents to this Court for review. If the trial court conducts an *in camera* inspection of documents, but denies the defendant’s request for the documents, they should be sealed and “placed in the record for appellate review.” *State v. Hardy*, 293 N.C. 105, 128, 235 S.E.2d 828, 842 (1977).

On appeal, this Court is required to examine the documents to determine if they contain information that is “both favorable to the accused and material to [either his] guilt or punishment.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 94 L. Ed. 2d 40, 57 (1987) (citations omitted). Defendant is constitutionally entitled to disclosure of this evidence, only if the sealed records contain evidence which is both “favorable” and “material.” *Id.* at 59, 94 L. Ed. 2d. at 58-59.

We have carefully examined the sealed documents, and conclude they do not contain any information favorable and material to Defendant’s guilt or punishment. *See State v. McGill*, 141 N.C. App. 98, 102-03, 539 S.E.2d 351, 355-56 (2000) (noting favorable evidence “includes evidence which tends to exculpate the accused as well as any evidence adversely affecting the credibility of the government’s witnesses” and evidence is material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different”).

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V. Conclusion

The trial court properly denied Defendant's motion to suppress the cell tower site location information obtained by law enforcement. These stored historical records were provided by AT&T, a third party, pursuant to a valid court order. Defendant had no reasonable expectation of privacy in these third-party records. *Smith*, 442 U.S. at 737, 61 L. Ed. 2d at 225. The procurement of this information was not a "search," and did not require the issuance of a warrant based upon probable cause. Neither the Fourth Amendment of the Constitution of the United States nor Article I, Section 20 of the Constitution of North Carolina was implicated.

We have reviewed the documents sealed by the trial court. Our review shows they contain no favorable or material information to Defendant's guilt or punishment.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in Defendant's conviction by the jury or in the trial court's judgment entered thereon.

NO ERROR.

Judge DIETZ concurs.

Chief Judge McGEE concurs in a separate opinion.

McGEE, Chief Judge, concurring.

I concur in the final disposition of the majority's opinion finding no error in the trial court's denial of Defendant's motion to suppress the evidence obtained by State law enforcement officers from AT&T pursuant to a judicial order issued under the Stored Communications Act ("the SCA") in accordance with 18 U.S.C. § 2703(d). However, I respectfully disagree with the majority's characterization of the information obtained pursuant to that judicial order — which order was entered and executed on 11 December 2012 for information generated and transmitted on the same day from AT&T to law enforcement officers after only a "five- to seven-minute delay" — as "historical" information, rather than "real-time" information.

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As described by the majority, on 11 December 2012, the trial court issued an order pursuant to an application under 18 U.S.C. § 2703(d)¹ authorizing AT&T to provide law enforcement officers with “cell site information including latitude, longitude, sector azimuth and orientation information” from 13 November 2012 through 12 December 2012, as well as “precision location/GPS, E911 locate or Mobile Locate Service” from 11 December 2012 through 12 December 2012 for Defendant’s cell phone. Such order required that law enforcement officers needed only to demonstrate “specific and articulable facts showing that there [we]re reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, [we]re relevant and material to an ongoing criminal investigation.” 18 U.S.C. § 2703(d) (2012). In other words, to obtain this judicial order for Defendant’s cell phone information, law enforcement officers were required to meet a “statutory standard [that wa]s less than the probable cause standard for a search warrant.” *See United States v. Davis*, 785 F.3d 498, 505 (11th Cir. 2015).

On appeal, Defendant challenged the issuance of the judicial order with which law enforcement officers obtained the cell site information for Defendant’s cell phone from AT&T for 11 December 2012 on 11 December 2012 as an erroneous authorization of an unconstitutional search using “real-time”² information obtained from Defendant’s cell

1. The other statutes referenced in the order were N.C. Gen. Stat. §§ 15A-261, 15A-262, and 15A-263. These statutes concern the application and approval procedures by which the State may install or use either a pen register or a trap and trace device. Nonetheless, since Defendant does not challenge any evidence gathered through these statutory mechanisms, and challenges only evidence gathered pursuant to the authority conveyed by 18 U.S.C. § 2703(d) of the SCA, we need not undertake an examination of these statutes.

2. While some courts have determined that “real-time” cell site information is a subset of “prospective” cell site information, *see In re U.S. for an Order Authorizing Installation & Use of a Pen Register (Maryland Cell Site Case)*, 402 F. Supp. 2d 597, 599 (D. Md. 2005), “[c]ourts generally use both ‘prospective’ and ‘real-time’ interchangeably to refer to this type of data.” *United States v. Espudo*, 954 F. Supp. 2d 1029, 1034 n.1 (S.D. Cal. 2013). An example given to illustrate the distinction between these terms is as follows: “[I]magine the government receives a court order on a Monday granting access to prospective cell site information (i.e. all cell site information generated going forward). On Thursday, the government begins tracking the phone in real time; such information is both prospective and real time cell site information. On Friday, the government goes back and accesses the records of the phone’s location on Tuesday and Wednesday; such information is prospective but not real time cell site information.” *Maryland Cell Site Case*, 402 F. Supp. 2d at 599 n.5. However, in order to more plainly distinguish “real-time” or “prospective” cell site information from “historical” cell site information, I use the term “real-time” cell site information to encapsulate both “real-time” and “prospective” information, except when directly quoting other cases that use the term “prospective.”

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phone without establishing probable cause and securing a warrant before conducting this search. Law enforcement officers — as well as the majority opinion — described the information obtained from AT&T as “historical” information, rather than “real-time” information. I believe the majority’s characterization of the information acquired from AT&T as “historical,” rather than “real-time,” is incorrect.

“Cell phones operate through the use of radio waves. To facilitate cell phone use, cellular service providers maintain a network of radio base stations — also known as cell towers — throughout their coverage areas.” *In re Application for Tel. Info. Needed for a Crim. Investigation (California Cell Site Case)*, No. 15 XR 90304 HRL 1(LHK), __ F. Supp. 3d __, __ (N.D. Cal. July 29, 2015). “Most cell towers have multiple cell sectors (or ‘cell sites’) facing in different directions.” *Id.* at __. “A cell site, in turn, is a specific portion of the cell tower containing a wireless antenna, which detects the radio signal emanating from a cell phone and connects the cell phone to the local cellular network or Internet.” *Id.* at __; *see United States v. Graham (Graham II)*, Nos. 12-4659 and 12-4825, __ F.3d __, __ (4th Cir. Aug. 5, 2015) (“Cell sites are placed at various locations throughout a service provider’s coverage area and are often placed on towers with antennae arranged in sectors facing multiple directions to better facilitate radio transmissions.”).

“Whenever a cell phone makes or receives a call, sends or receives a text message, or otherwise sends or receives data, the phone connects via radio waves to an antenna on the closest cell tower, generating [cell site location information].” *California Cell Site Case*, __ F. Supp. 3d at __; *Graham II*, __ F.3d at __ (“A cell phone connects to a service provider’s cellular network through communications with cell sites, occurring whenever a call or text message is sent or received by the phone.”). “When the phone connects to the network, the service provider automatically captures and retains certain information about the communication, including identification of the specific cell site and sector through which the connection is made.” *Graham II*, __ F.3d at __. “By identifying the nearest cell tower and sector, [cell site location information] can be used to approximate the whereabouts of the cell phone at the particular points in time in which transmissions are made.” *Id.* at __. “The cell sites listed can be used to interpolate the path the cell phone, and the person carrying the phone, travelled during a given time period.” *Id.* at __. “The precision of this location data depends on the size of the identified cell sites’ geographical coverage ranges.” *Id.* at __.

As commonly used, “historical” cell site location data “refers to the acquisition of cell site data for a period *retrospective* to the date of

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the order, whereas ‘prospective’ or ‘real-time’ cell site data refers [to] the acquisition of data for a period of time *going forward from* the date of the order.” *Espudo*, 954 F. Supp. 2d at 1034. In other words, “[r]eal time’ cell site information refers to data used by the government to identify the location of a phone at the present moment . . . [and] refers to all cell site information that is generated after the government has received court permission to acquire it,” *Maryland Cell Site Case*, 402 F. Supp. 2d at 599; *see also United States v. Graham (Graham I)*, 846 F. Supp. 2d 384, 391 n.7 (D. Md. 2012) (“In a *more invasive* search, the government will request that the carrier retain records for all of a handset’s automatic registrations, *which occur approximately every seven to ten minutes. Such a request is prospective*, as it asks for data generated *after* the court’s order or warrant and involves data being generated and turned over to law enforcement in real time, or close to it.” (second emphasis added)), *aff’d by Graham II*, Nos. 12-4659 and 12-4825, __ F.3d __ (4th Cir. Aug. 5, 2015), and “encompasses only that location information that already has been created, collected, and recorded by the cellular service provider at the time the court authorizes a request for that information.” *In re U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel.*, 849 F. Supp. 2d 526, 535 n.4 (D. Md. 2011). However, “[r]ecords stored by the wireless service provider that detail the location of a cell phone in the past (i.e.: prior to entry of the court order authorizing government acquisition) are known as ‘historical’ cell site information.” *Maryland Cell Site Case*, 402 F. Supp. 2d at 599.

As the majority recognizes, most federal courts that have considered this issue have concluded that a request from law enforcement for real time cell site information pursuant to the SCA requires probable cause,³ while a request for historical cell site information requires only specific and articulable facts. Thus, the characterization of information as “historical” or “real-time” — and, thus, the standard to which law enforcement must adhere in order to obtain such information — rests upon whether the information sought was generated before or after the issuance date of the order authorizing the transmission of information pursuant to 18 U.S.C. § 2703.

3. *See, e.g., In re U.S. for Orders Authorizing Installation & Use of Pen Registers*, 416 F. Supp. 2d 390, 391 (D. Md. 2006); *In re U.S. for an Order Authorizing Installation & Use of a Pen Register*, 415 F. Supp. 2d 211, 214 (W.D. N.Y. 2006); *In re U.S. for an Order (1) Authorizing the Use of a Pen Register*, 396 F. Supp. 2d 294, 300 (E.D. N.Y. 2005); *In re Application for Pen Register*, 396 F. Supp. 2d 747, 765 (S.D. Tex. 2005).

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In the present case, law enforcement officers filed an application pursuant to 18 U.S.C. § 2703(d) on 11 December 2012:

Requesting complete call detail records (see below), with cell site information including latitude, longitude, sector azimuth and orientation information for the target telephone number(s)[.]

Requesting precision location/GPS, E911 locate or Mobile Locate Service if applicable from December 11, 2012 through December 12, 2012 for the phone number(s) listed below and additionally upon request, precision location/GPS for an additional thirty (30) days from the end date of this order for any new number(s) identified/associated with the account or account holder(s) as a result of account modifications[.]

Evidence presented at trial established that AT&T sent emails at regular intervals to law enforcement officers on 11 December 2012, that such emails contained longitude and latitude coordinates of Defendant's cell phone as captured by AT&T's cell tower sites, and that the information provided by AT&T was sent with a frequency and contemporaneity with Defendant's then-current location — from somewhere between every five to seven minutes to every fifteen minutes — to allow law enforcement to track Defendant's location, through the information provided by AT&T, to a hotel where Defendant was physically located. For instance, one law enforcement officer testified that, by using the coordinates from AT&T, law enforcement "w[as] able to say for sure that [Defendant's cell phone] was in that hotel."

However, the majority has determined that the information acquired from AT&T was "historical," based on the following testimony: (1) that there was "probably a five- or seven-minute delay" from when Defendant's cell phone connected with the cell tower sites; (2) that "AT&T emailed the delayed recorded information to [the law enforcement officer] every fifteen minutes[;]" and (3) that law enforcement did not receive the information directly from Defendant's cell phone but, instead, had to enter the coordinates provided from AT&T's "stored records" "into a Google Maps search engine to determine the physical location of the last tower 'pinged.'"

Because most federal courts recognize that historical cell site information consists of information generated prior to the issuance date of a judicial order that allowed law enforcement to obtain such records for

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a given defendant, and because I believe allowing the majority's characterization of the information provided by AT&T to law enforcement, based on the facts in this case, would effectively obliterate the distinction between "historical" and "real-time" cell site information, I must respectfully disagree with the majority's characterization. Nevertheless, because I agree with the majority opinion that the good-faith exception to the Fourth Amendment warrant requirement would allow the challenged evidence to stand, I decline to undertake an examination of whether the majority properly concluded that Defendant had a reasonable expectation of privacy in the real-time cell site information obtained by law enforcement from AT&T in light of *Graham II* and *California Cell Site Case*.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER ADAM TURBYFILL

No. COA14-1003

Filed 1 September 2015

1. Witnesses—expert—blood alcohol extrapolation

The trial court did not abuse its discretion in an impaired driving prosecution by allowing a witness to testify as an expert in blood alcohol physiology, pharmacology, and related research on retrograde extrapolation. The witness's testimony confirmed that blood alcohol extrapolation is a scientifically valid field, with principles that have been tested, subjected to peer review and publication, and undisputedly accepted in the scientific community and in our courts. Most of defendant's contentions, although strongly stated, were arguments that went to the weight to be given the testimony, not its admissibility.

2. Motor Vehicles—horizontal gaze nystagmus—test—no prejudicial error

The trial court did not commit plain error in allowing an officer to testify to defendant's blood alcohol level. Although the officer appeared to have violated N.C.G.S. § 8C-1, Rule 702(a1) as it related to the Horizontal Gaze Nystagmus Test, the error did not have a probable impact on the jury's verdict.

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Appeal by defendant from judgment entered 6 May 2014 by Judge Jeffrey P. Hunt in Buncombe County Superior Court. Heard in the Court of Appeals 3 February 2015.

Attorney General Roy Cooper, by Assistant Attorney General Matthew L. Boyatt, for the State.

Mark Hayes for defendant-appellant.

BRYANT, Judge.

The trial court did not abuse its discretion by allowing a witness who demonstrated specialized knowledge, experience, and training in blood alcohol physiology, pharmacology, and related research on retrograde extrapolation to be qualified and testify as an expert. Defendant cannot show plain error where, despite improper blood alcohol level testimony, there was sufficient independent competent evidence of defendant's impairment to support the jury verdict.

At about 10:15pm on 21 December 2011, Officers Jonathan Collins and Lucas Lovelace of the Asheville Police Department responded to a single vehicle accident on a public road where they found twenty year-old defendant Christopher Turbyfill near his Ford F-150 truck which had rolled over on its side. Officer Lovelace approached defendant who was beside his truck crying and appeared to be upset, saying he was going to lose his job. As he spoke with defendant, Officer Lovelace noticed that defendant slurred his words, that his eyes were blood shot, that he was unsteady on his feet and had an odor of alcohol on his breath. Defendant admitted he had been drinking alcohol—a twenty-four ounce Smirnoff, and had taken prescription drugs Xanax and Hydrocodone earlier that day. After defendant was checked by medics and determined not to be injured, Officer Lovelace administered standard field sobriety tests. Those tests included: horizontal gaze nystagmus [HGN]; walk-and-turn; and one-legged stand.

At trial, Officer Lovelace was qualified by the trial court as an expert in administration of the HGN test. He testified without objection, that he observed six of six clues of intoxication as to defendant, and that “[m]ost of the time four clues would show a BAC [blood alcohol concentration] of point one.” Further, Officer Lovelace elaborated that “[t]he onset of nystagmus prior to forty-five degrees, anything prior to forty-five degrees is a point one or greater BAC.” Officer Lovelace also observed six of eight clues of intoxication as defendant took the walk-and-turn test, and one

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indicator of intoxication during the one-legged stand test. Based on defendant's performance on the tests and other signs of impairment Officer Lovelace formed the "opinion that the defendant had consumed a sufficient quantity of impairing substance that his mental and physical faculties were appreciably impaired." Defendant was placed under arrest and asked to perform a breathalyzer test on which he registered a BAC of .07 less than two hours after the accident.

Anthony Burnette, a field technician in the Forensic Test of Alcohol Branch of the North Carolina Department of Health and Human Services was tendered as an expert witness. Following extensive voir dire, the trial court qualified Burnette as an expert in blood alcohol physiology, pharmacology, and related research on retrograde extrapolation. Burnette testified that he used retrograde extrapolation to determine defendant's BAC at the time of the vehicle crash. Burnette stated that, using an alcohol elimination rate of .0165 per hour, in the 1.83 hours between the time defendant crashed his truck and the time he took the breathalyzer test, defendant's body had eliminated .030 grams of alcohol. Accordingly, it was Burnette's opinion that defendant's BAC at the time of the accident was .10.

Defendant was convicted by a jury of Driving after Consuming Alcohol under twenty-one years and Driving While Impaired. Defendant was sentenced as a Level 5 DWI offender and given a term of 45 days suspended, placed on probation for 24 months and ordered to serve eleven days active confinement. From this judgment defendant appeals.

On appeal, defendant argues that the trial court erred by (I) allowing Anthony Burnette to testify as an expert witness and (II) committed plain error by allowing Officer Lovelace to testify as to defendant's blood alcohol level.

I

[1] Defendant argues that Burnette failed to demonstrate sufficient knowledge of scientific and mathematical principles to qualify as an expert in blood alcohol physiology, pharmacology, and related research on retrograde extrapolation, and as a result the trial court abused its discretion in allowing his expert opinion testimony. We disagree.

"We review a trial court's ruling regarding the admission of expert testimony for abuse of discretion." *Pope v. Bridge Broom, Inc.*, ___ N.C. App. ___, ___, 770 S.E.2d 702, 707 (2015) (citation omitted). "Abuse of

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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) (citation omitted). Accordingly, "the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984).

Rule 702 of the North Carolina General Statutes governs testimony by experts and states, in pertinent part,

[i]f 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) (2013).

Rule 702 was amended effective 1 October 2011. See 2011 N.C. Sess. Laws 283 § 1.3. While our Supreme Court has not yet addressed the amendment to Rule 702, our Court of Appeals has done so and recently noted that "[o]ur Rule 702 was amended to mirror the Federal Rule 702, which itself ' "was amended to conform to the standard outlined in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)]." ' " *Pope*, ___ N.C. App. ___, ___, 770 S.E.2d 702, 707 (2015) (citing *State v. McGrady*, ___ N.C. App. ___, ___, 753 S.E.2d 361, 365 (quoting Committee Counsel Bill Patterson, 2011–2012 General Assembly, House Bill 542: Tort Reform for Citizens and Business 2–3 n. 3 (8 June 2011)), *disc. review allowed*, 367 N.C. 505, 758 S.E.2d 864 (2014)).

Defendant asserts that the amendment to Rule 702 "has increased the scrutiny that judges must impose on purported experts." Defendant challenges the reliability of Burnette's testimony and urges this Court to determine that Burnette did not meet the requirements for qualification

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as an expert under the more rigorous standard of *Daubert*. Defendant would have us find that Burnette was not qualified to testify as an expert and give opinion testimony on retrograde extrapolation. We disagree with defendant's assertions. While reasonable minds might agree that the gatekeeper function of the trial court in determining whether to allow expert testimony is perhaps now more clearly defined, it appears that the application of the principles in amended Rule 702, consistent with *Daubert*, would not significantly change the trial court's analysis.¹

Federal courts traditionally grant "a great deal of discretion" to the trial court in determining the admissibility of expert testimony under *Daubert*. *McGrady*, ___ N.C. App. at ___, 753 S.E.2d at 369. "*Daubert* clearly contemplates the vesting of significant discretion in the [trial] court with regard to the decision to admit expert scientific testimony." *Id.* (quoting *Maryland Cas. Co. v. Therm-O-Disc, Inc.*, 137 F.3d 780 (4th Cir. 1998)). Therefore, to sustain a successful challenge to a trial court's ruling allowing expert testimony, a defendant must show that the trial court's ruling was so arbitrary, so lacking in reason as to constitute an abuse of its discretion. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

Consistent with the application of Federal Rule 702 in federal courts, under North Carolina's amended Rule 702, trial courts must conduct a three-part inquiry concerning the admissibility of expert testimony:

Parsing the language of the Rule, it is evident that a proposed expert's opinion is admissible, at the discretion

1. Prior to the 2011 amendment of Rule 702, our Supreme Court's guidance on the admissibility of expert testimony was provided in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004).

"It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citing N.C.G.S. § 8C-1, Rule 104(a) (2003)). In *Howerton*, our Supreme Court set out a three step inquiry governing the admissibility of expert testimony:

- (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? [*State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-40 (1995)].
- (2) Is the witness testifying at trial qualified as an expert in that area of testimony? *Id.* at 529, 461 S.E.2d at 640.
- (3) Is the expert's testimony relevant? *Id.* at 529, 461 S.E.2d at 641.

State v. Green, 209 N.C. App. 669, 673, 707 S.E.2d 715, 718 (2011).

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of the trial court, if the opinion satisfies three requirements. First, the witness must be qualified by “knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. Second, the testimony must be relevant, meaning that it “will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* Third, the testimony must be reliable. *Id.*

Pope, ___ N.C. App. at ___, 770 S.E.2d at 708.

Rule 702 guides the trial court by providing general standards to assess reliability: whether the testimony is based upon “sufficient facts or data,” whether the testimony is the “product of reliable principles and methods,” and whether the expert “has applied the principles and methods reliably to the facts of the case.” Fed.R.Evid. 702. In addition, *Daubert* provides a nonexclusive checklist for trial courts to consult in evaluating the reliability of expert testimony. The test of reliability is “flexible,” and the *Daubert* factors do not constitute a “definitive checklist or test,” but may be tailored to the facts of a particular case. *Kumho [Tire Co. v. Carmichael]*, 526 U.S. 137, 150, 119 S.Ct. 1167, 1175, 143 L.Ed.2d 238, 251 (1999).

Id. at ___, 770 S.E.2d at 708.

In the instant case defendant does not challenge the science of retrograde extrapolation. In his brief to this court defendant readily acknowledges “[i]t is undisputed that, generally speaking, courts accept as scientifically valid the proposition that unknown blood levels can be extrapolated using known data,” and that “blood alcohol extrapolation, generally speaking, is a viable scientific field.” Instead, defendant challenges the reliability of Burnette’s testimony and the results based thereon, and urges this court to determine that he was not qualified to testify as an expert and give opinion testimony on retrograde extrapolation. Because defendant does not directly contend on appeal that the requirements of 702(a)(1)² and (a)(2)³ have not been met, we primarily review defendant’s challenges as they regard Rule 702(a)(3)—whether “the witness has applied the principles and methods reliably to the facts of the case.” N.C.G.S. § 8C-1, Rule 702(a)(3). “Although this case is [one

2. “The testimony is based upon sufficient facts or data.” N.C. R. Evid. 702(a)(1).

3. “The testimony is the product of reliable principles and methods.” N.C. R. Evid. 702(a)(2).

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of the few times] our appellate courts have discussed the application of the *Daubert* standard adopted by our amended Rule 702, federal courts and other state courts, of course, have been applying the *Daubert* analysis for more than two decades.” *Pope*, ___ N.C. App. at ___, 770 S.E.2d at 709.

In the instant case, Anthony Burnette was called to testify about retrograde extrapolation of BAC. Burnette has been employed as a field technician for the North Carolina Department of Health and Human Services in the “Forensic Test for Alcohol Branch” since 2005. Prior to that, Burnett had been a police officer and has held a chemical analyst certification since 1995. Burnett testified that to maintain his certification as a chemical analyst, he studied the pharmacology of alcohol and how alcohol is distributed through the body, and he has been recertified every two years. “Basically I am responsible for training law-enforcement officers and to certify them to be chemical analysts, and that is to perform the breath test on the Intox EC/IR II.” Since 2006, Burnett has been an instructor/training officer in standardized field sobriety covering the pharmacology of alcohol, pharmacokinetics, and the effects of alcohol on the brain and body. Burnette also uses his training in blood alcohol, pharmacology, and physiology to train officers in the western part of the state to correctly perform breathalyzer tests.

Burnett is a co-author of the pharmacology section of the current chemical analyst training-manual for law-enforcement officers in North Carolina. Burnett testified that he had attended approximately ten workshops with Paul Glover, “a research scientist with our branch with regard to pharmacology of alcohol, retrograde extrapolation.” Burnett testified that he had assisted in over 130 cases involving blood alcohol, pharmacology, and related research in retrograde extrapolation and had testified as an expert on retrograde extrapolation twenty-eight times. Based on those qualifications, the Court accepted Burnette as an expert in blood alcohol physiology, pharmacology, and related research and allowed him to give his opinion on retrograde extrapolation.

On appeal, defendant challenges the reliability of Burnett’s testimony first, on the basis that Burnett did not know if he could sufficiently answer the question “to what degree [was] [the theory of blood alcohol level extrapolation] accepted in the scientific community?” and second, on the basis that Burnett used the term “midpoint” and “average” interchangeably.

At trial, Burnette described retrograde extrapolation and its manner of acceptance in the scientific community as follows:

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A Retrograde extrapolation is basically where we know that alcohol eliminates from the body in predictable rates, and extrapolation is where we have a test at one point in time.

...

Q Have there been scientific studies in regard to retrograde extrapolation?

A Yes there have.

...

Q Is there an accepted rate at which alcohol leaves the body?

A Yes.

Q What is that rate?

A .0165 per hour.

Q And how has science arrived at that being an accepted rate?

A The .0165 per hour originally came from a study that Dr. Ellis at the University of North Carolina had done years ago is where the .0165 has come from.

Q And have there been subsequent studies done in regards to that elimination rate?

A Yes. I have a reference list of publications. It's attached to a worksheet that I would have provided the DA's office with that has three and a partial pages [sic] of published reports involved in elimination rates.

...

Q And, Mr. Burnette, is that retrograde extrapolation, is that a product of reliable principles?

A Yes.

Q Has it been tested and shown to be a reliable method?

A Yes.

Q And when you perform a retrograde extrapolation in regards to a defendant, what information do you need?

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A The time of an early event and then the time of a later event, which would be the time that the test was performed.

Q And if you have that information, you have sufficient facts to perform a retrograde extrapolation?

A Yes.

Q And in the course of this case did you perform a retrograde extrapolation?

A Yes, I did.

Q And did you use the same method and principles that have been done through those studies?

A Yes.

Q Did you deviate in any way from those studies?

A No.

Q Did you use the accepted principle of retrograde extrapolation in regards to this defendant?

A Yes.

Q And is that what's reflected on the document that's been introduced as State's Exhibit 4?

A Yes. [4]

4. State's Exhibit 4, the form Burnette provided to the trial court during voir dire showing the calculation of defendant's retrograde blood alcohol extrapolation, included a statement of "Principles and Methods." In pertinent part, the statement provides the following:

In looking at drinking drivers[,] we see an average rate for males of 0.018 BAC per hour, for females it is 0.020 BAC per hour. Chronic abusers are at a rate of about 0.03 BAC per hour. When considering individuals with little or no experience with alcohol we see a rate of about 0.015 per hour. Because it's been accepted by the North Carolina Court of Appeals as a reasonable rate, we use 0.0165 BAC per hour for everyone if we've not been able to calculate their actual rate. . . . By determining the elapsed time between the end of driving and the alcohol test and then multiplying that times the rate of elimination we can calculate the amount that the BAC decreased since the end of driving. By adding that value to the reported value we can calculate the BAC at the end of driving. The [thirty-nine] references that support these principles and methods are attached.

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Burnette's testimony confirmed that blood alcohol extrapolation is a scientifically valid field, which principles have been tested, subjected to peer review and publication, and undisputedly accepted in the scientific community and in our courts. This portion of defendant's challenge is overruled.

As to defendant's second challenge to the reliability of Burnette's testimony, defendant points to Burnette's use of the terms midpoint and average as synonymous. Defendant acknowledges that BAC extrapolation can provide reliable and useful results, but nevertheless contends that the State's expert "omitted numerous factors which any layman would recognize as critical to a credible conclusion" and "demonstrated a gross misunderstanding of basic science and math." Defendant cross-examined Burnette on this concern.

Q The [alcohol elimination] rate you used, you used a couple of different terms to talk about that rate. You used "average" and "mid-point," and I guess I'd like to understand is there a distinction there?

A I think they're synonymous.

...

Q I'm doing an average the way I learned to do an average in sixth grade: add two numbers together and divide; correct?

A Yes.

Q And so even in that limited context an average is something different than a mid-point; correct?

A In that context, yes.

Q So in your scientific analysis here is there something different that's happening that makes a mid-point and an average the same?

A Yeah, . . . [i]t's a bunch of people whose numbers are in close proximity to each other

Q What is the range from the lowest to the highest?

A From a [.01] to a .06 is the lowest and highest rates I've ever seen in a study.

...

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Q And so when we're applying an average rate we are not saying anything in particular about how [defendant] was; just multiplying by an average?

A That is correct.

Q And that's different than a mid-point that half the people are above it and half below it?

...

That means half eliminate it faster and half more slowly?

A Than [.]0165, yes.

Burnette testified that the alcohol elimination rate he used had been arrived at as a result of a study performed at the University of North Carolina. Burnett provided the trial court with a list of some thirty-nine articles, studies, or experiments ranging mostly between 1993 and 2008 regarding blood alcohol research. Burnette also provided the court with North Carolina cases in which this Court upheld the use of retrograde extrapolation to establish blood alcohol content: *State v. Catoe*, 78 N.C. App. 167, 336 S.E.2d 691 (1985); *State v. Taylor*, 165 N.C. App. 750, 600 S.E.2d 483 (2004); *State v. Fuller*, 176 N.C. App. 104, 626 S.E.2d 655 (2006); *State v. Teate*, 180 N.C. App. 601, 638 S.E.2d 29 (2006); and *State v. Davis*, 142 N.C. App. 81, 542 S.E.2d 236 (2001).

In *State v. Taylor*, 165 N.C. App. 750, 600 S.E.2d 483 (2004), this Court acknowledged the testimony of Paul Glover, "a research scientist and training specialist with the [F]orensic [T]ests for [A]lcohol [B]ranch of the North Carolina Department of Health and Human Services, [who] testified as an expert in breath and blood alcohol testing, blood alcohol physiology and pharmacology, and the effect of drugs on human performance and behavior." *Id.* at 752, 600 S.E.2d at 485.

Glover admitted that elimination rates vary "depending on a person's experience with alcohol" but stated that "there are elimination rates that have been published for over 65 years that have gained acceptance in the scientific community" which make extrapolation possible. Glover elaborated on how rates can vary and then stated that a "very conservative rate" is used for calculations in North Carolina. Glover described the 0.0165 rate as a conservative rate which tends to "favor the final result because it's going to give you a smaller number." When asked why he

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used this conservative rate, Glover responded, “because we don’t know absolutely a person’s alcohol history necessarily.” This testimony established that the elimination rate used by Glover was not defendant’s actual rate but rather an average rate.

Id. at 755, 600 S.E.2d at 487. This case, although decided in accordance with *Howerton*, 358 N.C. 440, 597 S.E.2d 674, shows that the conservative alcohol elimination rate of 0.0165 has been reliably used in North Carolina for decades.

Taylor establishes a key point in the debate between an expert’s qualification and his application of his expertise and resulting opinion. An expert can be qualified but his application of a formula should be tailored to the facts of the case. *Taylor* can be read to forecast a future objection to the particularization of the “average” of the formula to the facts of a case such as this one. However, our review of the record does not support such an objection by defendant. To be admissible under the heightened *Daubert* standard the reviewing judge must not only rule that the expert is qualified but that his math is correct as well. Here, no specific objection to the application of the formula’s math was made and no other expert was proffered at *voir dire* to contest the math or the application of the “average.” As a result, defendant in fact merely invokes an objection to the expert’s qualification, not his reliability.

Thus, despite defendant’s contention and obvious concern as to the midpoint and average terminology used, defendant presents no specific argument to explain how the use of the terms average and midpoint in this manner should have disqualified Burnette as an expert concerning his application of the formula. We accept that Burnette’s testimony, by defendant’s standards, does not reach the level of scrutiny under *Daubert* that defendant himself would require of an expert prior to qualification; however, we also acknowledge that the ultimate determination is made by the trial court. Herein, we hold that because the calculations themselves were based on well-recognized and accepted scientific formula and applicable methodology, the terminology (mis)used by the expert, while perhaps troubling from the standpoint of basic mathematical concepts, was not critical to his qualification. On this record, the specialized knowledge, skill, experience and training in the field of expertise demonstrated by Burnette, was sufficient for the trial court to allow his testimony in the form of an expert opinion. The trial court’s ruling to qualify Burnett as an expert in blood alcohol physiology, pharmacology, and related research on retrograde extrapolation was not a manifest abuse of discretion.

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Finally, it appears the trial court reviewed the five non-exclusive *Daubert* factors suggested for use by trial courts in assessing the reliability of scientific testimony. These factors include:

- 1) whether the expert's scientific technique or theory can be, or has been, tested; 2) whether the technique or theory has been subject to peer review and publication; 3) the known or potential rate of error of the technique or theory when applied; 4) the existence and maintenance of standards and controls; and 5) whether the technique or theory has been generally accepted in the scientific community.

Id. at ___, 770 S.E.2d at 708 (citing *United States v. Beverly*, 369 F.3d 516, 528 (6th Cir. 2004)). The record supports a determination: that the techniques or theory has been generally accepted in the scientific community (factor #5); that it has been tested (factor #1); that it has been subjected to peer review and publication (factor #2); and that it is subject to standards and controls (factor #4). Only factor #3, the error rate, could be deemed to have been the subject of a successful cross examination by defendant. Nevertheless, as the list is "non-exclusive", it was not necessary for the trial court to determine that all factors existed in order to adequately assess the testimony's reliability. It is sufficient that the record supports the trial court's assessment of the factors. We reiterate that the test of reliability is flexible and the *Daubert* factors "do not constitute a 'definitive checklist or test,' but may be tailored to the facts of a particular case." *Kumho Tire Co.*, 526 U.S. at 150, 143 L.Ed.2d at 251.

"[O]nce the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility." *Taylor*, 165 N.C. App. at 756, 600 S.E.2d at 488 (quoting *Howerton*, 358 N.C. at 460–61, 597 S.E.2d at 687). Most of defendant's contentions, although strongly stated, are arguments that go to the weight to be given the testimony, not its admissibility. Based on the testimony of the expert as set forth in the record in the instant case, defendant is unable to show an abuse of discretion by the trial court in allowing the testimony of the expert witness, Burnette. Accordingly, defendant's argument is overruled.

II

[2] Next, defendant argues that the trial court committed plain error in allowing Officer Lovelace to testify to defendant's blood alcohol level. We disagree.

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We apply the plain error standard of review where, as here, defendant fails to object to testimony at trial, which leaves the alleged error unpreserved for review on appeal, yet requests this court to grant plain error review. Such requires defendant to bear the heavier burden of showing that the error rises to the level of plain error. *State v. Melvin*, 364 N.C. 589, 593-94 (2010) (citation omitted).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations omitted).

Pursuant to Rule 702(a1) of our Rules of Evidence,

[a] witness, qualified under subsection (a) [of Rule 702] and with proper foundation, may give expert testimony *solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following*:

- (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

N.C.G.S. § 8C-1, 702(a1)(1) (emphasis added).

At trial, Officer Lucas Lovelace testified to his involvement in the investigation of a motor vehicle accident occurring on 21 December 2011. Officer Lovelace observed a Ford F-150 pickup truck resting on its side and defendant “outside the vehicle, emotional, crying, upset.”

I could tell that he was a little unsteady on his feet, slurring his words, had bloodshot eyes. I could smell an odor of an alcoholic beverage from his breath. . . . He stated that he’d had one – I think a twenty-four-ounce Smirnoff, and also taken a prescription Xanax and hydrocodone for his hip that he’d had surgery on.

Officer Lovelace asked defendant to submit to a series of field sobriety tests. At trial, Officer Lovelace was accepted as an expert on the horizontal gaze nystagmus (HGN) test, a test requiring a subject to follow a stimulus with his or her eyes from side to side on a horizontal plane. Officer Lovelace testified that during the course of the HGN test

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defendant exhibited six “clues” of impairment: “a lack of smooth pursuit in both eyes”; an involuntary jerking, or sustained nystagmus, in both eyes when defendant moved his eyes to the maximum deviation point of the test; and “the onset of nystagmus prior to forty-five degrees.” Officer Lovelace testified that the onset of any nystagmus prior to forty-five degrees is a point one or greater BAC.” Officer Lovelace further testified that “[m]ost of the time four clues would show a BAC of point one.” Defendant exhibited six clues: three for each eye.

Officer Lovelace’s testimony appears to have violated Rule 702(a1) on the issue of defendant’s specific alcohol concentration level as it related to the results of the Horizontal Gaze Nystagmus (HGN) Test defendant performed. However, we do not believe that, given an examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty of Driving While Impaired or Driving After Consuming Being Less Than 21. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Based on defendant’s admission to drinking alcohol and consuming impairing substances prior to his one-vehicle crash, testimony by witnesses to physical signs of defendant’s appreciable impairment as well as expert testimony based on retrograde extrapolation that at the time of his accident defendant’s BAC was 0.10, the jury heard significant competent evidence to allow it to reach its guilty verdict as to Driving While Impaired and Driving after consuming alcohol under 21 years old, absent the testimony of BAC level based on HGN test results offered by Officer Lovelace. Accordingly, defendant’s argument is overruled.

We find no error in the trial court’s proper exercise of its discretion to allow the expert testimony of Anthony Burnette, and no plain error as a result of the BAC level testimony of Officer Lovelace.

NO ERROR; NO PLAIN ERROR.

Judges STROUD and HUNTER, Robert N., Jr., concur.

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STATE OF NORTH CAROLINA

v.

LOGAN WILLIAMS, DEFENDANT

No. COA15-49

Filed 15 September 2015

Probation and Parole—absconding—probation revocation

The trial court erred by revoking defendant’s probation because defendant did not violate the absconding provision of N.C.G.S. § 15A-1343(b). The evidence was sufficient only to find violations of N.C.G.S. § 15A-1343(b)(2) and (3), which are not statutory bases for revocation of probation unless the requirements of N.C.G.S. § 15A-1344(a)(d2) are met. The judgment was reversed and case was remanded for entry of appropriate judgment.

Appeal by Defendant from judgment entered 28 August 2014 by Judge R. Allen Baddour, Jr. in Superior Court, Vance County. Heard in the Court of Appeals 12 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Ann Stone, for the State.

Peter Wood for Defendant.

McGEE, Chief Judge.

Logan Williams (“Defendant”) was placed on supervised probation on 15 January 2014 after pleading guilty to possession with intent to sell heroin. A probation violation report (“the report”) was filed on 9 July 2014, alleging that Defendant had violated seven conditions of his probation, including, *inter alia*, leaving the jurisdiction without permission, failing to report as ordered for scheduled office contacts, changing his address without informing his probation officer, and absconding. A probation revocation hearing (“the hearing”) was conducted on 28 August 2014.

Defendant’s probation officer (or “the probation officer”) testified at the hearing that, on 27 May 2014, when she went to the address Defendant had given as his residence, a woman informed her that Defendant had been “back and forth” to the address but had “never really lived at [the] address[.]” Defendant’s probation officer testified the woman informed her that Defendant had been going back and forth from North Carolina

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to New Jersey. The probation officer further testified that Defendant did not show up for a scheduled appointment on 16 June 2014, and did not respond to a message left on 16 June 2014 requiring him to come to her office on 17 June 2014. Defendant called the probation officer on 23 June 2014 and left a message. The probation officer talked to Defendant on 24 June 2014 and told him to show for an appointment on 1 July 2014. Defendant failed to attend the 1 July 2014 appointment, but answered the phone when the probation officer called him that evening. The probation officer advised Defendant that he had to come by her office the next day, 2 July 2014. Defendant failed to make that appointment, and the probation officer testified that, when she called Defendant, he said he was in New Jersey.

The probation officer obtained an order for Defendant's arrest and informed Defendant that he was required to show up at the probation office on 8 July 2014 at 4:00 p.m. Defendant arrived at the probation office at 3:30 p.m. on 8 July 2014. The probation officer testified that Defendant "admitted to going back and forth to . . . New Jersey, and [that she] just couldn't locate him and he wasn't making himself available for supervision." The trial court found that Defendant had violated all seven of the conditions alleged in the report and activated Defendant's sentence on 28 August 2014. Defendant appeals.

Defendant argues the trial court erred by revoking his probation because the State failed to prove a violation of the absconding provision in N.C. Gen. Stat. § 15A-1343(b). We agree.

Defendant does not argue that the trial court erred in finding he violated sections two through seven of the report. Defendant only argues that the evidence and law does not support a conclusion that he absconded. This matter is controlled by N.C. Gen. Stat. §§ 15A-1343 and 15A-1344.

The enactment of the JRA [the Justice Reinvestment Act of 2011] brought two significant changes to North Carolina's probation system. First, for probation violations occurring on or after 1 December 2011, the JRA limited trial courts' authority to revoke probation to those circumstances in which the probationer: (1) commits a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after serving two prior periods of CRV [confinement in response to violations] under N.C. Gen. Stat. § 15A-1344(d2). *See* N.C.

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Gen. Stat. § 15A-1344(a). For all other probation violations, the JRA authorizes courts to alter the terms of probation pursuant to N.C. Gen. Stat. § 15A-1344(a) or impose a CRV in accordance with N.C. Gen. Stat. § 15A-1344(d2), but not to revoke probation. *Id.*

Second, “the JRA made the following a regular condition of probation: ‘Not to abscond, by willfully avoiding supervision or by willfully making the defendant’s whereabouts unknown to the supervising probation officer.’”

State v. Nolen, __ N.C. App. __, __, 743 S.E.2d 729, 730 (2013) (citations omitted). A trial court may no longer revoke a defendant’s probation for a probation violation, unless that violation is committing a new crime or absconding, or unless the violation follows two prior periods of confinement in response to violations (“CRV”). *Id.* In its brief, the State does not argue that Defendant absconded, but simply states that “the [trial] court was reasonably satisfied in its discretion that [] Defendant violated the conditions of his probation and that the violations were willful and without lawful excuse.” The State argues:

[W]here the trial court is reasonably satisfied that a [d]efendant has willfully violated a valid condition of his probation without lawful excuse, it is within the court’s discretion to revoke [d]efendant’s probationary sentence and invoke the active sentence. *State v. Freeman*, 47 N.C. App. 171, 175, 266 S.E.2d 723, 725 (1980).

As indicated in *Nolen*, this is no longer a correct statement of the law for violations occurring on or after 1 December 2011. *Nolen*, __ N.C. App. at __, 743 S.E.2d at 730; *State v. Kornegay*, __ N.C. App. __, __, 745 S.E.2d 880, 882-83 (2013). In the case before us, the trial court could only revoke Defendant’s probation if it found that Defendant had absconded in violation of N.C. Gen. Stat. § 15A-1343(b)(3a).

The report contains the following relevant alleged probation violations:

1. Regular Condition of Probation: “Not to abscond, by willfully avoiding supervision or by willfully making the supervisee’s whereabouts unknown to the supervising probation officer” in that, THE DEFENDANT IS NOT REPORTING AS INSTRUCTED OR PROVIDING THE PROBATION OFFICER WITH A VALID ADDRESS AT THIS TIME. THE DEFENDANT IS ALSO LEAVING THE STATE

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WITHOUT PERMISSION. DUE TO THE DEFENDANT KNOWINGLY AVOIDING THE PROBATION OFFICER AND NOT MAKING HIS TRUE WHEREABOUTS KNOWN THE DEFENDANT HAS ABSCONDED SUPERVISION.”

. . . .

4. “Report as directed by the [c]ourt, [c]ommission or the supervising officer to the officer at reasonable times and places . . .” in that THE DEFENDANT FAILED TO REPORT FOR SCHEDULED OFFICE CONTACTS ON MARCH 3, 2014 AT 1500, APRIL 3, 2014 AT 1600, APRIL 8, 2014 AT 4PM AND MAY 8, 2014 AT 1500. THE DEFENDANT FAILED TO BE HOME FOR A SCHEDULED HOME CONTACT ON MAY 27, 2014.

5. Condition of Probation “. . . obtain prior approval from the officer for, and notify the officer of, any change in address . . .” in that ON OR ABOUT APRIL 13, 2014, THE DEFENDANT LEFT HIS RESIDENCE OF 1735 SPRING VALLEY LAKE ROAD, HENDERSON, NC AND HE HAS NOT MADE HIS PROBATION OFFICER AWARE.

. . . .

7. Condition of Probation “Remain within the jurisdiction of the [c]ourt unless granted written permission to leave by the [c]ourt or the probation officer” in that ON OR ABOUT MAY 28, 2014, THE PROBATION OFFICER WAS MADE AWARE THAT THE DEFENDANT HAD BEEN TRAVELING TO NEW JERSEY.

N.C. Gen. Stat. § 15A-1343 sets forth the regular conditions of probation and states in relevant part:

(b) **Regular Conditions.** – As regular conditions of probation, a defendant must:

- (1) Commit no criminal offense in any jurisdiction.
- (2) Remain within the jurisdiction of the court unless granted written permission to leave by the court or his probation officer.
- (3) Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit

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him at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.

(3a) Not abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation.

N.C. Gen. Stat. § 15A-1343 (2013). "Regular conditions of probation apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court." N.C. Gen. Stat. § 15A-1343(b). "The court may *only* revoke probation for a violation of a condition of probation under G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a), except as provided in G.S. 15A-1344(d2). *Imprisonment may be imposed pursuant to G.S. 15A-1344(d2) for a violation of a requirement other than G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a).*" N.C. Gen. Stat. § 15A-1344(a) (2013) (emphasis added).

The form for judgment and commitment upon revocation of probation in effect on 28 August 2014 included five sections. The third section had a subsection to indicate which conditions of probation Defendant violated. In its judgment and commitment, the trial court indicated that Defendant had violated all seven conditions included in the report. The fourth section included a box to check if the trial court concluded that "[e]ach violation is, in and of itself, a sufficient basis upon which [the trial court] should revoke probation and activate the suspended sentence." The trial court checked this box. However, only the first alleged violation in the report, absconding, could potentially constitute an offense for which Defendant's probation could be revoked.¹

Because the alleged violations occurred after 1 December 2011, the trial court was required to check all boxes in section five that applied. Section five of the judgment form stated:

1. The third alleged violation, testing positive for marijuana in February and March of 2014 in violation of the condition not to use or possess illegal drugs, was not presented in the violation report as a violation of N.C. Gen. Stat. § 15A-1343(b)(1). *See State v. Tindall*, __ N.C. App. __, __, 742 S.E.2d 272, 275 (2013) ("although defendant received notice that she violated conditions of her probation, by using illegal drugs and failing to comply with treatment requirements, such violations do not support a revocation of her probation").

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5. (**NOTE TO COURT:** *This finding is required when revoking probation for violations occurring on or after December 1, 2011.*) The Court may revoke defendant's probation (*check all that apply*):

a. for the willful violation of the condition(s) that he/she not commit any criminal offense. G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a), as set out above.

b. because the defendant twice previously has been confined in response to violation under G.S. 15A-1344(d2).

There was a box to the left of the "5." that was checked in this case. There were boxes to the left of both "a." and "b." for the trial court to check to indicate whether probation was revoked for either: "a." committing a new criminal offense, N.C. Gen. Stat. § 15A-1343(b)(1), or absconding, N.C. Gen. Stat. § 15A-1343(b)(3a), or for "b.," a violation following two previous confinements pursuant to N.C. Gen. Stat. § 15A-1344(d2). Neither of those boxes were checked and therefore the judgment did not include a specific finding that Defendant violated N.C. Gen. Stat. § 15A-1343(b)(3a), the statutory absconding provision. *See State v. Jordan*, __ N.C. App. __, 772 S.E.2d 13 (2015) (unpublished).

At the hearing, the trial court concluded: "The [c]ourt finds [] Defendant in willful violation of the terms and conditions of probation, and his probation is revoked and his sentence is activated." The trial court did not indicate which specific violations it was finding, and did not reference N.C. Gen. Stat. § 15A-1343.

The report alleged that "[D]efendant failed to report for scheduled office contacts on March 3, 2014 at 1500, April 3, 2014 at 1600, April 8, 2014 at 4pm and May 8, 2014 at 1500. [D]efendant failed to be home for a scheduled home contact on May 27, 2014." It further alleged that "[o]n or about April 13, 2014, [D]efendant left his residence of 1735 Spring Valley Lake Road, Henderson, NC and he has not made his probation officer aware." The report alleged that "[o]n or about May 28, 2014, the probation officer was made aware that [D]efendant had been traveling to New Jersey." Though the report did not specifically allege that Defendant violated any of the provisions of N.C. Gen. Stat. § 15A-1343(b), the allegations track language found in N.C. Gen. Stat. §§ 15A-1343(b)(2) and (3). It is clear that, pursuant to N.C. Gen. Stat. § 15A-1344(a), Defendant's probation could not be revoked for those violations alone. *Nolen*, __ N.C. App. at __, 743 S.E.2d at 730.

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In support of the first alleged violation, “[n]ot to abscond,” the report stated that “[D]efendant is not reporting as instructed or providing the probation officer with a valid address at this time. Defendant is also leaving the state without permission. Due to [D]efendant knowingly avoiding the probation officer and not making his true whereabouts known [D]efendant has absconded supervision.” This alleged violation is simply a re-alleging of the above alleged violations related to N.C. Gen. Stat. §§ 15A-1343(b)(2) and (3). “[U]nder these revised provisions, the trial court ‘may *only* revoke probation if the defendant commits a criminal offense or absconds[,]’ and may ‘impose a ninety-day period of confinement for a probation violation other than committing a criminal offense or absconding.’” *Tindall*, __ N.C. App. at __, 742 S.E.2d at 274 (citation and quotation marks omitted). We do not believe our General Assembly, in amending the probation statutes, intended for violations of N.C. Gen. Stat. §§ 15A-1343(b)(2) and (3) to result in revocation, unless the requirements of N.C. Gen. Stat. § 15A-1344(d2) have been met.

When a defendant under supervision for a felony conviction has violated a condition of probation other than G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a), the court may impose a period of confinement of 90 consecutive days. The court may not revoke probation unless the defendant has previously received a total of two periods of confinement under this subsection. A defendant may receive only two periods of confinement under this subsection.

N.C. Gen. Stat. § 15A-1344(d2);² *Nolen*, __ N.C. App. at __, 743 S.E.2d at 731 (“Although the probation officer used the term ‘absconding’ to describe Defendant’s non-compliance with the regular condition of probation under N.C. Gen. Stat. § 15A-1343(b)(2) (requiring the defendant to ‘[r]emain within the jurisdiction of the Court unless granted written permission to leave’), the trial court’s limited revoking authority under the JRA does not include this section 15A-1343(b)(2) condition.”); *see also State v. Romero*, __ N.C. App. __, __, 745 S.E.2d 364, 366 (2013) (“Under this Act, for probation violations other than those in which a defendant commits a criminal offense or ‘abscond[s], by willfully avoiding supervision or by willfully making [his] whereabouts unknown to the supervising probation officer[,]’ the trial court may *not* revoke probation, but instead may impose CRV for a period of 90 days for a

2. N.C. Gen. Stat. § 15A-1344(d2) has been amended in a manner that would not affect our holding. The amendments will apply to persons placed on probation on or after 1 December 2015.

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felony offender or ‘up to 90 days’ for a misdemeanor offender.”); *State v. Johnson*, __ N.C. App. __, __, 754 S.E.2d 259, 2014 WL 220755, at *1 (2014) (unpublished) (“For all other probation violations, a trial court has authority to alter the conditions of probation or impose a period of CRV, but does not have authority to revoke probation. N.C. Gen. Stat. §§ 15A-1344(a), (d2).”).

Although the report alleged that Defendant’s actions constituted “abscond[ing] supervision,” this wording cannot convert violations of N.C. Gen. Stat. §§ 15A-1343(b)(2) and (3) into a violation of N.C. Gen. Stat. § 15A-1343(b)(3a). In addition, the report did not include reference to N.C. Gen. Stat. § 15A-1343(b)(3a) or any other statutorily prescribed regular conditions of probation. Prior to the amendment of N.C. Gen. Stat. § 15A-1343(b) to include not “absconding” as a regular condition of probation, “abscond” has traditionally been used to refer to other conditions of probation:

Although N.C. Gen. Stat. § 15A-1343(b)(3a) introduced the term “abscond” into our probation statutes for the first time, the term “abscond” has frequently been used when referring to violations of the longstanding statutory probation conditions to “remain within the jurisdiction of the court” or to “report as directed to the officer.” Both are regular conditions of probation under N.C. Gen. Stat. § 15A-1343[.]

State v. Hunnicutt, __ N.C. App. __, __, 740 S.E.2d 906, 911 (2013) (citations omitted); see also *Nolen*, __ N.C. App. at __, 743 S.E.2d at 731 (“Although the probation officer used the term ‘absconding’ to describe Defendant’s non-compliance with the regular condition of probation under N.C. Gen. Stat. § 15A-1343(b)(2) (requiring the defendant to ‘[r]emain within the jurisdiction of the Court unless granted written permission to leave’), the trial court’s limited revoking authority under the JRA does not include this section 15A-1343(b)(2) condition.”).

We hold that the evidence in this case does not support finding a violation of N.C. Gen. Stat. § 15A-1343(b)(3a). The evidence was clearly sufficient to find violations of N.C. Gen. Stat. §§ 15A-1343(b)(2) and (3), and Defendant does not contest that portion of the judgment finding he violated those conditions. However, N.C. Gen. Stat. § 15A-1344(a) does not authorize revocation based upon violations of those conditions, unless the requirements of N.C. Gen. Stat. § 15A-1344(a)(d2) have been met, which is not the situation in the case before us. The judgment entered upon revocation of probation is hereby reversed. We remand to

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the trial court for entry of an appropriate judgment, consistent with the provisions of N.C. Gen. Stat. § 15A-1344, based on the violations found in sections two through seven of the report.

Reversed and remanded.

Judges HUNTER, JR. and DAVIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 SEPTEMBER 2015)

COOK v. TURLINGTON No. 14-956	Mecklenburg (10CVS18586)	No Error
IN RE A.L.M.M. No. 15-263	Guilford (11JT238) (11JT239) (11JT240) (11JT241)	Affirmed
IN RE D.H. No. 15-237	Brunswick (14JA85) (14JA86) (14JA87)	Affirmed
IN RE HERRING No. 14-1159	Wake (11SP5867)	Affirmed
IN RE M.J.C.J. No. 15-153	Burke (14JT18)	Reversed
N. C. STATE BAR v. BRITT No. 14-1116	Disciplinary Hearing Commission (13DHC13)	Affirmed
PITTMAN v. HENRY MONCURE MOTORS, INC. No. 14-1186	Halifax (08CVS1437)	Affirmed
PURCELL v. OLD MILL STREAM NURSERY & LANDSCAPING, INC. No. 14-1067	Hoke (12CVS863)	Affirmed
SARTORI v. N.C. DEPT' OF PUB. SAFETY No. 15-84	Wake (14CVS8849)	Affirmed
STATE v. CURTIS No. 15-74	Guilford (13CRS88035) (14CRS24219)	No Error
STATE v. GLASCO No. 14-978	Guilford (13CRS23120) (13CRS75720)	No error in part; vacated and remanded in part
STATE v. GROSS No. 14-1048	Craven (00CRS3817)	Affirmed

STATE v. KING No. 15-54	Brunswick (13CRS2082) (13CRS702)	No Plain Error
STATE v. LOPEZ No. 15-60	Wake (13CRS201434)	No Error
STATE v. MANN No. 15-30	Mecklenburg (13CRS240649)	No Error
STATE v. PEGRAM No. 14-921	Wake (12CRS208632)	Affirmed
STATE v. PERKINS No. 15-5	Wake (09CRS211758)	No Error
STATE v. TOMLINSON No. 14-1016	Nash (12CRS55249)	No Error

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 SEPTEMBER 2015)

GIEN v. GIEN No. 15-7	Mecklenburg (11CVD11022)	Affirmed in part, vacated in part, and remanded in part.
IN RE C.S.L.B. No. 15-399	Iredell (12JT48-49)	Dismissed
IN RE E.G. No. 15-434	Avery (11JT18) (11JT19) (11JT20)	Vacated
IN RE K.E.T. No. 15-430	Warren (12JT61)	Reversed and Remanded
IN RE T.E. No. 15-261	Ashe (14JA27) (14JA28)	Vacated and Remanded
IN RE T.Y.S. No. 15-24	Cumberland (08JT130) (08JT131)	Affirmed
IN RE X.M.E.R. No. 15-141	Guilford (13JT108)	Affirmed
MALLOY v. PRESLAR No. 14-1371	Anson (11CVS404)	Affirmed
MULL v. EUBANKS No. 15-204	Transylvania (13CVS314)	Dismissed
OCWEN LOAN SERVICING, LLC v. HEMPHILL No. 15-67	Transylvania (12CVS434)	Affirmed
STATE v. BALDWIN No. 15-299	Guilford (12CRS99006) (13CRS24145)	No Error
STATE v. COVINGTON No. 15-298	Rowan (11CRS1759) (11CRS51181)	No Error
STATE v. DICKENS No. 15-182	Pitt (14CRS50038-39)	No Error

STATE v. GREEN No. 14-1315	Orange (08CRS932-33) (09CRS513)	No Error
STATE v. HINTON No. 15-219	Pasquotank (09CRS1257)	No Error
STATE v. JIMENEZ No. 14-1294	Onslow (11CRS54362)	No Prejudicial Error
STATE v. JONES No. 15-173	Guilford (13CRS79510) (13CRS79512) (13CRS79514)	Dismissed
STATE v. MOSER No. 15-270	Union (11CRS50441)	Restitution Order Vacated and Remanded
STATE v. PAIGE No. 14-1324	Forsyth (12CRS55869-71) (12CRS59535-37) (12CRS59539)	Reversed in part; Vacated in part; No Prejudicial Error in part; Remanded for Resentencing
STATE v. STREET No. 14-1297	Randolph (12CRS53642)	No Prejudicial Error
STATE v. THOMPSON No. 15-4	New Hanover (13CRS55297)	No Error
STATE v. WEATHERS No. 15-112	McDowell (11CRS51965) (11CRS51971-73)	Vacated and Remanded

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ATLANTIC COAST PROPERTIES, INC., PETITIONER

v.

ANGERONA M. SAUNDERS AND HUSBAND, ALGUSTUS O. SAUNDERS, JR., LUCY M. TILLET, PATRICIA W. MOORE-PLEDGER, GENEVIVE M. GOODMAN, LYNETTE C. WINSLOW, AND CARLTON RAY WINSLOW, RESPONDENTS

No. COA14-1278

Filed 6 October 2015

Real Property—adverse petition—constructive ouster—summary judgment

Summary judgment for respondents was reversed and remanded in an action to petition property that had passed into three undivided interests by inheritance in the 1920s, and in which adverse possession was raised by respondents. The evidence, taken all together and viewed in the light most favorable to petitioner (the developer which had acquired an undivided half interest in the property), created a genuine issue of material fact as to whether the original owner and the heirs who lived on the property recognized the ownership interest of the Baxters (the remaining nonresident heirs, whose interest was acquired by the developer), thus defeating the presumption of constructive ouster.

Chief Judge McGEE dissenting.

Appeal by Petitioner from order entered 29 May 2014 by Judge J. Carlton Cole in Currituck County Superior Court. Heard in the Court of Appeals 20 April 2015.

Hornthal, Riley, Ellis & Maland, LLP, by M.H. Hood Ellis, for petitioner-appellant.

Vandeventer Black LLP, by Norman W. Shearin, for respondent-appellees.

DIETZ, Judge.

In the early 1920s, three children inherited their father's 14-acre tract of land in Currituck County. One of the siblings remained on the property throughout his life and his descendants continue to live on the property today. The other two siblings moved out of state. Over time, interest in the property passed through inheritance until two families

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each owned an undivided one-half interest in the property: the family still living on the Currituck County property and another family living out of state.

The two families did not keep in touch, and the out-of-state family never visited the property. But for decades, the family living on the land recognized the interest of their out-of-state relatives in various ways, even at one point suggesting that they partition the property to give the out-of-state relatives sole title to their share.

All that changed in 2005, when the out-of-state family sold their interest in the property to Petitioner Atlantic Coast Properties, a private developer with no connection to either family. Respondents—the descendants of the original heir who stayed on the land—then asserted for the first time that they acquired sole title to the property nearly 80 years earlier by adverse possession under the theory of constructive ouster.

The trial court granted summary judgment in favor of Respondents, concluding that Atlantic Coast Properties failed to forecast sufficient evidence to rebut Respondents' showing of constructive ouster. We disagree.

If one cotenant has been in “sole and undisturbed possession and use of the property for twenty years, without any demand for rents, profits or possession by the cotenants, constructive ouster of the cotenants is presumed.” *Herbert v. Babson*, 74 N.C. App. 519, 522, 328 S.E.2d 796, 798 (1985). But if the occupying tenant “does anything to recognize title of the cotenants during the twenty-year period, the presumption of ouster does not arise.” *Id.*

Here, one of the out-of-state heirs testified that she spoke to the family still living on the property as recently as 2004 and they recognized her interest. Moreover, a family member living on the property testified that her father—one of the original heirs of the property—recognized the interests of her out-of-state relatives while he was alive and “raised her up” to understand that recognizing her out-of-state relatives' interest in the property was “the right thing to do.”

To be sure, all of the original heirs to this property are long dead, so no one can testify directly to what was said in the 1920s or 1930s. But under Supreme Court precedent, a reasonable jury *could* conclude from this evidence that the family living on the property always recognized their out-of-state relatives' interests. That is all that is required to defeat summary judgment.

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Private property rights are the bedrock of liberty in our nation. In a case like this one, where a joint property owner's rights are threatened through the legal fiction of constructive ouster, without any actual ouster, we must be particularly vigilant in applying the well-settled summary judgment standard and permitting a jury to resolve fact disputes. To hold otherwise would expose well-intentioned property owners across our State to losses from the legal gamesmanship of their cotenants. Accordingly, for the reasons discussed below, we reverse the trial court's entry of summary judgment and remand for further proceedings.

Facts and Procedural History

M.C. "Mack" Moore acquired a 14-acre tract of land in Currituck County, North Carolina, on 15 August 1887. Mack Moore and his wife, Angeronia Moore, lived on the property and had three children during their marriage: John Sherman Moore, William Guthrie "W.G." Moore, and Parlie Mae Moore Baxter. Mack Moore died intestate on 29 March 1921 and the 14-acre tract of land passed to his three children equally with each child obtaining a one-third interest in the property as tenants in common.

John Sherman Moore moved to Pennsylvania where he stayed until his death in 1980. He died intestate with no wife and no children and his one-third interest in the Moore property passed to his two siblings, W.G. Moore and Parlie Mae Moore Baxter, leaving each surviving sibling with a one-half interest in the property.

Parlie Mae Moore Baxter left Currituck County and moved to New York. She married Leroy Baxter, Sr. and had one child, Leroy Baxter, Jr. When Parlie Mae Moore Baxter died intestate, her one-half interest in the Mack Moore property passed to Leroy Baxter Jr.'s wife and daughter, Susan and Valentis Baxter, who survived him.

W.G. Moore married Edna Norman Moore, and together they had four children: Sherman Malachi Moore, William Friley Moore, Respondent Edna Mae Moore Winslow,¹ and Respondent Angeronia Lovie Moore Saunders. W.G. Moore was the only child of Mack Moore to continue to live on the Moore property. He lived on the property with his family and made improvements on the land over the years. W.G. Moore was still living on the Moore property when he died intestate in 1973 and his one-half interest in the property ultimately passed to his two surviving

1. Edna Winslow passed away during these legal proceedings and her heirs were substituted as Respondents.

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children, Respondents Edna Winslow and Angerona Saunders, giving them each a one-fourth interest in the property.

In 2005, Petitioner Atlantic Coast Properties purchased the one-half undivided interest of Susan Pratt Baxter and Valentis Baxter by quit-claim deed.

On 7 April 2006, Atlantic Coast Properties filed a petition to partition the Moore property claiming a one-half undivided interest in the property.

Respondents Edna Winslow and Angerona Saunders filed their answer and counterclaims on 17 May 2006, asserting sole possession and title by adverse possession. On 28 September 2007, Respondents moved for summary judgment. The trial court held a hearing on 10 February 2014. In an order entered 29 May 2014, the trial court granted Respondents' motion and entered judgment, finding Respondents to be "the owners solely seized in fee simple of all right, title, and interest in the Moore tract." The trial court based this conclusion "on the exclusive possession by W.G. Moore, and his heirs, and the presumption of ouster arising therefrom." Atlantic Coast Properties timely appealed.

Analysis

Atlantic Coast Properties argues that the trial court erred in granting Respondents' motion for summary judgment because they forecasted evidence that, if accepted by the jury, would rebut the presumption of constructive ouster. We agree.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). When ruling on a motion for summary judgment, "the court must consider the evidence in the light most favorable to the nonmovant, and the slightest doubt as to the facts entitles him to a trial." *Snipes v. Jackson*, 69 N.C. App. 64, 72, 316 S.E.2d 657, 661 (1984). "[S]ummary judgment should be granted with caution and only where the movant has established the nonexistence of any genuine issue of fact." *Moye v. Thrifty Gas Co.*, 40 N.C. App. 310, 314, 252 S.E.2d 837, 841 (1979). This Court reviews a grant of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

Ordinarily, "the entry and possession of one tenant in common are presumed not to be adverse to his cotenants." *Town of Winton v. Scott*, 80 N.C. App. 409, 413, 342 S.E.2d 560, 563 (1986) (internal quotation marks omitted). With this presumption, one tenant in common cannot

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adversely possess against a cotenant without an ouster, either actual or constructive. *Collier v. Welker*, 19 N.C. App. 617, 620, 199 S.E.2d 691, 694 (1973).

Under the doctrine of constructive or presumptive ouster, “[i]f one tenant in common has been in sole and undisturbed possession and use of the property for twenty years, without any demand for rents, profits or possession by the cotenants, constructive ouster of the cotenants is presumed, and the ouster relates back to the initial taking of possession by the tenant in possession.” *Herbert v. Babson*, 74 N.C. App. 519, 522, 328 S.E.2d 796, 798 (1985). “Not only does 20 years of exclusive possession raise a presumption of ouster, but it also supplies all the elements necessary to support a finding that the possession was adverse and included elements of notice and hostility.” *Collier*, 19 N.C. at 621, 199 S.E.2d at 695. But if the party claiming adverse possession “does anything to recognize title of the cotenants during the twenty-year period, the presumption of ouster does not arise.” *Herbert*, 74 N.C. App. at 522, 328 S.E.2d at 798.

Atlantic Coast Properties argues that it forecast at least some admissible evidence that W.G. Moore and his heirs recognized the interests of the cotenants continuously from 1921 until the present, and therefore the presumption of constructive ouster does not arise. We agree.

First, Susan Baxter, one of the out-of-state heirs, testified that Respondent Edna Winslow contacted her by phone around 2004 and “asked [Susan] what [she] and her daughter, Valentis, wanted to do *with their interest* in the M.C. (Mack) Moore property” because Respondents were planning to subdivide it. Ms. Baxter’s testimony is confirmed by Respondent Edna Winslow’s deposition testimony, in which Ms. Winslow indicated that she believed the proposed subdivision would have included the Baxters. Respondents also admitted to hiring a surveyor around the same time to “assist with the subdivision” of the property, further confirming Susan Baxter’s testimony.

Second, Respondents conceded that their recognition of the Baxters’ interests also was a view shared by their father, W.G. Moore, one of the three original heirs of the Moore property. Respondent Edna Winslow testified as follows when asked about the proposed subdivision of the property:

[Ms. Winslow]: [W]hat we was trying to do was get the property - - *everybody’s interest in the property* could get their own deeds. That was the main interest, so we didn’t have to pay taxes all the time.

...

Q. Okay. And tell me - - the same thing I asked your sister was *who is everybody?* In other words, who was included in this subdivision?

[Ms. Winslow]: Well, along then when we first started it was my brothers and my sister, and their wife.

Q. *Were the Baxters included in this?*

[Ms. Winslow]: *Yeah. Everybody that had an interest in it.*

Q. Okay. And why were you going to include the Baxters if you had no relationship with them?

[Ms. Winslow]: Because that's the way we were raised up and that's the law.

...

Q. Okay. And what I was asking was, *is the reason the Baxters were included because your mom and your dad had raised you all to do the right thing?*

[Ms. Winslow]: *Yes.*

Q. *And they had acknowledged the Baxters' ownership interest, and that's why you and your sister thought that you should; is that fair?*

[Ms. Winslow]: *Yes.*

Ms. Winslow also testified that she had known of the Baxters' interests "since growing up in [her] mom and dad's house" because family members often talked about these out-of-state heirs to the property. Ms. Winslow's sister, Angerona Saunders, also testified that she recognized the Baxters' interests because "that's something [she] felt like [her] mother and father would have wanted [her] to do" and "something that they would have done."

Finally, Susan Baxter testified that it was not until after the Baxters sold the property to Atlantic Coast Properties that Edna Winslow first contacted her and told her that "[she] and her daughter had no interest in the M.C. (Mack) Moore property because [she] and her daughter had not paid any of the property taxes."

All of this evidence, taken together and viewed in the light most favorable to Atlantic Coast Properties, creates a genuine issue of

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material fact as to whether W.G. Moore and his heirs recognized the ownership interest of the Baxters, thus defeating the presumption of constructive ouster.

The dissent contends that, although there is evidence that Respondents and their father, W.G. Moore, recognized the ownership interest of the Baxters generally, “there is only speculation that W.G. Moore did anything to recognize the Baxters’ interest in the property during the twenty year period from 1921 to 1941.” The dissent contends that all evidence after 1941 is essentially irrelevant because, once W.G. Moore obtained sole title by adverse possession, recognition of the Baxters’ interests by him or his daughters could not divest him of that sole interest.

Our Supreme Court considered and rejected this precise argument in a nearly identical context, holding that evidence from outside a particular twenty-year period can be used to infer a consistent position within that twenty-year period. *See Clary v. Hatton*, 152 N.C. 107, 67 S.E. 258, 259 (1910). In *Clary*, three siblings inherited property from their parents in 1872. *Id.* The brother lived on the property during his lifetime; his two sisters did not. When the brother died in 1908, his heirs claimed the entire property by adverse possession. *Id.* Although there was no evidence that the brother recognized his sisters’ interests from 1872 to 1892, the sisters presented evidence that their brother acknowledged their interest in 1900, telling another man that “he only claimed or owned one third of the lot and his sister each owned a third.” *Id.* The Supreme Court held that the brother’s “declaration in 1900 in acknowledgement and recognition of his sisters’ title is evidence that prior to then he had never claimed adversely to them.” *Id.* This was sufficient evidence “to go to a jury that the possession of [the brother] was never adverse to the rights of his sisters . . . and that consequently [the brother] acquired no title by reason of his possession.” *Id.*

Here, too, W.G. Moore’s recognition and acknowledgement of the Baxters’ interests is sufficient to send the case to a jury. There is testimony that W.G. Moore recognized the Baxters’ interest, that he taught his two daughters about the Baxters’ interests when they were children, that the family talked about the Baxters’ interests at family gatherings, and that W.G. Moore instilled in his daughters the belief that recognizing that interest—despite the fact that the Baxters never came to visit the property—was “the right thing to do.”² From this testimony, a jury

2. The dissent has a different interpretation of some of this testimony, one that is considerably more favorable to Respondents. That interpretation is a perfectly reasonable

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readily could infer that W.G. Moore recognized the interests of the Baxter family consistently throughout his lifetime, including the period from 1921 to 1941. *See Clary*, 152 N.C. at 107, 67 S.E. at 259. This is particularly true here, because there is no evidence in this record indicating that W.G. Moore had a change of heart after 1941, or that he felt differently about the Baxters (his own sister and her family) in the 1920s and 1930s than he did for the rest of his life. Thus, under *Clary*, Atlantic Coast Properties has forecast sufficient evidence to survive summary judgment.

Finally, there are important policy reasons for following *Clary* and reversing the entry of summary judgment in this case. As this Court previously has observed, a rule requiring specific, concrete evidence from each twenty-year time period could encourage a cotenant “to deal with his fellow tenants in a less than open and honest manner.” *Sheets v. Sheets*, 57 N.C. App. 336, 338, 291 S.E.2d 300, 301 (1982). An occupying tenant could repeatedly reassure his cotenants that their interests are secure and then, after the passage of time has removed the records or witnesses, abruptly change position and claim title by constructive ouster occurring decades, or even centuries, ago.

Private property rights are the bedrock of liberty. It is one thing to lose property rights to the open and notorious adverse possession of another. But in a case like this one, where a joint property owner’s rights are threatened through the legal fiction of constructive ouster without any actual ouster, courts must be particularly vigilant in applying the well-settled summary judgment standard and permitting a jury to resolve fact disputes about who told what to whom.

Accordingly, we hold that Respondent Edna Winslow’s direct testimony that her father W.G. Moore recognized the Baxters’ interest during his lifetime (although without specifying any particular time frame) and that he raised her up to do the same, together with the complete absence of any evidence suggesting W.G. Moore ever felt differently at any point in his life, constitutes “more than a scintilla” of evidence from which the jury could conclude that Moore recognized his sister’s interest throughout his entire life, including from 1921 to 1941.³ Accordingly, we reverse

one as well. But this is summary judgment, so we must interpret all testimony in the light most favorable to Atlantic Coast Properties, the non-moving party. *Singleton*, 280 N.C. at 465, 186 S.E.2d at 403.

3. The dissent also contends that Ms. Winslow’s deposition testimony in which she testified that her father, W.G. Moore, recognized the Baxters’ interest during his lifetime was the product of an objectionable deposition question and was inadmissible hearsay:

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the trial court's entry of summary judgment and remand this case for further proceedings.

Conclusion

Atlantic Coast Properties forecasted sufficient evidence to create a genuine issue of material fact on the issue of whether W.G. Moore and his heirs recognized the title of their cotenants and defeated any claim of constructive ouster. Accordingly, we reverse the trial court's order granting summary judgment in favor of Respondents.

REVERSED AND REMANDED.

Judge HUNTER, JR. concurs.

Chief Judge McGEE dissents in a separate opinion.

McGEE, Chief Judge, dissenting.

Because I believe the trial court properly granted summary judgment in favor of Respondents, I dissent.

"On appeal, an order allowing summary judgment is reviewed *de novo*." *Park East Sales, L.L.C. v. Clark-Langley, Inc.*, 186 N.C. App. 198, 202, 651 S.E.2d 235, 238 (2007) (citation omitted). "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.

"Summary judgment is appropriate when 'there is no genuine issue as to any material fact' and 'any party is entitled to a judgment as a matter of law.'" Our Supreme Court has

Q. And they [Ms. Winslow's mother and father] had acknowledged the Baxters' ownership interest, and that's why you and your sister thought that you should; is that fair?

[Ms. Winslow]: Yes.

There is nothing improper about the form of this question—it is not a compound question and it is not vague or confusing. *See, e.g., State v. Hughes*, 159 N.C. App. 229, 582 S.E.2d 726 (2003). And the response is a statement by a party-opponent, Respondent Edna Winslow, manifesting her adoption or belief in the truth of her father's statement, thus qualifying it under one of the most fundamental and commonly invoked hearsay exceptions. *See* N.C. Gen. Stat. § 8C-1, Rule 801(d). Lastly, these are evidentiary arguments not raised by Respondents in their summary judgment papers or at the hearing. Appellate courts ordinarily do not address evidentiary arguments not raised and preserved in the trial court. *See Plemmer v. Matthewson*, 281 N.C. 722, 725, 190 S.E.2d 204, 206 (1972).

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held that “an issue is genuine if it is supported by substantial evidence, and [a]n issue is material if the facts alleged . . . would affect the result of the action[.]” Furthermore, “[s]ubstantial 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[.]”

Andresen v. Progress Energy, Inc., 204 N.C. App. 182, 184, 696 S.E.2d 159, 160-61 (2010) (citations omitted); *see also Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 682, 443 S.E.2d 114, 122 (1994) .

In *Herbert v. Babson* this Court stated:

A tenant in common may . . . acquire the title of cotenants by constructive ouster. If a cotenant occupies the entire property for twenty years to the exclusion of a cotenant it is presumed there was an ouster at the time of the entry and it is presumed the action of the occupying cotenant during this period includes everything necessary to establish adverse possession.

Herbert v. Babson, 74 N.C. App. 519, 521, 328 S.E.2d 796, 798 (1985) (citations omitted). This Court further stated that:

If one tenant in common has been in sole and undisturbed possession and use of the property for twenty years, without any demand for rents, profits or possession by the cotenants, constructive ouster of the cotenants is presumed, and the ouster relates back to the initial taking of possession by the tenant in possession. However, if the tenant in possession does anything to recognize title of the cotenants during the twenty-year period, the presumption of ouster does not arise.

Id. at 522, 328 S.E.2d at 798 (citations omitted).

The presumption includes everything necessary to be proved when the title can be ripened only by actual adverse possession as defined by this Court, and is a most reasonable inference of the law and justified under the circumstances, first, because men do not ordinarily sleep on their rights for so long a period, and, second, because a strong presumption arises that actual proof of the original ouster has become lost by lapse of time.

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Dobbins v. Dobbins, 141 N.C. 210, 216, 53 S.E. 870, 872 (1906); *see also Collier v. Welker*, 19 N.C. App. 617, 621-22, 199 S.E.2d 691, 695 (1973).

W.G. Moore lived on the disputed real property (“the property”) from 1921 until his death in 1973. During that time, W.G. Moore farmed the property. His children, including Angerona Moore Saunders (“Angerona Saunders”) and Edna Moore Winslow (“Edna Winslow”) (together, “Respondents”), were born on the property. W.G. Moore built a new home on the property in 1952 and then demolished the original house. Both W.G. Moore and his wife, Edna, are buried on the property, along with other family members. Neither Parlie Moore Baxter, nor any of her heirs (“the Baxters”), occupied the property after 1921. The Baxters never paid taxes on the property nor demanded rents, profits or possession at any time. *Herbert*, 74 N.C. App. at 522, 328 S.E.2d at 798. In fact, there is no evidence of any communication whatsoever between the Baxters and the W.G. Moore family until the early 1980s when Respondents attempted to contact the Baxters, but received no response.

Approximately eighty-five years passed between the time W.G. Moore and his family became the sole occupants of the property in 1921 and the filing of this action in 2006. In order for Respondents to prevail, there need only have been one uninterrupted twenty-year period within those eighty-five years to satisfy the requirements set forth in *Herbert*. *See Ellis v. Poe*, 73 N.C. App. 448, 451, 326 S.E.2d 80, 83 (1985) (events occurring after the twenty-year period was complete could not “constitute an acknowledgment of cotenancy” by the occupier). Once the requirements of adverse possession by constructive ouster have occurred, title has passed. *Id.* Petitioner acknowledges that all the requirements for constructive ouster were present except, Petitioner contends, “[W.G.] Moore and his family recognized the title of his brother and sister in the . . . property thus . . . rebutting any presumption of ouster.” Our Supreme Court has acknowledged the strong presumption that the requirements of adverse possession have been satisfied in situations where the sole possession of the property in question by a cotenant was far shorter than is the case here:

Justice Aston [reasoned] in that case: “Now, in this case, there has been a sole and quiet possession for 40 years, by one tenant in common only, without any demand or claim for an account by the other, and without any payment to him during that time. What is adverse possession or ouster, if the uninterrupted receipt of the rents and profits without account for near 40 years is not?” And by

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Justice Willes: “This case must be determined upon its own circumstances. The possession is a possession of 16 years above the 20 prescribed by the statute of limitations, without any claim, demand, or interruption whatsoever; and therefore, after a peaceable possession for such a length of time, I think it would be dangerous now to admit a claim to defeat such possession.”

The proof in this case showed an exclusive, quiet, and peaceable possession by the defendants and those under whom they claim for more than 20 years – indeed for more than 40 years – and the law presumes that there was an actual ouster, not at the end of that period, but at the beginning, and that the subsequent possession was adverse to the cotenants who were out of possession. This converted the estate in common, as between the former cotenants, into one in severalty, in the defendants, and defeated plaintiffs’ right to partition or to an ejectment.

Dobbins, 141 N.C. at 218, 53 S.E. at 873 (citations omitted).

Assuming, *arguendo*, that Respondents “recognized the title” of the alleged cotenants, this “recognition” is immaterial if full title had already passed to W.G. Moore at some earlier date. W.G. Moore would have obtained full title to the property so long as he did not do anything to recognize title in the Baxters for any continuous twenty-year period between 1921 and his death in 1973. Once the requirements for constructive ouster for a twenty-year period were met, W.G. Moore obtained sole title to the property pursuant to adverse possession. *Dobbins*, 141 N.C. at 217, 53 S.E. at 873. Once W.G. Moore, along with his wife, became sole owners of the property, they could do with it as they pleased – including deciding to give a portion of it to the Baxters. *Beck v. Beck*, 125 N.C. App. 402, 406, 481 S.E.2d 317, 320 (1997). I believe Petitioner fails to forecast sufficient evidence to rebut the presumption of ouster. Choosing a twenty-year period during W.G. Moore’s occupancy of the property, there is only speculation that W.G. Moore did anything to recognize the Baxters’ interest in the property during the twenty year period from 1921 to 1941.

Angerona Saunders was asked at her deposition:

[Petitioner’s Attorney]: And the reason you and your sister were, I take it, honoring that interest [the Baxters’ purported interest] was that that’s something you felt like your mother and father would have wanted you to do?

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[Saunders]: Yes.

[Petitioner's Attorney]: And something that they would have done?

[Saunders]: Yes, I believe they would have done that.

Petitioner's attorney asked Angerona Saunders if it was true that she "would not even have contacted [the Baxters] had you not thought that was consistent with your mother's and father's desires?" Angerona Saunders responded that she believed in "doing things the right way" and in "doing it fair." Angerona Saunders acknowledged that that was how her parents "raised [her]."

Initially, Angerona Saunders nowhere stated that her parents at any time did anything to acknowledge the Baxters' interest in the property. Angerona Saunders merely stated that she believed her parents would have wanted the Baxters to share in ownership of the property because it was the "right thing" to do. This is merely Angerona Saunders "belief," it does not forecast the presence or absence of any fact. Further, there is no indication of when Angerona Saunders' parents might have decided that they would share ownership of the property – assuming *arguendo* they ever made such a decision. There is certainly nothing indicating that Angerona Saunders' parents held this belief or in any way did anything acknowledging the Baxters' interest in the property between 1921 and 1941. Angerona Saunders' "belief" in what her parents would have wanted her to do does not constitute evidence sufficient to rebut the presumption of ouster.

In addition, Angerona Saunders was born in 1948, seven years after the relevant period ended. Angerona Saunders could not have had any personal knowledge of what occurred between 1921 and 1941. When Angerona Saunders was asked "[d]o you ever remember your dad discussing anything about his interest in the property[,]" she answered, "No." Angerona Saunders testified that she knew that Parlie Moore Baxter "lived in New York. I knew nothing about her, not one thing about" the Baxters other than that W.G. Moore's sister had married a Baxter and had a son named Leroy.¹ Angerona Saunders testified that W.G. Moore never talked to her about why he never tried to contact his sister or her family. When asked if there was "[a]nything else that you can recall

1. Though the "family tree" included in the record indicates that Parlie Moore Baxter died in 1980, both Angerona Saunders and Edna Winslow testified that Parlie Moore Baxter died before either of them was born.

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your dad or your mom saying about the Baxters[.]” Angerona Saunders answered, “[n]ope.” When Angerona Saunders was asked if W.G. Moore had “ever indicate[d] to you all that he was aware that [the Baxters] had an ownership interest in the property[.]” Angerona Saunders answered: “He just told us that it was his father and just told us who they was. But that’s about it, what he said.” When asked who she thought owned the property when she was growing up, Angerona Saunders answered that “we was under the impression that [W.G. Moore] was the one that owned it then, that nobody else was there or showed up, no more than he and [his brother] Uncle Sherman.” Angerona Saunders testified that she never heard W.G. Moore and her Uncle Sherman discuss the property, and she never heard her mother or “anyone else” “mention anything about anyone else owning any interest in the property[.]” Angerona Saunders never “conceded that [her] recognition of the Baxters’ interests also was a view shared by [her] father[.]” Concerning the survey that was conducted in 2007 showing a division of the property into plots, Angerona Saunders stated they had the survey done because “[w]e were going to convey them [some of the plots] to [the Baxters].”

Edna Winslow also gave deposition testimony in which she acknowledged that her parents had “raised [her] to do the right thing.” The following exchange occurred at her deposition:

[Petitioner’s Attorney]: And [your parents] had acknowledged the Baxters’ ownership interest, and that’s why you and your sister thought that you should [partition the property]; is that fair?

[Winslow]: Yes.

[Respondents’ attorney]: Objection. Object to the form of the question.

[Petitioner’s Attorney]: Well, tell me in your own words why you felt like you needed to recognize the Baxters’ interest by including them in the division?

[Winslow]: Well, at the time we were going by what, you know . . . we were doing it because it was Mack Moore’s heirs.

Edna Winslow’s testimony demonstrates her belief that including the Baxters was “the right thing” to do, and that that was “how her parents had raised her.” The portion of Edna Winslow’s testimony where she answered affirmatively to Petitioner’s attorney’s leading question concerning her parent’s acknowledgment of “the Baxters’ interest” was

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objected to, and Petitioner's attorney rephrased the question as a non-leading question. Edna Winslow's subsequent testimony was that she and Angerona Saunders were planning on including the Baxters in the partition of the property because the Baxters were "Mack Moore's heirs."

Edna Winslow was born in 1943, two years after W.G. Moore had continuously occupied the property for twenty years. Edna Winslow did not have any personal knowledge of how either W.G. or Edna Moore treated the property during that time period. When Edna Winslow was asked: "So about the only conversation you ever heard your dad say about [Parlie Moore Baxter] was that she had married a Baxter[,]?" Edna Winslow answered: "Right." Edna Winslow testified that she didn't even know if W.G. Moore knew that the Baxters lived in New York and that she learned most of what she knew about the Baxters "from Uncle Sherman." Edna Winslow stated that her Uncle Sherman told her about the Baxters, but that her mother "never talked about" any interest the Baxters might have had in the property. Edna Winslow knew that Parlie Moore Baxter was the daughter of Mack Moore "by Uncle Sherman telling us; and daddy told us he had a sister, but she was dead." I do not understand Edna Winslow's testimony to have been "that she had known of the Baxters' interest 'since growing up in [her] mom and dad's house' because family members often talked about these out-of-state heirs to the property." Edna Winslow testified in the following manner:

[Winslow]: [The Baxters] were Mack Moore's heirs, I guess.

[Petitioner's Attorney]: Okay. And that's something that you had known since growing up in your mom and dad's house?

[Winslow]: Yeah. Uncle Sherman told us a lot about them.

[Petitioner's Attorney]: What did he tell you a lot about?

[Winslow]: He just told us that [Parlie Moore Baxter] had died and she had one son, and he was in a wheelchair.

Edna Winslow then agreed with Petitioner's attorney's question: "[T]hat's where your deceased aunt's interest had ended up, was either with her husband or her son?" Unfortunately, as the trial court was informed, Edna Winslow died before the summary judgment hearing and would not be available to testify were this matter to proceed to trial.

There is nothing in Edna Winslow's testimony constituting evidence that W.G. Moore ever did anything acknowledging any interest of the

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Baxters' in the property, much less that he did so in the period between 1921 and 1941. Further, even if we were to consider this portion of the deposition as proof that W.G. Moore acknowledged the Baxters' interest in the property, there is no evidence allowing us to determine when he did so. Because over eighty years have passed and Petitioner presented no evidence to the trial court that W.G. Moore did anything to acknowledge the Baxters' interest in the property from 1921 to 1941, "a strong presumption arises that actual proof of the original ouster has become lost by lapse of time." *Dobbins*, 141 N.C. at 216, 53 S.E. at 872.

I can find no testimony that "W.G. Moore . . . taught his two daughters about the Baxters' interests when they were children, [or] . . . talked about the Baxters' interests at family gatherings[.]" The only testimony supporting the statement in the majority opinion that "W.G. Moore recognized the Baxters' interest" is the objected to statement of Petitioner's attorney at Edna Winslow's deposition to which Edna Winslow initially agreed. None of Edna Winslow's personal deposition statements indicate she ever discussed any interest the Baxters might have had in the property with her father. Angerona Saunders testified that W.G. Moore never discussed such matters with her, and growing up she understood her father to have owned the property. Petitioner has produced no witness testimony from anyone who was alive before 1941, nor any testimony from anyone who witnessed W.G. Moore do or say anything recognizing the Baxters' interest in the property during that time period.

It is correct that our Supreme Court in *Clary* considered testimony of a witness to defeat a presumption of ouster. In *Clary*, a witness testified, concerning the cotenant brother John Hatton ("Hatton"), who had resided on the property in question for over twenty years before his death, and who had told the witness that

eight years before he died, and while [Hatton] was then living on the lot, that he only claimed or owned one-third of the lot, and his sisters each owned a third, and for that reason he had not improved it and did not wish to spend any money on it.

These declarations of John Hatton are inconsistent with a claim of sole ownership or exclusive possession, and are competent, not to impeach any title that he had already acquired by twenty years' possession, but to show that *in reality he had never acquired any title by such possession*, because his possession during the entire period it continued, from 1872 to the day the declaration was made,

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was of a permissive and not of an adverse character; and that is was with his sisters' consent. This would tend to rebut any presumption of an ouster at any time prior to such declaration.

Clary v. Hatton, 152 N.C. 107, 109, 67 S.E. 258, 259 (1910) (emphasis added). I emphasize the portion of the quote above because I want to make clear that once title is acquired through adverse possession, no subsequent acknowledgment to the contrary will defeat it. I do not maintain that "all evidence after 1941 is essentially irrelevant." The holding in *Clary* stands for the proposition that an occupying cotenant's statements may be used to prove he never acquired sole title in the first instance.

I disagree that the situation in *Clary* is nearly identical to the one before us. In *Clary*, the witness testified that he had had a conversation with Hatton in 1900, and that Hatton expressly stated that his occupation was permissive. The witness in *Clary* was alive and testified to this conversation directly, and Hatton's statement was made only eight years after the relevant period. Further, Hatton died in 1908, and the action was brought against his heirs in early 1909. In the present case, Edna Winslow was not yet alive in the relevant period; because she passed away following her deposition, she can make no clarification concerning her understanding of the Baxters' "interest" beyond the clarification discussed above; and the Baxters never brought suit against Defendants. Further, the statement made by Hatton in *Clary* was unequivocal. In the present case we can only speculate concerning whether W.G. Moore even made a statement, much less what his meaning and intent might have been. Finally, the Baxters did not act immediately to protect their interest. They did nothing for approximately eighty-five years until Petitioner purchased whatever interest they might have had. Now Petitioner is attempting to determine what W.G. Moore's state of mind was approximately sixty-five years ago.

In my opinion it is the "strong presumption . . . that actual proof of the original ouster has become lost by lapse of time" that defeats Petitioner's challenge to the granting of summary judgment. W.G. and Edna Moore are deceased. Without any tangible evidence of an acknowledgment of the Baxters' interest during the relevant period, and with no testimony raising more than a permissible inference that there was no twenty-year period in which Moore failed to acknowledge the Baxters' interest, I would hold that summary judgment was correct. The evidence presented to the trial court could only allow the jury to infer that W.G. Moore might have recognized an interest in the Baxters at some unknown time. The presumption in *Dobbins* is tailored for the situation

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before us. The presumption is that evidence of W.G. Moore's intent to solely possess the property has been lost due to the passing of approximately eighty-five years in which the Baxters failed to assert their rights.

The sole enjoyment of property for a great number of years, without claim from another, having right and under no disability to assert it, becomes evidence of a title to such a sole enjoyment; and this not because it clearly proves the acquisition of such right, but because from the antiquity of the transaction, *clear proof cannot well be obtained to ascertain the truth, and public policy forbids a possessor to be disturbed by stale claims when the testimony to meet them cannot easily be had.* Where the law prescribes no specific bar from length of time, 20 years has been regarded in this country as constituting the period for a legal presumption of such facts as will sanction the possession and protect the possessor.

Dobbins, 141 N.C. at 216-217, 53 S.E. at 872 (citation and quotation marks omitted) (emphasis added); *see also id.* at 216, 53 S.E. at 872 (“The possession of one tenant in common is in law the possession of all his cotenants, because they claim by one common right. When, however, that possession has been continued for a great number of years, without any claim from another who has a right, and is under no disability to assert it, it will be considered evidence of title to such sole possession; and where it has so continued for twenty years, the law raises a presumption that it is rightful, and will protect it. *This it will do, as well from public policy, to prevent stale demands, as to protect possessors from the loss of evidence from lapse of time.*”) (citation omitted) (emphasis added). Our Supreme Court has already addressed the policy considerations inherent in this type of property dispute involving “stale claims when the testimony to meet them cannot easily be had.” *Id.*

The Baxters did nothing to claim any right in the property for approximately eighty-five years, and the testimonies of Angerona Saunders and Edna Winslow do not constitute “more than a scintilla [of evidence] or a permissible inference” that W.G. Moore ever did anything to recognize the Baxters' interest in the property. *Id.* (citation omitted). This constituted a constructive ouster.

[Constructive ouster] is a disseizin by one tenant of his cotenant, the taking by one of the possession and holding it against him by an act or series of acts which indicate a decisive intent and purpose to occupy the premises to the

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exclusion and in denial of the right of the other. This is what the law presumes, whether it be in exact accordance with the real facts or not. It is a presumption the law raises to protect titles, and answers in the place of proof of an actual ouster and a supervening adverse possession. The presumption includes everything necessary to be proved when the title can be ripened only by actual adverse possession as defined by this [c]ourt[.]

Dobbins, 141 N.C. at 215-16, 53 S.E. at 872. I would hold that there is no genuine issue of material fact and that summary judgment was proper.

GAILLARD BELLOWS AND HER HUSBAND, JON BELLOWS, PLAINTIFFS

v.

ASHEVILLE CITY BOARD OF EDUCATION DBA ASHEVILLE HIGH SCHOOL AND SKA CONSULTING ENGINEERS, INC., FORMERLY SUTTON-KENNERLY & ASSOCIATES, INC., AND ZEBULON W. WELLS, JR., INDIVIDUALLY, DEFENDANTS

No. COA15-131

Filed 6 October 2015

1. Appeal and Error—immediate appealability—sovereign immunity

In a case arising from an injury on school grounds, allegedly from an unsafe condition, only the trial court's ruling on the School Board's motion to dismiss on sovereign immunity grounds was immediately reviewable.

2. Immunity—sovereign—school grounds injury—maintenance—governmental function

In a case arising from an injury on school grounds, the trial court erred by denying the School Board's motion to dismiss. Under the controlling decision in *Bynum v. Wilson Cnty.*, 367 N.C. 355, the General Assembly's assignment of the ownership, maintenance, and repair of school property to the local school boards is dispositive of the question of whether the function performed by the Board in the present case is governmental.

Appeal by Defendants from order entered 13 November 2014 by Judge Bradley B. Letts in Buncombe County Superior Court. Heard in the Court of Appeals 3 June 2015.

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Northup McConnell & Sizemore, PLLC, by Isaac N. Northup, Jr., Elizabeth E. McConnell, and Katherine M. Pomroy, for the Plaintiff-Appellees.

Campbell Shatley, PLLC, by Christopher Z. Campbell and John F. Henning, Jr., for the Defendant-Appellant, Asheville City Board of Education.

Smith Moore Leatherwood LLP, by Patrick M. Kane, Bruce P. Ashley, and Lisa W. Arthur, for the Defendant-Appellants, SKA Consulting Engineers, Inc. and Zebulon W. Wells, Jr.

Christine T. Scheef and Allison B. Schafer, for Amicus Curiae, the North Carolina School Boards Association.

DILLON, Judge.

Asheville City Board of Education (the “Board”), SKA Consulting Engineers, Inc. (“SKA Consulting”), and Zebulon W. Wells, Jr., appeal from an order denying motions to dismiss Gaillard Bellows and Jon Bellows’ claims for negligence, willful negligence, and loss of consortium. We reverse the trial court’s denial of the Board’s motion to dismiss and dismiss SKA Consulting and Mr. Wells’ appeals.

I. Background

Plaintiffs filed a complaint asserting claims arising out of an incident at Asheville High School in which Plaintiff Ms. Bellows fell from her wheelchair and sustained injuries, allegedly due to unsafe conditions on the school grounds. Defendants made motions to dismiss, which the trial court denied by an order entered 13 November 2014. Defendants entered written notice of appeal.

II. Analysis

[1] The order being appealed is interlocutory because it does not dispose of all claims and all parties. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (“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.”). “Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Goldstone v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, our Supreme Court has held that “the denial of

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summary judgment on grounds of sovereign immunity is immediately appealable[.]” *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009). Thus, while interlocutory, the Board’s appeal from the order denying its motion to dismiss based on sovereign immunity is immediately appealable.¹

Unlike denials of motions to dismiss based on sovereign immunity, however, our Supreme Court has held that “no immediate appeal may be taken” from denials of motions to dismiss for failure to state a claim upon which relief can be granted. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 326, 293 S.E.2d 182, 183 (1982). Furthermore, in an appeal from an order denying multiple motions to dismiss made on different bases, only one of which is sovereign immunity, only the ruling on sovereign immunity is immediately reviewable; other rulings in the same order being appealed are not. *Lake v. State Health Plan for Teachers and State Employees*, ___ N.C. App. ___, ___, 760 S.E.2d 268, 271 (2014). Therefore, only the trial court’s ruling on the Board’s motion to dismiss on sovereign immunity grounds is immediately reviewable.² Accordingly, the appeals of SKA Consulting and Mr. Wells are dismissed.

[2] On the merits of the Board’s sovereign immunity defense, we agree that the trial court erred in denying the Board’s motion to dismiss. Specifically, we find our Supreme Court’s recent decision in *Bynum v. Wilson Cnty.*, 367 N.C. 355, 758 S.E.2d 643 (2014), controlling on this question. In *Bynum*, the Supreme Court clarified the contours of the defense of sovereign immunity under our law, reiterating that its availability depends on the nature of the function of the relevant governmental unit. *Id.* at 358, 758 S.E.2d at 646. “Immunity applies to acts committed pursuant to governmental functions but not proprietary functions,” the court explained. *Id.* The court reasoned that the General Assembly’s designation of an activity as governmental is dispositive to this question, and after identifying several statutes assigning the relevant governmental unit the responsibility of performing the function at issue, the court

1. Our Supreme Court has noted that the immunity possessed by a local school board “is more precisely identified as governmental immunity, while sovereign immunity applies to the State and its agencies.” *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 335 n. 3, 678 S.E.2d 351, 353 n. 3 (2009). However, as it applies to the present case, as in *Craig*, “the distinction is immaterial.” *Id.*

2. Recognizing that they have no right to appeal, SKA Consulting and Mr. Wells have petitioned our Court for *certiorari*. However, *certiorari* is an extraordinary writ. *See, e.g., State v. Roux*, 263 N.C. 149, 153, 139 S.E.2d 189, 192 (1962). In support of their petition, SKA Consulting and Mr. Wells argue generally that consolidated review would promote the administration and interests of justice. We are not persuaded. We hereby deny the petition.

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concluded that sovereign immunity applied.³ *Id.* at 359-60, 758 S.E.2d at 646-47.

Applicable to the present case, N.C. Gen. Stat. §§ 115C-40 and -521(c) designate the responsibility of the several boards of education in our State with the ownership and control of all school real and personal property, entrusting the boards of education with the maintenance and care thereof. *See* N.C. Gen. Stat. §§ 115C-40, -521(c) (2014). In relevant part, N.C. Gen. Stat. § 115C-40 provides:

The several boards of education, both county and city, shall hold all school property and be capable of purchasing and holding real and personal property, of building and repairing schoolhouses, of selling and transferring the same for school purposes, and of prosecuting and defending suits for or against [themselves].

Id. § 115C-40. N.C. Gen. Stat. § 115C-521(c) further provides that “[t]he building of all new school buildings and the repairing of all old school buildings shall be under the control and direction of, and by contract with, the board of education for which the building and repairing is done.” *Id.* § 115C-521(c). Therefore, under the controlling decision of our Supreme Court in *Bynum*, the General Assembly’s assignment of the ownership, maintenance, and repair of school property to the local school boards of our State is dispositive to the question of whether the function performed by the Board in the present case is governmental.⁴

3. Justice (now Chief Justice) Martin authored a separate concurrence in *Bynum*, in which he noted that the reasoning of the majority “would seem to create a categorical rule barring any premises liability claims against counties or municipalities for harms that occur on government property.” *Bynum v. Wilson Cnty.*, 367 N.C. 355, 361, 758 S.E.2d 643, 647 (2014) (Martin, J., concurring in result). Plaintiffs contend that the standard advocated by the minority in now-Chief Justice Martin’s concurrence is met in the present case. However, we are not free to disregard the majority’s reasoning. *See, e.g., Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 157, 731 S.E.2d 800, 811 (2012) (observing that the existence of a dissenting opinion does not undermine the precedential value of a majority opinion).

4. Plaintiffs argue at length that the so-called sidewalks doctrine was not affected by our Supreme Court’s decision in *Bynum*. As a general matter, “[w]hile the maintenance of public roads and highways is generally recognized as a governmental function,” the so-called sidewalks doctrine “imposes liability upon a municipality for damages resulting from failure to exercise ordinary care in keeping its streets and sidewalks in a reasonably safe condition[.]” *Millar v. Town of Wilson*, 222 N.C. 340, 342, 23 S.E.2d 42, 44 (1942). However, we base our conclusion that the ownership, maintenance, and repair of the walkway at issue in the present case – a walkway located on a school campus – was a governmental function on the unequivocal direction of our Supreme Court in *Bynum* that a statutory designation by the General Assembly is dispositive to this question, and do not reach the effect, if any, of *Bynum* on these prior decisions.

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Accordingly, we reverse the trial court's denial of the Board's motion to dismiss.

III. Conclusion

For the reasons stated herein, the trial court's denial of the Board's motion to dismiss is reversed. SKA Consulting and Mr. Wells' appeals are dismissed.

REVERSED IN PART; DISMISSED IN PART.

Judges CALABRIA and ELMORE concur.

EMILY JEAN BURGER, PLAINTIFF
v.
MATTHEW GEOFFREY SMITH, DEFENDANT

No. COA15-180

Filed 6 October 2015

1. Child Visitation—mother in N.C.—father in Malawi—child's best interests

In a child custody case with a mother in North Carolina and the father in Malawi in which the mother contended that the trial court erred by allowing the father the discretion to exercise visitation in Malawi, the trial court was not required to make a finding or conclusion that it was in the best interest of the child to travel to Malawi. Rather, the trial court's task was to fashion a custody arrangement that was in the child's best interest in the context of extremely unusual circumstances, and the trial court's findings reflected appropriate awareness of the possible dangers to the child of travel to Malawi. The trial court found that "Defendant will provide carefully for the protection and safety of the minor child if visitation is allowed in Malawi" and this finding was amply supported by other findings tending to show that defendant was a person of good moral character who had assiduously sought to exercise his right to visitation and who had several years of experience with conditions in Malawi.

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2. Child Visitation—mother in N.C.—father in Malawi—visitation schedule—not abuse of discretion

In a child custody case involving a mother in North Carolina and a father in Malawi, the trial court did not abuse its discretion by ordering a visitation schedule of alternating periods of a month with the father followed by two months with the mother and by directing that when the minor child, who was eighteen months old at the time of the hearing, begins kindergarten, defendant would then have visitation during the school's summer break and during the winter and spring breaks. The trial court's findings of fact and conclusions of law demonstrate an intention to fashion a custody plan that would foster the development of a close and meaningful relationship between the minor child and both of his parents. To achieve this goal the trial court was necessarily required to deviate from the most commonly employed custody schedules, and the visitation schedule was an appropriate response to the parties' unusual living situation. If the child's future high school activities render a change of visitation advisable, a modification could be sought at that time.

Appeal by plaintiff from order entered 29 August 2014 by Judge Pauline Hankins in Brunswick County District Court. Heard in the Court of Appeals 9 September 2015.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for plaintiff-appellant.

J. Albert Clyburn for defendant-appellee.

ZACHARY, Judge.

Emily Burger (plaintiff) appeals from a permanent child custody order awarding her the primary physical care and custody of the parties' minor child and Matthew Smith (defendant) secondary physical care and custody with visitation privileges with the parties' minor child. On appeal, plaintiff argues that the trial court erred and abused its discretion in the trial court's award of visitation privileges to defendant. We disagree.

I. Background

Defendant is a Canadian citizen and resident of Ontario. Plaintiff is a resident of Brunswick County, North Carolina. In 2006 defendant traveled to Malawi, Africa, to work as a construction manager for a

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missionary group. In addition to construction work, defendant assisted with the mission's orphanage and worked with the children in the mission's care. Defendant has a long-term personal and religious commitment to his work in Malawi. In 2010 plaintiff traveled to Malawi to teach English at the orphanage. Initially, plaintiff volunteered for a three month term; later, she and defendant began a romantic relationship and plaintiff decided to remain in Malawi indefinitely. On 29 August 2011, plaintiff and defendant held a marriage ceremony in Malawi. On 15 October 2011, they were married in North Carolina and then returned to Malawi. In 2012, the parties conceived a child while living in Malawi. They traveled to the United States for the birth of their son, which occurred on 24 January 2013, and in April 2013 the family returned to Malawi.

On 9 July 2013, when the parties' son was about six months old, plaintiff returned to North Carolina with the child. On 14 September 2013, plaintiff informed defendant that she wanted to separate. On 17 January 2014, plaintiff filed a complaint seeking sole custody of the child, asking the court to order that defendant have no overnight visits with the child until he was two years old, and requesting that all visitation between defendant and the child take place in North Carolina. On 5 February 2014, defendant filed an answer, a motion to dismiss plaintiff's complaint for lack of jurisdiction, and a counterclaim for custody of the child. On 23 April 2014, the trial court entered an order denying defendant's motion to dismiss plaintiff's complaint. Following a hearing conducted on 7 March 2014, the trial court entered a temporary custody order on 9 May 2014. In its temporary custody order the trial court awarded the parties joint custody of the child, with plaintiff to have primary physical custody and defendant secondary physical custody with visitation privileges. The order also provided that defendant was not to take the child to Malawi. On 2 June 2014, defendant filed a motion to show cause asserting that plaintiff was in contempt of the temporary custody order by failing to allow him visitation with the child as ordered by the court. On 9 June 2014, the trial court granted plaintiff's motion for psychological evaluations of the parties.

On 7 August 2014, the trial court conducted a hearing on the issue of permanent child custody and on defendant's show cause motion. On 29 August 2014, the trial court entered an order denying defendant's motion to show cause and awarding the parties joint legal care and custody of the child. The court awarded plaintiff primary physical care and custody of the parties' minor child, and defendant secondary physical care and custody of the minor child, with visitation privileges. Additional details of the trial court's order are discussed below. Plaintiff has appealed from the permanent custody order.

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II. Standard of Review

The standard of review “when the trial court sits without a jury 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.’” *Barker v. Barker*, __ N.C. App. __, __, 745 S.E.2d 910, 912 (2013) (quoting *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). “In a child custody case, the trial court’s findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. . . . Unchallenged findings of fact are binding on appeal.” *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)) (other citation omitted). “Whether [the trial court’s] findings of fact support [its] conclusions of law is reviewable *de novo*.” *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008) (citation omitted). “‘If the trial court’s uncontested findings of fact support its conclusions of law, we must affirm the trial court’s order.’” *Respass v. Respass*, __ N.C. App. __, __, 754 S.E.2d 691, 695 (2014) (quoting *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191, 731 S.E.2d 404, 409 (2012)).

In addition, “[i]t is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody.” *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998) (citation omitted). “A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [its order] was so arbitrary that it could not have been the result of a reasoned decision.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted).

III. DiscussionA. Introduction

As a preliminary matter, it is helpful to clarify the extent of plaintiff’s challenge to the permanent custody order. Plaintiff does not assert that the trial court erred by awarding the parties joint legal custody, by giving plaintiff primary physical custody and defendant secondary physical custody with visitation privileges, or by concluding that it was in the child’s best interest to have visitation with defendant. Plaintiff’s sole challenge on appeal is to certain features of the trial court’s order respecting defendant’s visitation with the child. Specifically, plaintiff challenges the provisions that establish the visitation schedule and that allow defendant to exercise visitation with the minor child in Malawi. Because plaintiff does not contend that the trial court’s findings of fact

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were not supported by record evidence, the trial court's findings of fact are conclusively established on appeal. Therefore, the issue before this Court is whether the trial court's findings of fact support its conclusions of law and the provisions of its order with regard to the trial court's award of visitation.

B. Defendant's Discretion to Exercise Visitation in Malawi

[1] Plaintiff argues first that the trial court erred by allowing defendant discretion to exercise his visitation privileges with the child in Malawi. Plaintiff contends that some of the trial court's findings of fact are simply recitations of witness testimony, that the trial court's findings of fact do not reflect its consideration of the dangers of Malawi, and that the trial court's findings of fact cannot support an "ultimate finding" or conclusion of law "that it is in the best interest of the minor child to travel to Malawi." We conclude that the trial court was not required to make a finding or conclusion that "travel to Malawi" was, as an abstract proposition, in the child's best interest. Instead, the trial court's task was to fashion a custody arrangement that was in the child's best interest in the context of the extremely unusual factual circumstances of the parties' lives. We further conclude that, disregarding any findings that consisted of a summary of witness testimony, the trial court's remaining findings of fact demonstrate its consideration of the possible dangers of travel to Malawi and reflect an appropriate custody award, including the trial court's award of visitation.

Under N.C. Gen. Stat. § 50-13.1(a) "the word 'custody' shall be deemed to include custody or visitation or both." N.C. Gen. Stat. § 50-13.2(a) provides in relevant part that:

An order for custody of a minor child . . . shall award the custody of such child to such person . . . as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors . . . and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child.

Moreover, it is undisputed that:

Findings of fact as to the characteristics of the competing parties must be made to support the necessary conclusions of law. These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child.

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Steele v. Steele, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978). Regarding the necessity for findings, N.C. Gen. Stat. § 1A-1 Rule 52(a)(1) provides in relevant part that in “all actions tried upon the facts without a jury” the trial court “shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.” In *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982), however, our Supreme Court held that

Rule 52(a) does not, of course, require the trial court to recite in its order all evidentiary facts presented at hearing. The facts required to be found specially are those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached. . . . “There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff’s cause of action or the defendant’s defense, and evidentiary facts are those subsidiary facts required to prove the ultimate facts. [N.C. Gen. Stat. § 1A-1 Rule 52(a)] requires the trial judge to find and state the ultimate facts only.”

(quoting *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951) (internal citations omitted). Thus, “[a]lthough a custody order need not, and should not, include findings as to each piece of evidence presented at trial, it must resolve the material, disputed issues raised by the evidence.” *Carpenter v. Carpenter*, 225 N.C. App. 269, 273, 737 S.E.2d 783, 787 (2013). Applying Rule 52 in the context of visitation rights in a child custody order, we have held that “[t]o support an award of visitation rights the judgment of the trial court should contain findings of fact which sustain the conclusion of law that the party is a fit person to visit the child and that such visitation rights are in the best interest of the child.” *Montgomery v. Montgomery*, 32 N.C. App. 154, 157, 231 S.E.2d 26, 29 (1977) (citations omitted).

In this case, the trial court’s conclusions of law included, in relevant part, the following:

1. That Plaintiff and Defendant are properly before this Court; that the Court has jurisdiction over the parties and of the subject matter; and that the claim for child custody was properly filed and noticed for hearing in this matter.
2. Joint legal care and custody of the minor child is appropriate and in the best interests of the minor child.

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3. Plaintiff is a fit and proper person to exercise primary care and custody of the minor child.
4. Defendant is a fit and proper person to exercise secondary care and custody of the minor child, by way of visitation.
5. The visitation schedules and provisions ordered herein below are reasonable, the parties are fit and appropriate to exercise the visitation as ordered, and the visitation is in the best interests of the minor child.

We conclude that the trial court made the appropriate conclusions of law required under N.C. Gen. Stat. § 50-13.2. On appeal, plaintiff challenges only Conclusion of Law No. 5, respecting visitation, arguing that the trial court's findings of fact do not support this Conclusion. We have carefully considered, but ultimately rejected, plaintiff's arguments concerning the trial court's findings and conclusions.

“ [T]he trial courts have the duty to decide domestic disputes, guided always by the best interests of the child and judicial objectivity. To that end, trial courts possess broad discretion to fashion custodial and visitation arrangements appropriate to the particular, often difficult, domestic situations before them.” *Lovallo v. Sabato*, 216 N.C. App. 281, 285, 715 S.E.2d 909, 912 (2011) (quoting *Glesner v. Dembrosky*, 73 N.C. App. 594, 598, 327 S.E.2d 60, 63 (1985)) (internal citation omitted). In this case, it is important to remember that the trial court's decision to allow defendant to exercise visitation with the child in Malawi was reached in the context of the extraordinarily uncommon circumstances of the parties' relationship. It is not disputed that plaintiff and defendant met when plaintiff traveled to Malawi to teach English at the mission where defendant had been living and working for several years. Plaintiff became involved with defendant, a Canadian citizen who has a long term commitment to his work in Africa. Plaintiff remained in Malawi and the parties conducted a wedding ceremony in Malawi as well as in North Carolina. Their child was conceived in Malawi and, after returning to the United States for his birth, the family went back to Malawi. The child lived in Malawi until he was about six months old, with no ill effects reported by either party. Plaintiff then decided to separate from defendant and live in Brunswick County, North Carolina. On appeal, plaintiff argues that the trial court erred by allowing defendant the option of exercising his right to visitation with the minor child in Malawi. Plaintiff fails to acknowledge that the factual circumstances of the parties' lives, which arose from their personal decisions, would not permit a conventional

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visitation schedule in which, for example, defendant had visitation with the child every Wednesday and every other weekend.

Essentially, plaintiff argues that the trial court's findings of fact do not demonstrate proper consideration of the dangers of allowing defendant to take the child to Malawi. We do not agree. Plaintiff urges that in resolving this issue we must disregard findings that consist of recitation of witness testimony without making findings based on that testimony. We conclude that the following findings, which do not consist of the recitation of witness testimony, establish that the trial court considered the factors relevant to the child's best interest, including the characteristics of the parties and the plaintiff's concerns about the child's travel to Malawi:

1. Plaintiff is a citizen and resident of Brunswick County, North Carolina, and has resided [there] since July 9, 2013[.] . . .
2. Defendant is a citizen and resident of Canada, residing . . . [in Ontario], Canada.
3. The Defendant went to Malawi, Africa to work for Iris Ministries Africa on a full time basis in 2006 as a missionary, working as a construction manager. In addition to that work he has assisted in the care of children living at the orphanage and/or attending school there, serving as a role model and mentor.
4. The parties met in January of 2010 when the Plaintiff went to volunteer at the orphanage in Malawi for three (3) months to teach English. Plaintiff then decided to stay on as a full-time missionary and teacher, and did so until July 2013.
5. Plaintiff and Defendant held a marriage ceremony on August 29, 2011 in Malawi, Africa. The parties . . . were [also] married in Brunswick County, North Carolina on October 15, 2011. . . . The parties have lived separate and apart since July 9, 2013 . . . [and have] stipulated that they separated for purposes of divorce on September 14, 2013, the date Plaintiff notified Defendant that she wanted a separation.
6. There was one (1) minor child born of the marriage of Plaintiff and Defendant, to wit: Eli James Smith, born on January 24, 2013, in the state of Maryland. . . .

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7. The parties' minor child has resided with Plaintiff in Brunswick County, North Carolina since July 9, 2013, . . . [and] North Carolina is the home state of the minor child.

8. The parties remained in the state of Maryland from the minor child's birth until March 1, 2013[,and then stayed] . . . for a month with the Defendant's parents in [Canada.] . . . [On April 8, 2013] they flew back to Malawi.

9. On July 9, 2013, the Plaintiff returned to the United States with the minor child, with the Defendant planning to follow a few weeks later[.] . . .

10. On August 16, 2013, Plaintiff notified Defendant by Email that she had decided that she could not return with the child to Malawi. From August 24 - 31, 2013, the Defendant travelled to Ocean Isle Beach, North Carolina, and had daytime visits with Plaintiff and [the] minor child, who at that time was seven months old.

11. From August 2013 until May 15, 2014, Defendant continued to reside at his parents' home in Canada. He then returned to Malawi for four weeks.

12. On September 14, 2013, the Plaintiff expressed to Defendant her desire to separate. The Defendant returned to Brunswick County, North Carolina to visit with the minor child from November 9 - 23, 2013. At this time, Plaintiff arranged for him to have daily daytime visits ranging from three to six hours in length with the baby but refused any overnight visits, citing the fact that the baby still was nursing at night. Defendant had no choice but to oblige with any and all of her demands.

. . .

14. By agreement of the Defendant, Plaintiff has been breastfeeding the minor child since birth. She has been the child's primary caregiver since birth. During the three months the child resided with both parties in Malawi, Plaintiff didn't work but rather devoted herself full-time to the child's care. . . .

15. The court conducted a temporary hearing on March 7, 2014. . . . The Court's Order, entered on May 9, 2014, placed the minor child in the parties' temporary joint legal custody

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and ordered that Defendant would visit for ten days each month with fourteen days written notice to Plaintiff of the dates he wished to visit. The visits were to occur within either the United States or Canada and Defendant was ordered not to take the minor child to Malawi during the term of the temporary custody order.

16. After the temporary custody hearing, Defendant opted to remain in Canada rather than return to his work in Malawi in order to exercise all visitations that were allowed to him under the Order.

17. Pursuant to the Temporary Order, Defendant had the minor child for a seven-day visit here in North Carolina from March 9 - 16[.] . . . Defendant then had the minor child for visitation with him in Canada from March 20th through March 27th, and April 17th through April 27th.

18. Pursuant to the Temporary Order, Defendant notified Plaintiff that he wished to have his May visit from May 3 to May 13, 2014. Plaintiff objected . . . [and] refused to allow the Defendant to exercise his visitation as ordered. . . .

19. Plaintiff did allow the Defendant to exercise his visitation for the months of June and July.

20. Since March of 2014, Defendant has incurred approximately \$5,500.00 in travel expenses to exercise his visitation with the minor child.

21. The minor child has been more “clingy” with the Plaintiff after the ten (10) day visits with the Defendant[.]

. . .

22. The Plaintiff is 26 years old. Plaintiff graduated from college in December 2009[, and] was employed . . . as a Teacher’s Assistant from April until June, 2014, earning high praises from . . . a first grade teacher at the school who testified on Plaintiff’s behalf. Plaintiff will begin working as a Teacher’s Assistant . . . for this upcoming school year, and has enrolled in graduate school . . . to earn a Master’s degree in teaching.

23. Plaintiff has a close and loving relationship with her parents, with whom she has resided in a very nice home in Ocean Isle Beach, North Carolina since . . . July 2013. Plaintiff is scheduled to move into a two (2) bedroom

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condo she will be renting in the same neighborhood as her current residence[.] . . .

24. The Defendant is 36 years old. He is a citizen of Canada, but has been living in Malawi since 2006. Defendant testified that his faith is extremely important to him, and that he has been involved in church and church activities all of his life. Defendant appears to be a man of character, integrity, and commitment, who has a strong love for the less fortunate.

25. Defendant has a close and loving relationship with his parents. His parents have been married to each other for forty-four (44) years and reside in Canada.

26. Defendant has always demonstrated a strong commitment to his family and marriage.

. . .

28. Plaintiff is concerned about the minor child traveling to Malawi to visit with the Defendant due to health reasons, parasite disease, the threat of malaria, the presence of poisonous snakes, extreme heat, and the unreliability of the hospitals located there. When the parties lived together with the minor child in Malawi, they took extra precautions to guard themselves against mosquitos[.] . . .

29. The Court believes that Defendant will provide carefully for the protection and safety of the minor child if visitation is allowed in Malawi.

30. Malawi does have a high death rate for infants and children as compared to [the] United States. Malaria is common in Malawi . . . [and the] U.S. State Department recommends that travelers to Malawi take a course of Malaria prophylaxis medication which should be initiated prior to travel and taken while there. It is recommended that the minor child be vaccinated for Hepatitis A, Hepatitis B, rabies and typhoid before any visits to Malawi.

31. The healthcare is not as good in Malawi as it is in the United States.

32. Defendant is a citizen of Canada, and due to the immigration laws of the United States, relocating to North Carolina to be closer to the child is not an option for him.

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33. The Plaintiff is currently breastfeeding the minor child and has been doing so since his birth.

. . .

37. Plaintiff made allegations that Defendant had anger management issues and requested a psychological evaluation of both parties. Plaintiff testified that she separated from the Defendant due to him being controlling, angry, impossible to please, and having rages toward her during the marriage, however the court did not find this testimony persuasive. . . .

. . .

43. Both parties are excellent parents and both have provided exceptional care for the minor child. Both parties have strong support systems from family and friends. Both parties had adequate housing arrangements. Both parties are very connected to the minor child.

44. Both parties are fit and proper persons to have custody of the minor child. It is in the child's best interest to be placed in the primary physical custody of the Plaintiff-Mother, with the Defendant-Father having secondary physical custody by way of visitation.

We hold that the trial court's findings demonstrate its evaluation of a complex and unusual domestic situation and reflect appropriate awareness of the possible dangers to the child of travel to Malawi. In the decretal portion of its order the trial court further demonstrated its concern for the child's health and safety by directing in relevant part that:

6. During the times that the minor child is in the custody of the Defendant, it is at the Defendant's discretion whether he wants to have the visit take place in Canada or Malawi. If he chooses to bring the minor child to Malawi, Defendant is to take all necessary precautions that have previously been taken for protection of the child.

7. Plaintiff is to have the minor child vaccinated in order to prepare for his trip to Africa, if the Defendant shall choose to exercise his visitation in Malawi.

. . .

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14. Both parties shall keep the other party apprised of the minor child's medical conditions, treatment, and any other relevant information pertaining to the child's wellbeing and activity.

...

20. Each party shall have direct access to the child's doctor, dentist or other physical or mental health care provider. . . as if the parent were the sole custodian of the child. . . .

...

22. Medical care providers, educational personnel and any other person deemed by law to have a confidential relationship to the minor child as patient or pupil are hereby authorized to discuss with both Plaintiff and Defendant all matters regarding the child's health, education, religious rearing and general welfare as if he or she was the full legal custodian of the child.

23. Each party shall promptly inform the other of any serious injury or illness sustained by the child requiring medical treatment. Each party shall inform the other of any medical or health problem that arose while the child was in their respective custody. . . .

Plaintiff asserts, however, that the trial court's "findings of fact do not support the trial court's ultimate decision that it is in the best interest of the minor child to travel to Malawi." We disagree with plaintiff's premise that the trial court's "ultimate decision" was that "it is in the best interest of the minor child to travel to Malawi." The trial court's "ultimate decision" was that it was in the child's best interest for his parents to have shared custody, with plaintiff having primary physical custody and defendant secondary physical custody with visitation privileges. Plaintiff also argues that the trial court's "ultimate" findings of fact are not supported by its "evidentiary" findings of fact. As discussed above, our task is to determine whether the trial court's unchallenged findings of fact support its conclusions of law. We conclude that the "ultimate finding" that is challenged by plaintiff is supported by the trial court's other findings of fact. Plaintiff identifies the following as "ultimate" findings of fact:

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29. The Court believes that Defendant will provide carefully for the protection and safety of the minor child if visitation is allowed in Malawi.

43. Both parties are excellent parents and both have provided exceptional care for the minor child. Both parties have strong support systems from family and friends. Both parties had adequate housing arrangements. Both parties are very connected to the minor child.

44. Both parties are fit and proper persons to have custody of the minor child. It is in the child's best interest to be placed in the primary physical custody of the Plaintiff-Mother, with the Defendant-Father having secondary physical custody by way of visitation.

Plaintiff has not made any arguments challenging Findings Nos. 43 or 44. Plaintiff's appeal is instead focused exclusively on Finding No. 29, in which the trial court found that "Defendant will provide carefully for the protection and safety of the minor child if visitation is allowed in Malawi." We conclude that this finding is amply supported by other findings tending to show that defendant is a person of good moral character who has assiduously sought to exercise his right to visitation and who has several years of experience with the conditions in Malawi. While we appreciate plaintiff's concerns about the child's health and safety, we conclude that the trial court's findings of fact reflect its consideration of this issue and support its conclusions of law.

Plaintiff also contends that in assessing whether the trial court's findings of fact support its conclusions of law we should apply the factors that are used to evaluate cases in which one parent seeks to permanently relocate a child. Plaintiff has not articulated a rationale for treating visitation of one or two months as the equivalent of a permanent relocation, and we conclude that we do not need to determine this issue as if it were a permanent relocation. We hold that plaintiff is not entitled to relief on the basis of this argument.

C. Visitation Schedule

[2] Plaintiff argues next that the trial court abused its discretion by ordering a visitation schedule of alternating periods of a month with defendant followed by two months with plaintiff and by directing that when the minor child, who was eighteen months old at the time of the hearing, begins kindergarten, defendant will then have visitation during the school's summer break and during the winter and spring breaks.

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Plaintiff contends that this schedule is so “harsh” and “arbitrary” that it constitutes an abuse of discretion. We disagree.

The decretal portion of the trial court’s order for permanent child custody provides in relevant part that:

4. The visitation schedule for the minor child will consist of one month custodial period with Defendant-Father, followed by two months of custodial time with Plaintiff-Mother. This schedule will continue until the summer before the minor child is scheduled to begin kindergarten.

...

8. When the minor child is scheduled to start school and for the summer prior to school commencing, during the summer every year the Defendant will have custodial time with the minor child from the day after school ends for the summer until one week (consisting of seven (7) days) prior to when school starts. For every year thereafter, Defendant will have custodial time with the minor child from the day after school is released for the year until the one week prior to when school recommences.

9. In addition to the summer visitation, after the minor child starts school, the Defendant will exercise custodial time with the minor child for Christmas Break and Spring Break every year from the day school recesses until the day before school recommences.

On appeal, plaintiff contends that the visitation schedule is so arbitrary that it “could not have been the result of a reasoned decision.” Plaintiff does not, however, challenge the trial court’s conclusion that “[d]efendant is a fit and proper person to exercise secondary care and custody of the minor child, by way of visitation.” Nor does plaintiff dispute the existence of evidence to support the trial court’s finding that:

43. Both parties are excellent parents and both have provided exceptional care for the minor child. Both parties have strong support systems from family and friends. Both parties [have] adequate housing arrangements. Both parties are very connected to the minor child.

The trial court’s findings of fact and conclusions of law demonstrate an intention to fashion a custody plan that would foster the development of a close and meaningful relationship between the minor child

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and both of his parents. As discussed above, to achieve this goal the trial court was necessarily required to deviate from the most commonly employed custody schedules. Plaintiff's appellate arguments fail to acknowledge the value in the child's relationship with defendant. Thus, plaintiff describes the visitation schedule as "removing [the child] from his home and friends" during every period of visitation with defendant, without considering that the child could benefit from having a home and friends with both plaintiff and defendant. We conclude that, rather than being arbitrary, the visitation schedule was an appropriate response to the parties' unusual living situation.

Plaintiff also speculates that in the future the visitation schedule may prove incompatible with extracurricular activities in which child might participate. For example, plaintiff contends that if the child were to play football or soccer in high school, the visitation schedule would interfere with summer tryouts and practice. Given that the child is not yet three years old, we decline to speculate on his possible activities or schedule in high school. Moreover:

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.

Shipman v. Shipman, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003) (quoting *Pulliam*, 348 N.C. at 619, 501 S.E.2d at 899). See also N.C. Gen. Stat. § 50-13.7(a) ("an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested."). If the child's future high school activities render a change of visitation advisable, plaintiff may seek a modification of the visitation schedule at that time.

Plaintiff also argues that testimony from her expert witness would have supported a different schedule. It is, however, the "duty of the trial judge 'to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.' 'It is not the function of this Court to reweigh the evidence on appeal.' " *Sauls v. Sauls*, ___ N.C. App. ___, ___, 763 S.E.2d 328, 330 (2014) (quoting *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citation omitted), and *Garrett v. Burris*, ___ N.C. App. ___, ___, 735 S.E.2d 414, 418 (2012), *aff'd per curiam*, 366 N.C. 551, 742 S.E.2d 803 (2013)).

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We hold that the trial court did not err in its permanent child custody order and that its order should be

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

CITY OF ASHEVILLE, A MUNICIPAL CORPORATION, PLAINTIFF
v.
STATE OF NORTH CAROLINA AND THE METROPOLITAN SEWERAGE DISTRICT OF
BUNCOMBE COUNTY, NORTH CAROLINA, DEFENDANTS

No. COA14-1255

Filed 6 October 2015

1. Cities and Towns—public water system—challenge to legislation—standing

Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the City had standing to challenge the constitutionality of the legislation. The Court of Appeals rejected the State's argument to the contrary because the City had not accepted any benefit from the legislation.

2. Cities and Towns—public water system—challenge to legislation—local act

Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the trial court erred by concluding that the legislation was a local act related to health, sanitation, or non-navigable streams in violation of Article II, Sections 24(1)(a) and (e) of the state constitution. The Court of Appeals directed the trial court on remand to enter summary judgment in favor of the State on this issue.

3. Cities and Towns—public water system—challenge to legislation—law of the land

Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the trial court erred by concluding that the legislation violated the law of the land clause in

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Article I, Section 19 of the state constitution. The Court of Appeals directed the trial court on remand to enter summary judgment in favor of the State on this issue.

4. Cities and Towns—public water system—challenge to legislation—condemnation

Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the trial court erred by concluding that the legislation violated Article I, Sections 19 and 35 of the state constitution, as an invalid exercise of power to take or condemn property. The Court of Appeals directed the trial court on remand to enter summary judgment in favor of the State on this issue.

Appeal by Defendants from “Memorandum of Decision and Order Re: Summary Judgment” entered 9 June 2014 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 3 June 2015.

Parker, Poe, Adams & Bernstein LLP, by Daniel G. Clodfelter, City Attorney for the City of Asheville, by Robin T. Currin and Robert W. Oast, Jr., Long, Parker, Warren, Anderson & Payne, P.A., by Robert B. Long, Jr., and Moore & Van Allen PLLC, by T. Randolph Perkins, for the Plaintiff-Appellee.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General I. Faison Hicks, for the Defendant-Appellant.

Cauley Pridgen, P.A., by James P. Cauley, III, and Gabriel Du Sablon, for Amicus Curiae, the City of Wilson.

Kimberly S. Hibbard and Gregory F. Schwitzgebel, III, for Amicus Curiae, the North Carolina League of Municipalities.

DILLON, Judge.

The City of Asheville (“Asheville”) commenced this action against the State of North Carolina, challenging the constitutionality of certain legislation enacted by our General Assembly in 2013. A provision in this legislation requires Asheville to cede ownership and control of its public water system to another political subdivision. The trial court entered an

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order enjoining this involuntary transfer, concluding that the legislation violated the North Carolina Constitution.

We affirm the trial court's conclusion that Asheville has standing to challenge the authority of the General Assembly in this matter. We reverse the court's conclusions regarding the legislation's constitutionality and its injunction and remand the matter for further proceedings consistent with this opinion.

I. Background

The General Assembly has empowered municipalities to own and operate public water systems and public sewer systems and to serve customers both inside and outside of their corporate limits. N.C. Gen. Stat. § 160A-312.

Asheville is a municipality which owns and operates a public water system (the "Asheville Water System"). Asheville, however, does not operate a public sewer system. Rather, the public sewer system is owned and operated by a metropolitan sewerage district (an "MSD").¹ Like a municipality, an MSD is a type of political subdivision authorized by the General Assembly. N.C. Gen. Stat. § 162-64, *et seq.*

The relationship between Asheville and its water customers living outside of its corporate limits has historically been quite litigious, with many disputes resolved through legislation from our General Assembly. *See Candler v. City of Asheville*, 247 N.C. 398, 101 S.E.2d 470 (1958); *City of Asheville v. State of North Carolina*, 192 N.C. App. 1, 665 S.E.2d 103 (2008).

In 2013, our General Assembly enacted legislation (the "Water/Sewer Act") which withdraws from Asheville the authority to own and operate the Asheville Water System and transfers the System to the Buncombe County MSD as follows:

The Water/Sewer Act creates a new type of political subdivision known as a *metropolitan water and sewerage district* (an "MWSD"), empowered to run both a public water system and a public sewer system within a defined jurisdiction. An MWSD may be formed either *voluntarily or by operation of law*. An MWSD is formed voluntarily when two or more political subdivisions (*e.g.*, cities and MSD's) consent to

1. This MSD, known as the Metropolitan Sewerage District of Buncombe County, is the nominal defendant in this action.

form an MWSO to consolidate the governance of the public water and sewer systems in their region. N.C. Gen. Stat. § 162A-85.2.

A provision in the Water/Sewer Act (the “Transfer Provision”) – the provision which is at the heart of this litigation – allows for the formation of an MWSO by operation of law. This provision states that the public *water* system belonging to a municipality or other political subdivision which meets certain criteria and which happens to operate in the same county that an MSD operates a public *sewer* system *must be transferred* to that MSD, upon which the MSD converts to an MWSO. *See* 2013 N.C. Sess. Laws 50, §§ 1(a)-(f), as amended by 2013 N.C. Sess. Laws 388, § 4.

Though the Transfer Provision does not *expressly* reference Asheville by name, the *only* public water system which currently meets all of the Transfer Provision’s criteria for a forced transfer to an MSD is the Asheville Water System.

Asheville commenced this action, challenging the legality of the Transfer Provision on several grounds. The State moved to dismiss, contending that Asheville lacked standing to challenge the General Assembly’s authority to enact the legislation. Also, both parties filed cross motions for summary judgment.

Following a hearing, the trial court entered an order recognizing Asheville’s standing. The trial court enjoined the application of the Transfer Provision, concluding that it violated our state constitution on *three* grounds.

The State timely appealed.

II. Standard of Review

As this case involves the interpretation of a state statute and our state Constitution, our review is *de novo*. *See In re Vogler*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012).

III. Asheville’s Standing

[1] The trial court concluded that Asheville has standing to challenge the authority of the General Assembly to enact the Transfer Provision. We agree.

Our Supreme Court has expressly held that “municipalities [have] standing to test the constitutionality of acts of the General Assembly.” *Town of Spruce Pine v. Avery County*, 346 N.C. 787, 790, 488 S.E.2d 144, 146 (1997) (citing *City of New Bern v. New Bern-Craven County Bd.*

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of *Educ.*, 328 N.C. 557, 402 S.E.2d 623 (1991) and *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 360 S.E.2d 756 (1987)).

In challenging Asheville's standing, the State cites *In re Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974), in which our Supreme Court held that a certain county lacked standing to challenge the constitutionality of a provision contained in a particular statute. However, the Court explained in *Town of Spruce Pine, supra*, that its holding in *Martin* was *not* that political subdivisions lack the authority to challenge the constitutionality of a statute *generally*, but rather that a political subdivision which *accepts the benefits* of part of a statute lacks standing to challenge another part of that same statute. *Town of Spruce Pine*, 346 N.C. at 790, 488 S.E.2d at 146 (distinguishing *Martin*). Here, Asheville has standing because it has not accepted any benefit from the 2013 Water/Sewer Act.

IV. Constitutionality of the Water/Sewer Act

The trial court held that the Transfer Provision was invalid under our North Carolina Constitution based on three separate grounds:

- (1) the Transfer Provision is a "local law" relating to "health," "sanitation" and "non-navigable streams," in violation of *Article II, Section 24*;
- (2) the Transfer Provision violates Asheville's rights under the "law of the land" clause found in *Article I, Section 19*; and
- (3) the Transfer Provision constitutes an unlawful taking of Asheville's property without just compensation in violation of *Article I, Sections 19 and 35*.

We disagree and hold that the Transfer Provision does not violate these constitutional provisions.²

2. The trial court refused to rule on a fourth basis in support of the injunction, namely, that the Transfer Provision unlawfully impairs Asheville's contractual obligations with its bondholders who provided financing for its public water system, in violation of *Article I, Section 10* of the United States Constitution; *Article I, Section 19* of the North Carolina Constitution; and N.C. Gen. Stat. § 159-93. However, Asheville has not presented any argument regarding this fourth ground as "an alternative basis in law for supporting the [injunction]," N.C. R. App. P. 10(c), and, therefore, it is not preserved.

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- A. The General Assembly has plenary power regarding the political subdivisions in our State, except as restricted by the state and federal constitutions.

The plenary police power of the State is “vested in and derived from the people,” *N.C. Const. Article I, § 2*; and “an act of the people *through their representatives in the legislature* is valid unless prohibited by [the State] Constitution.” *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989) (emphasis added). *See also Hart v. State*, ___ N.C. ___, ___, 774 S.E.2d 281, 287 (2015) (stating that the North Carolina Constitution “is not a grant of power, but [rather] a *limit* on the otherwise plenary police power of the State”); *Painter v. Wake County Bd. of Educ.*, 288 N.C. 165, 177, 217 S.E.2d 650, 658 (1975) (stating that “[a]n act of our General Assembly is legal when [the North Carolina] Constitution contains no prohibition against it”).

The General Assembly’s power includes the authority to organize and regulate the powers of our State’s municipalities and other political subdivisions. *See N.C. Const. art. VII, §1* (recognizing that the General Assembly has the power to regulate our towns and cities “except as [] prohibited by [our state] Constitution”). Our Supreme Court has repeatedly recognized this power. For example, in two cases in which Asheville was a party, the Court stated that the powers of a municipality “may be changed, modified, diminished, or enlarged [by the General Assembly, only] subject to the constitutional limitations,” *Candler v. City of Asheville*, 247 N.C. 398, 407, 101 S.E.2d 470, 477 (1958), and that the authority accorded a municipality “may be withdrawn entirely at the will or pleasure of the [General Assembly],” *Rhodes v. Asheville*, 230 N.C. 134, 140, 52 S.E.2d 371, 376 (1949). *See also In re Ordinance*, 296 N.C. 1, 16-17, 249 S.E.2d 698, 707 (1978) (“Municipalities have no inherent powers; they have only such powers as are delegated to them by [our General Assembly]”); *Highlands v. Hickory*, 202 N.C. 167, 168, 162 S.E. 471, 471 (1932) (“[Municipalities] . . . are the creatures of the legislative will, and are subject to its control”).

Here, the General Assembly has sought to exercise its power over political subdivisions by enacting the Transfer Provision, which (1) creates a new political subdivision in Buncombe County (an MWSD), (2) withdraws from Asheville authority to own and operate a public water system, and (3) transfers Asheville’s water system to the MWSD, all without Asheville’s consent and without compensation to Asheville.

Early last century, our Supreme Court recognized our General Assembly’s power to withdraw from the City of Charlotte its authority

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to operate its public water system and to transfer this system to a new political subdivision:

It is clear that the Legislature may, in aid of municipal government or for the purpose of discharging any municipal functions, or for any proper purpose, create municipal boards and confer upon them such powers and duties as in its judgment may seem best. . . . The Legislature has frequently exercised the power conferred by the Constitution by establishing boards of health in towns and cities, school boards and such others as may be deemed wise as additional government agencies. *We do not understand that this power is questioned, or that the title to the [public water system] purchased by [Charlotte] did not pass to and vest in the board of water commissioners established by the act [of the Legislature].*

Brockenbrough v. Board of Water Comm'rs., 134 N.C. 1, 17, 46 S.E. 28, 33 (1903). The Court recognized that the waterworks of a municipality are, in fact, "held in trust for the use of the city." *Id.* at 23, 46 S.E. at 35. Additionally:

There is no prohibition . . . against the creation by the Legislature of every conceivable description of corporate authority and to endow them with all the faculties and attributes of other pre-existing corporate authority. Thus, for example, there is nothing in the Constitution of this State to prevent the Legislature from placing the police department of [a municipality] or its fire department or its waterworks under the control of an authority which may be constituted for such purpose.

Brockenbrough, 134 N.C. at 18, 46 S.E. at 33. The Court noted that even the city of Charlotte, the plaintiff in *Brockenbrough*, "conced[ed] the power of the Legislature to establish [a separate] board of water commissioners and to transfer to the said board the [waterworks] property of the city." *Id.* at 18, 46 S.E. at 33.

Accordingly, *unless prohibited by some provision in the state or federal constitutions*, our General Assembly has the power to create a new political subdivision, to withdraw from Asheville authority to own and operate a public water system, and to transfer Asheville's water system to the new political subdivision.

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B. The three constitutional restrictions on the General Assembly's power cited by the trial court do not apply to the enactment of the Transfer Provision.

Asheville argues that the trial court correctly concluded that the Transfer Provision violates our state constitution. In our *de novo* review of the trial court's conclusions, we are guided by the following:

Our courts have the power to declare an act of the General Assembly unconstitutional. *See Hart*, ___ N.C. at ___, 774 S.E.2d at 284; *Bayard v. Singleton*, 1 N.C. 5 (1787).

We must not declare legislation to be unconstitutional unless "the violation is *plain and clear*," *Hart*, ___ N.C. at ___, 774 S.E.2d at 284 (emphasis added). We are to "indulge every presumption in favor of [an act's] constitutionality" and that "all reasonable doubt will be resolved in favor of its validity." *Painter*, 288 N.C. at 177, 217 S.E. at 658.

We are not to be concerned with the "wisdom and expediency" of the legislation, but whether the General Assembly has the "power" to enact it. *In re Denial*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982). As our Court has recognized in an opinion authored by Judge (now Chief Justice) Mark Martin, "courts have no authority to inquire into the *motives* of the [General Assembly] in the incorporation of [a] political subdivision[.]" *Bethania Town v. City of Winston-Salem*, 126 N.C. App. 783, 786, 486 S.E.2d 729, 732 (1997) (emphasis added).

And, finally, the burden in this case rests with Asheville to show beyond a reasonable doubt that the Transfer Provision violates some constitutional provision.

We now address the three constitutional grounds relied upon by the trial court in striking down the Transfer Provision.

1. Article II, Section 24 – Prohibition against certain types of local laws.

[2] Asheville argues, and the trial court concluded, that the Transfer Provision violates *Article II, Section 24(1)(a)* and *(e)* of our state constitution, which prevents the General Assembly from enacting certain types of local laws. We disagree.

Taking effect in 1917, *Article II, Section 24* restricts the otherwise plenary power of our General Assembly to enact so-called "local" laws, by declaring void any "local" law concerning any of 14 "prohibited subjects"

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enumerated in that provision. *N.C. Const. art. II, § 24(1)(a)-(n)*. Therefore, a law violates this constitutional provision *only* if it is deemed “local” *and* if it falls within the ambit of one of the 14 “prohibited subjects.”

In the present case, the trial court held that the Transfer Provision is a local law and that it falls within the ambit of two “prohibited subjects”: Laws “relating to health [or] sanitation” and laws “relating to non-navigable streams[.]” *N.C. Const. art. II, § 24(1)(a), (e)*.

Our Supreme Court has stated that a law is either “general” or “local,” but there is “no exact rule or formula” which can be universally applied to make the distinction. *Williams v. Blue Cross*, 357 N.C. 170, 183, 581 S.E.2d 415, 425 (2003). However, in the present case, we need not reach whether the Transfer Provision constitutes a “local law.” Rather, we hold that it is not *plain and clear* and *beyond reasonable doubt* that the Transfer Provision falls within the ambit of either prohibited subject identified by the trial court.

Seven years ago, our Court grappled with this issue in a case involving these same parties and a constitutional challenge of three statutes regulating the Asheville Water System. *City of Asheville v. State of North Carolina*, 192 N.C. App. 1, 665 S.E.2d 103 (2008).

In the 2008 case, Asheville argued that every law which concerns a water or sewer system “*necessarily* relate[s] to health and sanitation” within the ambit of *Article II, Section 24(1)(a)*. *City of Asheville*, 192 N.C. App. at 32, 665 S.E.2d at 126. Writing for this Court, our former Chief Judge John Martin rejected Asheville’s argument, holding that “the mere implication of water or a water system in a legislative enactment does not necessitate a conclusion that it relates to health and sanitation in violation of the Constitution.” *Id.* at 37, 665 S.E.2d at 129.

Rather, we concluded that our Supreme Court precedent instructs that a local law is not deemed to be one “relating to health [or] sanitation” unless (1) the law plainly “state[s] that *its purpose is to regulate* [this prohibited subject],” or (2) the reviewing court is able to determine “that the purpose of the act is to regulate [this prohibited subject after] careful perusal of the entire act”. *Id.* at 33, 665 S.E.2d at 126 (quoting *Reed v. Howerton*, 188 N.C. 39, 44, 123 S.E. 479, 481 (1924)). We noted that the best indications of the General Assembly’s purpose are “the language of the statute, the spirit of the act, and what the act seeks to accomplish.” *City of Asheville*, 192 N.C. App. at 37, 665 S.E.2d at 129 (quoting *State ex rel. Comm’r of Ins. v. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980)).

Following *Reed* and our 2008 case, we first look to see if the Water/Sewer Act expressly states that its purpose is to regulate health or sanitation, and conclude that it does not. Rather, the Act's *stated* purpose is to address concerns regarding the quality of the service provided to the customers of public water and sewer systems:

Whereas, regional water and sewer systems provide reliable, cost-effective, *high-quality* water and sewer *services* to a wide range of residential and institutional customers; and

Whereas, in an effort to ensure that the citizens and businesses of North Carolina are provided with the *highest quality services*, the State recognizes the value of regional solutions for public water and sewer for large public systems; Now, therefore,

The General Assembly of North Carolina enacts

2013 N.C. Sess. Laws 50 (emphasis added).

We next peruse the entire Water/Sewer Act to determine whether it is plain and clear that the Act's purpose is to regulate health or sanitation. We find that there are no provisions in the Act which "contemplate[] . . . prioritizing the [Asheville Water System's] health or sanitary condition[.]" See *City of Asheville*, 192 N.C. App. at 36-37, 665 S.E.2d at 128. In fact, a provision in the Act allows for the "denial or discontinuance of [water and sewer] service" by an MWSO based on a customer's non-payment, see N.C. Gen. Stat. § 162A-85.13(c), which, as in the 2008 case, belies Asheville's argument that the purpose of the Act relates to health and sanitation. See *City of Asheville*, 192 N.C. App. at 35, 665 S.E.2d at 127. Rather, the provisions in the Water/Sewer Act appear to prioritize concerns regarding the governance over water and sewer systems and the quality of the services rendered. See N.C. Gen. Stat. § 162A-85.1, *et seq.*

Following this same analysis, we hold that the Water/Sewer Act does not fall within the ambit of the phrase "relating to non-navigable streams." The mere implication in legislation of a public water system which happens to derive water from a non-navigable stream "does not necessitate a conclusion that [the legislation] relates to [non-navigable streams] in violation of the Constitution." *City of Asheville*, 192 N.C. App. at 37, 665 S.E.2d at 129. There is nothing in the Water/Sewer Act which suggests that its purpose is to address some concern regarding a non-navigable stream.

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Asheville cites five cases from our Supreme Court to argue that the Transfer Provision is a law “relating to health [or] sanitation,” which we now address:

The most compelling of these case is *Drysdale v. Prudden*, 195 N.C. 722, 143 S.E. 530 (1928). *Drysdale* appears to stand for the proposition that an act which establishes a sanitary district (to provide public water/sewer service) is a local law *and* relates to health and sanitation. However, on closer look, the *Drysdale* Court only bases its ruling on the fact that the act is a local law – the Court never makes any determination regarding which of the 14 “prohibited subjects” was implicated by the act; and, therefore we assume that this issue was not put before the Court.

We read *Drysdale* in conjunction with *Reed*, *supra*. Like *Drysdale*, *Reed* is a 1920’s case in which our Supreme Court addresses the constitutionality of a statute creating sanitary districts. *Reed*, 188 N.C. at 42, 123 S.E. at 479-80. However, unlike *Drysdale*, the Court in *Reed* held that the act in question, which (ironically) created sewer districts in Buncombe County, was constitutional. *Id.* at 45, 123 S.E. at 481-82. Specifically, the Court addressed the issue of whether the act was one “relating to health [or] sanitation,” holding that *it was not*, because the language in the act did not suggest this to be the act’s purpose, but rather the act merely sought to create political subdivisions through which sanitary sewer service could be provided. *Id.* at 44, 123 S.E. at 481. The Court then addressed *separately* the issue of whether the act was local, though curiously holding that the act was not local because it applied to the entire county. *Id.* at 45, 123 S.E. at 481-82.

In any event, both cases provide insight on the issue as to whether a law is “local” or “general,” and, admittedly, the Court’s conclusion in *Drysdale* on this issue is more consistent with recent holdings from that Court, while the conclusion on the issue reached in *Reed* – that a law is “general” if it applies throughout one entire county – appears to be somewhat of an outlier. However, *Reed* is more instructive than *Drysdale* in determining whether an act “relat[es] to health [or] sanitation.” *Id.* at 44, 123 S.E. at 481. The Court in *Reed* takes this issue head-on, while in *Drysdale* the Court never addresses the issue. Accordingly, as our Court did in 2008, we follow *Reed* on the issue as to whether a law relates to health or sanitation.

The other cases cited by Asheville do not mandate that we reach a contrary result in the present case. Three of these cases are distinguishable because they deal with legislation that empowers a political

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subdivision with authority to enforce health regulations in a county. See *City of New Bern v. Bd. of Educ.*, 338 N.C. 430, 437-38, 450 S.E.2d 735, 739-40 (1994) (authorizing Craven County to perform building inspections); *Idol v. Street*, 233 N.C. 730, 733, 65 S.E.2d 313, 315 (1951) (creating a city-county board of health in Forsyth County); *Sams v. Bd. of County Comm'rs*, 217 N.C. 284, 285, 7 S.E.2d 540, 541 (1940) (creating a county board of health in Madison County). In the present case, however, the Transfer Provision does not empower anyone to enforce health regulations, nor does it impose any health regulations on the Asheville Water System. Rather, similar to the act at issue in *Reed*, it merely creates the political subdivision through which public water and sewer systems may be provided in Buncombe County. *Reed*, 188 N.C. at 44, 123 S.E. at 481.

The fifth case cited by Asheville, *Lamb v. Bd. of Educ.*, is also not controlling. 235 N.C. 377, 70 S.E.2d 201 (1952). In *Lamb*, our Supreme Court declared unconstitutional an act which imposed a duty on the Randolph County Board of Education to provide “a sewerage system and an adequate water supply” for its schools. *Id.* at 379, 70 S.E.2d at 203. The Court held that this legislation *did* relate to health and sanitation because it was clear that “its sole purpose” was to make sure that school children in Randolph County had access to “healthful conditions” while at school. *Id.* The Water/Sewer Act, however, does not require any political subdivision to continue operating a water or sewer system.

2. Article I, Section 19 – “Law of the Land” Clause/Equal Protection

[3] Asheville argues, and the trial court concluded, that the Transfer Provision violated the “law of the land” clause contained in *Article I, Section 19* because there is no “rational basis” in treating Asheville differently from other municipalities operating public water systems and because there is no “rational basis” in transferring Asheville’s water system to another political subdivision. We disagree.

The trial court cites *Asbury v. Albemarle*, 162 N.C. 247, 78 S.E. 146 (1913), as authority for its holding. In *Asbury*, our Supreme Court stated that our General Assembly “is under the same constitutional restraints that are placed upon it in respect of private corporations” when exercising power regarding a municipality’s exercise of a proprietary function. *Id.* at 253, 78 S.E. at 149. However, we do not read *Asbury* as restricting the General Assembly’s authority to *withdraw* authority from a political subdivision to engage in a proprietary function, a power recognized in *Article VII, Section 1* and in a number of other Supreme Court decisions. Rather, *Asbury* addresses the limitations to the General Assembly’s

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power to *manage* certain aspects of a municipality's water system, standing for the propositions that (1) the General Assembly has the authority to *empower* a municipality to operate a public water system (or other proprietary endeavor); (2) the General Assembly, however, cannot *compel* a municipality to operate a water system (or other proprietary endeavor); and (3) where a municipality which has been empowered *and* has decided to operate a public water system, the General Assembly may regulate but cannot otherwise "control the exercise of [] discretion by the municipality" in operating the system. *Id.* at 255, 78 S.E. at 150.

Our holding here is not at odds with *Asbury*. The Transfer Provision does not *compel* Asheville to operate a water system nor does it seek to interfere with Asheville's *discretion* in running a water system. Rather, the General Assembly is exercising its power to *withdraw* from Asheville its authority to own and operate a public water system. *See Candler*, 247 N.C. at 407, 101 S.E.2d at 477 (recognizing the General Assembly's power to "diminish" the powers of a municipality).

Asheville contends, and the trial court agreed, that the General Assembly had no "rational" basis for *singling out* Asheville in the Transfer Provision. Assuming that the Transfer Provision has this effect, we believe that the fact that the General Assembly irrationally singles out one municipality in legislation merely means that the legislation is a "local" law; it does not render the legislation unconstitutional, *per se*. *See City of New Bern v. New Bern-Craven County Bd. of Educ.*, 338 N.C. 430, 435-36, 450 S.E.2d 735, 738-39 (holding that a law is local if there is no "rational basis reasonably related to the objective of the legislation" for singling out the class to whom the law applies); *McIntyre v. Clarkson*, 254 N.C. 510, 519, 119 S.E.2d 888, 894 (1961) (establishing the "reasonable classification" method to determine whether a law is general or local). As previously noted, the General Assembly can enact a local law concerning municipalities so long as the law does not fall within one of the 14 prohibited subjects enumerated in *Article II, Section 24* of our state constitution. *See City of Asheville*, 192 N.C. App. at 32, 665 S.E.2d at 126 (sustaining statutes regulating the Asheville Water System though concluding that the singling out of Asheville was not based on any rational basis).

We are persuaded by decisions from the United States Supreme Court holding that municipalities do not have Fourteenth Amendment rights concerning acts of the legislature, *Ysursa v. Pocatello Educ. Assoc.*, 555 U.S. 353, 363 (2009) (holding that unlike a private corporation, a municipality "has no privileges or immunities under the federal

constitution which it may invoke in opposition to the will of its creator [the legislature]”), a rule which applies even when legislation affects a municipality’s exercise of a proprietary function, such as operating a water system. *See Trenton v. New Jersey*, 262 U.S. 182, 190-91, 67 L. Ed. 937, 942 (1923) (holding that the distinction between a municipality acting “as an agent for the State for governmental purposes and as an organization to care for the local needs in a private or proprietary capacity . . . furnishes no ground to invoke [the Fourteenth Amendment of the United States]”); *see also Williams v. Baltimore*, 289 U.S. 36, 40, 77 L. Ed. 1015, 1020-21 (1933); *Rogers v. Brockette*, 588 F.2d 1057, 1067-68 (1979) (citing additional United States Supreme Court authority).

Finally, the trial court concludes that the Transfer Provision violates the “law of the land” clause because there is no rational basis between the purpose of the Act (to ensure that citizens and businesses are provided with the highest quality of services) and requiring the involuntary transfer of the Asheville Water System to an MWSD. The trial court lists reasons why it believes that the Transfer Provision will not accomplish a legitimate purpose. However, the State suggests a number of rational bases for the Transfer Provision. For instance, the Transfer Provision was included to provide better governance of the Asheville Water System, a system which has had a contentious history with customers residing outside Asheville’s city limits: The Transfer Provision allows the Asheville Water System to be governed by a political subdivision whose representatives are selected from all areas served by the System, as opposed to being governed by Asheville’s city council, which is chosen only by those living within Asheville’s city limits. It is not our role to second-guess “the wisdom [or] expediency” of the Transfer Provision, as long as there is some rational basis in that provision to accomplish some valid public purpose. *See In re Denial*, 307 N.C. at 57, 296 S.E.2d at 284.

Accordingly, we reverse the conclusion of the trial court that the Transfer Provision violates the “law of the land” clause in our state constitution.

3. Article I, Sections 19 and 35 – Taking of Asheville’s Property

[4] Asheville argues, and the trial court held, that the Transfer Provision exceeded the State’s authority to take property, or, in the alternative, to take property without paying just compensation in violation of *Article I, Sections 19 and 35* of our state constitution. We disagree.

Article I, Section 19 of our state constitution states that no person shall be “deprived of . . . property, but by the law of the land,” and *Article I,*

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Section 35 states that “[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.”

The trial court concluded that the Transfer Provision violates the above cited sections in two respects: First, the Transfer Provision was “not a valid exercise of the sovereign power of the [General Assembly] to take or condemn property for a public use” because the transfer of Asheville’s water system to the MSD would not result in any “change in the existing uses or purposes currently served by the [system]”; and *second*, even if the General Assembly had the power to “condemn” Asheville’s water system, it deprived Asheville of its constitutional right to receive “just compensation.”

On the first issue, we note that our Supreme Court has recognized the authority of our General Assembly to divest a city of its authority to operate a public water system and transfer the authority and assets thereof to a different political subdivision. *See Brockenbrough*, 134 N.C. at 19, 46 S.E. at 33 (recognizing that the waterworks of a municipality are, in fact, held “in trust for the use of the city”).

Our United States Supreme Court has held that there is no constitutional prohibition against a State withdrawing from a municipality the authority to own and operate a public water system and transferring the municipality’s system to another political subdivision “without compensation” to the municipality or “without the consent” of the municipality’s citizens:

The diversion of waters from the sources of supply for the use of the inhabitants of the State is a proper and legitimate function of the State. This function . . . may be performed directly [by the State]; or it may be delegated to bodies politic created for that purpose, or to the municipalities of the State. . . .

. . . . The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies. . . . All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.

Trenton v. New Jersey, 262 U.S. at 186, 67 L. Ed. at 940. *See also Hunter v. Pittsburgh*, 207 U.S. 161, 178-79, 52 L. Ed. 151, 159-60 (1907). The *Trenton* Court specifically addressed that its holding applied even to

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State action concerning a municipality acting in a proprietary capacity. *Trenton*, 262 U.S. at 191, 67 L.E. at 943.

Our holding today is consistent with holdings from around the United States. As the treatise *McQuillan on Municipal Corporations* recognizes, “it is generally held that transferring property and authority by act of the legislature from [a city] to another where the property is still devoted to its original purpose, does not invade the vested rights of the city.” *McQuillan*, sec. 4.133, Vol. 2. Indeed, the Minnesota Supreme Court has stated:

“[a]s to property held in a proprietary or private capacity, in trust for the benefit of township inhabitants for certain designated purposes, the legislature may provide for the transfer thereof from the officers of such municipality to different trustees, with or without consent of the municipality and without compensation to it.

Bridgie v. Koochiching, 35 N.W.2d 537, 540 (1948). Likewise, the Pennsylvania Supreme Court has stated:

The Commonwealth has absolute control over such agencies and may add to or subtract from the duties to be performed by them, or may abolish them and take property with which the duties were performed without compensating the agency thereof.

Chester County v. Commonwealth, 17 A.2d 212, 216 (1941). *See also Orleans Parish v. New Orleans*, 56 So.2d 280, 284; *Hickey v. Burke*, 69 N.E.2d 33 (1946) (Ohio court recognizing power to “relieve [a] municipality of [certain] duties and withdraw the power. If property has been acquired, it may shift the title and control to other agencies[.] . . . without compensation”).

None of the cases cited by Asheville in its argument address the situation where the General Assembly acts to take the property of a municipality used to carry on a proprietary function and transfers it to another political subdivision to carry out the same function. For instance, *State Hwy. Comm’n v. Greensboro Bd. of Educ.*, 265 N.C. 35, 143 S.E.2d 87 (1965) and *Bd. of Transp. v. Charlotte Park & Rec. Comm’n*, 38 N.C. App. 708, 248 S.E.2d 909 (1978) merely stand for the proposition that where one governmental agency charged with building roads condemns the property of another agency who owns property for purposes unrelated to building roads, the condemning agency must pay just compensation.

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Accordingly, we hold that the Transfer Provision does not constitute an unlawful taking without just compensation.

V. Conclusion

In conclusion:

We affirm the portion of the trial court's order denying the State's motion to dismiss, rejecting the State's argument that Asheville lacked standing or capacity to challenge the validity of the Transfer Provision.

We reverse the trial court's grant of summary judgment for Asheville on its first claim for relief, which declared that the Transfer Provision constitutes a local act relating to health, sanitation or non-navigable streams in violation of *Article II, Sections 24(1)(a) and (e)* of our state constitution. Specifically, we hold that, assuming it is a local act, it does not "relate to" health, sanitation, or non-navigable streams within the meaning of our state constitution. We also reverse the trial court's denial of the State's motion for summary judgment on this claim, and direct the court on remand to enter summary judgment in favor of the State on this claim.

We reverse the trial court's grant of summary judgment for Asheville on its second claim for relief, which declared that the Transfer Provision violates the "law of the land" clause in *Article I, Section 19* of our state constitution. We also reverse the trial court's denial of the State's motion for summary judgment on this claim, and direct the court on remand to enter summary judgment in favor of the State on this claim.

We reverse the trial court's grant of summary judgment for Asheville on its third claim for relief, which declared that the Transfer Provision violates *Article I, Sections 19 and 35* of our state constitution, as an invalid exercise of power to take or condemn property. We also reverse the trial court's grant of summary judgment on Asheville's sixth claim for relief, which, in the alternative to the injunction, awarded Asheville money damages for the taking of the Asheville Water System. We also reverse the trial court's denial of the State's motion for summary judgment on these claims, and direct the court on remand to enter summary judgment in favor of the State on these claims.

We reverse the trial court's order enjoining the enforcement of the Transfer Provision.

We do not reach any conclusion regarding Asheville's fourth and fifth claims for relief, in which Asheville contends that the enforcement of the Transfer Provision would impermissibly impair obligations of contract

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in violation of our state and federal constitutions and in violation of N.C. Gen. Stat. § 159-93. The trial court made no rulings on these claims, and Asheville did not take advantage of Rule 10(c) of our Rules of Appellate Procedure, which allows an appellee to propose issues which form “an alternate basis in law for supporting the order[.]” Therefore, any argument by Asheville based on these claims for relief are waived.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges CALABRIA and ELMORE concur.

EMPLOYMENT STAFFING GROUP, INC., PLAINTIFF
v.
MONICA LITTLE A/K/A MONICA PHILLIPS THOMAS, DEFENDANT

No. COA15-171

Filed 6 October 2015

1. Contracts—non-compete covenant—parol evidence—contract silent on essential term

The Court of Appeals affirmed the trial court’s preliminary injunction order prohibiting defendant, a former employee of plaintiff, from engaging in certain competition with plaintiff. A payment of \$100 to defendant in exchange for her signing the covenant not to compete rendered the covenant binding and enforceable. The parol evidence rule did not prohibit the trial court from considering parol evidence of the \$100 consideration where the contract was silent as to this essential term.

2. Employer and Employee—non-compete covenant—\$100 consideration—pressure to sign

The Court of Appeals affirmed the trial court’s preliminary injunction order prohibiting defendant, a former employee of plaintiff, from engaging in certain competition with plaintiff. The court rejected defendant’s argument that a \$100 payment by plaintiff was insufficient consideration to support the covenant not to compete. Even though defendant may have felt pressure to sign the agreement in order to continue her employment, the court has enforced non-compete agreements in similar circumstances in absence of fraud.

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Appeal by Defendant from order entered 22 December 2014 by Judge Forrest D. Bridges in Cleveland County Superior Court. Heard in the Court of Appeals 26 August 2015.

Harris & Hilton, P.A., by Nelson G. Harris, for Defendant-Appellant.

McGuireWoods LLP, by Jason D. Evans and Andrew D. Atkins, for Plaintiff-Appellee.

INMAN, Judge.

Monica Little (“Defendant”) appeals the trial court’s order granting Employment Staffing Group’s (“Plaintiff’s”) motion for a preliminary injunction, contending that the consideration given for the covenant not to compete within the parties’ employment agreement was illusory and inadequate. After careful review, we hold that a monetary payment to Defendant in exchange for her signing the Employment Agreement rendered the covenant binding and enforceable, and therefore affirm the decision below. In the context of a non-compete covenant, the parol evidence rule does not prohibit the trial court from considering parol evidence of consideration when the written contract is silent as to this necessary and essential term.

Factual and Procedural Background

On 13 June 2014, Defendant, who had been working for Plaintiff since September 2001, signed an Employment Agreement containing a covenant titled “Limitation on Competition” (the “non-compete covenant”). The non-compete covenant prohibited Defendant from performing for any competing business within a 50-mile radius of Plaintiff’s base locations for a period of one year following Defendant’s termination any “Protected Duties,” defined as those duties Defendant performed for Plaintiff in the two years before her termination. The non-compete covenant also contained a “Limitation on Solicitation” provision, which prohibited Defendant from soliciting Plaintiff’s customers for a period of two years following her termination.¹ Although the non-compete

1. The Employment Agreement also contained a provision prohibiting Defendant from disclosing confidential information and trade secrets, and the trial court’s order granting Plaintiff’s preliminary injunction enforced this provision in addition to the non-compete covenant. However, Defendant’s argument on appeal focuses solely on the non-compete covenant and whether it was supported by valuable consideration, a separate analysis from that involved in determining the likelihood of success on a misappropriation of trade secrets claim. *Compare Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 596, 424 S.E.2d 226, 230 (1993) (analyzing the plaintiff’s likelihood of success on its

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covenant does not contain any discussion of consideration, it is undisputed that Plaintiff's human resources director told Defendant that she would be paid \$100 for executing the Employment Agreement and that, on 17 June 2014, \$100 was directly deposited by Plaintiff into Defendant's bank account.

On 17 November 2014, Plaintiff filed suit against Defendant, claiming breach of the Employment Agreement, conversion, tortious interference with contractual relations, misappropriation of trade secrets, and unfair and deceptive trade practices. The complaint sought compensatory, punitive, and treble damages as well as injunctive relief. On 25 November 2014, Plaintiff moved for a preliminary injunction. According to the allegations in Plaintiff's Motion for a Preliminary Injunction, Defendant had left Plaintiff's employ and shortly thereafter begun soliciting Plaintiff's customers to her new employer, Atlantic Staffing Consultants. Plaintiff's Motion came on for hearing on 5 December 2014.² After hearing arguments, Judge Bridges concluded that "there is a reasonable likelihood that [Plaintiff] will prevail on its claims" and entered an order prohibiting Defendant from:

2. Soliciting or having any further business contact, directly or indirectly, with Ultra-Mek, Inc., any other ESG customer, and any employees of any such company. . . .

misappropriation of trade secrets by determining whether the plaintiff established a *prima facie* case of misappropriation by showing that: "(1) [the] defendant knows or should have known of the trade secret; and (2) [the] defendant has had a specific opportunity to acquire the trade secret"), and *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 510-11, 606 S.E.2d 359, 364 (2004) (clarifying that "[t]o plead misappropriation of trade secrets, a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur") (internal citation omitted), with *Horner Int'l Co. v. McKoy*, __ N.C. App. __, __, 754 S.E.2d 852, 856-58 (2014) (analyzing the likelihood of the plaintiff's success on his breach of a non-compete agreement by determining the validity of the non-compete agreement). Defendant's failure to advance any argument challenging the trade secret and confidential information provision of the injunctive order constitutes waiver of the issue on appeal. See *Hammond v. Saini*, __ N.C. App. __, __, 748 S.E.2d 585, 592 n.5 (2013).

2. In its injunction order, the trial court noted that previously, on 26 November 2014, it had entered an injunction prohibiting Defendant from soliciting Plaintiff's customers and competing with Plaintiff. However, despite receiving notice of the preliminary injunction hearing, Defendant had failed to appear. Based on his "concern about entering a preliminary injunction that would operate during the pendency of this matter without providing [Defendant] with an opportunity to request an additional hearing[.]" Judge Bridges allowed Defendant to request that the November injunction be dissolved for good cause, which she did, and treated the 5 December 2014 hearing on Defendant's Motion for Relief as a hearing on Plaintiff's Motion for a Preliminary Injunction, giving Defendant the opportunity to argue that Plaintiff was not likely to succeed on its asserted claims.

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3. Competing or attempting to compete with ESG in the staffing service industry on her own behalf or on behalf of any other employment staffing firm, directly or indirectly, by performing any duties that she performed within the 730 days immediately preceding her termination from ESG on July 21, 2014. . . .

Defendant timely appeals.

Appealability

“A preliminary injunction is interlocutory in nature, which means that an order issuing a preliminary injunction cannot be appealed prior to [a] final judgment absent a showing that the appellant has been deprived of a substantial right which will be lost should the order escape appellate review before final judgment.” *Copypro, Inc. v. Musgrove*, __ N.C. App. __, __, 754 S.E.2d 188, 191 (2014) (internal quotation marks omitted). However, as our Supreme Court has noted:

where time is of the essence, the appellate process is not the procedural mechanism best suited for resolving the dispute. The parties would be better advised to seek a final determination on the merits at the earliest possible time. Nevertheless, because this case presents an important question affecting the respective rights of employers and employees who choose to execute agreements involving covenants not to compete, we have determined to address the issues.

A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983); see also *Horner Int’l Co. v. McKoy*, __ N.C. App. __, __, 754 S.E.2d 852, 855 (2014). Because this case presents a time-sensitive issue as to both Plaintiff’s and Defendant’s rights under the Employment Agreement and has a substantial effect on their livelihoods, we address the merits of Defendant’s appeal.

Standard of Review

The standard of review from a preliminary injunction is essentially *de novo*. Thus, on appeal from an order of a superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself. Nevertheless, a trial court’s ruling on a motion for a preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous.

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Horner Int'l Co., ___ N.C. App. at ___, 754 S.E.2d at 855 (internal citations and quotation marks omitted).

As a general rule, a preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

A.E.P., 308 N.C. at 401, 302 S.E.2d at 759-60 (internal citation omitted).

Analysis

Defendant contends that Plaintiff is not likely to succeed on the merits because the non-compete covenant was unenforceable due to lack of consideration. Specifically, Defendant alleges that the \$100 Plaintiff paid her was illusory because it was not mentioned in the non-compete covenant or anywhere else in the Employment Agreement. Furthermore, Defendant, distinguishing *Hejl v. Hood, Hargett & Associates, Inc.*, 196 N.C. App. 299, 303-305, 674 S.E.2d 425, 428-29 (2009), where this Court found \$500 to constitute adequate consideration, argues that the parties in the present case did not contract "at arms length [sic]" because Defendant was already an employee at the time she signed the Employment Agreement and entering into the Employment Agreement "was a condition to continued employment."

A covenant not to compete is valid if the covenant is: "(1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy." *Hejl*, 196 N.C. App. at 303-04, 674 S.E.2d at 428 (internal quotation marks omitted). "[I]f an employment relationship already exists without a covenant not to compete, any such future covenant must be based upon new consideration." *Milner Airco, Inc. v. Morris*, 111 N.C. App. 866, 869, 433 S.E.2d 811, 813 (1993).

I. Illusory Consideration

The Employment Agreement specified in writing all essential terms of the non-compete covenant except consideration. However, contemporaneous with the execution of the written contract, the parties entered into a separate oral agreement as to the amount of consideration

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Plaintiff would pay Defendant for signing the non-compete agreement. Defendant relies on the Employment Agreement's merger clause that "[t]his [Employment] [A]greement embodies the entire agreement of the parties relating to the subject matter in this Agreement" to support her claim that the trial court is prohibited from considering any separate oral agreement as to consideration to determine whether the non-compete agreement is enforceable. Thus, the issue is whether the trial court could consider evidence of the parties' outside negotiations as to consideration even though the Employment Agreement contained a merger clause.

As our Court has noted, "merger clauses were designed to effectuate the policies of the Parol Evidence Rule; i.e., barring the admission of prior and contemporaneous negotiations on terms inconsistent with the terms of the writing. North Carolina recognizes the validity of merger clauses and has consistently upheld them." *Zinn v. Walker*, 87 N.C. App. 325, 333, 361 S.E.2d 314, 318 (1987). The parol evidence of the consideration in the present case is not inconsistent with the terms of the Employment Agreement, but it is needed to establish a necessary element for a valid covenant not to compete. In other words, the evidence is necessary to show the existence of a complete contract. "The parol evidence rule excludes prior or contemporaneous oral agreements which are inconsistent with a written contract if the written contract contains the complete agreement of the parties." *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 436, 617 S.E.2d 664, 670 (2005) (internal quotation marks omitted). As our Supreme Court has clarified,

[t]his rule applies where the writing totally integrates all the terms of a contract or supersedes all other agreements relating to the transaction. *The rule is otherwise where it is shown that the writing is not a full integration of the terms of the contract. The terms not included in the writing may then be shown by parol.*

Craig v. Kessing, 297 N.C. 32, 35, 253 S.E.2d 264, 265-66 (1979) (emphasis added).³ In *Craig*, the contract at issue had to also be in writing, see N.C. Gen. Stat. § 22-2, similar to the written requirement for non-compete agreements.

3. We note that our Supreme Court's decision appears to conflict with this Court's decision in *R.B. Cronland Bldg. Supplies, Inc. v. Sneed*, 162 N.C. App. 142, 146, 589 S.E.2d 891, 893 (2004). In *R.B. Cronland*, this Court concluded that the parol evidence rule prohibits the consideration of evidence "to supply a missing component of a contract." *Id.* There,

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This Court has previously addressed limitations of the parol evidence rule in the employment contract context. In *Hall v. Hotel L'Europe, Inc.*, 69 N.C. App. 664, 666, 318 S.E.2d 99, 101 (1984), the parties had an employment contract which was partly written and partly parol. They stipulated and admitted that there were significant and essential terms of the employment agreement that they had agreed upon but were not included in the written contract—specifically, a definite term for the duration of employment. *Id.* This Court noted that “[t]he parol evidence rule presumes finality with respect only to the written terms in the agreement. Other significant and essential terms, the presence of which was stipulated by the parties, can be established by using parol evidence without violating the rule.” *Id.* Accordingly, the Court held that “the term of employment was properly established with parol evidence.” *Id.*

Similarly, in *Beal v. K. H. Stephenson Supply Co., Inc.*, 36 N.C. App. 505, 509, 244 S.E.2d 463, 466 (1978), the parties had an employment contract where “the only element of an enforceable employment contract which [was] definite on the face of the paperwriting [was] the amount of compensation to be paid.” Since the parties agreed that there were other terms that were not included in the written contract, including the employer’s name and the employment duration, parol evidence establishing these missing terms was properly admitted. *Id.*

Here, since the Employment Agreement is *silent* as to consideration, an element necessary to form a binding non-compete agreement is absent—but that element is not precluded by any provision in the written agreement. Furthermore, both parties admitted that Plaintiff offered Defendant \$100 to sign the non-compete covenant, and it is undisputed that Plaintiff actually paid Defendant \$100. Consequently, as in *Hall* and *Beal*, the written non-compete covenant is not fully integrated, and the merger clause and parol evidence rule do not prohibit the trial court from considering the evidence showing the missing essential term of consideration—that Plaintiff paid Defendant \$100 for signing the Employment Agreement. This Court has reached a similar conclusion in a case in which there was no signature on the signature line of the written non-compete agreement. See *New Hanover Rent-A-Car, Inc.*

at issue was a guaranty contract that failed to identify a debtor and did not include a signature of a debtor. *Id.* This Court held that parol evidence of these missing elements was not admissible. *Id.* However, where there is a conflict between an opinion from this Court and one from our Supreme Court, we are bound to follow the Supreme Court’s opinion. See *Crawford v. Commercial Union Midwest Ins. Co.*, 147 N.C. App. 455, 459, n.5, 556 S.E.2d 30, 33 (2001). Thus, we are not bound by *R.B. Cronland* but, instead, must follow the rule enunciated in *Craig*.

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v. Martinez, 136 N.C. App. 642, 646-47, 525 S.E.2d 487, 490-91 (2000) (considering parol evidence to determine whether an employee had signed a non-compete agreement and assented to its terms). In this case, we hold that Defendant's argument that the consideration was illusory because it was not provided for in the Employment Agreement is without merit.

II. Inadequate Consideration

Next, Defendant argues that the non-compete covenant was not supported by adequate consideration. This argument is refuted by well-established case law.

Defendant, citing *Hejl*, 196 N.C. at 304-305, 674 S.E.2d at 429, concedes that "[o]ur Courts have generally not evaluated the adequacy of the consideration for a non-competition agreement entered into after the employment relationship already exists, considering the parties to be the judges of the adequacy of the consideration." However, Defendant contends that because the parties in the instant case did not contract "at arms length [sic]," this Court is authorized to "judge the adequacy of the consideration." Defendant alleges that "arms length [sic]" transactions do not involve "pressure and duress." While it may be true that Defendant felt pressure to sign the non-compete covenant in order to continue her employment, this Court has enforced non-compete agreements under similar circumstances in the absence of fraud. *See generally Hejl*, 196 N.C. App. at 305, 674 S.E.2d at 429 (noting that "the parties dealt at arms length [sic]" even though the plaintiff worked for the defendant at the time he signed the non-compete agreement). Accordingly, we hold that Defendant's argument that this Court may invalidate the non-compete covenant based on the inadequacy of the \$100 consideration is without merit.

Conclusion

For the reasons stated above and based on our review of the record and the applicable law, we affirm the preliminary injunction order.

AFFIRMED.

Judges CALABRIA and STROUD concur.

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WILLIAM THOMAS FOX AND SCOTT EVERETT SANDERS, PLAINTIFFS

v.

MITCHELL JOHNSON, TIMOTHY R. BELLAMY, GARY W. HASTINGS, AND
MARTHA T. KELLY, IN THEIR INDIVIDUAL CAPACITIES, DEFENDANTS

No. COA15-206

Filed 6 October 2015

1. Appeal and Error—appealability—denial of judgment on the pleading

Defendants' interlocutory appeal was properly before the Court of Appeals where the denial of their motion for judgment on the pleadings affected a substantial right. Defendants made a colorable assertion that the claim was barred by collateral estoppel.

2. Judges—one not overruling another—Rule 12(c) and Rule 12(b)(6) motions

A Rule 12(c) order was not an improper "overruling" by a second superior court judge of an earlier superior court judge's Rule 12(b)(6) order where different materials and questions were considered.

3. Collateral Estoppel and Res Judicata—federal and state rule 12(b)(6)

The trial court erred by denying defendants' motion for judgment on the pleadings as to plaintiffs' malicious prosecution claims based on collateral estoppel where plaintiffs' Rule 12(b)(6) motion had been granted in federal court. The standard under Federal Rule 12(b)(6) is a different, *higher* pleading standard than mandated under the North Carolina General Statutes.

Appeal by Defendants from order entered 25 September 2014 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 26 August 2015.

Morrow Porter Vermitsky Fowler and Taylor PLLC, by John C. Vermitsky, for Plaintiffs.

Wilson Helms & Cartledge, LLP, by G. Gray Wilson, Stuart H. Russell, and Lorin J. Lapidus, for Defendants.

STEPHENS, Judge.

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In this appeal, we consider whether Plaintiffs' malicious prosecution claims under North Carolina law brought in Guilford County Superior Court are barred by the doctrine of collateral estoppel as a result of the dismissal under Federal Rule of Civil Procedure 12(b)(6) of certain federal law claims brought in Plaintiffs' earlier federal lawsuit against Defendants. Because we conclude that dismissal of federal claims pursuant to Federal Rule 12(b)(6) is not an adjudication on the merits for purposes of collaterally estopping a plaintiff from raising the same issues under state law in our State's courts, we affirm the trial court's order denying Defendants' motion to dismiss on the basis of collateral estoppel.

Factual and Procedural Background

This appeal arises from claims and counterclaims of racial discrimination, misconduct, and conspiracies by various factions in the Greensboro Police Department ("GPD") and the government of the City of Greensboro ("the City"). In simplified form, some African American GPD officers alleged that a secret unit of Caucasian GPD officers was targeting them for improper investigations based on their race, while some of the accused Caucasian officers denied those allegations and instead asserted that *they* were the victims of racially motivated false claims and criminal charges.

In June 2005, GPD Officer James Hinson and other African American GPD officers accused then-GPD Chief David Wray of using certain Caucasian officers of the Special Investigation Section ("SIS"), a subdivision of the GPD, to surveil and target African American GPD officers. Officially, the SIS was tasked with duties such as protecting celebrities who visited Greensboro, investigating allegations of criminal activities by GPD officers, and handling other sensitive police matters.¹

Hinson alleged that one tool the SIS used in its supposed racial misconduct against African American GPD officers was a binder containing photographs of African American GPD officers known as the "black book." The SIS did in fact have a black binder which contained photo arrays of African American GPD officers, but SIS officers asserted that the photos were only those officers who had been on duty at the time of an alleged sexual assault by a uniformed African American GPD officer and that the binder was shown only to the victim of the alleged sexual assault as part of an SIS investigation into the matter.

1. Prior to June 2005, Hinson himself had been investigated by the SIS for alleged police misconduct.

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After learning of Hinson's claims, Defendant Mitchell Johnson, who was employed by the City first as Assistant City Manager and later as City Manager, and who also served on the City Council, met with attorneys representing some of the African American GPD officers who made the allegations against the SIS. After that meeting, Johnson instructed the City Attorney's Office to initiate an investigation of Plaintiffs William Thomas Fox and Scott Everett Sanders, two Caucasian GPD officers alleged to have been part of the SIS group racially targeting African American officers. Johnson and the City Council also contracted with Risk Management Associates, Inc., ("RMA") to conduct a private investigation of Plaintiffs and the SIS to supplement the official City investigation. Plaintiffs contend that the investigations were initiated by Johnson as part of a plan to pressure Wray into resigning as well as to tarnish Plaintiffs' own reputations and ultimately remove them from their positions with the SIS.

In the midst of the official and private investigations, on 9 January 2006, Wray resigned as GPD Chief, and Defendant Timothy R. Bellamy was appointed as acting Chief and then Chief of the GPD. A few days later, the Federal Bureau of Investigation ("FBI") began its own investigation into the actions of Wray and Plaintiffs. After learning that the FBI investigation revealed no evidence of civil rights violations by Wray, Fox, or Sanders, Bellamy directed Johnson to request an investigation by the State Bureau of Investigation ("SBI"). In the course of its investigation, the SBI interviewed numerous GPD officers, including defendants Gary R. Hastings and Martha T. Kelly. Plaintiffs contend that Bellamy and Johnson sought the SBI investigation despite knowing that the allegations of wrongdoing by Fox and Sanders were false. Plaintiffs further assert that Hastings and Kelly gave false information to the SBI and destroyed and/or refused to turn over to the SBI evidence and information that was favorable to Fox and Sanders. The SBI investigation concluded in the fall of 2007, and resulted in the indictment of Fox on one count each of felonious obstruction of justice and felonious conspiracy, while Sanders was indicted on one count of accessing a government computer without authorization, two counts of felonious obstruction of justice, and one count of felonious conspiracy.

Following a trial in February 2009, a jury found Sanders not guilty of improperly accessing a government computer. As a result of a post-trial *Brady*² motion by Sanders, previously undisclosed statements came to

2. A criminal defendant is entitled to production of all government evidence favorable to him. *See Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963).

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light, leading to the dismissal of all the remaining charges against both Plaintiffs. Plaintiffs contend those exculpatory statements had been intentionally and maliciously suppressed by Hastings and Kelly, among others, as part of a conspiracy against Plaintiffs.

Plaintiffs filed a complaint on 23 March 2010 against Johnson, Bellamy, Hastings, and Kelly, as well as the City, RMA, and GPD officers John Slone and Ernest Cuthbertson (collectively, “the federal defendants”) in the United States District Court for the Middle District of North Carolina. *See Fox v. City of Greensboro*, 807 F. Supp. 2d 476 (2011). In their complaint, Plaintiffs alleged claims for

violation of 42 U.S.C. § 1981 by the City and Johnson (Counts Two & Three); violation of the Fourth Amendment by the City, Johnson, Bellamy, Hastings, and Kelly (Counts Four & Five); and violation of 42 U.S.C. § 1985 by Johnson, Bellamy, Hastings, Kelly, Slone, Cuthbertson, and RMA (Counts Six & Seven). Plaintiffs also allege[d] a variety of state-law claims against various combinations of Defendants: declaratory judgment regarding indemnification of litigation expenses (Count One); malicious prosecution (Counts Eight and Nine); abuse of process (Counts Ten and Eleven); negligence (Count Twelve); defamation (Count Thirteen); civil conspiracy (Counts Fourteen and Fifteen); and punitive damages (Count Sixteen).

Id. at 483-84. After the federal defendants moved to dismiss, Plaintiffs sought and were granted leave by the federal court to amend their complaint to “clarify and amplify the factual basis for their allegations.” *Id.* at 501. Plaintiffs filed their amended complaint on 1 April 2011. The federal defendants then moved to dismiss the amended complaint, including, *inter alia*, Plaintiffs’ claims “that the City, Johnson, Bellamy, Hastings, and Kelly took certain actions . . . that led to ‘unfounded’ criminal charges against Plaintiffs (which ultimately terminated in their favor) and the arrest and detention of Plaintiffs in violation of their Fourth Amendment right to be free from unreasonable searches and seizures.” *Id.* at 491. Specifically as to those Fourth Amendment claims, “Defendants argue[d] that Plaintiffs’ vague allegations d[id] not sufficiently indicate that each Defendant performed actions proximately causing Plaintiffs’ indictment and arrest.” *Id.*

The federal court dismissed with prejudice all of Plaintiffs’ federal law claims, including the Fourth Amendment claims. *Id.* at 501. In addition, noting that, “[u]nder 28 U.S.C. § 1367(c), a federal district court

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may decline to exercise supplemental jurisdiction over such state-law claims if the district court has dismissed all claims over which it has original jurisdiction[,]” the federal court “decline[d] to exercise supplemental jurisdiction over [Plaintiffs’] state-law claims[,]” which it dismissed without prejudice. *Id.* at 500 (citation and internal quotation marks omitted).

On 23 January 2012, Plaintiffs filed a complaint (“the state complaint”) in Forsyth County Superior Court³ against all of the federal defendants except RMA, and added Defendant Norman O. Rankin, another GPD officer (collectively, “the state defendants”). The state complaint alleged the following claims: malicious prosecution, abuse of process, civil conspiracy, and punitive damages against Johnson, Bellamy, and Hastings; malicious prosecution and abuse of process against Kelly; civil conspiracy and punitive damages against Cuthbertson, Slone, and Rankin; and declaratory judgment, malicious prosecution, abuse of process, and punitive damages against the City. Johnson, Bellamy, Hastings, and Kelly (“Defendants”) were sued in both their official and individual capacities, while Cuthbertson, Slone, and Rankin were sued only in their individual capacities.

On 24 February 2012, the individual state defendants moved to dismiss all claims against them “because [the complaint] fails to sufficiently plead a conspiracy, abuse of process, and other matters.” *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013). The City also moved to dismiss. At the motion hearing, the state defendants argued that Plaintiffs’ claims were barred by, *inter alia*, the statute of limitations, the intracorporate conspiracy doctrine, collateral estoppel, and the failure to plead sufficient facts. On 11 July 2012, the trial court granted the motion to dismiss as to the City and dismissed all claims against it with prejudice, a ruling that also effectively eliminated Plaintiffs’ claims against the individual state defendants in their official capacities. *See Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997) (“[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. Thus, where the governmental entity may be held liable for damages resulting from its official policy, a suit naming public officers in their official capacity is redundant.”) (citations and internal quotation marks omitted). On 14 August 2012, the trial court entered an order dismissing Plaintiffs’ civil conspiracy and abuse of process claims against the remaining state defendants in

3. By consent order entered 12 March 2012, the action was transferred from Forsyth County to Guilford County.

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their individual capacities, but “otherwise denied” the motions to dismiss, leaving intact Plaintiffs’ malicious prosecution claims against Defendants in their individual capacities.

Defendants appealed from the trial court’s 14 August 2012 order, contending that the trial court erred by failing to dismiss Plaintiffs’ malicious prosecution claims pursuant to Rule 12(b)(6). Plaintiffs cross-appealed from the trial court’s dismissal of their civil conspiracy and abuse of process claims. In an unpublished opinion entered 17 December 2013, this Court dismissed the appeal and cross-appeal as interlocutory. *Fox v. City of Greensboro*, 752 S.E.2d 256 (2013), available at 2013 N.C. App. LEXIS 1321, *disc. review denied*, 367 N.C. 494, 757 S.E.2d 919 (2014). In its opinion, this Court noted that

collateral estoppel is an affirmative defense that must be pled. However, our Supreme Court has held that the denial of a motion to dismiss a claim for relief affects a substantial right when the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel. Thus, collateral estoppel is properly before the trial court if that defense is specifically argued in a motion to dismiss made before a defendant has answered the plaintiff’s complaint. . . .

Where an affirmative defense is raised for the first time in a motion to dismiss under Rule 12(b)(6), the motion must ordinarily refer expressly to the affirmative defense relied upon. However, where the non-movant has not been surprised and has full opportunity to argue and present evidence on the affirmative defense, the failure of the motion to expressly refer to the affirmative defense will not bar consideration of the defense by the trial court. Once it is determined that the affirmative defense is properly before the trial court, dismissal under Rule 12(b)(6) on the grounds of the affirmative defense is proper if the complaint on its face reveals an insurmountable bar to recovery.

Id. at *6-7 (citations, internal quotation marks, and brackets omitted). This Court then held that Defendants

did not make any colorable claim of collateral estoppel in their motion to dismiss. In fact, Defendants’ motion is devoid of any mention of collateral estoppel. There is

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no pleading in the record asserting collateral estoppel. Further, Defendants' motion does not reference the prior order of the District Court for the Middle District of North Carolina upon which they base their argument for collateral estoppel. Finally, . . . the complaint in the present case makes no mention of the federal court judgment.

It is true that Defendants argued collateral estoppel at the hearing on their motion to dismiss, and that Plaintiffs, without objection, argued against collateral estoppel at that hearing. It also appears that Defendants submitted a brief in support of their motion to dismiss in which they argued collateral estoppel. However, that brief does not appear in the record. Assuming, *arguendo*, the collateral estoppel argument was properly before the trial court, we do not see how the trial court could have granted Defendants' motion to dismiss based upon that argument.

Id. at *8-11 (citations and internal quotation marks omitted).

Following dismissal of the prior appeal, Defendants filed a timely answer to Plaintiffs' complaint on 14 November 2013, specifically pleading the factual basis for their collateral estoppel defense and attaching and incorporating by reference the relevant federal complaint and order upon which that defense is based. On 5 August 2014, Defendants moved for judgment on the pleadings pursuant to Rule 12(c) of our North Carolina Rules of Civil Procedure:

In support of this motion, [D]efendants contend that [P]laintiffs' remaining claim for malicious prosecution is barred by the doctrine of collateral estoppel given the final judgment in the prior case *Fox v. City of Greensboro*, 807 F. Supp. 2d 476 (M.D.N.C. 2011) (See Answer, First Defense.) Specifically, the federal court previously dismissed *with prejudice, inter alia*, [P]laintiffs' claim for malicious prosecution rooted in the Fourth Amendment to the Federal Constitution because the alleged misconduct of [D]efendants did not proximately cause them harm. This federal order and judgment therefore bar[s] [P]laintiffs' remaining malicious prosecution claims against [D]efendants because the causation element essential to that state law claim was previously decided against [P]laintiffs by virtue of the federal court's order.

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Following a hearing on 4 September 2014, the trial court denied Defendants' motion specifically as to the issue of collateral estoppel by order entered 25 September 2014. From that order, Defendants appeal.

Grounds for Appellate Review

[1] As Defendants note, this appeal is interlocutory.

Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy. As a general rule, interlocutory orders are not immediately appealable. However, immediate appeal of interlocutory orders and judgments is available . . . when the interlocutory order affects a substantial right under [N.C. Gen. Stat.] §§ 1-277(a) and 7A-27(d)(1).

. . . . [The] denial of a motion to dismiss a claim for relief affects a substantial right when the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel. . . . Under the collateral estoppel doctrine, parties and parties in privity with them . . . are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination. The doctrine is designed to prevent repetitious lawsuits, and parties have a substantial right to avoid litigating issues that have already been determined by a final judgment.

Turner v. Hammocks Beach Corp., 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citations and internal quotation marks omitted). As noted *supra*, following dismissal of their previous appeal, Defendants filed an answer in which they specifically asserted collateral estoppel as a defense to Plaintiffs' malicious prosecution claims and moved for judgment on the pleadings based upon their collateral estoppel defense. Defendants having made "a colorable assertion that the claim is barred under the doctrine of collateral estoppel[,]" the denial of their motion for judgment on the pleadings affects a substantial right. *See id.* Accordingly, Defendants' interlocutory appeal is properly before this Court.

Discussion

Defendants argue that the trial court erred in denying their motion for judgment on the pleadings as to Plaintiffs' malicious prosecution claims based on the doctrine of collateral estoppel. We disagree.

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I. Relation of the trial court's Rule 12(c) and 12(b)(6) orders

[2] As a preliminary matter, we consider Defendants' assertion that the trial court's August 2012 order denying their Rule 12(b)(6) motion did not bar the trial court from adjudicating Defendants' motion for judgment on the pleadings pursuant to Rule 12(c). It is well established that, ordinarily, "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). The only exception occurs when three conditions are met: (1) the subsequent order "was rendered at a different stage of the proceeding, [(2)] the materials considered by [the second judge] were not the same, and [(3)] the [first] motion . . . did not present the same question as that raised by the later motion . . ." *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987) (citation omitted). Defendants argue that all three of the *Smithwick* conditions are satisfied here.

First, Defendants point out that a motion pursuant to Rule 12(c) may be made only after the pleadings are closed, while a Rule 12(b)(6) motion must be made before the pleadings are closed. *See* N.C. Gen. Stat. § 1A-1, Rule 12; *see also Robertson v. Boyd*, 88 N.C. App. 437, 440, 363 S.E.2d 672, 675 (1988) (noting that "[t]he principal difference between the two motions is that a motion under Rule 12(c) . . . is properly made after the pleadings are closed while a motion under Rule 12(b)(6) must be made prior to or contemporaneously with the filing of the responsive pleading"). Plaintiffs counter that, because "[b]oth a motion for judgment on the pleadings and a motion to dismiss for failure to state a claim upon which relief should be granted when a complaint fails to allege facts sufficient to state a cause of action or pleads facts which deny the right to any relief[.]" *id.* (citations omitted), there is no "functional" difference between the stage of the proceedings when each motion is decided. We must reject Plaintiffs' contention:

As we have recognized, a complaint is subject to dismissal under Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim. On the other hand, a motion for judgment on the pleadings pursuant to Rule 12(c) should only be granted when the movant clearly establishes that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law. Neither

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rule employs the same standard. It is plainly evident under our Rules of Civil Procedure that because a plaintiff has survived a 12(b)(6) motion, and thus has alleged a claim for which relief may be granted, his survival in the action is not the equivalent of the court determining that conflicting issues of fact exist and no party is entitled to judgment as a matter of law under Rule 12(c).

Cash v. State Farm Mut. Auto. Ins. Co., 137 N.C. App. 192, 201-02, 528 S.E.2d 372, 378 (2000) (citations and internal quotation marks omitted).

Regarding the second and third *Smithwick* conditions, this Court's opinion dismissing Defendants' previous appeal shows that different materials and questions were considered by the trial court in ruling on the respective Rule 12(b)(6) and Rule 12(c) motions. In ruling on Defendants' Rule 12(b)(6) motion, the trial court considered only Plaintiffs' complaint and the arguments of the parties, while the later Rule 12(c) ruling was based upon the trial court's consideration of additional materials: Defendants' answer, the federal complaint, and the federal court's decision. Further, as we observed *supra*, this Court dismissed Defendants' interlocutory appeal precisely because it was not persuaded by Defendants' argument that the trial court's denial of their Rule 12(b)(6) motion "necessarily rejected their argument that Plaintiffs' malicious prosecution claims were barred by collateral estoppel." *Fox*, 2013 N.C. App. LEXIS 1321 *4. In contrast, the trial court's Rule 12(c) order explicitly ruled on Defendants' collateral estoppel argument. In sum, the Rule 12(c) order appealed from here is not an improper "overruling" by a second superior court judge of an earlier superior court judge's Rule 12(b)(6) order.

II. Standard of review

[3] "A motion for judgment on the pleadings [pursuant to Rule 12(c)] should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *B. Kelley Enters., Inc. v. Vitacost.com, Inc.*, 211 N.C. App. 592, 593, 710 S.E.2d 334, 336 (2011) (citation and internal quotation marks omitted).

The trial court is required to view the facts and permissible inferences in the light most favorable to the non-moving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except

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conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted). We review *de novo* a trial court's ruling on a motion to dismiss under Rule 12(c). *Id.* Further, for a Rule 12(c) motion based upon an assertion of collateral estoppel:

In determining what issues were actually litigated or determined by the earlier judgment, the court in the second proceeding is free to go beyond the judgment roll, and may examine the pleadings and the evidence if any in the prior action. . . . The burden is on the party asserting issue preclusion to show with clarity and certainty what was determined by the prior judgment.

Burgess v. First Union Nat'l Bank of N.C., 150 N.C. App. 67, 75, 563 S.E.2d 14, 20 (2002) (citation, internal quotation marks, brackets, and emphasis omitted).

III. The trial court's rejection of Defendants' collateral estoppel defense

Defendants' collateral estoppel defense is based on their contention that, in its 2011 opinion dismissing, *inter alia*, Plaintiffs' Fourth Amendment claims for failure to state a claim under Federal Rule 12(b) (6), the federal court ruled against Plaintiffs on the same issue of proximate cause applicable to their state malicious prosecution allegations, thereby precluding re-litigation of those claims in Guilford County Superior Court. Although we agree that both Plaintiffs' federal Fourth Amendment claims and their state malicious prosecution claims include the same element of proximate cause,⁴ after a careful analysis of the procedural posture of the federal case, we are not persuaded that the dismissal of the Fourth Amendment claims for failing to meet the federal "plausibility" pleading standard means "the federal court has already determined that [P]laintiffs cannot establish the same requisite causation element essential to their [state malicious prosecution] claim[s]."

"Under the doctrine of collateral estoppel, *when an issue has been fully litigated and decided*, it cannot be contested again between the same parties, even if the first adjudication is conducted in federal court

4. "It is well settled that a plaintiff asserting a constitutional tort under § 1983 must, like any tort plaintiff, satisfy the element of proximate causation." *Fox*, 807 F. Supp. 2d at 492 (citation, internal quotation marks, brackets, and ellipsis omitted).

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and the second in state court.” *McCallum v. N.C. Coop. Extension Serv. of N.C. State Univ.*, 142 N.C. App. 48, 52, 542 S.E.2d 227, 231 (citation omitted; emphasis added), *appeal dismissed and disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001). In addition, “parties are precluded from retrying *fully litigated issues* that were decided in any prior determination, even where the claims asserted are not the same.” *Id.* at 51, 542 S.E.2d at 231 (citation omitted). “The elements of collateral estoppel . . . are as follows: (1) a prior suit resulting in a *final judgment on the merits*; (2) *identical issues involved*; (3) *the issue was actually litigated in the prior suit* and necessary to the judgment; and (4) *the issue was actually determined.*” *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, 657 S.E.2d 55, 61 (citation and internal quotation marks omitted; emphasis added), *disc. review denied*, 362 N.C. 679, 669 S.E.2d 741 (2008). Thus, as an initial step, we must determine whether the federal court’s dismissal of Plaintiffs’ claims under Federal Rule 12(b)(6) was a final judgment on the merits that actually decided the issue of proximate cause.

It is well settled that “[a] dismissal under [North Carolina Rule of Civil Procedure] Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice.” *Hoots v. Pryor*, 106 N.C. App. 397, 404, 417 S.E.2d 269, 274 (citations omitted), *disc. review denied*, 332 N.C. 345, 421 S.E.2d 148 (1992); *see also* N.C. Gen. Stat. § 1A-1, Rule 41(b) (2013). However, the federal court did not dismiss Plaintiffs’ federal claims under North Carolina Rule 12(b)(6), but rather dismissed them pursuant to Federal Rule 12(b)(6). *See Fox*, 807 F. Supp. 2d at 484. No North Carolina case law or statute that we have discovered directly addresses the question of whether a dismissal under Federal Rule 12(b)(6) operates as an adjudication on the merits so as to collaterally estop a plaintiff from re-litigating a claim or issue in our State’s courts. Of course, if the evaluation of a claim in light of a motion to dismiss pursuant to Federal Rule 12(b)(6) were identical to the evaluation made in response to a motion under North Carolina Rule 12(b)(6), it would be clear that the federal court’s dismissal had adjudicated and settled the same issue Plaintiffs raise in their state complaint. However, our review of the pertinent statutes and case law demonstrates that the standard under Federal Rule 12(b)(6), which the federal court here held Plaintiffs failed to meet, is a different, *higher* pleading standard than mandated under our own General Statutes. In other words, the fact that Plaintiffs’ allegations of proximate cause in the federal complaint did not meet the pleading standard under Federal Rule 12(b)(6) does not *necessarily* mean that their allegations of proximate cause would have resulted in dismissal pursuant to North Carolina Rule 12(b)(6).

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As the federal court noted in its order, “[t]he purpose of a motion under Federal Rule of Civil Procedure 12(b)(6) is to test[] the sufficiency of a complaint and *not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.*” *Id.* (citation and internal quotation marks omitted; emphasis added). In so doing, the federal court explicitly applied the so-called “plausibility” pleading standard as enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*:

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Although the complaint need only “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), *abrogated on other grounds by Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929), a plaintiff’s obligation “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do,” *id.* [Federal] Rule 12(b)(6) protects against meritless litigation by requiring sufficient factual allegations “to raise a right to relief above the speculative level” so as to “nudge[] the[] claims across the line from conceivable to plausible.” *Id.* at 555, 570; *see Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949-51, 173 L. Ed. 2d 868 (2009).

Id. at 484. As a prior panel of this Court has previously held, the higher federal plausibility pleading standard differs from our State’s notice pleading standard:

Plaintiff argues that this [C]ourt should apply the plausibility standard as set forth in *Bell Atlantic Corp. v. Twombly* Plaintiff has also correctly noted that to date, North Carolina has not adopted the plausibility standard set forth in *Bell Atlantic* for 12(b)(6) Motions to Dismiss. This Court does not have the authority to adopt a new standard of review for motions to dismiss. Instead, we use the following standard, which is the correct standard of review as used by the North Carolina appellate courts:

On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of

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review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Holleman v. Aiken, 193 N.C. App. 484, 490-91, 668 S.E.2d 579, 584-85 (2008) (citations, internal quotation marks, and brackets omitted).

Given the difference between the federal and State pleading standards, we must conclude that a federal court's dismissal of claims pursuant to Federal Rule 12(b)(6) is not an adjudication on the merits for purposes of collaterally estopping a plaintiff from raising the same or related claims under State law in our State's courts. *See Hoots*, 106 N.C. App. at 404, 417 S.E.2d at 274. In other words, a determination that Plaintiffs' allegations regarding proximate cause in their Fourth Amendment claims did not pass the federal plausibility test does not *automatically* mean they fail to meet the notice pleading requirements of our State. We acknowledge that the federal court's well-reasoned and highly detailed opinion amply demonstrates that the allegations in Plaintiffs' federal complaint regarding proximate cause between Defendants' alleged acts and Plaintiffs' criminal prosecutions were, "to put it charitably, sparse at best." *Fox*, 807 F. Supp. 2d at 495. However, the "issue actually litigated in the prior suit . . . and . . . actually determined" by the federal court, *see Bluebird Corp.*, 188 N.C. App. at 678, 657 S.E.2d at 61 (citation and internal quotation marks omitted), was whether Plaintiffs' pleadings met the plausibility standard applicable to motions to dismiss pursuant to Federal Rule 12(b)(6). The federal court's opinion simply did not consider or address the issue of whether Plaintiffs' pleadings sufficiently stated a claim to survive a motion to dismiss pursuant to the notice pleading requirements of North Carolina Rule 12(b)(6). Accordingly, the trial court properly denied Defendants' motion to dismiss pursuant to Rule 12(c) based upon their assertion of collateral estoppel.

We emphasize that our holding here is specific and limited to the sole issue raised by Defendants in *this* appeal: whether Plaintiffs are collaterally estopped from litigating their state malicious prosecution claims in North Carolina courts because the federal court dismissed their federal "malicious prosecution" claims for failing to meet the plausibility standard applicable to motions to dismiss pursuant to Federal Rule 12(b)(6). We express no opinion about whether Plaintiffs' malicious prosecution

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claims were sufficiently pled under North Carolina Rule 12(b)(6). As noted by this Court in Defendants' previous appeal, that interlocutory issue is not before us at this point. *See, e.g., Turner*, 363 N.C. at 558, 681 S.E.2d at 773.

In sum, Plaintiffs are not collaterally estopped from bringing their malicious prosecution claims under state law. Accordingly, the trial court did not err in denying Defendants' motion to dismiss on that basis, and its order is

AFFIRMED.

Judges McCULLOUGH and ZACHARY concur.

STEVEN CRAIG HERNDON, PLAINTIFF
v.
ALISON KINGREY HERNDON, DEFENDANT

No. COA15-28

Filed 6 October 2015

Constitutional Law—Fifth Amendment—domestic violence protective order—civil case—voluntary testimony not an automatic waiver

A domestic violence prevention order was vacated and remanded where the trial court asked defense counsel whether defendant would be claiming her Fifth Amendment right to remain silent and then indicated that she was not going to “do” the Fifth Amendment. The trial court went on to substitute its own questions for cross-examination, with many of those questions going beyond the scope of direct examination. A witness does not automatically waive her Fifth Amendment rights by voluntarily testifying in a civil case. The trial court must evaluate whether a real danger of self-incrimination exists given the implications of the question and the setting in which it was asked.

Judge BRYANT dissents by separate opinion.

Appeal by defendant from order entered 10 September 2014 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 19 May 2015.

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Foil Law Offices, by N. Joanne Foil and Laura E. Windley, for plaintiff-appellee.

Tharrington Smith, LLP, by Jill Schnabel Jackson and Evan B. Horwitz, for defendant-appellant.

DIETZ, Judge.

This is an appeal from a domestic violence protective order entered against Alison Herndon upon motion of her husband Steven Herndon. Mr. Herndon alleged that his wife was putting sleep-inducing drugs in his food and then sneaking out at night to conduct an affair, often leaving their children home unsupervised.

When Ms. Herndon's counsel called her to testify at the hearing, the trial court stated, "You're calling her. She ain't going to get up there and plead no Fifth Amendment?" Ms. Herndon's counsel responded that she did not expect Ms. Herndon to invoke her Fifth Amendment right to remain silent. The trial court then stated, "I want to make sure that wasn't going to happen because you – somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth Amendment."

Ms. Herndon testified on direct examination without invoking her Fifth Amendment rights. The trial court then stated that there would not be any cross-examination. Instead, the trial court asked Ms. Herndon questions, many of which were beyond the scope of Ms. Herndon's direct examination. In response to those questions, Ms. Herndon stated variations of "I don't recall" or "I don't remember."

After ending the questioning, the trial court explained that it found Ms. Herndon's testimony "not credible that you don't remember." The court then entered a domestic violence protective order against Ms. Herndon.

We are constrained to reverse and remand this case. Under long-standing U.S. Supreme Court precedent, a witness does not automatically waive her Fifth Amendment rights by voluntarily taking the stand to testify in a civil case. Instead, the trial court must listen to the witness's testimony and determine whether the questions for which the witness invokes the right to remain silent concern "matters raised by her own testimony on direct examination." *Brown v. United States*, 356 U.S. 148, 156 (1958). If so, then the witness has waived her Fifth Amendment rights as to those questions.

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Here, the trial court's statement that "I'm not doing no Fifth Amendment" and that if Ms. Herndon attempted to invoke her Fifth Amendment rights "somebody might be going to jail" violated Ms. Herndon's Fifth Amendment rights. The threat to imprison Ms. Herndon if she invoked her right to remain silent may have forced Ms. Herndon to answer questions differently than she otherwise would have if she felt free to assert that constitutional right. Accordingly, we must vacate and remand this case for a new hearing that disregards Ms. Herndon's previous testimony, obtained in violation of her Fifth Amendment rights.

Finally, as explained below, our need to vacate and remand this case on Fifth Amendment grounds precludes us from reaching the remaining issues raised in this appeal under the doctrine of constitutional avoidance.

Facts and Procedural Background

On 21 May 2014, Plaintiff Steven Herndon filed a complaint and motion for a domestic violence protective order against his wife, Defendant Alison Herndon. In his complaint, Plaintiff claimed that Defendant caused or attempted to cause bodily injury to him and the parties' four minor children, and that Mr. Herndon lived in fear of imminent serious bodily injury. Specifically, Mr. Herndon alleged that Ms. Herndon had drugged his food and drink on at least three occasions, causing him to pass out and become ill. Mr. Herndon also alleged that, after rendering him incapacitated, his wife left the couple's four minor children in the home unsupervised while she visited her lover. Based on these allegations, the trial court entered an *ex parte* domestic violence protective order that same day and scheduled a full hearing.

On 10 September 2014, the trial court held a full hearing. Following Mr. Herndon's evidence, Ms. Herndon's counsel called her to the stand and the following exchange occurred:

COUNSEL: Call Alison Herndon.

THE COURT: All right. Before we do that, let me make a statement. You're calling her. She ain't going to get up there and plead no Fifth Amendment?

COUNSEL: No, she's not.

THE COURT: I want to make sure that wasn't going to happen because you -- somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth Amendment.

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After defense counsel's direct examination, the trial court denied Mr. Herndon's counsel the right to cross-examination, explaining that "I was going to let you all ask two questions, but we're about [out] of time for them now." The court then asked Ms. Herndon a series of questions, some of which concerned whether Ms. Herndon had admitted in text messages that she was drugging her husband. Ms. Herndon answered many of those questions with variations of "I don't recall" or "I don't remember."

After these questions concluded, the trial court announced its ruling. The court stated that it did not believe Ms. Herndon's testimony: "I find your limited testimony you did talk about to be not credible that you don't remember." The court then made a series of additional findings and conclusions and later entered a written domestic violence protective order. Ms. Herndon timely appealed.

Analysis

Among the many arguments presented in this appeal, Ms. Herndon contends that her Fifth Amendment rights were violated when the trial court stated "You're calling her. She ain't going to get up there and plead no Fifth Amendment" and that "I want to make sure that wasn't going to happen because you – somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth Amendment." We agree that these statements violated Ms. Herndon's Fifth Amendment rights and require us to vacate and remand this matter for a new hearing that disregards Ms. Herndon's previous testimony.

The Fifth Amendment protects an individual from being compelled to testify in a way that could incriminate her or subject her to fines, penalties, or forfeiture. *See State v. Pickens*, 346 N.C. 628, 637, 488 S.E.2d 162, 166 (1997). To determine whether the Fifth Amendment privilege applies, the trial court must evaluate whether, given the implications of the question and the setting in which it was asked, a real danger of self-incrimination by the witness exists. *Id.* at 637, 488 S.E.2d at 167. The court can reject a claim of Fifth Amendment privilege only if there is no possibility of such danger. *Id.* at 637, 488 S.E.2d at 167.

Importantly, the "privilege against self-incrimination is intended to be a shield and not a sword." *McKillop v. Onslow County*, 139 N.C. App. 53, 63, 532 S.E.2d 594, 601 (2000). As a result, although a witness does not "forego the right to invoke on cross-examination the privilege against self-incrimination" merely by choosing to testify willingly in a civil proceeding, that choice is a waiver of the right with regard to "matters raised by [the witness's] own testimony on direct examination."

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Brown v. United States, 356 U.S. 148, 154-56 (1958). Indeed, it is horn-book law that “[a] party to or other witness in a civil proceeding does not waive his privilege merely by taking the stand.” *Testifying in civil proceedings as waiver of privilege against self-incrimination*, 72 A.L.R.2d 830 (2014) (collecting cases). When a witness chooses to testify, “the privilege is not lost as to matters wholly unrelated to and not connected with the subject of the direct examination.” *Id.*

In *Brown*, the Supreme Court held that the decision whether to permit invocation of the Fifth Amendment in a civil proceeding is one that can be made only after the trial court considers what the witness “said on the stand.” *Id.* at 157. In other words, the determination that a witness may not invoke the Fifth Amendment cannot be made simply because the witness “physically took the stand.” *Id.*

That is precisely what happened here. The trial court first sought to confirm with Ms. Herndon’s counsel that, if Ms. Herndon testified, “[s]he ain’t going to get up there and plead no Fifth Amendment.” The court then threatened to imprison Ms. Herndon (or her counsel) if Ms. Herndon invoked her Fifth Amendment rights during her testimony: “I want to make sure that wasn’t going to happen because you – somebody might be going to jail then. I just want to let you know. I’m not doing no Fifth Amendment.”

Under *Brown*, the trial court’s statements violated Ms. Herndon’s Fifth Amendment rights. Ms. Herndon was left with the choice of forgoing her right to testify at a hearing where her liberty was threatened or forgoing her constitutional right against self-incrimination. It was error for the trial court to place her in that impossible situation. Moreover, the error was prejudicial and “amounts to the denial of a substantial right.” N.C. R. Civ. P. 61. Although Ms. Herndon’s direct testimony did not address her alleged drugging of her husband, the trial court asked her about text messages that corroborated this allegation. Ms. Herndon responded to these questions with variations of “I don’t recall” and “I don’t remember.” The trial court then relied on those answers to determine that Ms. Herndon’s testimony was not credible. The trial court’s threat to imprison Ms. Herndon if she invoked her Fifth Amendment rights may have forced Ms. Herndon to answer these questions differently than she otherwise would have if she felt free to assert that constitutional right.

The dissent asserts that Ms. Herndon waived her Fifth Amendment rights when her counsel indicated that Ms. Herndon did not plan to invoke those rights. But Ms. Herndon’s counsel could not have anticipated that

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the trial court, on its own initiative, would ask Ms. Herndon questions well beyond the scope of the direct testimony. Thus, counsel's statement that Ms. Herndon would not invoke her Fifth Amendment rights is more reasonably viewed as addressing the scope of her testimony on direct.¹ And, in any event, a trial court cannot demand that a witness waive her Fifth Amendment rights in order to testify in her own defense—particularly in a proceeding like this one, where Ms. Herndon's fundamental right to be with her children is at stake. *See Jenkins v. Wessel*, 780 So. 2d 1006, 1008 (Fla. Dist. Ct. App. 2001) (discussing the scope of Fifth Amendment waiver for testimony during a domestic violence protective order hearing).

The dissent also cites *McKillop v. Onslow County*, 139 N.C. App. 53, 63, 532 S.E.2d 594, 601 (2000), a case in which this Court found a complete waiver of a party's Fifth Amendment rights. But *McKillop* involved a plaintiff who *initiated* the legal proceedings by challenging the constitutionality of an ordinance regulating adult businesses. This Court held that "if a plaintiff seeks *affirmative relief* or a defendant pleads *an affirmative defense*[,] he should not have it within his power to silence his own adverse testimony when such testimony is relevant to the cause of action or the defense." *Id.* (emphasis added). Here, by contrast, Ms. Herndon is defending an action brought against her, seeking a protective order that would prevent her from contacting her own children. As the Florida District Court of Appeal acknowledged in *Jenkins*, a defendant in this circumstance is entitled to invoke the Fifth Amendment in response to questions beyond the scope of her direct testimony. *See* 780 So. 2d at 1008.

Finally, the dissent notes that Ms. Herndon "presents no substantive authority in support of her argument." To be sure, there are few citations to legal authority in this section of Ms. Herndon's brief, but Ms. Herndon quoted the portion of the hearing transcript containing the trial court's challenged statements, asserted a violation of the Fifth Amendment, and cited both the Fifth Amendment to the U.S. Constitution and a U.S. Supreme Court case discussing the scope of Fifth Amendment rights. We believe that is sufficient to satisfy Rule 28(b)(6) of the Rules of Appellate Procedure. Indeed, Mr. Herndon had no difficulty understanding and responding to this argument; his Appellee Brief cites and discusses both *Brown* and *McKillop*.

1. Notably, in his Appellee Brief, Mr. Herndon does not contend that this statement constituted a waiver.

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In sum, we hold that the trial court violated Ms. Herndon's Fifth Amendment rights. We therefore vacate and remand this case for a new hearing. At that hearing, the trial court should disregard Ms. Herndon's testimony from the previous hearing. If Ms. Herndon chooses to testify at the new hearing, the trial court should assess any invocation of the Fifth Amendment under the test established by the Supreme Court in *Brown*.²

This appeal also raises several other evidentiary issues, one of which involves an issue of first impression with a constitutional dimension concerning the right to privacy in the marital relationship. We cannot address those issues. As explained above, we must vacate and remand this case for a new hearing. At that hearing, the trial court may not rule the same way on these evidentiary issues, or the parties may choose to present different evidence and these issues might never arise. Thus, our discussion of those issues in this opinion would be non-binding dicta, see *Trustees of Rowan Tech. College v. J. Hyatt Hammond Associates, Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985), or, worse yet, might be an impermissible advisory opinion, *Kirkman v. Wilson*, 328 N.C. 309, 312, 401 S.E.2d 359, 361 (1991). Moreover, with respect to the issue concerning the right to privacy, addressing it would violate the long-standing principle that "the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002). Accordingly, for the reasons discussed above, we vacate and remand this case based on the violation of Ms. Herndon's Fifth Amendment rights, and decline to reach the remaining issues raised on appeal.

Conclusion

For the reasons stated above, we vacate and remand the trial court's entry of the domestic violence protective order and remand this matter for further proceedings.

VACATED AND REMANDED.

2. We note that Ms. Herndon's invocation of her Fifth Amendment rights in response to certain questions by the court, or counsel on cross-examination, will not impede the court's ability to find the truth in a civil hearing. "The finder of fact in a civil cause may use a witness' invocation of his Fifth Amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him." *McKillop*, 139 N.C. App. at 63-64, 532 S.E.2d at 601. Thus, if Ms. Herndon refuses to answer certain questions based on her Fifth Amendment rights, the trial court may draw an adverse inference supporting Mr. Herndon's request for the protective order.

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Judge STEPHENS concurs.

Judge BRYANT dissents by separate opinion.

BRYANT, Judge, dissenting.

The majority reverses and remands on grounds that the trial court violated defendant's Fifth Amendment rights. However, under the circumstances present in this case, where defendant waived her Fifth Amendment privilege, then took the stand and testified in her own defense, the trial court's assertion that defendant would not be allowed to claim the privilege has no practical and certainly no prejudicial effect. Because there was no violation of defendant's Fifth Amendment rights, I respectfully dissent.

"No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This phrase, commonly known as the privilege against self-incrimination, is meant to assure individuals that they will not be compelled to give testimony which will tend to incriminate them or which will tend to subject them to fines, penalties, or forfeiture. *McKillop v. Onslow Cnty.*, 139 N.C. App. 53, 62–63, 532 S.E.2d 594, 600 (2000). "However, 'it is well established that the privilege protects against real dangers, *not remote and speculative possibilities*,' and a witness may not arbitrarily refuse to testify without existence in fact of a real danger, it being for the court to determine whether that real danger exists." *Trust Co. v. Grainger*, 42 N.C. App. 337, 339, 256 S.E.2d 500, 502 (1979) (emphasis added) (quoting *Zicarelli v. Investigation Comm'n*, 406 U.S. 472, 478, 32 L. Ed. 2d 234, 240 (1972)).

At the outset, it should be noted that defendant has failed to argue any case law in support of her argument, citing only to *Malloy v. Hogan*, 378 U.S. 1, 12 L. Ed. 2d 653 (1964), for the proposition that the Fifth Amendment right against compulsory self-incrimination is applicable to the states through the Fourteenth Amendment. As defendant presents no substantive authority in support of her argument, our Rules of Appellate Procedure normally require that defendant's argument be dismissed. See N.C. R. App. P. 28(b)(6) (2015) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). However, the majority chooses to address the Fifth Amendment issue as its sole reason for reversing the trial court; I therefore address the issue in dissent.

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Here, a review of the record fails to demonstrate a violation of defendant's constitutional right against self-incrimination. The transcript of the hearing indicates that defendant and her paramour were both hostile witnesses. Defendant's paramour was called as a witness by plaintiff. On direct examination, defendant's paramour consistently refused to answer questions posed by plaintiff. Instead, he repeatedly asserted his Fifth Amendment right against compulsory self-incrimination in lieu of answering the questions posed.¹ With the exception of questions regarding communications between defendant and her paramour regarding defendant's children (which the court found did not expose defendant's paramour to criminal culpability), there is nothing in the record to indicate that the paramour was compelled to answer questions once he asserted his Fifth Amendment right.

THE COURT: I understand why you are not answering the other questions and nobody is asking you to

In fact, following its order compelling testimony regarding communications about defendant's children, the trial court informed the witness that the scope of her order compelling his testimony was limited to the testimony about those communications.

After plaintiff rested his case, defendant put on her direct case. Defendant called a neighbor of plaintiff and defendant as a witness, whose testimony on direct and cross-examination was in response to many questions regarding plaintiff and defendant, their children, and many aspects of the parties' lives. Defense counsel then called defendant as a witness. As defendant was about to take the stand on her own behalf, the following occurred:

THE COURT: Thank you. Come on down. Call your next witness.

[Defense counsel]: Call Alison Herndon.

THE COURT: All right. Before we do that, let me make a statement. *You're calling her. She ain't going to get up there and plead no Fifth Amendment?*

[Defense counsel]: No, she's not.

1. According to the record, plaintiff attempted to depose defendant's paramour prior to trial, but defendant's paramour refused to testify under oath or remain for the deposition. Later, Judge David Q. LeBarre found defendant's paramour to be willfully not in compliance with a subpoena of the Durham County District Court.

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THE COURT: I want to make sure that wasn't going to happen because you -- somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth Amendment.

[Defense counsel]: No.

THE COURT: Okay. Call your witness.

[Defense counsel]: Alison Herndon.

(emphasis added). The majority holds that this statement by the trial court constituted a violation of defendant's constitutional right against self-incrimination, because "[this] threat to [defendant] . . . may have forced [her] to answer questions *differently* than she otherwise would have if she felt free to assert that constitutional right." (emphasis added). I strongly disagree with the majority's holding and its reasoning.

To the trial court's question, "You're calling her. She ain't going to get up there and plead no Fifth Amendment?" defendant's counsel responded, "No she's not." Defendant's counsel made no further response or objection to the trial court's statement. Defendant testified at length regarding matters before the court, and never asserted or attempted to assert a Fifth Amendment privilege, nor did defendant make a proffer that her testimony was in anyway compromised, that she felt threatened or forced to answer questions differently based on the trial court's comments. As such, the factual basis upon which the majority bases its opinion, is unsupported. There is nothing in the record or transcript to permit the majority's finding that defendant's Fifth Amendment right against self-incrimination was violated. In fact, counsel's response that defendant would not plead the Fifth, could, I submit, be considered a waiver of the privilege. Further, it is clear that defendant could have refused to testify upon hearing the trial court's additional statement that "somebody might be going to jail"; instead, defendant proceeded to testify.

[W]hen a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. *Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a*

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witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell.

Brown v. United States, 356 U.S. 148, 155–56, 2 L. Ed. 2d 589, 597 (1958) (emphasis added). While the majority cites *Brown* in support of its holding that a Fifth Amendment violation occurred, I do not read *Brown* as supporting the overly technical application made by the majority. The majority states that *Brown* holds “the decision whether to permit invocation of the Fifth Amendment in a civil proceeding is one that can be made only after the trial court considers what the witness ‘said on the stand.’ ” And a “determination that a witness may not invoke the Fifth Amendment cannot be made simply because the witness ‘physically took the stand.’ ” Viewing the facts as interpreted by the majority, even if the trial court’s actions did not follow the procedure the majority seems to think is required before a ruling on privilege, I am unaware of any cases that would consider these facts to constitute a Fifth Amendment violation and support a reversal of this case.

I disagree with the majority’s assertion that *Brown* is an indication of “long-standing U.S. Supreme Court precedent” that “a witness does not waive her Fifth Amendment rights by voluntarily taking the stand to testify in a civil case.” *Brown* resulted from a civil contempt proceeding during which the defendant was held in contempt for failure to answer certain questions on cross-examination. The United States Supreme Court held that where the defendant took the stand voluntarily and testified on her own behalf, she could **not** invoke the privilege against self-incrimination as to relevant matters, and affirmed the lower court’s contempt ruling. See *McKillop*, 139 N.C. App. at 64–65, 532 S.E.2d at 601 (“[U]nder [*Cantwell v. Cantwell*, 109 N.C. App. 395, 427 S.E.2d 129 (1993)], we hold that [the] plaintiff must choose between her right not to incriminate herself in a pending criminal trial and her claim that she cannot be held in civil contempt.”).

In *McKillop*, this Court addressed *Brown* and discussed how, even when a party invokes the Fifth Amendment, the trial court has a duty to weigh the rights of the litigants and ensure that there is due process and a fair trial:

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While we recognize that the defendant in the present case had the right to invoke her privilege against self-incrimination, “the interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege. . . .” *Brown v. United States*, 356 U.S. 148, 156, 2 L. Ed. 2d 589, 597, *reh’g denied*, 356 U.S. 948, 2 L. Ed. 2d 822 (1958) (a party witness in a criminal case cannot present testimony on direct examination and then invoke the privilege on cross-examination); *see also Pulawski v. Pulawski*, 463 A.2d 151, 157 (R.I. 1983) (as between private litigants, the privilege against self-incrimination must be weighed against the right of the other party to due process and a fair trial). The privilege against self-incrimination is intended to be a shield and not a sword. *Pulawski*, 463 A.2d at 157; *Christenson v. Christenson*, 162 N.W.2d 194, 200 (Minn. 1968). Therefore, “if a plaintiff seeks affirmative relief or a defendant pleads an affirmative defense[,] he should not have it within his power to silence his own adverse testimony when such testimony is relevant to the cause of action or the defense.” *Christenson*, 162 N.W.2d at 200 (citation omitted).

[*Cantwell*, 109 N.C. App. at 397, 427 S.E.2d at 130–31]. Finding *Christenson* persuasive and instructive, this Court held “a party has a right to seek affirmative relief in the courts, but if in the course of her action she is faced with the prospect of answering questions which might tend to incriminate her, she must either answer those questions or abandon her claim.” *Id.* at 398, 427 S.E.2d at 131.

Furthermore, it is well established that North Carolina law allows the trier of fact to infer guilt on a civil defendant who, having the opportunity to refute damaging evidence against her, chooses not to. The finder of fact in a civil cause may use a witness’ invocation of his Fifth Amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable

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to him. *Fedoronko v. American Defender Life Ins. Co.*, 69 N.C. App. 655, 657–58, 318 S.E.2d 244, 246 (1984).

McKillop, 139 N.C. App. at 63–64, 532 S.E.2d at 600–01.

[S]ince the power of the court over a witness in requiring proper responses is inherent and necessary for the furtherance of justice, it must be conceded that testimony which is obviously false or evasive is equivalent to a refusal to testify within the intent and meaning of the foregoing statutes, and therefore punishable [by contempt].

Galyon v. Stutts, 241 N.C. 120, 124, 84 S.E.2d 822, 825 (1954).

In the instant case, the trial court understood that the purpose of the DVPO hearing was to determine whether sufficient credible evidence existed to support plaintiff's claim that his wife was putting drugs in his food and sneaking out of the house to have an affair with her paramour. The trial court had already heard the paramour take the Fifth Amendment upon being asked a number of questions regarding his relationship with defendant and whether she had shared certain information with him regarding what she may have been doing to her husband. However, unlike Defendant, the paramour was compelled to testify. *See Brown*, 356 U.S. at 155, 2 L. Ed. 2d at 597 ("A witness who is compelled to testify . . . has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate.")

And while defendant had the right to meet the evidence presented against her by plaintiff with evidence of her own, defendant was not compelled to testify on her own behalf. She did so voluntarily. Based on the initial question and response just prior to her testimony, defendant could be said to have waived the privilege. However, it was within the inherent power of the trial court to ascertain from defendant that she chose to testify voluntarily and waive her privilege against self-incrimination. Further, the trial court's statement was sufficient to put defendant on notice that if she intended to testify, the trial court expected defendant to answer questions truthfully. Notwithstanding the less than artful phraseology, it was ultimately up to the court to determine the scope of the privilege. *See id.* at 156, 2 L. Ed. 2d at 597 ("The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.").

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Upon hearing the trial court's statement of warning, defendant could have refused to testify, she was not compelled to do so. Instead, she took the stand and testified. The court did not allow plaintiff to cross-examine defendant, but the trial court asked questions of her. Throughout, defendant made no objection to the trial court's admonition and never asserted the privilege against self-incrimination. Moreover, defendant does not claim and the record does not support that she incriminated herself, or that she testified differently because of the trial court's comments. There is no indication from these facts that defendant's Fifth Amendment rights were violated. Further, neither *Brown, McKillop*, nor any other case I have found would support a holding that defendant's Fifth Amendment right against self-incrimination was violated in this case.

If allowed to stand, the majority opinion would grant a defendant the right to use a constitutional privilege, intended as a shield to protect a litigant, to be used as a sword to strike down the inherent authority of the court to oversee the proper conduct of trials. Accordingly, as I see no facts or law as espoused by the majority that amount to a violation of defendant's constitutional right against self-incrimination, I respectfully dissent.

IN THE MATTER OF E.L.E.

No. COA15-113

Filed 6 October 2015

1. Termination of Parental Rights—failure to pay for child's care—child not in foster home

The trial court erred by concluding that respondent's parental rights could be terminated for failing to pay a reasonable portion of the child's care under N.C.G.S. § 7B-1111(a)(3). This ground for termination applied only if petitioners' home qualified as a foster home, but it did not qualify because the child was not placed with petitioners by a child placing agency and because petitioners were related to the child by blood.

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2. Termination of Parental Rights—no reasonable progress—conclusion not supported by findings

The trial court's findings of fact did not support its conclusion that respondent-mother had not made reasonable progress under the circumstances toward correcting the conditions that led to the removal of her child from her care, and the trial court erred by concluding that respondent's parental rights should be terminated.

3. Termination of Parental Rights—neglect—probability of repetition—findings inadequate

The trial court erred by concluding that grounds existed to terminate respondent-mother's parental rights based on neglect where it did not find that there was a probability of repetition of neglect. While there was arguably competent evidence in the record to support such a finding, the absence of the necessary finding required reversal.

Appeal by respondent-mother from order entered 6 November 2014 by Judge David Byrd in Ashe County District Court. Heard in the Court of Appeals 8 September 2015.

Randolph and Fischer, by J. Clark Fischer, for petitioner-appellee custodians.

Assistant Appellate Defender Joyce L. Terres for respondent-appellant mother.

No brief filed for guardian ad litem.

BRYANT, Judge.

Where the trial court failed to make necessary findings of fact to support its conclusions of law that grounds exist to terminate respondent's parental rights, we reverse.

In February 2010, shortly after Emma's¹ birth, the Ashe County Department of Social Services ("DSS") received a report of domestic violence and substance abuse in her home. DSS arranged for Emma to be placed with her maternal great aunt and uncle ("petitioners") though

1. A pseudonym has been used to protect the identity of the minor child pursuant to N.C. R. App. P. 3.1 (2013).

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a kinship agreement. Respondent entered into an in-home services agreement with DSS, but on 3 August 2010 she was arrested for shoplifting, concealing goods, and possession of a controlled substance.

On 5 August 2010, DSS filed a petition alleging Emma was a neglected juvenile because she lived in an environment injurious to her welfare and did not receive proper care, supervision, or discipline. In the petition, DSS reiterated the domestic violence and substance abuse claims that were first reported in February 2010, and asserted that respondent had failed to move forward with the Family Service Case Plan she entered into in March of 2010. Additionally, DSS alleged that respondent had been arrested for shoplifting as she left a pediatrician's office after an appointment for Emma. DSS took nonsecure custody of Emma, but continued placement of her with petitioners.

After a hearing on 27 October 2010, the trial court entered an order adjudicating Emma to be a neglected juvenile. The court continued custody of Emma with DSS and sanctioned her placement with petitioners. The court directed respondent to comply with her plan of treatment and awarded her supervised visitation with Emma for at least two hours per week.

In an order from a review hearing held 23 February 2011, the trial court continued custody of Emma with DSS and continued to sanction placement with petitioners. However, the court found that respondent, while not perfect, "had done well in therapy and drug screen[s,]" and granted her two hours of weekly unsupervised visitation with Emma. The court conditioned respondent's unsupervised visitation upon her continued compliance with her case plan and the requirements of the Family Solutions House, where she was residing and receiving mental health and substance abuse treatment and therapy.

The trial court held a combined review and permanency planning on 27 April 2011. The court set the permanent plan for Emma as reunification with a parent, continued custody of Emma with DSS and placement with petitioners, and increased respondent's visitation to include one overnight visitation each week. The court stated that it was impressed that respondent had not missed any counseling sessions or classes since her entry into the Family Solutions House, but admonished her for committing "childish" violations of the house rules.

A second combined review and permanency planning hearing was held by the trial court on 30 September 2011. In its order from that hearing, the court found respondent mother was no longer living at the Family Solutions house because she was "kicked out" the previous June

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for continued violations of the house rules. The court further found that respondent missed several drug tests in July and August 2011, had a recent conviction for driving while impaired, had a sporadic work history consisting of short-duration jobs, and had married in July 2011. Respondent's new husband was a recovering alcoholic and had entered into a Family Service Case Plan with DSS that required him to obtain substance abuse treatment. The court incorporated by reference GAL court summaries, particularly the portion of the GAL summary recording respondent's poor reunification efforts. The court found that although respondent had made some recent progress on her case plan, she had not shown consistent and lasting progress toward correcting the conditions that led to the removal of Emma from her care.

Based on respondent's lack of progress, the court concluded that reasonable efforts toward reunification were futile and relieved DSS of any further responsibility to work with respondent towards reunification. Nevertheless, the court found that respondent had a close bond with Emma and that it would not be in Emma's best interests to terminate respondent's parental rights. The court awarded full legal and physical custody of Emma to petitioners and established a visitation schedule for respondent. At the next review and permanency planning hearing, the trial court relieved Emma's guardian ad litem of further involvement in the juvenile case, continued legal and physical custody with petitioners, continued visitation with respondent, and converted the juvenile case to a Chapter 50 civil action by order entered 23 June 2012.

On 28 January 2013, petitioners filed a petition to terminate respondent's parental rights to Emma. Petitioners alleged grounds existed to terminate respondent's parental rights based on neglect, failure to make reasonable progress to correct the conditions that led to Emma's removal from her care and custody, failure to pay a reasonable portion of the cost of Emma's care, dependency, and abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1)–(3), (6)–(7) (2013). Petitioners filed a motion to appoint a guardian ad litem ("GAL") for Emma, and by order entered 27 February 2013, the trial court reappointed the GAL who had previously represented Emma in the juvenile case. Petitioners also obtained civil court orders ceasing respondent's visitation with Emma.

After a three-day hearing, the trial court entered an order terminating respondent's parental rights on 6 November 2014. The trial court terminated respondent's parental rights on the grounds of neglect, failure to make reasonable progress to correct the conditions that led to Emma's removal from her care and custody, and failure to pay a reasonable portion of the cost of Emma's care. Respondent appeals.

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On appeal, respondent-mother contends the trial court erred by failing to appoint an attorney advocate. Respondent further argues that the trial court erred in terminating her parental rights because the trial court's findings of fact and conclusions of law were inaccurate.

[1] We first address respondent's arguments that the trial court erred in concluding that grounds exist to terminate her parental rights. At the adjudication stage of a termination of parental rights proceeding, the trial court "examines the evidence and determines whether sufficient grounds exist under N.C. Gen. Stat. § 7B-1111 to warrant termination of parental rights." *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736 (2004), *aff'd per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005).

We review the trial court's adjudication to determine if its "findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984). "Findings of fact supported by competent evidence are binding on appeal even if evidence has been presented contradicting those findings." *In re L.H.*, 210 N.C. App. 355, 362, 708 S.E.2d 191, 196 (2011). Similarly, the trial court's findings of fact that are not challenged by the appellant are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). However, "[t]he trial court's conclusions of law are reviewable *de novo* on appeal." *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citations and internal quotation marks omitted).

We first address the trial court's conclusion that grounds exist to terminate respondent's parental rights because she willfully failed to pay a reasonable portion of the cost of care for Emma. This conclusion is based on N.C. Gen. Stat. § 7B-1111(a)(3), which permits termination of parental rights where:

The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3) (2013). Here, Emma was not placed in the custody of a county department of social services, a licensed

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child-placing agency, a child-caring institution, and this ground may only apply if petitioners' home qualifies as a foster home. A foster home in North Carolina is defined as a:

[P]rivate residence of one or more individuals who permanently reside as members of the household and who provide continuing full-time foster care for a child or children who are placed there by a child placing agency or who provide continuing full-time foster care for two or more children who are unrelated to the adult members of the household by blood, marriage, guardianship or adoption.

N.C. Gen. Stat. § 131D-10.2(8) (2013). Thus, there are two means by which petitioners' home may qualify as a foster home: (1) they are providing full-time foster care for a child placed there by a child placing agency; or (2) they are providing full-time foster care for two or more children who are unrelated to them. Petitioners meet neither of these criteria. Emma was not placed with petitioners by a child placing agency because petitioners are Emma's lawful custodians pursuant to a court order entered 23 June 2012. Petitioners are also Emma's maternal great aunt and uncle and thus related to her by blood. Accordingly, petitioners' home does not qualify as a foster home and the trial court erred in concluding that respondent's parental rights could be terminated for her failure to pay a reasonable portion of Emma's cost of care under N.C.G.S. § 7B-1111(a)(3).

[2] The trial court also concluded that grounds exist to terminate respondent's parental rights because she had "willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances ha[d] been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2) (2013).

To terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a) (2), the trial court "shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." *In re C.C.*, 173 N.C. App. 375, 618 S.E.2d 813, 819 (quoting N.C. Gen. Stat. § 7B-1109(e) (2003)). Consequently, the trial court must perform a two part analysis:

The trial court must determine by clear, cogent and convincing evidence that [1] a child has been willfully left by the parent in . . . placement outside the home for over twelve months, and, [2] further, that as of the time of the

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hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

In re O.C., 171 N.C. App. 457, 464, 615 S.E.2d 391, 396 (2005).

Emma had been adjudicated neglected and removed from respondent's care and custody due to domestic violence and respondent's substance abuse. The trial court made no findings of fact regarding respondent's progress toward correcting her domestic violence issues, and the evidence presented at the hearing failed to suggest that respondent continued to be involved in any domestic violence. On the other hand, the court did find that respondent had "gone through various substance abuse treatment programs and ha[d] been 'clean' for approximately 18 months." The court commended respondent on her progress in addressing her substance abuse issues. Accordingly, we conclude that the trial court's findings of fact do not support its conclusion that respondent had not made reasonable progress under the circumstances toward correcting the conditions which led to Emma's removal from her care. We thus hold the trial court erred in concluding that respondent's parental rights could be terminated based on this ground.

[3] Lastly, the trial court concluded that grounds exist to terminate respondent's parental rights because she had neglected the juvenile. *Id.* § 7B-1111(a)(1) (2013). A neglected juvenile is defined as:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2013). Generally, "[i]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding.'" *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). However, "[w]here, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003) (citations

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omitted). In such cases, a trial court may terminate parental rights based upon prior neglect of the juvenile if “the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to her parents.” *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000).

Here, the trial court did not find there was a probability of repetition of neglect if Emma were returned to respondent and, thus, the ground of neglect is unsupported by necessary findings of fact. *Shermer*, 156 N.C. App. at 287–88, 576 S.E.2d at 407–08. Arguably, competent evidence in the record exists to support such a finding, however, the absence of this necessary finding requires reversal. Moreover, we note that in this case there had been no showing that Emma could be returned to respondent, as she was in petitioners’ custody pursuant to a civil custody order that, unlike custody granted in a juvenile order under Chapter 7B, could only be modified upon a showing that “(1) that there has been a substantial change in circumstances affecting the welfare of the child, and (2) a change in custody is in the best interest of the child.” *Evans v. Evans*, 138 N.C. App. 135, 139, 530 S.E.2d 576, 578–79 (2000) (internal citations omitted). Accordingly, we hold the trial court erred in concluding that respondent’s parental rights could be terminated on the ground of neglect.

In conclusion, because the trial court erred in concluding that any ground existed to terminate respondent’s parental rights, we must reverse its order. Because we are reversing the trial court’s order on this basis, we need not address respondent’s arguments regarding whether the court erred in failing to appoint an attorney to represent Emma at the termination hearing or in concluding that it would be in Emma’s best interests to terminate respondent’s parental rights.

REVERSED.

Judges McCULLOUGH and INMAN concur.

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[243 N.C. App. 309 (2015)]

IN THE MATTER OF J.R.

No. COA15-286

Filed 6 October 2015

**Child Abuse, Dependency, and Neglect—neglect adjudication—
not sufficiently supported by evidence**

An adjudication that a juvenile was neglected was reversed where some of the trial court’s findings were not supported by competent evidence from the adjudicatory hearing. The trial court’s findings focused primarily on contact between the child and his father, who had pled guilty to indecent liberties with a sibling, but the evidence and the findings did not show that the father’s single contact with the child harmed him or created a risk of harm. Moreover, there was no evidence that the mother’s housing instability impeded her care of the child or exposed him to an injurious environment.

Appeal by respondent father from order entered 1 December 2014 by Judge Keith Gregory in Wake County District Court. Heard in the Court of Appeals 8 September 2015.

Anthony H. Morris for petitioner-appellee Wake County Human Services.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster, for guardian ad litem.

Assistant Appellate Defender Joyce L. Terres for respondent-appellant father.

McCULLOUGH, Judge.

Respondent-father appeals from an order adjudicating his son “Jonah”¹ a neglected juvenile under N.C. Gen. Stat. § 7B-101(15) (2013). Because the evidence at the adjudicatory hearing and the trial court’s findings of fact do not support the conclusion that Jonah was neglected, we reverse.

1. The parties stipulated to this pseudonym to protect the child’s privacy.

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I. Background

Jonah was born out of wedlock in September 2012 and thereafter resided with his mother (“respondent-mother”). Respondent-mother has three older children who were placed in foster care in 2010. While in foster care, respondent-mother’s eldest daughter disclosed prior sexual abuse by respondent-father.² In November 2011, respondent-father pled guilty to taking indecent liberties with a minor. He received a suspended prison sentence and was placed on supervised probation for three years. As a condition of his probation, respondent-father was forbidden “to socialize or communicate with individuals under the age of eighteen (18) in work or social activities unless accompanied by a responsible adult who is aware of the abusive patterns and is approved in writing by the supervising [probation] officer.”

On 1 May 2014, Wake County Human Services (“WCHS”) received a report that respondent-mother “was homeless and living from place to place” with Jonah; that she was allowing respondent-father to have contact with Jonah; and that she was using marijuana in Jonah’s presence. After meeting with a WCHS social worker, respondent-mother signed a safety plan on 2 May 2014 agreeing not to allow respondent-father to have any contact with Jonah. Respondent-father signed a similar safety plan on 8 May 2014 agreeing to have no contact with his son.

On 2 June 2014, WCHS obtained nonsecure custody of Jonah and filed a juvenile petition claiming that he was neglected and dependent. The petition alleged that respondent-father had been arrested for violating his probation after police observed Jonah sitting on his lap on 22 May 2014. It accused respondent-mother of “willingly allowing this contact to occur.” The petition further alleged that respondent-mother had “lost her housing through the Raleigh Rescue Mission . . . for not complying with the program recommendations” and had obtained temporary shelter for herself and Jonah at the Salvation Army through 12 June 2014. Moreover, at the time WCHS took Jonah into custody, respondent-mother “was not able to provide an appropriate alternative placement option for the child.”

At the 4 November 2014 adjudicatory hearing, a Raleigh police officer testified that on 22 May 2014, he observed respondent-mother “in the company” of respondent-father, who was “pushing a stroller.” The officer saw respondents get onto a Capital Area Transit (“CAT”) bus. He

2. The judgment revoking respondent-father’s probation indicates that the sexual abuse occurred in December 2006.

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followed them onto the bus and observed respondent father “sitting on the CAT bus . . . with a small child on his lap.” The officer left the bus and reported the incident to respondent-father’s probation officer, who filed a violation report based thereon. Respondents both testified that they had encountered each other by chance at the bus stop and were taking the bus to different destinations.

The trial court entered an order adjudicating Jonah neglected on 1 December 2014. At the hearing, the court made the following findings in support of the adjudication:

8. . . . [Respondent-mother’s] three older children came into foster care June 11, 2010 due to unstable housing and lack of proper care. Her youngest child was adopted and the two older children were placed in the Guardianship of [her] mother. [Respondent-mother’s] parental rights to one child have been terminated.

9. Respondent-mother’s] daughter disclosed sexual abuse by [respondent-father], and he was arrested and pled guilty to four counts of indecent liberties in 2013.

10. That on May 1, 2014, a report was made alleging that [respondent-]mother was homeless and living from place to place with [Jonah]. [Respondent-mother] had stayed with a friend for as many as four months, had resided at a Super 8 motel for a couple of months, at a rooming house and at the Raleigh Rescue Mission. At the time of the filing of the petition the mother and child were residing at the Salvation Army and would need to find another residence by June 12, 2014.

11. . . . [O]n May 2, 2014, the Social Worker and mother met and entered a safety plan, whereby she agreed to not allow [respondent-father] to have contact with the child.

12. As a condition of his parole [respondent-father] was not allowed to be in the presence of any child and on May 8, 2014, [he] signed a safety plan to not have any contact with [Jonah].

13. On May 22, 2014, Raleigh Police [O]fficer Alexander Johnson observed [Jonah] sitting on the lap of [respondent-father]. [Respondent-mother] willingly allowed this contact to occur. [Respondent-father] was arrested for

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violating this term of his probation and he remains incarcerated for this incident. . . .

14. That [Jonah] was neglected at the time of the filing of the petition in that he was subjected to an injurious environment, did not receive proper care and supervision and lived in a home where another juvenile was subjected to abuse and neglect by an adult who regularly lived in the home.

The court found insufficient evidence to support an adjudication of dependency under N.C. Gen. Stat. § 7B-101(9) (2013).

II. Discussion

On appeal, respondent-father argues that the trial court's adjudication of neglect is not supported by the evidence at the adjudicatory hearing or by the court's findings of fact. This Court reviews an adjudication of neglect under N.C. Gen. Stat. § 7B-807 (2013) to determine whether the trial court's findings of fact are supported by "clear and convincing competent evidence" and whether the court's findings, in turn, support its conclusions of law. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Findings supported by competent evidence are "binding on appeal." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003). Moreover, "erroneous findings unnecessary to the determination do not constitute reversible error" where an adjudication is supported by sufficient additional findings grounded in competent evidence. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006). We review a trial court's conclusions of law *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

As an initial matter, we agree with respondent-father that certain of the trial court's findings of fact are unsupported by competent evidence adduced at the adjudicatory hearing. Finding nine lacks evidentiary support insofar as it states that respondent-father pled guilty to "four counts of indecent liberties in 2013." The record shows respondent-father's conviction of a single count of this offense in November 2011. Finding twelve also erroneously refers to respondent-father being on "parole" rather than probation in May 2014. We will disregard these unsupported findings for purposes of our review. *See In re T.M.*, 180 N.C. App. at 547, 638 S.E.2d at 240.

We further agree with respondent-father that no evidence supports the trial court's averment in Finding fourteen that Jonah "lived in a home where another juvenile was subjected to abuse and neglect by an adult

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who regularly lived in the home.” See N.C. Gen. Stat. § 7B-101(15). While it appears that respondent-mother’s older children were placed in foster care, the court received no evidence regarding the circumstances of these placements.³ WCHS made no proffer that respondent-mother “subjected” her older children “to abuse and neglect[;]” that respondent-father “regularly live[d] in the home” with respondent-mother’s older children; or that respondent-father “regularly lives in the home” with Jonah, as contemplated by N.C. Gen. Stat. § 7B-101(15).

In pertinent part, the Juvenile Code defines a “neglected juvenile” as follows:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile’s parent, . . . or who lives in an environment injurious to the juvenile’s welfare In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home . . . where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15). “[T]he decisions of this Court require there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide ‘proper care, supervision, or discipline’ in order to adjudicate a juvenile neglected.” *In re McLean*, 135 N.C. App. 387, 390, 521 S.E.2d 121, 123 (1999) (citations, internal quotation marks, and emphasis in original omitted). “Whether a child is ‘neglected’ is a conclusion of law which must be supported by adequate findings of fact.” *Id.*

The trial court’s adjudicatory findings focus primarily on respondent-father’s contact with Jonah on 22 May 2014, which violated both the conditions of respondent-father’s probation and the safety plan developed by WCHS and signed by both parents. The findings further show that respondent-father is a convicted child sex offender, having pled guilty to taking indecent liberties with respondent-mother’s eldest daughter.

In *In re J.C.B.*, the respondent-father was accused of sexually abusing his first cousin’s twelve-year-old step-daughter R.R.N. during

3. During her testimony, respondent-mother acknowledged a “history of Child Protective Services involvement” involving “unstable housing” and “a lack of income[.]” If WCHS was going to rely on this basis for removal of Jonah, it is incumbent that it offer further evidence.

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her overnight visit to the residence that respondent-father shared with his wife, their twelve-year-old son J.C.B., and their nieces C.R.R. and H.F.R. __ N.C. App. __, __, 757 S.E.2d 487, 488, *disc. review denied*, 367 N.C. 524, 762 S.E.2d 213 (2014). Absent some additional indicia that respondent-father's actions posed a threat of harm to the other children in the home, we found his actions insufficient to support their adjudication as neglected:

Even if we assume arguendo that respondent-father abused R.R.N., a juvenile, in the home where J.C.B., C.R.R., H.F.R., and respondent-father lived, this fact alone does not support a conclusion that J.C.B., C.R.R., and H.F.R. were neglected. . . . The trial court made virtually no findings of fact regarding J.C.B., C.R.R., or H.F.R., and wholly failed to make any finding of fact that J.C.B., C.R.R., and H.F.R. were either abused themselves or were aware of respondent-father's inappropriate relationship with R.R.N. Additionally, the trial court failed to make any findings of fact regarding other factors that would support a conclusion that the abuse would be repeated. As a result, the findings of fact do not support a conclusion that respondent-father's conduct created a substantial risk that abuse or neglect of J.C.B., C.R.R., and H.F.R. might occur.

Id. at __, 757 S.E.2d at 489-90 (citations and internal quotation marks omitted).

As in *In re J.C.B.*, the evidence and the trial court's findings are insufficient to show that respondent-father's single contact with Jonah on 22 May 2014 either harmed the child or created a substantial risk of such harm. The court received no evidence regarding the nature of respondent-father's prior sex offense, including the age of respondent-mother's daughter at the time of the abuse. Moreover, the court heard no evidence and made no findings tending to show that respondent-father was at risk of sexually abusing his own nineteen-month-old son. Accordingly, the findings about the bus incident do not establish neglect under N.C. Gen. Stat. 7B-101(15).

Respondent-mother's lack of stable housing likewise is insufficient to support the trial court's adjudication of neglect, absent some evidence of harm or a substantial risk of harm to Jonah. The court made no finding that Jonah was ever without shelter or that he suffered harm or a substantial risk of harm from respondent-mother's frequent moves. WCHS social worker Paula Hill acknowledged that it was the incident on

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the bus with respondent-father, rather than respondent-mother's housing situation, that led the department to file the petition in this cause:⁴

Q. Is it true that the only reason that this petition was filed by your agency is because of the events that happened on the day of the bus incident?

A. [That was] the initial evidence that precipitated our filing the petition, yes.

Q. And so had those events not occurred, you would not have filed a petition?

A. Probably not.

A lack of stable housing may certainly contribute to a juvenile's status as neglected. *E.g.*, *In re Adcock*, 69 N.C. App. 222, 226, 316 S.E.2d 347, 349 (1984) (noting, *inter alia*, "that respondents moved approximately eight times within an eighteen-month period"). Here, however, there is no evidence or finding that respondent-mother's housing instability impeded her care and supervision of Jonah or exposed the child to an environment injurious to his welfare. The fact that respondent-mother had just ten more days to stay at the Salvation Army at the time WCHS filed its petition does not alter our conclusion. *See generally In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 15 (2006) ("[P]ost-petition evidence is admissible for consideration of the child's best interest in the dispositional hearing, but not an adjudication of neglect[.]"); *see also* N.C. Gen. Stat. § 7B-802 (2013).

Our Supreme Court has characterized parental behavior constituting "neglect" as "either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003). Considering as we must the totality of the evidence, *In re L.T.R.*, 181 N.C. App. 376, 384, 639 S.E.2d 122, 127 (2007), we conclude that neither the evidence nor the trial court's findings are sufficient to establish Jonah as a neglected juvenile. Accordingly, we reverse the court's adjudication.

Respondent-father also challenges the provision of the order requiring him to maintain stable housing and income, arguing that it exceeds the trial court's dispositional authority under N.C. Gen. Stat. § 7B-904(d1)(3)

4. Regarding the report that respondent-mother had used marijuana in Jonah's presence, Hill testified, "I never observed her to be impaired or have any signs of impairment. There was no never [sic] any reason to suspect" such drug use.

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(2013). Having reversed the underlying adjudication, we need not address this issue.

REVERSED.

Judges BRYANT and INMAN concur.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY
CAROL A. RAWLS AND DEWEY GEORGE RAWLS DATED JANUARY 24, 2005 AND
RECORDED IN BOOK 1538 AT PAGE 1243 IN THE CALDWELL COUNTY PUBLIC
REGISTRY, NORTH CAROLINA

No. COA15-248

Filed 6 October 2015

1. Mortgages and Deeds of Trust—foreclosure—note indorsed in blank

On appeal from an order authorizing the substitute trustees to proceed with a foreclosure sale, the Court of Appeals held that the trial court did not err by concluding that E*Trade (petitioner) was the holder of the note. Petitioner's production of the original note indorsed in blank established that petitioner was the holder of the note.

2. Appeal and Error—foreclosure—default—issue not raised at trial—not preserved

On appeal from an order authorizing the substitute trustees to proceed with a foreclosure sale, the Court of Appeals did not consider the merits of respondent's argument that respondent had not personally defaulted on the loan. Respondent failed to raise the issue of default at trial, thereby failing to preserve the issue for appellate review.

Appeal by Respondent from order entered 12 June 2014 by Judge C. Thomas Edwards in Caldwell County Superior Court. Heard in the Court of Appeals 26 August 2015.

Shapiro & Ingle, LLP, by Jason K. Purser, for petitioner-appellee.

Lindley Law, PLLC, by Trey Lindley, and Clontz & Clontz, PLLC, by Ralph C. Clontz III, for respondent-appellant.

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[243 N.C. App. 316 (2015)]

ZACHARY, Judge.

Turnip Investments, LLC (respondent) appeals from an order authorizing the substitute trustee to proceed with a foreclosure sale to recover money owed on a debt secured by a note and deed of trust on property located in Hickory, North Carolina (the property). On appeal, respondent argues that the trial court erred by allowing the foreclosure to proceed, on the grounds that E*Trade (petitioner) failed to prove that it was the holder of the note evidencing the debt, and that respondent had not personally defaulted on the loan. We conclude that the trial court did not err by concluding that petitioner was the holder of the note, and that respondent failed to preserve the issue of default for appellate review.

I. Factual and Procedural Background

On 24 January 2005 Carol Rawls executed a Home Equity Credit Line Agreement in favor of Capital One F.S.B. (Capital One) in exchange for an \$85,500.00 credit line loan. On the same date, Ms. Rawls and her husband, Dewey Rawls, executed a Deed of Trust for the property to secure the loan. The note and deed of trust were later indorsed in blank and possession was transferred to petitioner. The last payment towards the loan was made on 25 June 2012. On 12 April 2013 the substitute trustees, Grady I. Ingle or Elizabeth B. Ells, filed a notice of a hearing on foreclosure of the deed of trust. At some point prior to the filing of the foreclosure notice, respondent had purchased the property at an execution sale, subject to the deed of trust; however, the record does not indicate the date of respondent's purchase. The notice, which was directed both to Dewey and Carol Rawls and to respondent, alleged that respondent was the present owner of the property and that the loan was in default. On 22 July 2013 the Ford Firm, PLLC, was appointed substitute trustee. On 30 July 2013 the Assistant Clerk of Superior Court of Caldwell County entered an order permitting the foreclosure to proceed.

Respondent appealed the order to the Superior Court, where a hearing was conducted on 2 June 2014. At the hearing, petitioner "tender[ed the] court file and the documents therein" to the trial court. In addition, petitioner proffered the "original promissory note indorsed in blank" for the trial court to review and compare to the copy in the court file. Petitioner also informed respondent and the trial court that it had been unable to secure service on the Rawls, who are not parties to this appeal. On 12 June 2014 the trial court entered an order allowing foreclosure.

Respondent appeals.

IN RE FORECLOSURE OF RAWLS

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II. Standard of Review

Respondent appeals from the trial court's order entered following a bench trial on petitioner's right to proceed with foreclosure. "When an appellate court reviews the decision of a trial court sitting without a jury, 'findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary.'" *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968)). " 'Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.'" *Id.* (quoting *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)). "When this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review." *In re Simpson*, 211 N.C. App. 483, 487-88, 711 S.E.2d 165, 169 (2011) (citing *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997), and *N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008)).

III. Analysis

On appeal, respondent challenges the trial court's determination that petitioner was entitled to proceed with foreclosure. Respondent argues that the trial court erred by finding that petitioner was the holder of a valid debt and that it was error to find the existence of default on the debt. The elements of a valid foreclosure proceeding are well established:

[C]ertain elements must be established by the clerk of superior court before a mortgagee or trustee may proceed with a foreclosure by power of sale, including findings of a "(i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such under subsection (b)[.]" . . . When a foreclosure action is appealed to the superior court, the trial court is limited to a *de novo* review of those same elements. N.C. Gen. Stat. § 45-21.16(d) (2011).

In re Manning, __ N.C. App. __, __, 747 S.E.2d 286, 290 (2013) (quoting N.C. Gen. Stat. § 45-21.16(d)).

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A. Petitioner as Holder of Valid Debt

[1] Respondent argues first that in its order the trial court made no specific findings of facts as to who had possession of the promissory note, instead grouping the paragraphs of the court's order into one "findings of fact and conclusions of law." It is clear that this Court may categorize the findings of fact and conclusions of law. *Id.* Respondent also asserts that there was no competent evidence that at the time of the hearing petitioner was the holder of the promissory note securing the debt. Specifically, respondent contends that petitioner's production of the original note indorsed in blank did not establish that petitioner possessed the note, and that affidavits submitted by petitioner contained hearsay which should not have been considered by the trial court. We find petitioner's production of the original note indorsed in blank to be dispositive.

Under North Carolina law, "[i]n order to find that there is sufficient evidence that the party seeking to foreclose is the holder of a valid debt, we must find (1) competent evidence of a valid debt, and (2) that the party seeking to foreclose is the current holder of the Note." *Manning*, ___ N.C. App. at ___, 747 S.E.2d at 291 (citing *In re Foreclosure of Adams*, 204 N.C. App. 318, 321, 693 S.E.2d 705, 709 (2010)). "This Court has determined that the definition of 'holder' in North Carolina's adoption of the Uniform Commercial Code ('UCC') is applicable to the term as it is used in N.C.G.S. § 45-21.16 for foreclosures under powers of sale." *Adams*, 204 N.C. App. at 322, 693 S.E.2d at 709 (2010) (citing *Connolly v. Potts*, 63 N.C. App. 547, 551, 306 S.E.2d 123, 125 (1983)). We next review the applicable definitions under the UCC.

A "promissory note is a 'negotiable instrument' under N.C. Gen. Stat. [§] 25-3-104(a)." *Franklin Credit Recovery Fund v. Huber*, 127 N.C. App. 187, 189, 487 S.E.2d 825, 826 (1997). N.C. Gen. Stat. § 25-1-201(b) (21) defines a "holder" in relevant part as the "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession" and thereafter at N.C. Gen. Stat. § 25-1-201(b)(27) defines "person" to include "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture . . . public corporation, or any other legal or commercial entity[.] "Bearer" is defined by the same statute in part as "a person in possession of a negotiable instrument, negotiable tangible document of title, or certificated security that is payable to bearer or indorsed in blank." An "indorsement is 'a signature . . . that alone or accompanied by other words is made on an instrument for the purpose

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of . . . negotiating the instrument.’ ” *Bass*, 366 N.C. at 468, 738 S.E.2d at 176 (quoting N.C. Gen. Stat. § 25-3-204(a)).

The Uniform Commercial Code differentiates between two types of indorsements: special and blank. If an indorsement is “made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to whom it makes the instrument payable, it is a ‘special indorsement.’ ” N.C. Gen. Stat. § 25-3-205(a). “If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a ‘blank indorsement’. When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.” N.C. Gen. Stat. § 25-3-205(b). The distinction between a “special indorsement” and an indorsement “in blank” may be significant in determining whether a petitioner has shown possession of the note. As stated in the Official Comments to N.C. Gen. Stat. § 25-3-205:

If the indorsement is made by a holder and is not a special indorsement, it is a blank indorsement. For example, the holder of an instrument, intending to make a special indorsement, writes the words ‘Pay to the order of’ without completing the indorsement by writing the name of the indorsee. The holder’s signature appears under the quoted words. The indorsement is not a special indorsement because it does not identify a person to whom it makes the instrument payable. Since it is not a special indorsement it is a blank indorsement and the instrument is payable to bearer. The result is analogous to that of a check in which the name of the payee is left blank by the drawer.

Thus, as noted by the Fourth Circuit, “[n]egotiable instruments like mortgage notes that are endorsed in blank may be freely transferred. And once transferred, the old adage about possession being nine-tenths of the law is, if anything, an understatement. Whoever possesses an instrument endorsed in blank has full power to enforce it.” *Horvath v. Bank of New York, N.A.*, 641 F.3d 617, 621 (4th Cir. 2011).

Applying the above definitions, this Court concludes that the “holder” of a promissory note may be a bank or other lending institution that is in possession of a note that has been indorsed in blank:

Under the Code, the party in possession of a negotiable instrument indorsed in blank is presumptively the holder. N.C. Gen. Stat. § 25-1-201(b)(21) (2013); N.C. Gen. Stat.

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§ 25-3-109 (2013). *See also, In re Manning*, __ N.C. App. __, __, 747 S.E.2d 286, 291-92 (2013) (presentation of the original note to the court, indorsed in blank, “serves as competent evidence to support the trial court’s finding that [the party] was the present holder.”).

In re Dispute over the Sum of \$375,757.47, __ N.C. App. __, __, 771 S.E.2d 800, 806 (2015). Our conclusion in this regard finds support in several unpublished opinions of this Court, in addition to opinions from federal bankruptcy court which, although not binding on this Court, we find persuasive. *See, e.g., In re Gibbs*, 765 S.E.2d 122, 2014 N.C. App. LEXIS 948 (unpublished):

In a recent case addressing a similar issue, this Court stated that, “[w]here petitioner, at a foreclosure hearing before the trial court, produced the original mortgage loan note reflecting a blank indorsement and an affidavit stating that the lienholder was in possession of the Note, such was sufficient to establish the lienholder as the holder of the Note.” Although we are not bound by our prior unpublished decisions, we believe that *Cornish* sheds additional light on our decision that the record contains sufficient evidence to establish that Petitioner held Respondents’ note.

Gibbs, 765 S.E.2d at *17 n.4 (quoting *In re Cornish*, 757 S.E.2d 526 at *1, 2014 N.C. App. LEXIS 216 (unpublished), and citing *United Services Automobile Assn. v. Simpson*, 126 N.C. App. 393, 396, 485 S.E.2d 337, 339 (1997)). *See also, e.g., In re Hernandez*, 2014 Bankr. LEXIS 5146 (Bankr. E.D.N.C. Dec. 24, 2014) (“At the hearing . . . counsel for [petitioner] presented the original Note with a blank endorsement. While [petitioner’s counsel] was in actual possession of the Note, he was acting as attorney, agent and proxy for [petitioner] and it is clear from the court’s examination of the Note that it was the original document clearly in the possession of [petitioner].”), and *In re Robinson*, No. 07-02146-8-JRL, 2011 Bankr. LEXIS 4504 (Bankr. E.D.N.C. Nov. 22, 2011) (“At the hearing, [petitioner] entered the original promissory note with the blank indorsement into evidence. Thus [petitioner] is clearly the holder of the note because it is in possession of the original note indorsed in blank.”).

Based on the plain language of N.C. Gen. Stat. § 25-3-205(b) (“When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.”), and the reasoning of cases such as those cited above, we hold that a petitioner’s production of an original note indorsed in blank establishes that

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the petitioner is the holder of the note. In this case it is undisputed that petitioner produced the original note indorsed in blank, and we hold that this was sufficient to support the trial court's conclusion that petitioner was the holder of the note.

Respondent concedes on appeal that petitioner produced the original note at the hearing, but contends that this was insufficient to establish that petitioner was the holder of the note. Respondent's position is based upon a quote from *Simpson*, in which we stated that “[p]roduction of an original note at trial does not, in itself, establish that the note was transferred to the party presenting the note with the purpose of giving that party the right to enforce the instrument[.]” *Simpson*, 211 N.C. App. at 491, 711 S.E.2d at 171. *Simpson*, however, which did not hold that production of an original note could never be adequate to establish a petitioner's right to enforce a note, is factually distinguishable from the instant case. *Simpson* did not involve a note indorsed in blank, but instead concerned a note that had been indorsed to a specific entity which was “not the party asserting a security interest in Respondent's property.” *Id.* at 493, 711 S.E.2d at 172. Significantly, *Simpson* specified that it was “[b]ecause the indorsement does not identify Petitioner and is not indorsed in blank or to bearer, [that] it cannot be competent evidence that Petitioner is the holder of the Note.” *Id.* at 493, 711 S.E.2d at 173 (emphasis added).

Given that we have concluded that petitioner's production of the original note indorsed in blank was sufficient to allow the trial court to conclude that petitioner was the holder of the note, we find it unnecessary to reach respondent's arguments concerning the admissibility of the affidavits proffered at the hearing. Respondent also argues that the trial court erred by holding that petitioner was the holder of the note without making a specific finding that petitioner was in physical possession of the note. In this case, there was no dispute that petitioner was in possession of the note. Moreover, we have held that:

“[W]hen a court fails to make appropriate findings or conclusions, this Court is not required to remand the matter if the facts are not in dispute and only one inference can be drawn from them.” There is no dispute that petitioner had physical possession of the note at the hearing . . . Therefore, the only inference that can be drawn from the evidence is that petitioner . . . was in physical possession of the note at the time of the hearing.

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In re Foreclosure of Yopp, 217 N.C. App. 488, 499, 720 S.E.2d 769, 775 (2011) (quoting *Green Tree Financial Servicing Corp. v. Young*, 133 N.C. App. 339, 341, 515 S.E.2d 223, 224 (1999)). We conclude that respondent's argument lacks merit.

B. Default

[2] In its second argument, respondent asserts that because it was not the original borrower, it could not personally be in default under the terms of the loan. Respondent does not dispute, however, that it purchased the property subject to the note and deed of trust. Moreover, respondent did not raise any argument challenging the issue of default at the hearing before the trial court. Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states that 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" and must "obtain a ruling upon the party's request, objection, or motion." By failing to raise the issue of default at trial, respondent has failed to preserve it for appellate review. *See, e.g., Basmis v. Wells Fargo Bank N.A.*, __ N.C. App. __, __, 763 S.E.2d 536, 539 (2014), which held:

Plaintiffs argue that the trial court erred by finding that their default on the loan after entry of [an earlier order] constituted new facts or circumstances[, and] . . . assert that their mortgage debt was discharged in bankruptcy[.] . . . We do not reach the merits of this issue, because plaintiffs failed to preserve for appellate review the effect of a discharge in bankruptcy on the foreclosure action.

For the reasons discussed above, we conclude that the trial court did not err and that its order must be

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

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[243 N.C. App. 324 (2015)]

NORTH CAROLINA INDUSTRIAL COMMISSION, I.C. Nos. 459234, 271904
DOROTHY JANE KETCHIE AND CLEGG LEE JOINES, EMPLOYEES, PLAINTIFFS

v.

FIELDCREST CANNON, INC., INSOLVENT SELF-INSURED EMPLOYER,
N.C. SELF-INSURANCE SECURITY ASSOCIATION, DEFENDANTS

No. COA15-140

Filed 6 October 2015

**Workers' Compensation—asbestosis—last exposure prior to
Security Association—not covered claims**

The Full Industrial Commission's conclusion in a workers' compensation case that plaintiffs' claims for were not "covered claims" for purposes of compensation was affirmed where plaintiffs suffered from asbestosis, their last injurious exposure occurred prior to their employers becoming members of the North Carolina Self-Insurance Security Association, and their employer (Fieldcrest) became bankrupt. Because the Security Association was not created until 1 October 1986, after each of plaintiffs' last injurious exposure to asbestos occurred, these claims do not constitute "covered claims" within the scope of the statutes. While the Workers' Compensation statutes must be liberally construed, the Court of Appeals must not enlarge the definition of "covered claims" beyond the clearly expressed language of the statutes.

Appeal by Plaintiffs-Appellants from order entered 29 October 2014 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 13 August 2015.

Wallace and Graham, P.A., by Michael B. Pross, Edward L. Pauley, and Cathy A. Williams, for Plaintiffs-Appellants.

Stuart Law Firm, PLLC, by Catherine R. Stuart and Susan J. Vanderweert, for Defendants-Appellees.

INMAN, Judge.

Plaintiffs-Appellants are appealing the Full Commission's order denying their claims on the grounds that their claims are not "covered claims," as that term is defined in N.C. Gen. Stat. § 97-130(4), because their last injurious exposure to asbestos occurred before Fieldcrest was a member of the North Carolina Self-Insurance Security Association ("the Security Association"). After careful review, we affirm.

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When workers who suffer from occupational disease incurred their last injurious exposure to asbestos prior to a self-insurer joining the Security Association, this Court cannot interpret the statute in a manner contrary to its plain and unambiguous language, even if this interpretation bars recovery by workers who have no other recourse due to the employer's bankruptcy.

Factual and Procedural Background

Plaintiff-Appellant Clegg Lee Joines ("Mr. Joines") was employed for various periods of time by Defendant-Appellee Fieldcrest Cannon, Inc. ("Fieldcrest") beginning in 1941 and ending 24 September 1986. It is undisputed that Mr. Joines was exposed to asbestos during his employment with Fieldcrest. The parties stipulated that Mr. Joines's last injurious exposure to asbestos occurred during the seven months prior to 24 September 1986. Mr. Joines was diagnosed with mesothelioma in 2003 and died on 9 May 2004.

Plaintiff-Appellant Dorothy Jane Ketchie ("Ms. Ketchie") was employed by Fieldcrest from 1972 to 1974. Her last date of employment was 31 January 1974. The parties stipulated that her last injurious exposure to asbestos occurred within the seven months prior to 31 January 1974. In 2000, Ms. Ketchie was diagnosed with asbestosis as a result of her exposure to asbestos during her employment with Fieldcrest.

The General Assembly created the Security Association on 1 October 1986 after several large, self-insured trucking companies became insolvent which resulted in many injured employees' outstanding claims not being paid. The Security Association's enabling statute states that the purpose of the Security Association is, among other things, "to provide mechanisms for the payment of covered claims against member self-insurers, to avoid excessive delay in payment of covered claims, [and] to avoid financial loss to claimants because of the insolvency of a member self-insurer[.]" N.C. Gen. Stat. § 97-131(a) (2013). This same language was used in the original 1986 version of section 97-131(a).

Fieldcrest (which later became a subsidiary of Pillowtex Inc. and Pillowtex Corporation) was a member of the Security Association from 1 October 1986 until 19 December 1997, at which time Fieldcrest purchased workers' compensation insurance. In 2000, Pillowtex filed for bankruptcy in Delaware. However, the bankruptcy court ordered relief from the automatic stay to allow Pillowtex to continue resolving workers' compensation claims that had arisen prior to Fieldcrest's membership in the Security Association, *i.e.*, claims that arose prior to 1 October 1986. Pillowtex reorganized and emerged from bankruptcy.

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Pillowtex filed for a second bankruptcy in 2003. At that time, Fieldcrest defaulted on its workers' compensation claims incurred during its period of self-insurance—claims that arose prior to Fieldcrest joining the Security Association on 1 October 1986. Plaintiffs'-Appellants' claims, and approximately 15 other similarly situated former employees' claims, fell into this category—their employment and their last injurious exposure to asbestos both occurred prior to 1 October 1986 but their asbestos-related diseases were not diagnosed until after Fieldcrest's bankruptcies. Because Plaintiffs'-Appellants were diagnosed with their asbestos-related diseases after Fieldcrest declared bankruptcy in 2003 and defaulted on all of its outstanding workers' compensation claims, their last resort to seek compensation is the Security Association.

Both Plaintiffs'-Appellants filed workers' compensation claims against Fieldcrest and the Security Association in the Industrial Commission in 2009. The matter came on for hearing before the Full Commission on 4 August 2014. The Full Commission concluded that the language of section 97-130(4) was plain and unambiguous and statutorily excluded both Plaintiffs'-Appellants' claims because "covered claims" only includes those claims that relate to an injury that occurred while the employer was a member of the Security Association. Here, because Plaintiffs'-Appellants were not injured but had asbestos-related diseases, the Full Commission relied on N.C. Gen. Stat. § 97-57, which provides that in latent occupational disease cases, "liability attaches to the employer or carrier who is on the risk when the last injurious exposure occurs." Thus, because "Fieldcrest was not a member of [the] Security Association on the alleged date of last injurious exposure," the Plaintiffs'-Appellants' claims were not "covered claims" under section 97-130(4). Plaintiffs'-Appellants appeal.

Standard of Review

"The Industrial Commission's conclusions of law are reviewable *de novo* by this Court." *Moore v. City of Raleigh*, 135 N.C. App. 332, 334, 520 S.E.2d 133, 136 (1999). "Although the Workers' Compensation Act should be liberally construed, judges must interpret and apply statutes as they are written" to ensure that the legislative intent is accomplished. *Clark v. ITT Grinnell Indus. Piping, Inc.*, 141 N.C. App. 417, 426, 539 S.E.2d 369, 375 (2000). As our Supreme Court has noted:

This Court has interpreted the statutory provisions of North Carolina's workers' compensation law on many occasions. In every instance, we have been wisely guided by several sound rules of statutory construction which

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bear repeating at the outset here. First, the Workers' Compensation Act should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions. Second, such liberality should not, however, extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of "judicial legislation." Third, it is not reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation; consequently, the judiciary should avoid ingrafting upon a law something that has been omitted, which it believes ought to have been embraced.

Shaw v. U.S. Airways, Inc., 362 N.C. 457, 462-63, 665 S.E.2d 449, 452-53 (2008).

Analysis

The only issue on appeal is whether N.C. Gen. Stat. § 97-130(4) can be interpreted to include Plaintiffs'-Appellants' claims even though their last injurious exposure occurred prior to Fieldcrest becoming a member of the Security Association.

The Security Association is a nonprofit, unincorporated entity created to, among other things, "provide mechanisms for the payment of covered claims against member self-insurers, to avoid excessive delay in payment of covered claims, [and] to avoid financial loss to claimants because of the insolvency of a member self-insurer." N.C. Gen. Stat. § 97-131(a) (2013). All individual and group self-insurers are required to be members of the Security Association as a condition of being licensed to self-insure by the Commissioner of Insurance. N.C. Gen. Stat. § 97-131(b) (2013). "An individual self-insurer or group self-insurer shall be deemed to be a member of the Association for purposes of its own insolvency if it is a member when the compensable injury occurs." N.C. Gen. Stat. § 97-131(b)(2) (2013). "Covered claims" are the unpaid claims against insolvent self-insurers "that relate[] to an injury that occurs while the [self-insurer] is a member of the Association and that is compensable under [the Workers' Compensation Act]." N.C. Gen. Stat. § 97-130(4) (2013).

The plain language of sections 97-130 and 97-131 restricts the scope of compensation to those claims that arise while a self-insured company

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is both (1) insolvent and (2) a member of the Security Association. Thus, the only claims that the Security Association would be obligated to pay on behalf of Fieldcrest are those that “relate to an injury” that occurred—or in this case, relate to an occupational disease where the last injurious exposure occurred—while Fieldcrest was a member of the Security Association. Because the Security Association was not created until 1 October 1986, a date *after* each of Plaintiffs-Appellants’ last injurious exposure to asbestos occurred, these claims do not constitute “covered claims” within the scope of the statutes. Thus, the Full Commission properly concluded that Plaintiffs-Appellants are not eligible for compensation pursuant to N.C. Gen. Stat. § 97-130(4) and § 97-131.

Plaintiffs-Appellants contend that the plain meaning approach to interpreting the statutes is “overly narrow” for two reasons. First, Plaintiffs-Appellants argue that because the General Assembly used only the word “injury” in N.C. Gen. Stat. 97-130(4), “the General Assembly simply never contemplated some of the unique issues found in disease claims when it enacted the Security Association statutes.” Therefore, as Plaintiffs-Appellants contend, the laws regarding the Security Association must be “flexibly construe[d]” to effectuate the intent of the legislature to compensate victims of occupational disease in addition to victims of injuries. This argument fails because section 97-52 (2013) of the Workers’ Compensation Act provides that the disablement or death from an occupational disease “shall be treated as the happening of an injury by accident.” Thus, the General Assembly’s use of the word “injury” necessarily included any claims for occupational disease. Therefore, it is not necessary to “flexibly” expand our interpretation of what constitutes a “covered claim” based on the General Assembly’s failure to use the word “occupational disease” in the relevant statutes.

Second, Plaintiffs-Appellants allege that the amendments to the statutes when the Security Association was first created in 1986 evidence a legislative intent that “all claims arising due to an insolvency whether before or after 1986 would be paid by the Security Association.” Following Plaintiffs-Appellants’ logic, “covered claims” would include even those claims that had arisen before a self-insurer became a member of the Security Association; in other words, once a self-insurer joined the Security Association, all claims were retroactively covered. We disagree with this interpretation of the amendments.

As noted, while we must liberally construe workers’ compensation statutes, this Court must not enlarge the definition of “covered claims” beyond the clearly expressed language of the statutes. *See Shaw*, 362 N.C. at 462-63, 665 S.E.2d at 453. Plaintiffs-Appellants rely on the

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original 1986 version of section 97-133(a)(4), which has been subsequently amended, that states:

The Association shall pay claims against a self-insurer that are not or have not been paid as a result of a determination of insolvency or the institution of bankruptcy or receivership proceedings *that occurred prior to the effective date of this Article*; provided that any assessments made to pay such claims may be credited towards the tax paid by the self-insurers under G.S. 97-100.

1986 N.C. Sess. Laws 208, 208-09, ch. 928, § 1 (emphasis added). Plaintiffs-Appellants interpret this language to mean that any claims that arose “prior to the effective date” of the Security Association statutes are covered. However, Plaintiffs-Appellants have misinterpreted this statute; the clause “that occurred prior to the effective date of this Article” refers to when the insolvency occurred, not when the claims arose. This original version of the statute required the Security Association to pay claims that had arisen prior to 1 October 1986 only if the self-insurer had become insolvent prior to the creation of the Security Association, in order to cover the existing workers’ compensation claims against the insolvent trucking companies. However, the original language does not reflect an intent to cover pre-existing claims against companies that were solvent prior to creation of the Security Association. In other words, there is no coverage for pre-1986 claims if the insolvency of the self-insurer occurred after the Security Association was created.

In addition to misconstruing the original language of section 97-133(a)(4), Plaintiffs-Appellants completely disregard the plain language of the original version of section 97-131(b)(2):

A self-insurer shall be deemed to be a member of the Association for purposes of its own insolvency when: (a) the self-insurer is a member of the Association *when the insolvency occurs*, but claims relating to a compensable event that occurred prior to the date the self-insurer joined the Association are not included hereunder[.]

1986 N.C. Sess. Laws 402, 403, ch. 1013, § 1 (emphasis added). This language plainly precluded claims that arose before a self-insurer joined the Security Association if the self-insurer was solvent prior to the creation of the Security Association. Moreover, even under the original version of the statutes, a “covered claim” still only included those claims that related to an injury that occurred while the self-insurer was a member of the Security Association. *Id.* Plaintiffs’-Appellants’ interpretation of the

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1986 version of section 97-133(a)(4) cannot be reconciled with the other provisions of the statutes expressly precluding coverage for pre-existing claims against self-insurers who were solvent at the time the Security Association was created. Thus, even if this Court were to conclude that the language is ambiguous, and look to the legislative history to discern intent, the original 1986 statutes precluded Plaintiffs'-Appellants' claims from being "covered claims" because: (1) Fieldcrest was solvent when it joined the Security Association on 1 October 1986; and (2) Plaintiffs'-Appellants' last injurious exposure occurred prior to Fieldcrest becoming a member.

Finally, Plaintiffs'-Appellants contend that the Full Commission's order violates their due process and equal protection rights. However, because Plaintiffs'-Appellants fail to raise any constitutional argument before the Industrial Commission, they waived these arguments on appeal. *See Powe v. Centerpoint Human Servs.*, 215 N.C. App. 395, 412, n.3, 715 S.E.2d 296, 307, n.3 (2011) (refusing to address a plaintiff's constitutional argument when she failed to raise this issue before the Industrial Commission).

Conclusion

Based on the plain and unambiguous language of the statutes governing the Security Association, we affirm the Full Commission's conclusion that Plaintiffs'-Appellants' claims are not "covered claims" for purposes of compensation.

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

DABEERUDDIN KHAJA, PLAINTIFF
v.
FATIMA HUSNA, DEFENDANT

No. COA14-701

Filed 6 October 2015

1. Divorce—marriage in India—procedural posture—issues addressed separately

An "incredibly complex" divorce case was organized by separately looking at the each of the issues addressed by the Divorce

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Judgment. Although the trial considered a motion to dismiss based upon subject matter jurisdiction, the wife chose not to pursue the motion and there were no arguments about it on appeal. The wife's motion to dismiss based upon Rule 12(b)(6) was converted to a motion for summary judgment, but only on the claim for absolute divorce. The wife did not contest the denial of the motion to dismiss based on an Indian annulment and also did not contest the granting of the claim for absolute divorce, which was affirmed. The wife did, however, contest the trial court's use of findings from the divorce judgment in the alimony order.

2. Injunctions—preliminary—divorce—use of findings

A preliminary injunction in a divorce case was affirmed where the wife did not present any substantive challenge to the entry of the preliminary injunction itself but argued that the trial court erroneously relied on findings from the preliminary injunction in its Alimony Order.

3. Evidence—affidavit not considered—waiver of privilege involved—affidavit ultimately not offered

There was no error in a complicated divorce case where the trial court did not consider the wife's affidavit in opposition to the motion for sanctions/in limine filed against the wife. Considered in the context of the entire hearing, the wife wanted to blame her prior attorneys for her failures to respond to discovery requests, which she sought to do by her affidavit without waiving attorney-client privilege. When the trial court noted that she would be waiving attorney-client privilege if it accepted the affidavit, she chose not to waive the privilege, did not challenge the trial court's interpretation of the affidavit or its stance on privilege, and declined to present the affidavit. The affidavit was not admitted because the wife's attorney made the strategic decision not to offer it.

4. Discovery—sanctions order—sanctions—abuse of discretion not argued or shown

There was no abuse of discretion in a divorce case in the exclusion of an affidavit as a discovery sanction where the wife did not introduce the affidavit, argue abuse of discretion, or demonstrate abuse of discretion. Moreover, considered in context, the trial court did not require her to do the impossible.

5. Discovery—sanctions order—date of entry—argument waived

The wife in a divorce case waived on appeal any argument regarding the date of the entry of a sanctions order where she

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essentially argued that she was not aware of her discovery obligations until it was too late. The wife's counsel did not mention any concerns about the entry of the sanctions order at the alimony trial, despite the discussion of various portions of the order at the hearing.

6. Divorce—alimony—prior findings

An alimony order was reversed and remanded where the trial court made it clear that it thought it was bound by all judgments and orders that had preceded the hearing. The trial court was not actually bound by the prior findings of fact. The trial court used findings from the divorce judgment that went beyond the facts needed to address the limited issues before it. Those unnecessary findings from the divorce judgment should have been irrelevant to the trial court when considering alimony.

7. Divorce—preliminary injunction—findings—not binding

Findings from a preliminary injunction were not binding upon the trial court at an alimony hearing.

8. Divorce—sanctions order—findings

Viewed within context, as an order addressing discovery issues and violations, a Sanctions Order in a divorce case remained binding on remand, including its prohibition on the wife's presentation of evidence of marital fault by husband. The order was remanded because the appellate court had no way of knowing exactly which prior findings of fact the trial court erroneously relied upon or whether the trial court might otherwise have found differently.

9. Divorce—wife's income—Bureau of Labor Statistics

In a divorce case remanded on other grounds, the trial court erred by taking judicial notice of Bureau of Labor Statistics information on salaries in defendant's occupation and relying so heavily upon these statistics for its finding of fact regarding her earning capacity.

Appeal by defendant from judgments entered 11 December 2012 and 4 January 2013, preliminary injunction entered 3 January 2013, orders entered 22 May and 3 June 2013 by Judge Debra Sasser in District Court, Wake County, and order entered 26 August 2013 by Judge Michael J. Denning, in District Court, Wake County. Heard in the Court of Appeals 19 March 2015.

Sandlin Family Law Group, by Deborah Sandlin and Debra Griffiths, for plaintiff-appellee.

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Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellant.

STROUD, Judge

Defendant, former wife, appeals several judgments, a preliminary injunction, and orders regarding her divorce and alimony obligations to plaintiff, her former husband. For the following reasons, we affirm in part and reverse and remand in part.

I. Background

This incredibly complex case, with a record, a supplemental record, and transcripts totaling over 3,500 pages, arises from a very short marriage. Unfortunately, this case is not the only litigation spawned by the two parties, as defendant (“wife”) has also filed a separate tort action against plaintiff (“husband”) in Superior Court, Wake County and brought both criminal charges and a civil action against him in India. Perhaps it goes without saying that the parties agree on very little, but it is undisputed that the parties met through an Indian marriage website, began communicating in June of 2007, and were married in India on 19 October 2007. Sometime in 2008 they separated, though the exact date of separation is disputed.

The issues relevant to this appeal arise from husband’s divorce and alimony claim against wife. On 24 October 2011, husband filed a complaint in Wake County seeking an absolute divorce, alimony, and attorney fees. On 3 February 2012, wife filed “MOTIONS AND ANSWER” in which she moved to dismiss husband’s claims based upon subject matter jurisdiction and failure to state a claim upon which relief could be granted, arguing that the parties were no longer married due to an annulment in November of 2011 in India. Wife also raised various affirmative defenses, including the annulment; constructive and actual abandonment; “physical[], sexual[] and psychological[] abuse[] . . . [due to] cruel and barbarous treatment endangering her life and well being[;]” “indignities to [wife] as to render her condition intolerable and her life burdensome[;]” a lie that “induce[d] her into entering” the marriage; “fraudulent[] induce[ment] . . . in order to gain entry into the United States and to procure immigration through her[;]” and “fraud and unclean hands . . . for alimony” purposes. From this point forward, we will outline the chronology of this case by reviewing the judgments, preliminary injunction, and orders on appeal.

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A. Preliminary Injunction

On 4 December 2012, the trial court issued a “TEMPORARY RESTRAINING ORDER” (“TRO”) on behalf of husband due to (1) ongoing disputes between the parties regarding discovery, particularly wife’s failure to turn over electronic devices such as computers and flash drives, and (2) wife’s “pursuing false criminal charges against [husband] in India, having [husband’s] family members arrested,” . . . “attempt[ing] to have [husband’s] medical license revoked[,]” “effort to interfere with [husband’s] immigration status[,]” and “false police reports to the Morrisville Police Department[,]” which ultimately culminated in husband being arrested by Immigration and Custom Enforcement

and held for 21 days as a result of [wife’s] interference and lies. [Husband’s] passport has been impounded as a result of her lies and he was placed on Interpol’s Most Wanted because of her lies which he has only recently been able to rectify after substantial work and attorneys’ fees.

The TRO ordered wife to immediately

surrender . . . all computers, laptops, sim cards, flash drives, cd drives, hard drives and other modes of electronic storage equipment, in [wife’s] possession, custody or control or that [wife] used at any time between August 200[¹] to the present . . . by 5:00 pm on Wednesday, December 5, 2012.

2. [Wife] is to immediately cease any harassment (as defined by NCGS § 14[-]277.3A(b)(2)) or interference with [husband] or his family, including but not limited to contacting the State Department, Department of Homeland Security, Immigration Services, any Congressman’s office, any governmental agency in India regarding [husband]. [Wife] is also prohibited from submitting any further documentation to any Indian official without a court order allowing her to do so. This prohibition applies to both direct and indirect harassment and interference. [Wife] is to tell any person acting on her behalf to stop all such contact.

The TRO set “[t]his matter” for hearing on 13 December 2012.

1. The final digit of the year is illegible.

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As set by the TRO, on 13 December 2012, the trial court held the hearing, and on 3 January 2013, based on the 13 December 2012 hearing, the trial court entered a Preliminary Injunction. The Preliminary Injunction included extensive findings of fact regarding the inception of the parties' relationship, the relationship's demise, wife's efforts to have husband arrested and deported, the ensuing litigation outside of this case, and wife's repeated refusals to comply with discovery requests and orders.²

Despite the title of the order, it was not a Preliminary Injunction in the usual sense of the term since it mainly addressed discovery issues. *See Jeffrey R. Kennedy, D.D.S. v. Kennedy*, 160 N.C. App. 1, 8, 584 S.E.2d 328, 333, ("A preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." (citation and quotation marks omitted)). Essentially, the Preliminary Injunction addressed wife's non-compliance with the discovery process; in other words, had wife complied with discovery requests and orders, no preliminary injunction would have been needed. The Preliminary Injunction required wife to preserve her "electronic devices . . ., including but not limited to cellular phones, smart phones, laptops, computers, storage devices such as flash drives or external hard drives, table[t]s, disks, etc.[,]" "provide her email addresses and passwords[,]" to Mr. Ellington, an expert in computer forensics and analysis, and "[b]y December 20, 2012, . . . submit an affidavit . . . detail[ing] . . . any [and] all communication that [wife] has had with any governmental agency that may directly or indirectly impact [husband]."³ The Preliminary Injunction set another hearing on 3 January 2013 for consideration of "remaining discovery issues [and] any issues regarding the implementation of this order."

B. Judgment for Absolute Divorce

On 11 December 2012, exactly one week after the TRO was entered and two days before the hearing which would result in the Preliminary

2. Husband had previously served various discovery requests upon wife, and the trial court had entered an order compelling discovery which is not a subject of this appeal.

3. The TRO did enjoin wife from continuing to "harass" husband and from reporting him to various agencies, but this language was not included in the decretal portion of the Preliminary Injunction.

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Injunction, the trial court entered a “JUDGMENT FOR ABSOLUTE DIVORCE[.]” On 4 January 2013, the trial court entered an “AMENDED JUDGMENT FOR ABSOLUTE DIVORCE” (“Divorce Judgment”) to correct a “typographical error[.]” The Divorce Judgment noted that wife “withdrew her motion to dismiss for lack of subject matter jurisdiction based on lack of domicile of either party and proceeded with her Rule 12(b)(6) claim asserting the affirmative defense of an Indian annulment.”

The trial court made several findings of fact, including the following which are relevant to the issues raised on appeal:

5. . . . This court declines to recognize the Indian annulment decree under the principles of comity in that the petition was filed at a time when neither [husband] nor [wife] was a domiciliary of India. . . .
6. The parties were married on October 19, 2007. Plaintiff left the marital residence on February 9, 2008 when Defendant asked him to leave. The parties worked on reconciling the marriage for sometime. Defendant made the decision to remain separate and apart from Plaintiff beginning in September 2008. The parties have in fact remained separate and apart since September 2008.

C. Order for Sanctions and Injunction

As set by the Preliminary Injunction, on 3 January 2013, the same day the Preliminary Injunction was entered, the trial court held a hearing regarding “[husband’s] request for an injunction and for sanctions related to spoliation of evidence and non-production of discovery[;]” on 22 May 2013, the trial court entered the resulting “ORDER FOR SANCTIONS AND INJUNCTION” (“Sanctions Order”). The Sanctions Order has extensive findings of fact, including findings of fact regarding the contents of wife’s provided electronic devices, her continued failure to fully comply with the prior orders regarding discovery, and her extensive interference in husband’s life. The trial court concluded that wife had no “legal merit” in her objections regarding discovery compliance and that there was “no just cause” for wife’s failure to comply with discovery requests. The trial court ordered:

1. [Wife] is hereby precluded from presenting any evidence regarding any marital fault on the part of [husband].

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2. [Wife] is hereby precluded from providing any testimony that is not solicited by [husband's] attorney regarding any contact or communication with any third party or third party agency regarding [husband].
3. [Wife] is hereby precluded from presenting any evidence regarding [husband's] earning capacity. [Wife] may only present evidence regarding [husband's] financial need for alimony.
4. [Wife] may not solicit testimony from any witness that she has not fully disclosed to [husband].

It is important to note, that like the Preliminary Injunction, the “injunction” portion of the Sanctions Order addresses discovery issues. Wife was not actually “enjoined” from any activity but rather was ordered to comply with discovery and sanctioned for not having already done as ordered. The trial court also noted that “[t]he issue of attorneys’ fees amount and expert fees shall be entered by separate order.”

D. Order for Alimony and Attorney Fees

On 22 May 2013, the same date the Sanctions Order was entered, the trial court began a three-day trial on husband’s alimony and attorney’s fee claim; on 26 August 2013, the trial court entered the resulting “ORDER FOR ALIMONY AND ATTORNEYS’ FEES” (“Alimony Order”). The Alimony Order has 16 single-spaced pages with extensive findings of fact and conclusions of law. Ultimately, on 26 August 2013, the trial court entered an order requiring wife to pay alimony to husband in the amount of \$1,600 per month, starting 1 September 2013 and continuing until 30 August 2016 and to pay additional attorney fees to husband’s counsel in the amount of \$40,000.

E. Order for Attorney Fees

On 3 June 2013, the trial court entered an “ORDER FOR ATTORNEYS’ FEES” (“Fees Order”), pursuant to its Sanctions Order in which it had informed the parties it would be entering an order at a later time. The Fees Order required wife to pay \$20,000 to husband’s counsel and \$2,500.00 to “Mr. Ellington for the forensic evaluations and court testimony[.]” Wife filed a notice of appeal from most of the aforementioned orders and judgments, even if interlocutory, on 25 September 2013.

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II. Divorce Judgment

“We made a mess of it.”⁴

To understand wife’s first argument on appeal we must turn back from the Amended Divorce Judgment to the Divorce Judgment as originally entered. The introductory paragraph in the original Divorce Judgment stated that

[t]he parties, through counsel, presented evidence during Defendant’s motion to dismiss, thus converting the motion to dismiss to a summary judgment hearing. The court having heard testimony of the parties, examined various exhibits and examined extensive case law finds that no genuine issue of material fact exists and that [husband] is entitled to summary judgment divorce for the following reasons[.]⁵

On 28 November 2012, the trial court held a testimonial hearing to address wife’s two motions to dismiss and husband’s divorce claim. Wife first proceeded on her motions to dismiss for lack of subject matter jurisdiction and failure to state a claim; both these arguments, according to wife, were based on the annulment of the parties’ marriage issued by a court in India.⁶ In order to address the jurisdictional issues, the parties presented testimony and other evidence. Since hearings on motions to dismiss under Rule 12(b)(6) typically do not include testimony, this put the case in an interesting procedural posture because the testimony and exhibits the trial court was considering for the jurisdictional motion should not have been considered for the Rule 12(b)(6) motion. See *Hillsboro Partners v. City of Fayetteville*, ___ N.C. App. ___, ___, 738 S.E.2d 819, 822 (“As a general proposition, a trial court’s consideration of a motion brought under Rule 12(b)(6) is limited to examining the legal

4. Throughout this case, the parties’ counsel and trial court remained keenly aware of the level of complexity and chaos involved. For this reason, the record includes comments which seem to summarize each of the issues raised on appeal, and we have quoted these as introductions to each section. We appreciate husband’s counsel for her candor in this particular remark about the procedural posture of the case during the divorce hearing.

5. We recognize that this quoted portion was removed from the Amended Divorce Judgment, but as we noted, this procedural summary is helpful to understand wife’s argument on appeal.

6. Wife’s motion to dismiss states, “The Court lacks subject matter jurisdiction over Plaintiff’s Claim for Absolute Divorce because the parties are no longer married.” In a later motion for relief from order, wife raises another issue with subject matter jurisdiction regarding “residency and domiciliary[.]” claiming that she resided in South Carolina.

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sufficiency of the allegations contained within the four corners of the complaint.”), *disc. review denied*, 367 N.C. 236, 748 S.E.2d 544 (2013).

Husband testified first, followed by wife. During wife’s examination, the trial court made it clear that the annulment in India was not really a jurisdictional issue and addressed the procedural quagmire:

There’s a first motion to dismiss, lack of subject matter jurisdiction because parties are no longer married.

That’s what it says, which is not subject matter jurisdiction.

The second motion to dismiss is it doesn’t state a claim upon which relief can be granted.

MS. CONNELL [Wife’s Counsel]: Correct. I will concede that the first motion to dismiss for lack of subject matter jurisdiction raised there is inappropriate.

THE COURT: OK. Again, remember on a motion to dismiss is you look at the four corners of the document.

You don’t rely on other information. And I don’t know what’s in the document, itself.

But that’s why I don’t understand why we’re having all this testimony on the issue of dismissal, 12(b)6.

I’m looking at the complaint.

MS. SANDLIN [Husband’s Counsel]: Your Honor, I think it can be turned into a summary judgment.

THE COURT: It can be turned into a summary judgment motion because that’s basically what we’re going to do, is summary judgment on that issue.

If you bring in extraneous information, the Court can allow it and it would be treated as a motion for summary judgment.

MS. CONNELL: I believe that’s where we are at this point, Your Honor.

THE COURT: Yeah. I am a big nitpicker on civil procedure. I wish someone had filed a motion for summary judgment instead of—and we’ll proceed on that as we go.

Y’all work out the documents.

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MS. CONNELL: And just to clarify what I was going to say, the 12(b)6, now summary judgment, and then our contention is that the subject matter jurisdiction fails because no one was a domiciliary—

THE COURT: (Interposing) Well, you just got through telling me you're not—I'm talking only about the motions to dismiss right now.

MS. CONNELL: I apologize. I'm jumping ahead.

THE COURT: I'm only talking about the motions to dismiss.

MS. CONNELL: OK.

THE COURT: You've already told me that you're not doing the motion to dismiss alleged in the complaint.

MS. CONNELL: Yes, ma'am.

THE COURT: And you haven't filed another motion to dismiss the complaint based on anything else other than the two asserted in your answer?

MS. CONNELL: Yes, ma'am.

THE COURT: So I'm only talking about the motions to dismiss right now. . . .

After the lunch recess, the trial court resumed by clarifying:

Folks, just to kind of carry on the discussion we had before we left, I do believe that this is being converted to a motion for summary judgment, which everyone realizes that even though it's [wife's] motion, I can grant summary motion in favor of the [husband] at the conclusion of this.

Whereas, if it were just a motion to dismiss, that would be my only option, would be to dismiss it in its entirety.

So if I were to find that there was --that the evidence regarding annulment was insufficient, that there was a valid marriage, I can grant summary judgment on the divorce claim, because that's what you've moved--you've moved to dismiss the entire complaint, but I certainly can grant summary judgment on the divorce claim.

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Not on the alimony, because I don't think all the elements will be presented in evidence.

At this point wife's attorney stated that wife would only be proceeding on the Rule 12(b)(6) motion that had been "converted" to a summary judgment motion due to the testimony and exhibits the trial court was to consider. With this background in mind, we turn to wife's argument on appeal.

[1] Wife's first argument is that "the trial court erred in making factual findings in the summary judgment proceeding which impacted the supposed duration of the marriage and subsequent alimony award." (Original in all caps.) (Quotation marks omitted.) Wife argues that the trial court improperly made findings of fact in the Divorce Judgment which created "a snowball effect" in the Alimony Order, as the trial court considered the findings of fact from the Divorce Judgment the law of the case. The focus of wife's argument is not the validity of the absolute divorce itself but instead the trial court's later reliance upon its findings of fact in the Alimony Order. Thus, we turn to the Divorce Judgment and the issues it actually intended to and did address.

Although the procedural posture of the case was a "mess[,]" we can organize the mess by separately looking at each of the issues addressed by the Divorce Judgment. First, the trial court considered the motion to dismiss based upon subject matter jurisdiction. Wife chose not to pursue this motion, and there are no arguments regarding it on appeal. Secondly, the trial court considered wife's motion to dismiss based upon Rule 12(b)(6) that was "converted" to a motion for summary judgment only on the claim for absolute divorce. Ultimately, wife does not contest the basis of the trial court's denial of the motion to dismiss because it did not recognize the annulment in India. Wife has not raised any arguments that the annulment should have been recognized.

Lastly, there was the divorce claim. North Carolina General Statute § 50-6 provides,

Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months.

N.C. Gen. Stat. § 50-6 (2011). Thus, to grant a summary judgment divorce the trial court need only find that there was no genuine issue of material

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fact that the parties had been separated for a year, although the exact date is not a necessary finding as long as the time period was a year or more, and that one of the parties had resided in North Carolina for six months preceding the filing of the complaint. *See id.*, *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011) (“The judgment sought shall be rendered forthwith 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.”).

Wife does not contest that the parties had been separate and apart for at least a year or that she or husband had resided in North Carolina for six months. Thus, wife does not contest the granting of husband’s claim for absolute divorce. Wife does contest the trial court’s reliance on the findings of fact in the Divorce Judgment when it later entered the Alimony Order. For the reasons we have just stated, we agree that findings of fact beyond not recognizing the annulment in India, that the parties had been separated and apart for a year, and that either husband or wife had resided in North Carolina for six months were not necessary for the trial court to make in the Divorce Judgment. However, because the determinations of the Divorce Judgment itself are not challenged, we affirm the Divorce Judgment. Yet this does not end our inquiry regarding the Divorce Judgment, because we must consider the extent to which the trial court wrongfully used the extraneous findings of fact in the Divorce Judgment in support of its Alimony Order. We will address this issue in our analysis of the Alimony Order.

III. Preliminary Injunction

“The particular marital fault that there has been testimony about in the past with regard to this case . . . there are findings of fact about it in this order.”⁷

[2] Wife’s argument here is similar to the argument we just addressed, although more plainly stated as she contends that in the Alimony Order “[t]he trial court improperly granted conclusive and preclusive effect to the factual findings in an earlier entered preliminary injunction order.” (Original in all caps.) Just as in the last section, here, wife contends that the trial court improperly relied upon findings of fact made in the Preliminary Injunction in its Alimony Order. Wife does not present any substantive challenge to the entry of the Preliminary Injunction itself.

7. Husband’s counsel made this argument to the trial court at the alimony hearing as to the effect of the findings of fact in the Preliminary Injunction.

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Thus, we affirm the Preliminary Injunction, and to the extent that the trial court relied upon findings of fact from the Preliminary Injunction in its Alimony Order, we will address this in our analysis of the Alimony Order.

IV. Sanctions Order

Wife makes two arguments as to the Sanctions Order, and we separately address each.

A. Failure to Consider Wife's Affidavit

"That's fine. I withdraw it. I'll withdraw the affidavit."⁸

[3] Wife argues that "the trial court improperly failed to consider wife's affidavit in opposition to the motion for sanctions/in limine filed against wife." (Original in all caps.) Wife contends that had the trial court considered her affidavit, it would have ruled differently regarding the Sanctions Order, but she does not argue any other substantive challenge to the actual Sanctions Order.

Wife's argument on appeal focuses on a few limited statements made by the trial court from two separate parts of the hearing:

[T]he trial court would not consider Wife's affidavit in opposition to the motions pending before the court. . . . The trial court said it would not consider the affidavit unless it was "presented" as "evidence." The trial court noted that Wife "[didn't] have to file a response" to the outstanding motions. . . . Later in the hearing, when Wife's counsel actually sought to introduce the affidavit into "evidence," the trial court refused the entry of the affidavit.

But defendant's summary of what happened at the hearing takes the trial court's statements out of context; we shall seek to place them back in proper perspective.

On 3 January 2013, at the beginning of the hearing, the trial court stated:

We're here, I think it's called Plaintiff's Motion in Limine on my calendar. I know it was a carry-over from a previous court date with regard to some discovery sanctions.

8. This quote is from wife's counsel.

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. . . .

MS. SANDLIN: December 4th, Your Honor. And you signed the TRO that day and you entered a preliminary injunction following that hearing, which we had December the 13th.

THE COURT: Right.

MS. SANDLIN: And as part of the December 13th hearing, you ordered certain things. And that's something else that we're here about today, which is also covered in the motion in limine.

And you ordered certain things to happen back in September of 2012 and you've subsequently made other orders, just re-enforcing your order from September of 2012.

The other thing that is on the calendar, Your Honor, is when we were here, Ms. Connell consented for Ms. Husna for the entry and continuation of the preliminary injunction as it related to electronic devices.

THE COURT: Right.

Thereafter, Mr. Will Cherry, wife's new counsel, stated that he would like to hand up wife's affidavit

that responds to various things that I think are going to be at issue today.

THE COURT: Counsel, I'm going to tell you if you expect me to read that affidavit, it counts against your time.

The trial court then thoroughly explained the "parameters" around its consideration of the affidavit. Then husband's attorney objected to the affidavit:

MS. SANDLIN: Your Honor, I have some objections to the affidavit. Primarily my biggest objection is it has attached what purports to be attorney/client communication between Ms. Husna and her counsel, Ms. Connell and Ms. Tanner, which purports to explain some of her behavior.

THE COURT: Are you waiving the attorney/client privilege, Counsel?

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MR. CHERRY: As the affidavit states, it is waived with respect to those—

THE COURT: (Interposing) No. When you open the door, you open the door.

MR. CHERRY: Your Honor, that—

THE COURT: (Interposing) And it's not in evidence yet, so no door has been opened.

MR. CHERRY: *That's fine. I withdraw it. I'll withdraw the affidavit.*

(Emphasis added.)

Thereafter, the trial court, to put it bluntly and colloquially, expressed its concern that wife was attempting to throw her prior attorneys “under the bus” and that this would not be allowed without hearing also from the attorneys themselves. The trial court then explained it would only consider the affidavit if it came in as evidence, and this was one of the portions of the transcript noted in wife’s brief:

THE COURT: So to the extent you want to move that affidavit into evidence, I haven’t made any rulings on it.

But just handing it up to the Court for something other than evidence I don’t think is appropriate.

At the point you want to present it as evidence, well, you can certainly jump through the evidentiary hoops and try to get it in.

MR. CHERRY: *For the time being, I think we'll address the matters through Defendant's testimony.*

(Emphasis added.)

Turning to the second portion of the transcript noted in wife’s brief, later in the hearing, wife did testify on direct with husband’s counsel, and part of this testimony involved a lengthy and confusing discussion regarding wife’s failure to properly provide discovery. During the testimony, the following exchange took place:

Q. (By Ms. Sandlin) Ma’am, you attached this affidavit⁹, and you said, “This is evidence that I asked the Indian

9. In context, “this affidavit” is the affidavit wife had previously attempted to hand up to the trial court and then withdrawn.

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Police Department and the Public Prosecutor to produce the computer.”

Isn't that the purpose that you did this?

A. Yes.

....

MR. CHERRY: I would like to move this affidavit into evidence since we've been talking about it so that you can consider—

THE COURT: (Interposing) The affidavit is not coming into evidence. You're going to have her on the stand. You can get it in before me. Alright?

MR. CHERRY: Yes, ma'am.

THE COURT: *And then it can come into evidence, just to basically corroborate her testimony.*

(Emphasis added.) Thereafter, wife never attempted to offer the affidavit into evidence.

Regardless of the merits of wife's legal arguments as to when and how an affidavit may generally be presented in opposition to a motion, a review of the entire hearing puts the issue in its proper context. Wife wanted to blame her prior attorneys for her failures to respond to discovery requests, and she sought to do this by her affidavit, without waiving her attorney-client privilege and without calling the attorneys to testify. The trial court noted that if it accepted wife's affidavit she would be waiving her attorney-client privilege. Wife chose not to waive the attorney-client privilege, and she did not challenge the trial court's interpretation of her affidavit or the trial court's stance on privilege either before the trial court or on appeal. The trial court then gave wife an opportunity to present the affidavit as evidence, but wife's counsel declined, and chose to “address the matters through Defendant's testimony.”

Thereafter, during wife's testimony on direct for husband's attorney, wife's counsel again asked to offer the affidavit as evidence, and the trial court explained it would accept the affidavit as evidence during wife's time “on the stand[,]” in other words, during her presentation of evidence, not during husband's case-in-chief.¹⁰ Wife's counsel did not

10. Black's Law Dictionary defines “case-in-chief” as “1. The evidence presented at trial by a party between the time the party calls the first witness and the time the party

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disagree with the trial court's ruling on the appropriate time for the affidavit to be admitted into evidence. And although wife did present evidence during her case in chief, she did not proffer the affidavit again.

The affidavit was not admitted into evidence because wife's attorney made the strategic decision not to offer it. Perhaps this decision was based upon attorney-client privilege, or because he believed that wife's testimony was sufficient, or a myriad of other possible reasons, but the fact remains that the trial court plainly stated it would accept the affidavit as evidence during wife's presentation of evidence if properly offered, and wife's attorney chose not to offer it. This argument has no merit.

B. Extent of Discovery Required

"So I guess to answer your question, every device that I've been given has been either misrepresented or tampered with in some way."¹¹

[4] Wife next argues that "the trial court improperly sanctioned wife for failing to produce items she was under no obligation to produce." (Original in all caps.) (Quotation marks omitted.) "Our standard of review of an order imposing discovery sanctions under N.C. Gen. Stat. § 1A-1, Rule 37 is abuse of discretion." *Ross v. Ross*, 215 N.C. App. 546, 548, 715 S.E.2d 859, 861 (2011).

We have already concluded that wife's affidavit was not received into evidence because she did not introduce it. Thus, to the extent that wife relies on the same affidavit as evidence of errors in the Sanctions Order, her argument is rejected. Wife's argument is hypertechnical and focused on a few words in husband's discovery requests, in which he requested discovery of "regularly used" or "primarily used" electronic devices, while, during the hearing and in the Sanctions Order, the trial court addressed "any" electronic device she has been exposed to over the course of litigation. But considering the entirety of the Sanctions Order in context, the trial court did not, as wife argues, require her to do

rests. 2. The part of a trial in which a party presents evidence to support the claim or defense." Black's Law Dictionary 244 (9th ed. 2009). Normally each party offers exhibits into evidence during his or her case-in-chief and not during the opponent's case-in-chief. See *generally id.* Under N.C. Gen. Stat. § 8C-1, Rule 611(a), "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." N.C. Gen. Stat. § 8C-1, Rule 611(a) (2011).

11. This quote is from Mr. Ellington.

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the impossible by providing every single electronic device she had been exposed to, whether or not it belonged to her. Instead, the Sanctions Order quite logically addresses discovery violations such as wife's denial of use of an email address which the evidence showed she had used *after* the date she claimed she had last used it and tampering with devices she eventually did turn over for discovery. On appeal, wife does not actually contest a single finding of fact regarding her devious conduct during discovery nor does she challenge the propriety of the trial court's ultimate sanction which bars her from presenting certain evidence, including evidence of husband's marital fault, at the alimony hearing. Wife has failed to argue, much less demonstrate, an abuse of discretion. *See id.*

Once again, the focus of wife's arguments regarding the Sanctions Order is the trial court's later reliance on findings from the Sanctions Order in the Alimony Order. Wife's only heading in this section of her brief is entitled, "A specific illustration of how the trial court's error in the sanction/in limine order illegally prejudiced Wife *at the alimony trial.*" (Emphasis added.) In fact, wife concludes her argument regarding the Sanctions Order by stating, "For that reason and others cited herein, the alimony order and the corresponding order on attorneys' fees must be vacated[,] and does not even mention vacating, reversing, or remanding the Sanctions Order.

[5] Lastly, we note that wife filed a reply brief and argued,

assuming *arguendo* the trial court could change the terms [to "any" device instead of "regularly" or "primarily" used devices] if wife's obligations to provide discovery responses from those of the original requests and the trial court's own order to compel, wife could not be bound by those changed terms until a written order on sanctions was issued.

(Original in all caps.)

The trial court rendered its decision at the hearing regarding sanctions on 3 January 2013, but did not enter the written Sanctions Order until 22 May 2013, the first day of the alimony hearing. Wife claims that since "no written order on the sanctions had been entered . . . it was unclear what Wife's obligations were pending entry of such an order." Wife essentially argues that she was not aware of her discovery obligations until it was too late. Although we acknowledge that in some cases a delay in entry of an order of this sort could be problematic, as a party truly may not know what is required of her by the trial court, that did not happen here. We know this because at the alimony trial, which began on

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22 May 2013, the same day that the Sanctions Order was signed and filed, wife's counsel does not mention any concerns whatsoever regarding the date of entry of the Sanctions Order, despite the fact that various provisions of the order are discussed during the hearing. If wife believed that she was prejudiced by the delayed entry of the Sanctions Order and did not understand her obligations, she should have mentioned it that day, when the trial court could have addressed the issue with both parties and counsel. Wife has thereby waived any argument on appeal regarding the date of entry of the Sanctions Order. *See* N.C.R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]"); *see also State v. Johnson*, 204 N.C. App. 259, 266, 693 S.E.2d 711, 716-17 (2010) ("As a general rule, the failure to raise an alleged error in the trial court waives the right to raise it for the first time on appeal.") Thus, we affirm the Sanctions Order,¹² and finally turn to the crux of this entire appeal, the Alimony Order.

V. Alimony Order

"[I]f the Court is stuck with those findings of fact, which I think we are—we can't go back and relitigate those."¹³

Finally, we turn to the Alimony Order. Wife essentially raises two arguments as to the Alimony Order, and we address each in turn.

Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.

An abuse of discretion has occurred if the decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.

Kelly v. Kelly, ___ N.C. App. ___, 747 S.E.2d 268, 272-73 (2013) (citation and quotation marks omitted).

12. Wife does not make a separate argument regarding the Attorney Fees Order, and thus it too is affirmed.

13. This quote is from the trial court.

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A. Trial Court's Reliance on Prior Orders

[6] As we have noted several times so far, most of wife's arguments regarding other judgments and orders are that the trial court improperly relied on various findings of fact in these prior judgments and orders in the Alimony Order. Indeed, the trial court made it clear at the alimony hearing that it was bound by all judgments and orders that had preceded this hearing; and as to marital fault, a main focus of the Alimony Order, the trial court stated that what had been determined about fault was "the law of the case, and it's done." Because the trial court was not actually "stuck" with all of the prior findings of fact, we must reverse and remand the Alimony Order.

We consider first the trial court's reliance on findings of fact in the summary judgment Divorce Judgment. As we noted in the section regarding the Divorce Judgment, the trial court did indeed make some findings of fact, particularly finding 6, that went beyond the facts needed to address the limited issues before it.¹⁴ Our Court has previously recognized as to findings of fact in summary judgment proceedings that "[t]he Findings of Fact entered by the trial judge, insofar as they may resolve issues as to a material fact, have no effect on this appeal and are irrelevant to our decision." *Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975) (citations and quotation marks omitted). The unnecessary findings of fact in the Divorce Judgment should also have been irrelevant to the trial court when considering alimony, *see generally id.*, but unfortunately they were not. The irrelevant findings of fact in the Divorce Judgment include the date of separation of September 2008, as this was a contested issue. Essentially, the parties agree they ceased living together on 9 February 2008, but husband contends, and the trial court found in the Divorce Judgment, that the parties separated in September 2008, apparently based upon "defendant's" formation of the intent to remain separate and apart from "plaintiff."¹⁵

14. During rendition of the divorce ruling, the trial court recognized that a summary judgment divorce order should not have findings of fact: "So I'm granting summary judgment in favor of the Plaintiff on the divorce claim. . . . But of course, it's a summary judgment, folks, so there's not a lot of findings in there."

15. Based upon the evidence presented and the arguments on appeal, we think that perhaps this finding may also include a "typographical error" in referring to the parties. Based upon the evidence that the trial court appeared to find the most reliable, husband's evidence, it is likely the trial court actually found that *husband* formed his intent to remain separate and apart in September, and not that *wife* formed an intent then; but either way, the result is the same on appeal, since the trial court will have to make a new finding of fact on the date of separation on remand.

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Although it might be appropriate to reverse and remand the Alimony Order for this reason alone, since we have no way of knowing how much weight the trial court gave the findings of fact it relied upon from the Divorce Judgment, such as the date of separation, or if the unnecessary findings of fact had any effect on the final ruling, we will address the other issues as well in the hope of limiting and clarifying the determinations which will have to be made on remand.

[7] The findings of fact from the Preliminary Injunction were also not binding upon the trial court at the alimony hearing. *See Childress v. Yadkin Cty.*, 186 N.C. App. 30, 43, 650 S.E.2d 55, 64 (2007) (citation and quotation marks omitted). (“[F]indings and conclusions made in the grant of an injunction are not authoritative as the law of the case for any other purpose[.]”) Indeed, our Supreme Court has explained the “relevant rules” regarding Preliminary Injunctions:

1. The purpose of an interlocutory injunction is to preserve the status quo of the subject matter of the suit until a trial can be had on the merits. . . .

. . . .

7. *The findings of fact and other proceedings of the judge who hears the application for an interlocutory injunction are not binding on the parties at the trial on the merits.* Indeed, these findings and proceedings are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing.

Huskins v. Hospital, 238 N.C. 357, 360-62, 78 S.E.2d 116, 119-21 (1953) (citations omitted). Upon remand the trial court should not rely upon any of the findings of fact in the Preliminary Injunction to make findings required for husband’s alimony claim, including the findings regarding marital fault.

[8] We now consider the Sanctions Order. We have already affirmed the Sanctions Order, and this order bars wife from presenting certain evidence, including any evidence of marital fault by husband. Yet, even if wife could not present evidence of marital fault by husband, the trial court was not “stuck” with all of the prior findings of fact regarding marital fault committed by wife. We also note that in the trial court’s consideration of marital fault, the actual date of separation will determine whether wife’s actions alleged as marital misconduct occurred during the marriage or after the date of separation. N.C. Gen. Stat. § 50-16.3A (b)(1)(2011) (determining the amount and duration of alimony requires,

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if relevant, consideration of “[t]he marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation[.]”) Again, we have no way of knowing exactly which prior findings of fact the trial court erroneously relied upon or if the trial court might have found differently if not bound by prior findings, so we must remand the Alimony Order. Furthermore, from our review, the Sanctions Order’s findings of fact addressed the issues of discovery and non-compliance with the discovery process, but they properly did not address non-relevant issues such as the date of separation and marital fault for purposes of alimony, so to the extent these findings could even be inferred from the Sanctions Order, they would not be binding on the claim for alimony as this claim is separate and apart from the discovery issues. But viewed within context, as an order addressing discovery issues and violations, we have affirmed the Sanctions Order, so it remains binding on remand, including its prohibition on wife’s presentation of evidence of marital fault by husband.

B. Judicial Notice

“Her earning capacity is an ultimate fact. And to say, ‘OK, I pulled this up on the website and I want you to take judicial notice that this is what she can earn,’ without any further evidence about what she can earn, I would object.”¹⁶

[9] Wife’s last argument is that “the trial court erred in taking judicial notice of the Bureau of Labor Statistics concerning supposed salaries for electrical engineers, [wife’s occupation,] as these statistics do not constitute undisputed adjudicative facts capable of being judicially noticed.” (Original in all caps.) (Quotation marks omitted.) The trial court found:

Defendant is an accomplished electrical engineer who hold several patents. She has been published more than 20 times. Defendant’s area of expertise is that of semiconductor and other electrical components. The court takes judicial notice of the occupational employment statistics, occupational employment and wages for 2012 as published by the national Bureau of Labor Statistics. The national average salary for an electrical engineer

16. This statement is wife’s counsel’s objection to the trial court taking judicial notice of the labor statistics.

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with Defendant's qualifications is \$99,540 annually. The mean salary for an electrical engineer in North Carolina is \$126,000. Defendant has the ability to earn at least \$99,540 annually. Defendant is capable of earning a substantial income but is choosing to not do so in order to avoid her support obligation to Plaintiff.

North Carolina General Statute § 8C-1, Rule 201 of the Rules of Evidence governs judicial notice:

(a) Scope of rule.--This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts.--A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary.--A court may take judicial notice, whether requested or not.

(d) When mandatory.--A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard.--In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

N.C. Gen Stat. § 8C-1, Rule 201 (2011).

In *Greer v. Greer*, this Court noted:

Rule 201(b) of the North Carolina Rules of Evidence specifies that a judicially noted fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. . . .

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Any subject, however, that is open to reasonable debate is not appropriate for judicial notice.

175 N.C. App. 464, 472, 624 S.E.2d 423, 428 (2006) (emphasis added) (citation, quotation marks, and brackets omitted).

As part of husband's evidence regarding wife's earning capacity, his attorney asked the trial court "to take judicial notice of the Department of Labor Statistics with regard to salaries for electrical engineers." Wife's counsel objected, noting that "[t]his is the sort of thing that if they wanted to call in a vocational expert to talk about what she's capable of earning, then I wouldn't have any objection to it." After further discussion, husband's counsel noted that "what I'm asking you to take judicial notice of is what the average salary is for someone with her qualifications." The trial court then took judicial "notice of what she can earn[.]"

According to wife's brief, her "earning capacity was highly disputed[.]" and the trial court made an unchallenged finding of fact regarding her prior earnings. The trial court found in finding of fact 13 that wife was employed by Cree Inc. at the time of the marriage and earned \$58,685.00 annually. In 2008, she earned \$63,783.00, and in 2009, \$89,242.53. In 2010, wife's income from Cree Inc. and Nitek was \$57,328.00. Wife also began pursuing her PhD and Nitek was paying her tuition, which was "substantial" and unreported on her income tax returns. In 2011, wife was paid \$24,023 by Nitek, and in 2012, she was paid "about \$25,000.00" and sold stock "in excess" of \$17,000.00. In August of 2012, wife quit her job. Furthermore, the trial court found, and wife does not dispute, that she "is an accomplished electrical engineer who hold several patents" and "has been published more than 20 times[.]" her area of expertise is "semi-conductor and other electrical components." The trial court then found wife's earning capacity to be \$99,540.00 annually, based upon the "national average salary" for an electrical engineer with wife's qualifications.

Given the evidence at trial, and the trial court's own recitation of wife's varying salaries through the years, wife's earning capacity actually was and is "open to reasonable debate[.]" *Id.* Even if the labor statistics alone are undisputed, their applicability to wife is still open to question. Wife may contend, and apparently does, that she does not have the capacity to earn as much as the average electrical engineer with her qualifications or perhaps her capacity to earn is even greater than average, considering her patents and publications. Either way, her earning capacity is not the type of undisputed fact of which the trial court could take judicial notice under Rule 201. *See id.*

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Husband argues that even if the trial court erred in taking judicial notice of the statistics regarding average salaries, the error is harmless based upon the evidence of her actual earnings before quitting her job, particularly her earnings of \$88,512.00 in 2009 and her stock option benefits. But wife is correct that there is no evidence to support the trial court's finding of fact as to her earning capacity of \$99,540.00, and this finding was explicitly based upon the judicially noticed statistics. This amount, \$99,540.00, is substantially greater than wife's earnings for most of the years addressed in finding of fact 13. We agree that the trial court erred by taking judicial notice of the statistics and relying so heavily upon these statistics for its finding of fact regarding wife's earning capacity. We have already determined that the Alimony Order must be reversed and remanded, but we address this issue so that the trial court does not make the same error upon remand in determining wife's earning capacity.

VI. Conclusion

In conclusion, we affirm the Divorce Judgment, Preliminary Injunction, Sanctions Order, and Attorney Fees Order. We reverse and remand only the Alimony Order. On remand, the trial court must, if wife should request to do so, permit her to present additional evidence regarding the date of separation and her intent to separate, to the extent that this evidence is not barred by the Sanctions Order. As to this issue, the parties must have the opportunity to present additional evidence since wife did not previously have the opportunity to present this evidence because of the trial court's reliance on the finding of fact as to the date of separation in the Divorce Judgment. Due to the affirmed Sanctions Order, wife still may not present evidence of marital fault by husband or any other evidence barred by the Sanctions Order. However, the trial court should make its own independent determination of marital misconduct by wife as it is not bound by any prior judicial determination. Of course, this opinion does not prevent the trial court from making the same findings of fact on remand, so long as the findings are based upon its independent consideration of the evidence for purposes of determining the alimony claim. Since it has been over two years since the entry of the Alimony Order, we leave it in the trial court's sole discretion as to whether the parties should be permitted to present additional evidence. It would be entirely appropriate for the trial court to enter its new order based upon the evidence that was before it in 2013, but this Court has no way of knowing the current circumstances of the parties or if the trial court would prefer to receive additional evidence prior to entering a new alimony order; so the determination of whether to permit the

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parties to present additional evidence on remand and the extent of any evidence allowed can only be made by the trial court.

AFFIRMED in part; REVERSED and REMANDED in part.

Judges DILLON and DAVIS concur.

NORTH CAROLINA STATE BAR, PLAINTIFF
v.
DAN L. MERRELL, ATTORNEY, DEFENDANT

No. COA14-1334

Filed 6 October 2015

1. Attorneys—professional conduct violation—notice to attorney

On appeal from an order of discipline of the N.C. State Bar concluding that defendant attorney violated the Rules of Professional Conduct during the course of a commercial real estate transaction, the Court of Appeals rejected defendant's argument that, because he did not receive adequate notice of the conduct upon which the Bar ultimately relied in finding a violation, his due process rights were violated. The factual allegations in the complaint gave defendant sufficient notice of the primary misconduct alleged, and the use of the client's name instead of the client's LLC's name in the complaint did not constitute a material difference depriving defendant of notice. Even assuming the allegations of the complaint were materially different from the findings in the order, the State Bar's pleading was amended by implied consent to conform to the proof presented at trial.

2. Attorneys—professional conduct violation—real estate transaction—misappropriation of funds—conflict of interest

On appeal from an order of discipline of the N.C. State Bar concluding that defendant attorney violated the Rules of Professional Conduct during the course of a commercial real estate transaction, the Court of Appeals held that the Bar's findings of facts were supported by the evidence and that the conclusions of law were supported by the findings of fact. The evidence showed that defendant transferred funds without receiving the owner of the funds' permission and then failed to take steps to ensure that the funds were not

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misappropriated. Defendant also engaged in a conflict of interest and failed to provide full disclosure to one of the clients.

Appeal by defendant from order entered 2 December 2013 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 7 May 2015.

N.C. State Bar, by Counsel Katherine Jean, Deputy Counsel David R. Johnson, and Deputy Counsel Maria Brown, for plaintiff-appellee.

Phillip H. Hayes for defendant-appellant.

GEER, Judge.

Defendant Dan L. Merrell appeals from an order of discipline of the Disciplinary Hearing Commission of the North Carolina State Bar (the “DHC”) concluding that defendant violated the Rules of Professional Conduct by: (1) failing to safeguard and hold in trust clients’ entrusted funds in violation of Rule 1.15-2(a) and (2) engaging in a conflict of interest by representing both parties to a commercial real estate transaction without first obtaining written and informed consent in violation of Rule 1.7(a). We hold that the DHC’s findings of fact are supported by substantial evidence in the record, and the findings, in turn, support the DHC’s conclusions of law. Consequently, we affirm.

Facts

The North Carolina State Bar commenced this disciplinary action against defendant by filing a complaint on 12 April 2012. This case arises out of defendant’s representation of Michael Lam, a real estate developer. In its order of discipline, the DHC found, in pertinent part, the following facts.

In late 2005, Lam sought to develop a residential community, initially to be called Blue Water Cove, in Tyrrell County, North Carolina. Lam had entered into contracts to purchase the land that he wished to develop, but did not have the funds to finance the project. Lam solicited Thomas and James Gordon, who were residents of the State of Maryland, to participate in an investment project to buy and develop the land for Blue Water Cove. With the assistance of John Bollech, Lam created a term sheet for Blue Water Cove that included a description of the project with cost and profit projections. The term sheet stated that the cost of acquiring the land for the project was \$1.5 million. Lam advised the Gordons that he needed to move quickly because his contracts to purchase the land had either expired or were about to expire.

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On 20 December 2005, Lam and Bollech met with defendant at his office to discuss the Blue Water Cove project. Lam informed defendant that he wanted to form an LLC for the project and that the Gordons had committed to fund \$2,450,000.00 toward the project with \$1,500,000.00 designated for the purchase of the land. The Gordons were represented by Steven Nemeroff, an attorney licensed to practice in Maryland. Between late December 2005 and 12 January 2006, defendant communicated with Nemeroff and lawyers representing Bollech in the drafting of a memorandum of understanding (“MOU”) among the individuals and entities who would have an ownership interest in the project.

On 29 December 2005, defendant filed articles of organization to form Deepwater Development Company, LLC (“Deepwater”) – Lam was the sole member of Deepwater. On 13 January 2006, Lam, the Gordons, Bollech, Bernard Brooks, and Bill Reidy executed an MOU related to the development of Blue Water Cove. The MOU contemplated that a company would be formed to carry on the business of the project and that the Gordons would loan \$1.5 million to that company to acquire the land. The MOU contained a provision prohibiting self-dealing by Lam or any other party to the MOU.

On 18 January 2006, defendant drafted the articles of organization for Development Company of Columbia, LLC (“DCC”), the company created for purchasing and developing the land for Blue Water Cove. The articles named Lam as the organizer and registered agent and used Lam’s home address as DCC’s registered office. Also on 18 January 2006, the Gordons wired \$1.5 million to defendant’s general trust account maintained at the Bank of Currituck. The Gordons expected Merrell to hold their funds in trust to be disbursed to pay for DCC’s purchase of the land at closing. Although the funds belonged to the Gordons, they were recorded in defendant’s trust account ledger under the name of Lam.

The following day, defendant wrote a note to an associate in his law office, Bill Stott, advising Stott that Lam intended to purchase a parcel of the Tyrrell County land for \$360,000.00 and then sell it to DCC for \$650,000.00, and that Lam also wanted to buy two parcels from other owners of the Tyrrell County land using investor money and convey only one parcel to DCC, with Lam and Bollech keeping the second parcel, consisting of more than 80 acres, free and clear. Defendant advised Stott that he saw potential for criminal and civil liability in both transactions and directed Stott to draft a letter to Lam and a disclosure letter.

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On 23 January 2006, defendant filed the articles of organization for DCC with the Secretary of State. On or about that day, defendant sent a letter to Lam advising him that the series of transactions that he contemplated could constitute fraud and violate state and federal law. Defendant advised Lam that he would not represent him in the transactions unless full and complete disclosure was made to Lam's investors and potential partners and all of them acquiesced in the proposed arrangement. Defendant stated that his office would prepare disclosure documents to be executed after he verified that full disclosure had been made to all parties.

Despite the language of the 23 January 2006 letter, defendant did not draft a disclosure letter. Lam told defendant that he had made full disclosure to all interested parties, including the Gordons, of the fact that he planned to acquire the land for less than \$1.5 million. Defendant believed Lam and did not insist on any written documentation that full disclosure had in fact been made.

On 24 January 2006, defendant transferred the Gordon's \$1.5 million to a certificate of deposit account ("CD account") at Bank of America in the name of "Dan L. Merrell, Special Trustee for Development Company of Columbia, LLC." The address given for the account was Lam's address, and the tax identification number used was that of DCC. Defendant did not ensure that there was a signature card that would limit signatory authority on the account to him.

Although not signed by the members until 1 March 2006, the operating agreement of DCC, by its terms, became effective 1 February 2006. The operating agreement provided that Lam was the manager of DCC and, through Deepwater, was also a member of DCC. The term "property" under the agreement was defined as four separate parcels or interests referred to as the Sykes tract, the Davis tract, Ludford Landing, and an easement in an existing canal on the Taylor tract. Lam, as a manager of DCC, was prohibited by the agreement from self-dealing.

In February 2006, defendant was the closing attorney for Lam in Lam's purchase, through Deepwater, of the following tracts of land: on 3 February 2006, the Sykes tract for \$360,000.00; on 9 February 2006, the Taylor tract for \$267,500.00; on 14 February 2006, the Pinner interest in Ludford Landing for \$16,666.00; on 15 February 2006, the Cahoon interest in Ludford Landing for \$50,000.00, and the Davis tract for \$300,000.00. In all, Deepwater paid a total of \$726,666.00 to acquire the properties. Although defendant was aware that Deepwater acquired the entire Taylor tract for only \$267,500.00, on 16 February 2006, defendant

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contacted Nemeroff on behalf of Lam to confirm that the Gordons would provide an additional \$295,000.00 for DCC to purchase a license and easement for use of the existing canal on the Taylor tract.

Meanwhile, funds were withdrawn from the Bank of America CD account without the Gordons' knowledge, permission, or approval on 27 January 2006, 14 February 2006, and 1 March 2006. These withdrawals were used for Lam's benefit, including funding Deepwater's purchase of the Tyrrell County land. Defendant was not, however, aware that the funds were wrongfully withdrawn from the CD account without his authorization until sometime in September 2006.

On 2 March 2006, defendant was the closing attorney for the transaction in which DCC bought the Tyrrell County land and the Taylor tract easement from Deepwater for \$1,745,000.00. Defendant represented DCC, Lam, and Deepwater at the closing. The transaction resulted in a profit of close to \$1 million to Deepwater at the expense of DCC.

The 1 March 2006 withdrawal from the CD account closed out the account. However, defendant did not provide the Gordons with a written accounting of the receipts and disbursements of the \$1.5 million upon the complete disbursement of the funds and did not account for the interest earned on the funds while in the CD account.

Based upon these findings, the DHC concluded that defendant's conduct constituted grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) (2013) in that defendant violated the Rules of Professional Conduct:

- a. By moving the Gordons' funds from defendant's trust account to a certificate of deposit account at Bank of America in the name of "Dan L. Merrell, Special Trustee for Development Company of Columbia, LLC" with Lam's mailing address on the account, using DCC's tax identification number, failing to ensure access to the account was limited to himself, and failing to provide an accounting, along with other factors noted above, Merrell failed to safeguard and hold in trust the Gordons' entrusted funds in violation of Rule 1.15-2(a).
- b. By representing both Deepwater and DCC at the closing on March 2, 2006 when Defendant's representation of DCC was materially limited by his responsibilities to Deepwater and he had not obtained the written

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informed consent of the clients to the dual representation, Defendant engaged in a conflict of interest in violation of Rule 1.7(a).

The DHC suspended defendant's law license for two years and stayed the suspension for a period of two years contingent on defendant's compliance with certain conditions. Defendant timely appealed the order to this Court.

I

[1] On appeal, defendant argues that the DHC violated his due process rights because the allegations in the complaint did not provide him with adequate notice of the conduct upon which the DHC ultimately relied in concluding that defendant violated Rules 1.15-2(a) and 1.7(a) of the Rules of Professional Conduct. This Court has explained that

“[n]otice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution. Accordingly, prior to the imposition of sanctions, a party has a due process right to notice both (1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions.”

N.C. State Bar v. Barrett, 219 N.C. App. 481, 485-86, 724 S.E.2d 126, 129 (2012) (quoting *In re Small*, 201 N.C. App. 390, 395, 689 S.E.2d 482, 485-86 (2009)). Thus, “[a]n attorney facing disbarment is entitled to ‘procedural due process, which includes fair notice of the charge’ made against [him].” *Id.* at 486, 724 S.E.2d at 129-30 (quoting *In re Ruffalo*, 390 U.S. 544, 550, 20 L. Ed. 2d 117, 122, 88 S. Ct. 1222, 1226 (1968)).

Correspondingly, the State Bar rules provide that “[c]omplaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint[.]” 27 N.C. Admin. Code 1B.0114(c) (2014), and that “[p]leadings and proceedings before a hearing panel will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts except as otherwise provided herein[.]” 27 N.C. Admin. Code 1B.0114(n).

Rule 8(a)(1) of the Rules of Civil Procedure, in turn, requires “[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series

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of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]” This Court has explained that “[b]y enacting section 1A-1, Rule 8(a), our General Assembly adopted the concept of notice pleading.” *Wake Cnty. v. Hotels.com, L.P.*, ___ N.C. App. ___, ___, 762 S.E.2d 477, 486, *disc. review denied*, 367 N.C. 799, 766 S.E.2d 608 (2014). “Under notice pleading, ‘a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought.’ ” *Id.* (quoting *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970)). “ ‘Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.’ ” *Id.* (quoting *Pyco Supply Co. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 442-43, 364 S.E.2d 380, 384 (1988)). Thus, “detailed fact-pleading is no longer required” so long as the pleading “gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and -- by using the rules provided for obtaining pretrial discovery -- to get any additional information he may need to prepare for trial.” *Sutton*, 277 N.C. at 104, 176 S.E.2d at 167.

Here, defendant argues that the DHC based its conclusion that defendant violated Rule 1.15-2(a) and Rule 1.7(a) on conduct by defendant that was outside of the allegations of the complaint. With respect to Rule 1.15-2(a), the DHC concluded that defendant:

By moving the Gordons’ funds from defendant’s trust account to a certificate of deposit account at Bank of America in the name of “Dan L. Merrell, Special Trustee for Development Company of Columbia, LLC” with Lam’s mailing address on the account, using DCC’s tax identification number, failing to ensure access to the account was limited to himself, and failing to provide an accounting, along with other factors noted above, Merrell failed to safeguard and hold in trust the Gordons’ entrusted funds in violation of Rule 1.15-2(a).

Defendant argues that the complaint alleged only that defendant violated Rule 1.15-2(a) “[b]y moving the Gordons’ funds from his trust account to a CD account in the name of DCC and with Lam’s mailing address[.]” Therefore, defendant asserts, the complaint alleged a different name for the CD account and failed to allege (1) that defendant

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used DCC's tax identification number, (2) that defendant failed to ensure access to the account was limited to himself, and (3) that defendant failed to provide an accounting.

We first note that in characterizing the allegations of the complaint, defendant relies exclusively on the allegations contained in the final conclusory paragraphs of the complaint, setting forth which Rules of Professional Conduct defendant violated, and completely ignores the factual allegations alleged in support of that conclusion. The factual allegations of the complaint state more specifically, in pertinent part, that on 24 January 2006, Merrell transferred the Gordons' funds, without their knowledge or permission, to a CD account at Bank of America "in the name of 'Dan L. Merrell, Special Trustee for Development Company of Columbia, LLC', not in the name of the Gordons or as trustee for the Gordons." The complaint further alleged that "[f]unds were withdrawn from this CD account without the Gordons' knowledge, permission, or approval on January 27, 2006, February 14, 2006, and March 1, 2006" and that these withdrawals were for Lam's benefit, including covering Lam's costs to acquire the Tyrrell County property which was later resold to DCC.

These allegations not only gave defendant notice of the name of the CD account as found in the DHC's order, but also of the underlying conduct that is the subject of the complaint: that defendant's transfer of the Gordons' funds, without their permission, resulted in the funds being accessed by and for the benefit of someone other than the owner of the funds. Although the complaint does not specifically allege that defendant used DCC's tax identification number or that he failed to provide the Gordons with an accounting, these facts are incidental to the primary misconduct alleged: defendant's failure to safeguard and hold in trust the Gordons' funds. We hold that the allegations in the complaint were sufficient under the notice pleading standard to give defendant "sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it . . . and – by using the rules provided for obtaining pretrial discovery – to get any additional information he may need to prepare for trial." *Sutton*, 277 N.C. at 104, 176 S.E.2d at 167.

With respect to the Rule 1.7(a) violation, defendant argues that the allegations of the complaint materially differ from the findings of fact and conclusions of law in the order because the complaint alleged that defendant engaged in a conflict of interest "[b]y representing both DCC and Lam in DCC's purchase of the Tyrrell County property," whereas the order concludes that the violation is based upon defendant's

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representation of both DCC and Deepwater at the closing. Defendant argues that there is a material difference between Deepwater and Lam because Deepwater is an LLC and Lam is an individual. While this is true, we do not agree that the difference between Lam and Deepwater deprived defendant of notice of the basis for the alleged conflict of interest. The complaint makes it clear that the DHC considered Lam and Deepwater, for all intents and purposes, as one and the same. The complaint alleged that Deepwater was Lam's company and that defendant was the closing attorney "for a series of transactions in which Lam, through his company Deepwater" purchased the Tyrrell County land. It also alleged that DCC's purchase of the property resulted in a profit of nearly \$1 million going to "Lam/Deepwater." We therefore hold that the allegations of the complaint are not materially different from the findings of fact and conclusions of law in the order.

Furthermore, the State Bar argues, and we agree, that even assuming that the allegations of the complaint were materially different from the findings in the order, the State Bar's pleading was amended by implied consent to conform to the proof presented at trial. The doctrine of implied consent is based upon Rule 15(b) of the Rules of Civil Procedure, which provides:

When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

As explained by our Supreme Court, "[u]nder 15(b) the rule of 'litigation by consent' is applied when no objection is made on the specific ground that the evidence offered is not within the issues raised by the

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pleadings.” *Roberts v. William N. & Kate B. Reynolds Mem’l Park*, 281 N.C. 48, 58, 187 S.E.2d 721, 726 (1972) (emphasis omitted). “[T]he effect of this rule is to allow amendment by implied consent to change the legal theory of the cause of action so long as the opposing party has not been prejudiced in presenting his case, i.e., where he had a fair opportunity to defend his case.” *Id.* at 59, 187 S.E.2d at 727.

Here, defendant did not object at the hearing to the admission of the evidence presented in support of the findings that he now challenges on appeal. Specifically, he did not object to the admission of evidence regarding the name of the CD account, the use of DCC’s tax identification number for the CD account, defendant’s failure to provide an accounting, or his representation of Deepwater, rather than Lam, at the 2 March 2006 closing. Further, defendant makes no argument as to how the introduction of this evidence prejudiced him or deprived him of a fair opportunity to defend his case. Accordingly, we hold that the order did not violate defendant’s due process rights. *Compare Barrett*, 219 N.C. App. at 488, 724 S.E.2d at 131 (holding DHC violated attorney’s due process rights where complaint contained one allegation of misconduct related to misrepresentations by closing attorney in a HUD statement, but at the hearing the lender presented a second HUD statement and made additional allegations of misconduct based on that document and attorney objected to evidence on grounds that she had never seen the document before, had no notice of its existence, and had not prepared a defense to the additional allegations of misconduct).

II

[2] We now turn to the substance of the order. This Court reviews disciplinary orders of the DHC under the whole record test “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[.]” *N.C. State Bar v. Talford*, 356 N.C. 626, 632, 576 S.E.2d 305, 309 (2003).

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

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support its findings and conclusions must rise to the standard of clear[, cogent,] and convincing.

Id., 576 S.E.2d at 309-10 (internal citations and quotation marks omitted).

Defendant first challenges the DHC's conclusion that defendant violated Rule 1.15-2(a) of the Rules of Professional Conduct. Pursuant to Rule 1.15-2(a), "[a]ll entrusted property shall be identified, held, and maintained separate from the property of the lawyer, and shall be deposited, disbursed, and distributed only in accordance with this Rule 1.15." "Entrusted property" includes "trust funds" which are "funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of legal services." N.C.R. Prof. Conduct 1.15-1(e), (n). Rule 1.15 provides, in pertinent part, that all trust funds received by a lawyer must be deposited in either a general trust account, also known as an IOLTA account, or a dedicated trust account. N.C.R. Prof. Conduct 1.15-2(b). IOLTA accounts are subject to the requirements set forth in 27 N.C. Admin. Code 1D.1316. *Id.* A lawyer should place trust funds in an IOLTA account if the funds "in the lawyer's good faith judgment, are nominal or short-term." *Id.* Otherwise, the funds may be placed in a dedicated trust account, which is "a trust account that is maintained for the sole benefit of a single client or with respect to a single transaction or series of integrated transactions." N.C.R. Prof. Conduct 1.15-1(c). The interest earned in a dedicated trust account is the property of the client. N.C.R. Prof. Conduct 1.15-2(p). Comment 3 following Rule 1.15-3 contains a list of factors to be considered when determining whether there is a duty to invest the funds on behalf of a client by depositing the funds into a dedicated trust account.

Rule 1.15-3 sets forth the record keeping and accounting requirements for all trust accounts and provides in pertinent part that a lawyer shall maintain "complete and accurate records of all entrusted property received by the lawyer" and shall "render to the client a written accounting of the receipts and disbursements of all trust funds . . . upon the complete disbursement of the trust funds[.]" N.C.R. Prof. Conduct 1.15-3(e), (g). Comment 19 to Rule 1.15-3 explains that the "lawyer is responsible for keeping a client, or any other person to whom the lawyer is accountable, advised of the status of entrusted property held by the lawyer. In addition, the lawyer must take steps to discover any unauthorized transactions involving trust funds as soon as possible."

In this case, the DHC concluded that defendant violated Rule 1.15-2(a) by: (1) moving the Gordons' funds from defendant's trust

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account to a CD account at Bank of America; (2) putting the CD account in the name of “Dan L. Merrell, Special Trustee for Development Company of Columbia, LLC;” (3) having Lam’s mailing address as the address on the account; (4) using DCC’s tax identification number; (5) failing to ensure access to the account was limited to himself; and (6) failing to provide an accounting.

Defendant contends that the evidence is insufficient to support several of the findings of fact supporting the conclusion that defendant violated Rule 1.15-2(a). Defendant first challenges finding of fact 25 that “[t]he address given for the [CD] account was Lam’s address, not the Gordons’ or Merrell’s.” Defendant does not dispute that Lam’s address is the address associated with the CD account in Bank of America’s records. Rather, he argues that Lam’s address was put on the account because of the mistaken assumption of William Ashley Gurganus, the Bank of America employee who set up the account, and not because defendant directed the bank to put Lam’s address on the account. Defendant points out that the check transferring the funds from his general trust account to the CD account had his address on it and that the assistant who opened the account at defendant’s direction testified that she did not provide Bank of America with any other address. Mr. Gurganus testified that he could not specifically recall where he obtained the address, but that he knew that Lam had other accounts at Bank of America and that Lam was associated with DCC. Even assuming, without deciding, that there is insufficient evidence to support a finding that defendant provided Bank of America with Lam’s address for the account, it is undisputed that Lam’s address was in fact associated with the account, and defendant took no action to correct it.

Defendant next argues that there is insufficient evidence to support the portion of finding of fact 27 that defendant “knew that withdrawals were made from the CD account without any requirement that [defendant] sign anything.” Defendant misinterprets this as a finding that defendant was aware of the unauthorized withdrawals on 27 January and 14 February when they occurred. However, the DHC found in finding of fact 32 that defendant was not aware of those unauthorized withdrawals until September 2006. Finding of fact 27 merely states that defendant was aware that a withdrawal could be made from the CD without his signature. This finding is supported by evidence that defendant was able to withdraw funds from the account on 1 March 2006 and close the account without having to sign anything.

Defendant also challenges finding of fact 31 that the withdrawals on 27 January and 14 February “were for Lam’s benefit, including covering

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Lam's costs to acquire the Tyrrell County land that he later resold at a higher price to DCC." This finding is supported by ample evidence in the record, including a report of a forensic accounting analysis performed by Derek W. Royster.

Finally, defendant challenges finding of fact 48 that defendant "did not provide the Gordons [with] a written accounting of the receipts and disbursements of the \$1.5 million upon the complete disbursement of the funds, nor did he account for the interest earned on the \$1.5 million while in the Bank of America CD account." Defendant concedes that he "did not specifically account for the interest earned separate and apart from the principal," but points to evidence that he had his legal assistant send copies of the closing documents, including the HUD statement, to Mr. Nemeroff, the Gordons' legal counsel. These documents, however, only included the final disbursement of the funds for the closing, and did not account for the unauthorized withdrawals made in January and February 2006.

We now turn to the question whether the findings of fact are sufficient to support a conclusion that defendant violated Rule 1.15-2(a). We agree with defendant that moving the Gordons' funds from defendant's general trust account to a CD account at Bank of America, in and of itself, would not have violated the rule. As defendant correctly points out, Rule 1.15 contemplates that funds that are not nominal or short term will be deposited in a dedicated trust account so that the client can earn interest on the funds. *See* N.C.R. Prof. Conduct 1.15-2(b) ("Trust funds placed in a general account are those which, in the lawyer's good faith judgment, are nominal or short-term."); N.C.R. Prof. Conduct 1.15-3, cmt. 3 (funds must be deposited in a general trust account "if there is no duty to invest on behalf of the client" and, in determining whether there is a duty to invest, lawyer should consider, among other factors, amount of funds, duration of the deposit, and interest rate at financial institution where funds are to be deposited).

However, in this case, the evidence shows that when the Gordons transferred their funds to defendant's general trust account, defendant identified the funds in his client ledger as belonging to Lam, not the Gordons. Then, when defendant transferred the funds to the Bank of America CD account, he again misidentified the owner of the funds as DCC, not the Gordons. By labeling the account "Dan L. Merrell, Special Trustee for Development Company of Columbia, LLC" and using DCC's tax identification number, he improperly identified DCC as the owner of the funds. Even assuming, without deciding, that defendant provided his own address, and not Lam's, when creating the account, his mislabeling

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of the beneficiary of the account caused employees at the bank to believe that DCC owned the funds in the account and that Lam, as the manager of DCC, was authorized to access the funds in the account. In other words, defendant did not take any steps to ensure that the bank was aware that the account was a trust account for the benefit of the Gordons and that defendant was the only authorized signatory on the account. This failure led to the funds being misappropriated by Lam. In sum, defendant never notified the Gordons that he had transferred their funds to a different account, did not receive their permission for the transfer, and did not take any steps to ensure that the funds were not misappropriated.

We conclude that these findings of fact are sufficient to support the conclusion that defendant violated Rule 1.15-2(a). *See* N.C.R. Prof. Conduct 1.15-3, cmt. 19 (“The lawyer is responsible for keeping a client, or any other person to whom the lawyer is accountable, advised of the status of entrusted property held by the lawyer. In addition, the lawyer must take steps to discover any unauthorized transactions involving trust funds as soon as possible.”).

Defendant next challenges the DHC’s conclusion that defendant engaged in a conflict of interest in violation of Rule 1.7(a) by representing both Deepwater and DCC at the 2 March 2006 closing. Although defendant purports to challenge the sufficiency of the evidence to support several of the findings of fact upon which this conclusion is based, his arguments on appeal do not actually challenge the evidentiary basis for the findings, but rather argue the legal significance of the findings and whether they are sufficient to support the conclusion that defendant engaged in a conflict of interest.

Comment 8 to Rule 1.7 explains that “[e]ven where there is no direct adverseness, a conflict of interest exists if a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client may be materially limited as a result of the lawyer’s other responsibilities or interests. For example, a lawyer asked to represent a seller of commercial real estate, a real estate developer and a commercial lender is likely to be materially limited in the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client.” Here, the DHC concluded that defendant’s representation of DCC was materially limited by his responsibilities to Deepwater because defendant knew that Lam, through Deepwater, had engaged in self-dealing and could not disclose this information to DCC.

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Defendant argues that there was no conflict of interest because Lam did not engage in self-dealing. Self-dealing is “[p]articipation in a transaction that benefits oneself instead of another who is owed a fiduciary duty.” *Black’s Law Dictionary* 1481 (9th ed. 2009). A fiduciary relationship is “one in which ‘there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . and in which there is confidence reposed on one side, and resulting domination and influence on the other.’” *Austin Maint. & Constr., Inc. v. Crowder Constr. Co.*, 224 N.C. App. 401, 408-09, 742 S.E.2d 535, 541 (2012) (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001)).

“Business partners, for example, are each other’s fiduciaries as a matter of law. In less clearly defined situations the question whether a fiduciary relationship exists is more open and depends ultimately on the circumstances. Courts have historically declined to offer a rigid definition of a fiduciary relationship in order to allow imposition of fiduciary duties where justified. Thus, the relationship can arise in a variety of circumstances . . . and may stem from varied and unpredictable factors.”

Id. at 409, 742 S.E.2d at 541 (quoting *HAJMM Co. v. House of Raeford Farms*, 328 N.C. 578, 588, 403 S.E.2d 483, 489 (1991)).

Defendant argues that Lam did not owe a fiduciary duty to DCC until the Operating Agreement was signed on 1 March 2006. He reasons that the 13 January MOU was nonbinding and argues that there is no evidence that the parties intended the operating agreement to have retroactive effect. However, the DHC found that “[b]y its terms, the operating agreement was effective February 1, 2006.” The operating agreement was submitted into evidence and supports this finding.

An operating agreement is a contract, and this Court has explained that:

“With all contracts, the goal of construction is to arrive at the intent of the parties when the contract was issued. The intent of the parties may be derived from the language in the contract.

It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument. When the language of the

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contract is clear and unambiguous, construction of the agreement is a matter of law for the court and the court cannot look beyond the terms of the contract to determine the intentions of the parties.”

Bank of Am., N.A. v. Rice, ___ N.C. App. ___, ___, 750 S.E.2d 205, 209 (2013) (quoting *Stovall v. Stovall*, 205 N.C. App. 405, 410, 698 S.E.2d 680, 684 (2010)).

Therefore, when interpreting the terms of a contract, our courts have applied the parol evidence rule.

“The parol evidence rule is not a rule of evidence but of substantive law. . . . It prohibits the consideration of evidence as to anything which happened prior to or simultaneously with the making of a contract which would vary the terms of the agreement. Generally, the parol evidence rule prohibits the admission of evidence to contradict or add to the terms of a clear and unambiguous contract. Thus, it is assumed the [parties] signed the instrument they intended to sign[,] . . . [and, absent] evidence or proof of mental incapacity, mutual mistake of the parties, undue influence, or fraud[,] . . . the court [does] not err in refusing to allow parol evidence[.]”

Drake v. Hance, 195 N.C. App. 588, 591, 673 S.E.2d 411, 413 (2009) (quoting *Thompson v. First Citizens Bank & Trust Co.*, 151 N.C. App. 704, 708-09, 567 S.E.2d 184, 188 (2002)).

Here, the operating agreement plainly states that the agreement “is made effective as of this 1st day of February 2006 by and among the signatories hereto.” This language is clear and unambiguous. Defendant has failed to point to any proof of “mental incapacity, mutual mistake of the parties, undue influence, or fraud,” *id.*, with respect to the effective date of the operating agreement. Accordingly, the plain language of the operating agreement controls. The operating agreement was effective beginning 1 February 2006 and prohibited Lam from engaging in self-dealing. It is undisputed that Deepwater’s purchase and reselling of the properties to DCC benefitted Lam at the expense of DCC. Accordingly, we hold that the DHC did not err in concluding that Lam engaged in self-dealing when he purchased the properties in February and resold them to DCC for a profit at the 2 March 2006 closing.

Defendant next argues that the parties gave written informed consent to his dual representation at the closing by signing the operating

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agreement, which stated, among other things, that “the parties have been advised that a potential conflict exists among their individual interests[.]” Acknowledging that a potential conflict exists, without identifying the potential conflict, does not provide the parties with informed consent. *See* Comment 18 to Rule 1.7 (“Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.”); Comment 19 to Rule 1.7 (“Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.”). In this case, the parties could not give informed consent of dual representation without full disclosure from Lam.

Furthermore, the DHC’s conclusion that defendant’s dual representation created a conflict of interest is consistent with 2015 Formal Ethics Opinion 14 (“2015 FEO 14”), which held that in most instances, common representation in a commercial real estate closing is a “nonconsentable” conflict. “While not precedential authority for this Court, formal ethics opinions, as defined in the Procedures for Ruling on Questions of Legal Ethics of the North Carolina State Bar, ‘provide ethical guidance for attorneys and to establish a principle of ethical conduct.’” *N.C. Baptist Hosps., Inc. v. Crowson*, 155 N.C. App. 746, 752 n.5, 573 S.E.2d 922, 925 n.5 (J. Campbell dissenting) (quoting 27 N.C. Admin. Code 1D.0101(10) (2001)), *aff’d per curiam*, 357 N.C. 499, 586 S.E.2d 90 (2003). Thus, this Court has looked to formal ethics opinions for guidance when determining whether an attorney has violated the Rules of Professional Conduct. *See, e.g., Nationwide Mut. Fire Ins. Co. v. Bournon*, 172 N.C. App. 595, 602-03, 617 S.E.2d 40, 45-46 (2005) (when reviewing plaintiff’s argument that attorney breached attorney-client relationship, citing formal ethics opinions in support of conclusion that attorney-client relationship existed), *aff’d per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006).

Here, although 2015 FEO 14 did not come out until 23 January 2015, its reasoning is persuasive. The opinion cites *Baldassarre v. Butler*, 132 N.J. 278, 295-96, 625 A.2d 458, 467 (1993), in which the Supreme Court of New Jersey held that an attorney may not represent both the buyer and seller in a complex commercial real estate transaction even if both parties give their informed consent:

The disastrous consequences of [the lawyer’s] dual representation convinces us that a new bright-line rule

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prohibiting dual representation is necessary in commercial real estate transactions where large sums of money are at stake, where contracts contain complex contingencies, or where options are numerous. The potential for conflict in that type of complex real estate transaction is too great to permit even consensual dual representation of buyer and seller.

Formal Ethics Opinion 14 concludes:

[D]ual representation of the borrower and the lender for the closing of a commercial real estate loan is a nonconsentable conflict of interest unless the following conditions can be satisfied: (1) the contractual terms have been finally negotiated prior to the commencement of the representation; (2) there are no material contingencies to be resolved; (3) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (4) it is unlikely that a difference in interests will eventuate and, if it does, it will not materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that should be pursued on behalf of a client; (5) the lawyer reasonably concludes that he will be able to act impartially in the representation of both parties; (6) the lawyer explains to both parties that his role is limited to executing the tasks necessary to close the loan and that this limitation prohibits him from advocating for the specific interests of either party; (7) the lawyer discloses that he must withdraw from the representation of both parties if a conflict arises; and (8) after the foregoing full disclosure, both parties give informed consent confirmed in writing.

Defendant has failed to show that these conditions were satisfied in this case. Significantly, the DHC's findings, which we have held are supported by the evidence in the record, show that defendant had obtained information through his representation of Lam and Deepwater that would have been material to DCC in determining whether to go forward with the closing and that defendant failed to disclose to DCC before representing both DCC and Deepwater in the closing. There can be no question that a conflict of interest arises when an attorney obtains information through his representation of one party that is material to the attorney's representation of a second party, and the attorney cannot or

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does not disclose that information to the second party. *See In re Shay*, 756 A.2d 465, 476 (D.C. 2000) (holding attorney’s “duties to her respective clients . . . were irreconcilable and resulted in a conflict of interest” where attorney drafted will for one client and did not disclose material information, obtained from a second client, which was necessary for first client to make informed decision regarding disposition of property); *Matter of LaVigne*, 146 N.J. 590, 607, 684 A.2d 1362, 1371 (1996) (“Respondent engaged in an impermissible conflict of interest, in violation of *RPC* 1.7(b) and (c), by his representation of the seller and two separate sets of purchasers when his own pecuniary interest materially limited his ability to counsel his clients. He failed fully to disclose and explain the nature of the conflict to the respective purchasers and lenders and made no effort to obtain their express consent to his multiple representation, in violation of *RPC* 1.7(b).”).

In short, we hold that there is sufficient evidence to support the DHC’s finding of fact that Lam engaged in a conflict of interest and failed to provide full disclosure of his actions to the other members of DCC. These findings, in turn, support the DHC’s conclusion that defendant engaged in a conflict of interest in violation of Rule 1.7(a) because defendant’s representation of DCC at the closing was materially limited by his responsibilities to Deepwater and he had not obtained written informed consent to the dual representation.

AFFIRMED.

Judges ELMORE and DILLON concur.

LESLIE FREDERICK QUINN, PLAINTIFF

v.

DANNY S. QUINN AND WIFE, PATRICIA QUINN, DEFENDANTS

No. COA14-979

Filed 6 October 2015

1. Deeds—validity of deed—notarization—alteration after execution

There was no material issue of fact as to the validity of a contested deed where the deed was void, whether due to its notarization or due to the fact that it was altered after execution without plaintiff’s knowledge or consent.

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2. Adverse Possession—under color of title—intent

The trial court erred by granting summary judgment for defendants on an adverse possession under color of title claim where there was a material issue of fact as to defendants' subjective intent. The issue of adverse possession cannot be answered without consideration of intent.

Judge BRYANT concurring in the result only.

Appeal by plaintiff from order entered 27 February 2014 by Judge Benjamin G. Alford in Superior Court, Lenoir County. Heard in the Court of Appeals 20 January 2015.

White & Allen, P.A., by E. Wyles Johnson, Jr. and Ashley Fillippeli Stucker, for plaintiff-appellant.

Wooten & Coley, by William C. Coley III and Everette L. Wooten, Jr., for defendant-appellees.

STROUD, Judge.

Plaintiff appeals order granting summary judgment in favor of defendants. For the following reasons, we reverse and remand.

I. Background

This case would make a good bar exam question, or perhaps several questions, since so many legal issues are raised. The briefs in this case have been of limited assistance to this Court, since both parties argue important facts diametrically opposed to those they previously asserted in their pleadings or depositions or both.

On 10 May 2004, the deed which is the subject of this dispute was recorded in the Lenoir County Register of Deeds in Book 1378, Page 691 of the Lenoir County Register of Deeds ("recorded deed").¹ The date on the deed when it was executed is 12 March 1999, but it was not notarized until 10 May 2004, the same day as recordation, by defendant Patricia Quinn. The recorded deed has no revenue stamp but recites that it was given for consideration. Plaintiff alleges in his complaint it was a gift deed.

1. Other individuals are involved, at times, as grantors and grantees on the deeds discussed, but because their involvement is not at issue, we limit listing grantors and grantees to those individuals necessary for an understanding of this case.

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It is undisputed in deposition testimony that the recorded deed arose from an agreed-upon exchange of two parcels of property between plaintiff and his brother, Thomas Quinn and wife, Inez Quinn. The deed from Thomas and Inez Quinn to plaintiff, which is not a subject of this case, was also executed on 12 March 1999 and not recorded until 10 May 2004 in Book 1378, Page 689 of the Lenoir County Register of Deeds.

In March of 2013, plaintiff filed a verified complaint against defendants. In the complaint, plaintiff alleges that he “made and executed” a gift deed from himself to defendants in 1999. Defendant Patricia Quinn notarized the deed in 2004, and it was then recorded. Plaintiff alleges that defendant Patricia Quinn “was disqualified to notarize” the deed “because she stood to receive directly from” it, and thus the deed should be treated as unrecorded. Plaintiff also alleged that because the deed was a gift that went unrecorded for more than two years, it is now void. Plaintiff made claims for a declaratory judgment, quiet title, and ejectment.

In May of 2013, defendants filed a motion to dismiss and answered plaintiff’s complaint denying that plaintiff had “made and executed” a deed to *them* and asserting that the deed was not a gift and that defendant Patricia Quinn had indeed notarized the deed in 2004. Defendants denied the substantive allegations of plaintiff’s claims. Defendants claimed that

[b]efore the deed was recorded, the first page of the deed was replaced with one showing . . . Danny and Patricia as Grantees. This was done at the direction of Thomas and Inez as they intended throughout for this land to be Danny and Patricia’s since it adjoined land already owned and occupied by Danny and Patricia.

Defendants alleged numerous affirmative defenses and counterclaimed in the alternative that *if the recorded deed was void* they should receive an award of damages for unjust enrichment and betterments for improvements they made to the property and *if the recorded deed was valid* they should have removal of any cloud on their title. In July of 2013, plaintiff answered defendant’s counterclaims and raised numerous affirmative defenses.

On 29 August 2013, plaintiff was deposed. Plaintiff explained that he and his brother, Thomas Quinn, agreed to exchange two parcels of land. According to plaintiff, he did not sign a deed with Danny and Patricia Quinn as the grantees, but he executed a deed to Thomas Quinn as grantee. This testimony contradicts the allegations of his complaint but is consistent with the defendants’ answer and forecast of evidence.

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The following day, defendant Patricia Quinn was also deposed. Defendant Patricia Quinn stated that she notarized a deed signed by plaintiff as grantor and Thomas Quinn as grantee. Defendant Patricia Quinn vehemently denied numerous times throughout her deposition that she had ever notarized a deed from plaintiff to herself. According to defendant Patricia Quinn, page two of the recorded deed, the page signed by plaintiff and notarized by her, was not attached to page one as it is now recorded with defendants' names on it; defendant Patricia Quinn stated that when plaintiff signed the deed and she notarized it, page one reflected the grantee as Thomas Quinn. Defendant Patricia Quinn further opined that she did not believe plaintiff was aware the pages were switched.²

Thus, in summary, plaintiff filed a complaint alleging solely "technical" issues regarding the recorded deed from himself to defendants; plaintiff does not allege that the recorded deed is fraudulent or in any way not the deed he originally executed in 1999. Defendants *denied* that plaintiff had executed a deed to them as grantees. Plaintiff then clarified that the deed he executed was actually to his brother, Thomas Quinn. Defendant Patricia Quinn agreed with plaintiff and testified under oath that plaintiff signed a deed to Thomas Quinn and that is the deed she notarized. Thus, without speculation as to the family discord which most likely lies behind this scenario, because a determination of credibility can be made only by the jury or the trial judge sitting as such, there seem to be two possibilities from the facts as provided thus far: (1) If plaintiff's complaint is taken as true, plaintiff gave his land to defendants, and defendant Patricia Quinn notarized the deed to herself as a grantee or (2) if all of the other evidence is taken as true, plaintiff gave the land to his brother Thomas Quinn, and in 2004 defendant Patricia Quinn notarized that deed. Patricia Quinn believed that Thomas and Inez took the deed to their attorney after it was signed by plaintiff in an attempt "to save money and time or whatever to just not have it recorded in their names" because they would have to switch it later to put the land into defendants' names, but again, this scenario is based

2. Although this fact is directly contrary to defendant Patricia Quinn's own emphatic and repeated deposition testimony, defendant-appellees' brief states that "Appellant . . . executed the deed . . . to Appellees." The recorded deed was notarized by Appellee Patricia W. Quinn. Thus, the facts as argued in defendants' brief contradict both defendants' answer and defendant Patricia Quinn's deposition which both assert that plaintiff signed and defendant Patricia Quinn notarized a deed to Thomas Quinn. For purposes of our discussion, we are using the version of the facts presented by defendants' pleadings and defendant Patricia Quinn's deposition, instead of the one argued by defendants' counsel in defendants' brief, although in the end, the result is the same either way.

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upon defendant Patricia Quinn's speculations, and not even she asserts this is what actually occurred. However, even taking defendant Patricia Quinn's assumptions as true, this would mean that plaintiff never properly signed the deed as it was recorded. We are not aware of any evidence brought forth by defendants that indicates plaintiff executed a deed to them; rather their pleadings and defendant Patricia Quinn's deposition indicate the opposite.

On 7 October 2013, plaintiff filed a motion for summary judgment. On 20 February 2014, the trial court entered an order granting defendants' motion to dismiss plaintiff's claim for a declaratory judgment and denying defendants' motion to dismiss plaintiff's claims for quiet title and ejectment.³ On 27 February 2014, the trial court granted summary judgment on plaintiff's claim for quiet title and ejectment *in favor of defendants*; the trial court also granted summary judgment in favor of defendants on their claim of quiet title and "ordered that any 'cloud on title' of the Defendants by any claim of the Plaintiff . . . is hereby removed." Thus, because the recorded deed was not determined to be void, all claims were resolved. Plaintiff appeals only the summary judgment order in which the trial court dismissed plaintiff's claims for quiet title and ejectment and granted summary judgment for defendants on their counterclaim to quiet title and remove any cloud on title.

II. Standard of Review

A trial court appropriately grants a motion for summary judgment when the information contained in any depositions, answers to interrogatories, admissions, and affidavits presented for the trial court's consideration, viewed in the light most favorable to the non-movant, demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. As a result, in order to properly resolve the issues that have been presented for our review in this case, we are required to determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law.

3. The order dismissing plaintiff's claim for declaratory judgment was not appealed, and we have been unable to discern to what effect, if any, this order has upon the case. It is not clear why the trial court dismissed the declaratory judgment claim, while thereafter ruling upon other claims based upon all of the same factual and legal allegations. It seems that both the trial court and parties disregarded the labels of the claims in the complaint and simply addressed the legal dispute as to the validity of the deed.

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Both before the trial court and on appeal, the evidence must be viewed in the light most favorable to the nonmoving party and all inferences from that evidence must be drawn against the moving party and in favor of the nonmoving party. When there are factual issues to be determined that relate to the defendant's duty, or when there are issues relating to whether a party exercised reasonable care, summary judgment is inappropriate. We review orders granting or denying summary judgment using a *de novo* standard of review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court.

Trillium Ridge Condominium v. Trillium Dev., ___ N.C. App. ___, ___, 764 S.E.2d 203, 210–11 (citations, quotation marks, and brackets omitted), *disc. review denied*, ___ N.C. ___, 766 S.E.2d 619, *disc. review denied*, ___ N.C. ___, 766 S.E.2d 646, *disc. review denied*, ___ N.C. ___, 766 S.E.2d 836 (2014); *see* N.C. Gen. Stat. § 1A-1, Rule 56 (2013).

III. Summary Judgment

[1] It is elementary that summary judgment is proper only where there is no genuine issue of a material fact when the evidence is viewed in the light most favorable to the non-movant, and a party is clearly entitled to prevail based on the law. *See id.* Here, there are factual disputes, and we must consider whether the factual issues are material to the various legal theories raised by both plaintiff's claims and defendant's counterclaims. Here, plaintiff was the party who moved for summary judgment, and plaintiff argues on appeal that the trial court should have granted summary judgment for him, although the trial court granted summary judgment for defendants. Defendants naturally argue that summary judgment in their favor was proper. Since both plaintiff and defendants argue that summary judgment was proper, if granted in their own favor, both argue that the material facts are undisputed, but then they draw differing inferences of the facts. Thus we must consider how the law fits in with this conflict.

Turning to the law, summary judgment here was granted in favor of defendant's on the legal claim of quiet title while plaintiff's claim for quiet title was dismissed.⁴

4. The trial court granted summary judgment in favor of defendants on plaintiff's claim titled "EJECTMENT." We assume that what plaintiff meant by ejectment is a request for the trial court to order defendants to vacate the property upon determining that plaintiff owed it. However, ejectment would actually seem to be a remedy and not a claim;

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An action to quiet title to realty pursuant to section 41-10 of the North Carolina General Statutes requires two essential elements: (1) the plaintiff must own the land in controversy, or have some estate or interest in it; and (2) the defendant must assert some claim to such land adverse to the plaintiff's title, estate or interest.

New Covenant Worship Ctr. v. Wright, 166 N.C. App. 96, 103, 601 S.E.2d 245, 250-51 (2004); see N.C. Gen. Stat. § 41-10 (2013). The trial court also granted defendant's request to remove cloud on title, and the elements of this claim are the same as those for quieting title. See *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 461, 490 S.E.2d 593, 596-97 (1997) ("An action to remove a cloud on title: May be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims, and a decree for the plaintiff shall debar all claims of the defendant in the property of the plaintiff then owned or afterwards acquired. N.C. Gen. Stat. § 41-10 (1996). In order to establish a *prima facie* case for removing a cloud on title, a plaintiff must meet two requirements: (1) plaintiff must own the land in controversy, or have some estate or interest in it; and (2) defendant must assert some claim in the land which is adverse to plaintiff's title, estate or interest." (ellipses and brackets omitted)), *disc. review denied*, 347 N.C. 574, 498 S.E.2d 380 (1998).

A. Notarization

Plaintiff argues this Court should have granted summary judgment in his favor due to the fact that defendant Patricia Quinn improperly notarized the deed as recorded, or if in fact she properly notarized the deed to Thomas Quinn, the pages of the recorded deed were switched, and thus plaintiff as grantor did not even sign the recorded deed; either way, the deed would be void. See N.C. Gen. Stat. § 22-2 (2013). If plaintiff did sign the deed to defendants as recorded, the deed was not properly acknowledged by defendant Patricia Quinn because she was a grantee. See N.C. Gen. Stat. § 10B-20(c)(5-6) (2013) ("A notary shall not perform a notarial act if . . . [t]he notary is a signer of, party to, or beneficiary of

furthermore, this remedy is only appropriate in the context of a landlord-tenant relationship. See *Adams v. Woods*, 169 N.C. App. 242, 244, 609 S.E.2d 429, 431 (2005) ("The summary ejectment remedy provided for in N.C. Gen. Stat. § 42-26 is restricted to situations where the relationship of landlord and tenant exists. The district court has jurisdiction to hear a summary ejectment proceeding even if the plaintiff does not allege a landlord-tenant relationship in the complaint, but this relationship must be proven in order for the plaintiff's remedy to be granted. If the record lacks evidence to support a finding of a landlord-tenant relationship, the court must dismiss the plaintiff's cause of action." (citations omitted)).

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the record, that is to be notarized” or “[t]he notary will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration[.]”) Thus, if defendant Patricia Quinn did acknowledge the recorded deed to herself, the whole deed fails. *See also Lance v. Tainter*, 137 N.C. 249, 250, 49 S.E. 211, 212 (1904) (“The acknowledgment being a nullity, so was the probate by the clerk based thereon, and the registration. . . . It follows, therefore, that this instrument, not having been legally acknowledged, probated, nor registered, is invalid . . . and should be canceled as a cloud upon the title which might injuriously affect the administration of the estate in the plaintiff’s hands.”)

Defendants contend that North Carolina General Statute § 47-62 “cures the [notary] problem.” In other words, defendants argue that even if defendant Patricia Quinn notarized the deed to herself and her husband – something she claims did not happen – North Carolina General Statute § 47-62 validates the deed. North Carolina General Statute § 47-62 provides that

[t]he proof and acknowledgment of instruments required by law to be registered in the office of the register of deeds of a county, and all privy examinations of a feme covert to such instruments made before any notary public on or since March 11, 1907, are hereby declared valid and sufficient, notwithstanding the notary may have been interested as attorney, counsel *or otherwise* in such instruments.

N.C. Gen. Stat. § 47-62 (2013) (emphasis added). Defendants contend that the “or otherwise” includes defendant Patricia Quinn in her capacity as both notary and grantee. We disagree.

We first note that

[a] court must be guided by the fundamental rule of statutory construction that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other. Thus, courts must harmonize such statutes, if possible, and give effect to each, that is, all applicable laws on the same subject matter should be construed together so as to produce a harmonious body of legislation, if possible.

Transportation Servs. of N.C., Inc. v. Wake Cnty. Bd. of Educ., 198 N.C. App. 590, 595, 680 S.E.2d 223, 226 (2009) (citations and quotation marks

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omitted). Secondly, we consider the listing of those interested as “attorney, counsel or otherwise” under *ejusdem generis*, which is the rule

that where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.

State v. Lee, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970) (citations and quotation marks omitted).

To read North Carolina General Statute § 47-62, as defendants argue, would render North Carolina General Statute § 10B-20(c)(5-6) meaningless as *any* interested person acting in *any* capacity could act as the notary and thereafter have it cured by North Carolina General Statute § 47-62. *See* N.C. Gen. Stat. §§ 10B-20(c)(5-6), 47-62. Our legislature amended North Carolina General Statute § 10B-20(c) as recently as 2013 and intentionally clarified which interested persons would be allowed to notarize documents; as North Carolina General Statute § 10B-20(c)(5) now provides:

a disqualification under this subdivision shall not apply to a notary who is named in a record solely as (i) the trustee in a deed of trust, (ii) the drafter of the record, (iii) the person to whom a registered document should be mailed or sent after recording, or (iv) the attorney for a party to the record, so long as the notary is not also a party to the record individually or in some other representative or fiduciary capacity.

N.C. Gen. Stat. § 10B-20(c)(5); *see* N.C. Gen. Stat. § 10B-20 Effects of Amendments. Reading North Carolina General Statute § 10B-20(c)(5) in conjunction with North Carolina General Statute § 47-62 indicates that “attorney, counsel or otherwise” was meant to include persons that may have drafted or otherwise participated in the preparation of the document. N.C. Gen. Stat. § 47-62; *see* N.C. Gen. Stat. § 10B-20(c)(5); *see also Transportation Servs. of N.C., Inc.*, 198 N.C. App. at 595, 680 S.E.2d at 226. Furthermore, using the rule of *ejusdem generis* leads to the same conclusion as the “general word[]” “otherwise” is “presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.” N.C. Gen. Stat. § 47-62; *Lee*, 277 N.C. at 244, 176 S.E.2d at 774. Thus, North Carolina General Statute § 47-62 cannot cure any

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defect in notarization as to defendant Patricia Quinn if she was in fact a grantee under the deed she notarized.

B. Validity between the Parties

Defendants next contend that even if “the recording of the deed is not valid” the deed is still “[v]alid [b]etween the [p]arties” and cites to *Patterson v. Bryant*, 216 N.C. 550, 5 S.E.2d 849 (1939), which stated that an unrecorded deed is valid as between the parties to the deed. *See Patterson* at 553, 5 S.E.2d at 851. Of course, one problem here is determining who the “parties” to the deed actually were. We know that plaintiff was a party, but defendants may not have been. If plaintiff did sign the deed to defendants as recorded, the deed was void because defendant Patricia Quinn could not take under the deed as notary. If plaintiff did not sign the deed as it was recorded but instead signed a deed to Thomas Quinn, the deed is void here too as plaintiff did not sign this deed. *See generally* N.C. Gen. Stat. § 22-2 (2013). *Patterson* is inapplicable as it does not address when the deed itself is void, but rather when multiple valid deeds are filed regarding the same property; *Patterson* does not address a deed that was not properly executed or acknowledged as the recorded deed is here. *See id.*, 216 N.C. 550, 5 S.E.2d 849. In other words, in *Patterson* the issue was a *faulty recording* of a deed, here the issue is a *faulty deed* itself. *See id.* The recordation or non-recordation of this deed does not change the defect in its creation and cannot make it valid “between the parties,” whomever they may be.

C. Adverse Possession

[2] Until now, no matter which factual scenario we proceeded under, the legal conclusion has been the same – defendants cannot prevail. However, defendants now raise an argument where this is no longer the case as they contend they have “[g]ood [t]itle through [a]dverse [p]ossession” under color of title as they have possessed the land at issue since 2004 when the deed was recorded.⁵

N.C. General Statute § 1–38 governs adverse possession under color of title. *See* N.C. Gen. Stat. § 1–38 (2013).

When a person or those under whom he claims is
and has been in possession of any real property,
under known and visible lines and boundaries and

5. Adverse possession without color of title requires 20 years of possession. *See* N.C. Gen. Stat. § 1-40 (2013).

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under color of title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same.

N.C. Gen. Stat. § 1–38(a) (2011). Furthermore, this Court has defined color of title as a writing that purports to pass title to the occupant but which does not actually do so either because the person executing the writing fails to have title or capacity to transfer the title or because of the defective mode of the conveyance used. However, in order to constitute color of title, defendants must have accepted the deed and entered the . . . Property in good faith. *Farabow v. Perry*, 223 N.C. 21, 25, 25 S.E.2d 173, 176 (1943).

Adams Creek Associates v. Davis, ___ N.C. App. ___, ___, 746 S.E.2d 1, 7 (2013) (citation, quotation marks, and ellipses omitted).

Adverse possession under color of title is a complicated issue, in part, because it requires substantive consideration of subjective intent on the part of the grantee; in this case it is a particularly bewildering consideration since even the facts as solely presented by defendant Patricia Quinn leave us baffled as to what exactly happened here. *See id.* (“[I]n order to constitute color of title, defendants must have accepted the deed and entered the . . . Property in good faith.”); *see also Walls v. Grohman*, 315 N.C. 239, 246, 337 S.E.2d 556, 560 (1985) (noting that “doubt” indicates a lack of hostility which is required for adverse possession); *New Covenant Worship Center*, 166 N.C. App. at 105, 601 S.E.2d at 252 (“It is well settled that, if the grantee knows a deed is fraudulent, the deed cannot qualify as color of title.”) However, we need not address every possible alternative and its result since defendants’ subjective intent is certainly a “genuine issue of material fact[,]” and the issue of adverse possession cannot be answered without consideration of their intent. *Trillium Ridge Condominium*, ___ N.C. App. at ___, 764 S.E.2d 203, 210–11.

D. Change in Grantees

Lastly, defendants contend that even if the grantee on the deed was changed after plaintiff executed it, the change will not “put title back” to plaintiff. Defendants note quite correctly that plaintiff alleged in his complaint that he signed the deed to defendants. Of course, we also have defendant’s sworn testimony that the deed plaintiff signed was to Thomas Quinn, not defendants. Yet this issue of fact is not material because the deed fails either way.

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Defendants' argument is as follows:

[Plaintiff] signed a deed for the property to someone. If the front page was changed to a new grantee, that would not put title back into [plaintiff]. *See Dugger v. McKesson*, 100 N.C. 1, 11, 6 S. E. 746, 750 (1888).

In the case of *Bowden v. Bowden*[,] 264 N.C. 296, 300, 141 S. E. 2d 296, 300, (1965) the court found that the alteration of a deed by adding another grantee does not ordinarily divest the title and estate conveyed to the original grantee in the deed in its original form. In *Bowden, supra*, the court found that the burden of proof as to such alteration is on the party attacking the altered deed.

Bowden states that “[w]here it has been established that alterations were made after execution and delivery of a deed, the burden is upon those claiming under the altered deed to prove that the alterations were made with the knowledge and consent of the grantor.” *Bowden*, 264 N.C. at 301, 141 S.E.2d at 626. Defendants are the parties “claiming under the altered deed” so the burden is on them to show “that the alterations were made with the knowledge and consent of the grantor.” *Id.* Defendants have not forecast any evidence plaintiff knew that the first page of the deed was switched after he executed it or that he consented to this change. In fact, defendant Patricia Quinn stated that she did not believe that plaintiff was aware of the change. The evidence only supports two scenarios here: either the first page of the deed was switched after it was executed by the grantor and notarized, and plaintiff was not aware of the change or the deed was actually recorded as it was executed, but that means the deed was notarized by defendant Patricia Quinn and fails for that reason.

IV. Conclusion

So where does that leave this convoluted case? Despite the conflicting evidence, there is no genuine issue of material fact as to the validity of the deed. The deed is void, whether due to notarization by Patricia Quinn if the deed was to her and her husband or due to the fact that the deed was materially altered after execution without plaintiff's knowledge or consent. Either way it is not valid as between plaintiff and defendants and case law regarding later changes to the grantees with the grantor's knowledge is inapplicable. However, we must reverse the trial court's order granting summary judgment in favor of defendants because there is a genuine issue of material fact as to whether defendants acquired

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title to the land by adverse possession under color of title. In addition, if a jury were to determine that defendants did not acquire title by adverse possession, defendants' counterclaims for unjust enrichment and betterments must then be determined. For the foregoing reasons, we reverse and remand.

REVERSED and REMANDED.

Judge HUNTER, JR. concurs.

Judge BRYANT concurs in the result only.

WILLIAM SHANNON, M.D., PLAINTIFF

v.

BOB TESTEN, JOSPEH P. JORDAN, AND NORTH CAROLINA
PHYSICIANS HEALTH PROGRAM, INC., DEFENDANTS

No. COA15-64

Filed 6 October 2015

1. Physicians—peer review evaluation—statutory immunity

Where a medical doctor (plaintiff) sued defendants, who performed an evaluation that served as the basis for the termination of plaintiff's hospital staff privileges, the trial court did not err by dismissing the complaint for failure to state a claim. Pursuant to N.C.G.S. § 90-21.22(f), which governs peer review agreements by the North Carolina Medical Board, defendants had statutory immunity absent allegations of bad faith. Plaintiff's complaint merely asserted that defendants' evaluation contained factual errors, and it failed to allege bad faith.

2. Physicians—peer review evaluation—private cause of action

Where a medical doctor (plaintiff) sued defendants, who performed an evaluation that served as the basis for the termination of plaintiff's hospital staff privileges, the trial court did not err by dismissing the complaint for failure to state a claim. Plaintiff could not pursue a claim under the federal peer review law because that law does not provide a private cause of action. In addition, even assuming the state peer review law provided a private cause of action, the allegations in the complaint established that defendants complied with the statute.

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[243 N.C. App. 386 (2015)]

Appeal by plaintiff from judgment entered 5 September 2014 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 11 August 2015.

Wyrick, Robbins, Yates & Ponton, LLP, by Tobias S. Hampson, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Michael E. Weddington and Robert E. Desmond, and Cranfill Sumner & Hartzog LLP, by Beth R. Fleishman, Jaye E. Bingham-Hinch, and Ginger B. Hunsucker, for defendants-appellees.

DIETZ, Judge.

In 2010, Defendants performed an assessment of Plaintiff William Shannon, a physician, at the request of Gaston Memorial Hospital, where Dr. Shannon had staff privileges. Based on Defendants' evaluation, the hospital terminated Dr. Shannon's staff privileges.

Dr. Shannon then sued Defendants alleging that they breached statutory duties owed to him during the evaluation process. Dr. Shannon also alleged that Defendants violated statutory due process rights established by applicable federal and state peer review laws. The trial court dismissed Dr. Shannon's complaint for failure to state a claim upon which relief could be granted, and Dr. Shannon timely appealed.

We affirm the trial court. Dr. Shannon concedes that N.C. Gen. Stat. § 90-21.22(f) provides a statutory immunity to Defendants absent allegations of bad faith. Here, Dr. Shannon's complaint alleges that Defendants' evaluation contained factual errors and omissions, but does not allege that those errors and omissions were intentional or otherwise done in bad faith. As a result, the complaint fails to allege facts sufficient to overcome Defendants' statutory immunity.

Likewise, Dr. Shannon's due process allegations fail to state a claim upon which relief can be granted. Even assuming Dr. Shannon can bring a direct cause of action against Defendants under the statutory due process language on which he relies, that language requires only that "peer review agreements shall include provisions assuring due process." N.C. Gen. Stat. § 90-21.22(b). Here, Dr. Shannon's complaint alleges that the agreement contains provisions ensuring that Defendants' activities will "be in accordance with due process." Thus, on its face, the complaint fails to allege facts sufficient to state a claim for violation of the statute. Accordingly, we affirm the trial court's judgment.

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Facts and Procedural History

The following facts are taken from Dr. Shannon's complaint, accepting all allegations as true and drawing all reasonable inferences in his favor. See *Thompson v. Waters*, 351 N.C. 462, 462-63, 526 S.E.2d 650, 650 (2000) (citations omitted).

Dr. Shannon is a licensed medical doctor practicing ophthalmology in Gastonia, North Carolina. He had staff privileges at Gaston Memorial Hospital, where he had been on the medical staff since 1980. As a result of two patient incidents, Gaston Memorial requested Dr. Shannon "undergo a comprehensive neuropsychiatric assessment as part of their evaluation." Gaston Memorial made this request to assess whether Dr. Shannon had any physical, psychiatric, emotional, or substance abuse related illness, or personal health issues that may have contributed to the incidents in question. Dr. Shannon's Gaston Memorial privileges were temporarily suspended, pending the results of this requested evaluation.

Dr. Shannon cooperated with Gaston Memorial's request and submitted to evaluations by both a psychologist and a psychiatrist in Charlotte in late August and early September of 2010. The psychiatrist reported that his and the psychologist's evaluations revealed no cognitive defects, psychiatric disorders, delusional thinking, hallucinations, or memory issues. He also concluded that Dr. Shannon did not exhibit dementia or psychiatric illnesses that would affect his performance as a medical doctor.

Gaston Memorial then referred Dr. Shannon to North Carolina Physicians Health Program, Inc. ("NCPHP") and the two individual defendants for further evaluation. Dr. Shannon met with Defendants Testen and Jordan for approximately two hours on or about 29 November 2010. At the time of the meeting, Testen was a licensed clinical social worker and served as a consultant and clinical coordinator for NCPHP. Jordan was a counselor and employee of NCPHP. NCPHP is a North Carolina not-for-profit corporation operating under an agreement with the North Carolina Medical Board pursuant to N.C. Gen. Stat. § 90-21.22(b), a state law governing peer review agreements.

During the meeting, Dr. Shannon gave Testen and Jordan names of witnesses he believed would have relevant information regarding his behavior and the incidents that gave rise to the evaluation by NCPHP. He also identified documents, including hospital and patient records, that supported his position and explained the two incidents. However, Testen and Jordan did not consult these witnesses and documents.

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Following the 29 November 2010 meeting, Testen and Jordan prepared an “initial assessment” letter and gave it to the North Carolina Medical Board and Gaston Memorial. The letter stated that Dr. Shannon had no alcohol or substance abuse issues, no legal issues, and no history of psychiatric illness. The letter also stated that Dr. Shannon was “cooperative and forthcoming,” and complied with their drug testing and other informational requests “without hesitation.” But, according to Dr. Shannon, the assessment letter contained factual errors and significant omissions regarding the two incidents in question.¹ Testen and Jordan concluded their assessment letter with a recommendation that Dr. Shannon immediately obtain further professional evaluation.

Testen and Jordan repeated their recommendation for further professional evaluation in a 4 January 2011 letter sent to Dr. Shannon and copied to the North Carolina Medical Board. In this letter Testen and Jordan also stated that they had continued to gather information from Dr. Shannon’s earlier psychological and psychiatric evaluations in Charlotte and that, “this information has been informative and concerning.” The January letter did not explain what was “concerning” about the information Testen and Jordan had gathered.

In December 2010, Gaston Memorial informed Dr. Shannon that, based on information provided by Defendants, his staff privileges would not be reinstated. Dr. Shannon volunteered his license to the North Carolina Medical Board in February 2011.

On 26 November 2013, Dr. Shannon sued Testen, Jordan, and their employer, NCPHP, alleging that Testen and Jordan were negligent in performing their evaluations, and that NCPHP was vicariously liable as their employer. On 23 June 2014, Dr. Shannon filed an amended complaint, adding a claim for violation of due process under federal and state statutory law governing the peer review process, but leaving the original negligence claim unaltered.

Defendants moved to dismiss Dr. Shannon’s amended complaint pursuant to Rule 12(b)(6), arguing that they were immune from suit under N.C. Gen. Stat. § 90-21.22(f) and that Dr. Shannon had failed to state any claim upon which relief may be granted. On 5 September 2014, the trial court granted the motion. Dr. Shannon timely appealed.

1. The complaint does not specifically identify these alleged errors and omissions.

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Analysis

This Court reviews the grant of a Rule 12(b)(6) motion to dismiss *de novo*. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d. 794, 796 (2013). We examine “whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.” *Id.* (citations omitted). Dismissal is only appropriate if “it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim.” *Scadden v. Holt*, 222 N.C. App. 799, 801, 733 S.E.2d 90, 91-92 (2012) (citations omitted).

I. Negligence Claim

[1] Dr. Shannon first argues that his complaint states a claim for breach of duties that Defendants owed him under the applicable peer review statutes. Dr. Shannon acknowledges that to state a claim in this context he must allege that the Defendants acted in bad faith, thus overcoming the statutory immunity provided in N.C. Gen. Stat. § 90-21.22(f). Dr. Shannon contends that the Court should infer bad faith from the express allegations in the complaint. For the reasons discussed below, we reject Dr. Shannon’s argument.

N.C. Gen. Stat. § 90-21.22 governs peer review agreements by the North Carolina Medical Board concerning programs for impaired physicians. The statute provides an immunity to suit for those participating in the peer review process: “Peer review activities conducted in good faith pursuant to any agreement under this section shall not be grounds for civil action under the laws of this State.” N.C. Gen. Stat. § 90-21.22(f). As a result, a plaintiff suing individuals or corporations involved in this statutory peer review process must allege bad faith in order to survive a Rule 12(b)(6) motion.

To allege bad faith, the complaint must do more than allege mere negligence. Bad faith requires some showing of intentional dishonesty or a wrongful motive. As our Supreme Court has observed, “[bad faith] implies a false motive or a false purpose, and hence it is a species of fraudulent conduct. Technically, there is, of course, a legal distinction between bad faith and fraud, but for all practical purposes bad faith usually hunts in the fraud pack.” *Bundy v. Commercial Credit Co.*, 202 N.C. 604, 163 S.E. 676, 677 (1932).

Here, Dr. Shannon’s complaint fails to allege bad faith. Indeed, the complaint does not even contain a conclusory allegation that Defendants acted in bad faith; to the contrary, the allegations read like a run-of-the-mill negligence claim. The complaint alleges that Defendants committed various mistakes in the peer review process:

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17. Upon information and belief, the individual defendants did not interview necessary witnesses with knowledge of what had occurred on the two incidents in question.

19. The initial assessment by the individual defendants contained factual errors and significant omissions regarding the two incidents in question that cast Dr. Shannon in a poor light professionally.

23. Upon information and belief, the individual defendants did not interview the individuals who Dr. Shannon identified as having relevant information . . . and did not review the relevant hospital and patient records with him or with eyewitnesses to the events in question.

None of these allegations suggest the report's alleged "factual errors" and "omissions" were intentional. Moreover, the complaint contains a number of allegations indicating the defendants acted in *good faith*:

20. The individual defendants in their initial assessment, accurately stated that Dr. Shannon does not have difficulties with alcohol or substance abuse, has no history of mental or psychiatric illness or legal issues; and the defendants found Dr. Shannon "cooperative and forthcoming."

21. The individual defendants reported that Dr. Shannon "without hesitation" completed their request for a urine drug screen and complied with their request to sign a release allowing the individual defendants to speak with members of the hospital, as well as the psychologist and psychiatrist who had previously evaluated him.

27. During the December 30, 2010, telephone conversation . . . defendant Jordan extended the time limit for [Dr. Shannon] making an appointment for evaluation to January 30, 2011.

Dr. Shannon argues that this Court should *infer* bad faith from the fact that defendants provided little specific information to him during their inquiry and that their report ultimately contained at least some factual errors and omissions. But this is an inferential leap too far. In essence, Dr. Shannon contends that the Court should infer willfulness from carelessness. To do so would set aside the distinction between negligence and bad faith established in cases from this Court and our Supreme Court. *See Edwards v. Northwestern Bank*, 39 N.C. App. 261, 268, 250 S.E.2d 651, 656 (1979); *Bundy*, 202 N.C. at 607, 163 S.E. at 677.

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Accordingly, we hold that the complaint fails to allege bad faith—a necessary step in overcoming the legal immunity afforded by N.C. Gen. Stat. § 90-21.22(f)—and therefore fails to state a claim upon which relief can be granted.

II. Due Process Claim

[2] Dr. Shannon next argues that his complaint states a claim for violation of statutory due process protections provided by the applicable federal and state peer review laws. We disagree.

As an initial matter, Dr. Shannon cannot pursue a claim under the federal law, the Health Care Quality Improvement Act, because that statute does not provide a private cause of action. *Hancock v. Blue Cross Blue Shield of Kan., Inc.*, 21 F.3d 373, 375 (10th Cir. 1994); *see also Bok v. Mut. Assurance, Inc.*, 119 F.3d 927, 928 (11th Cir. 1997) (per curiam); *Wayne v. Genesis Med. Ctr.*, 140 F.3d 1145, 1147 (8th Cir. 1998); *Singh v. Blue Cross Blue Shield of Mass., Inc.*, 308 F.3d 25, 45 n.18 (1st Cir. 2002).

Dr. Shannon concedes that he does not—and cannot—pursue a private cause of action under the Health Care Quality Improvement Act. But he argues that he can pursue a *state* common law claim for the violation of his statutory due process rights provided by the federal law. To support this novel theory, Dr. Shannon cites our Supreme Court’s holding that “the common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right.” *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). This language from *Corum* concerns rights established in the North Carolina Constitution.² Thus, *Corum* does not permit a litigant to bring a state common law claim to enforce an alleged violation of a federal statute simply because federal law does not permit a private cause of action. *See Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 339, 678 S.E.2d 351, 355 (2009); *Copper v. Denlinger*, 363 N.C. 784, 788, 688 S.E.2d 426, 428-29 (2010) (both limiting *Corum* to violations of the state Constitution). Accordingly, Dr. Shannon’s claim based on federal law fails to state a claim upon which relief can be granted.

2. Dr. Shannon has not alleged a violation of his state constitutional due process rights in his complaint. He only alleges that Defendants violated his *statutory* due process rights under the applicable federal and state peer review laws, 42 U.S.C. § 11112 and N.C. Gen. Stat. § 90-21.22. But, even if Dr. Shannon’s complaint could somehow be read to allege a constitutional violation, it never alleges the trigger of state constitutional due process rights: state action. To the contrary, it alleges that Defendant NCPHP is a private corporation and the individual Defendants are NCPHP employees.

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Dr. Shannon also asserts a claim under N.C. Gen. Stat. § 90-21.22(b), which provides that “peer review agreements shall include provisions assuring due process.” We are not persuaded that the General Assembly intended for this provision to provide a private cause of action against third parties like the defendants in this case, who are subject to a peer review agreement with the North Carolina Medical Board. Rather, if the Medical Board failed to comply with the statutory obligation to ensure that “peer review agreements shall include provisions assuring due process,” Dr. Shannon’s claim, if one exists at all, ought to be directed at the Medical Board.

In any event, even assuming Dr. Shannon can sue Defendants for the alleged violation of N.C. Gen. Stat. § 90-21.22(b), the allegations in Dr. Shannon’s complaint establish that Defendants complied with the statute. The statute requires only that “peer review agreements shall include provisions assuring due process.” *Id.* Dr. Shannon alleges that the “‘memorandum of understanding’ between Gaston Memorial Hospital and the North Carolina Medical Board, pursuant to North Carolina General Statute § 90-21.22(b) . . . requires the activities of Defendant NCPHP to be in accordance with due process.” Simply put, the complaint itself alleges that the peer review agreement includes provisions assuring due process. Thus, Dr. Shannon’s complaint fails to state a claim for violation of N.C. Gen. Stat. § 90-21.22.³

Conclusion

For the reasons discussed above, the trial court did not err in dismissing Plaintiff William Shannon’s Amended Complaint for failure to state a claim upon which relief can be granted.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

3. We also note that agency regulations create a thorough process for NCPHP to follow in conducting its assessment, and this process readily provides the sort of notice and opportunity to be heard necessary to satisfy basic due process rights. *See* 21 NCAC 32K.0201, 32K.0202. Dr. Shannon does not allege that these requirements were violated, and the allegations in the complaint establish that they were satisfied.

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[243 N.C. App. 394 (2015)]

STATE OF NORTH CAROLINA

v.

JOHN JOSEPH CARVALHO, II

No. COA14-1251

Filed 6 October 2015

1 Constitutional Law—speedy trial—Barker factors

The trial court did not err by determining that the State did not violate defendant's state or federal constitutional right to a speedy trial where the nearly nine-year delay, while extraordinary, was not *per se* determinative. Applying the four factors in *Barker v. Wingo*, 407 U.S. 514, defendant failed to carry his burden of showing that negligence or willfulness by the State caused the length of delay in his trial.

2. Evidence—audiotape and transcript—redacted and limiting instruction

Defendant argued the trial court erred in a prosecution for first-degree murder and armed robbery by admitting portions of an audiotape and corresponding transcript of a conversation between defendant and another inmate (Anderson). Given the importance of the credibility of Anderson's testimony to the State's case, it could not be concluded that the trial court was manifestly unreasonable in determining that the relevance of the redacted version of the transcript, combined with a limiting instruction, substantially outweighed any unfair prejudice to defendant.

3. Criminal Law—closing arguments—conversation with another inmate

The State's closing arguments were not grossly improper and did not warrant a new trial where defendant was charged with first-degree murder and armed robbery, evidence was introduced of defendant's conversation with another inmate, and the State used that evidence in its closing argument. The State did not ask the jury to use the challenged evidence to convict defendant of the crimes for which he was on trial, nor did the State ask the jury to use the evidence admitted in any other improper manner.

Chief Judge McGEE concurring in part and dissenting in part.

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[243 N.C. App. 394 (2015)]

Appeal by defendant from judgment entered 7 April 2014 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 1 June 2015.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

TYSON, Judge.

John Joseph Carvalho, II (“Defendant”) appeals from judgment entered upon jury verdicts finding him guilty of first-degree murder and of robbery with a dangerous weapon. We find no error in Defendant’s conviction or judgment entered thereon.

I. Factual Background

The evidence tended to show: On 28 April 2000, George N. Kastansis (“Mr. Kastansis”) died of multiple gunshot wounds at his place of business, Avondale Grocery, located in Monroe, North Carolina. A warrant was issued for Defendant’s arrest on 16 November 2004, over four and one-half years later, for the murder of Mr. Kastansis. The grand jury indicted Defendant for first-degree murder and robbery with a firearm on 3 January 2005. Defendant knew Mr. Kastansis through an illegal gambling partnership they had run out of Avondale Grocery. The State’s theory of guilt was that Defendant killed Mr. Kastansis, because he was preventing Defendant from continuing his involvement in their gambling partnership, costing Defendant “thousands of dollars.”

On the same date, the State also charged Defendant with the murder of Robert Long (“Mr. Long”). The grand jury indicted him for the first-degree murder of Mr. Long on 3 January 2005. The State initially filed an intention to seek the death penalty for both murders, but later requested that the trial court try both cases as non-capital. The trial court ordered both cases against Defendant be tried non-capitally on 19 December 2008.

The State tried Defendant for the death of Mr. Long in 2009. The trial court declared a mistrial after the jury deadlocked. The State tried Defendant for the murder of Mr. Long a second time in 2010 and the trial court again declared a mistrial because of a deadlocked jury.

The State’s primary evidence against Defendant in both murders of Mr. Long and Mr. Kastansis was the testimony of an informant, William

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C. Anderson (“Anderson”). Anderson was incarcerated with Defendant in 2004. Anderson testified that during his incarceration with Defendant, Defendant purportedly confessed to killing both Mr. Long and Mr. Kastansis. Anderson testified at Defendant’s first trial for the murder of Mr. Long. At Defendant’s second trial for the murder of Mr. Long, Anderson invoked his Fifth Amendment right against self-incrimination and refused to testify. Anderson said he believed that if he testified he might say something incorrectly and perjure himself.

When Anderson testified at Defendant’s first trial for the murder of Mr. Long, the State also entered into evidence an audiotaped conversation between Anderson and Defendant (“the audiotape”). The audiotape did not contain an actual confession, but rather a wide-ranging conversation, which touched on the murders of Mr. Long and Mr. Kastansis, as well as other potentially criminal acts. The sound quality of the audiotape was very poor and the State Bureau of Investigation (“SBI”) made efforts to clarify the audiotape.

After Defendant’s two mistrials for the murder of Mr. Long, the State again sought to secure the testimony of Anderson and to improve the quality of the audiotape. The SBI first contacted the Federal Bureau of Investigation (“FBI”) for its assistance to clarify the audiotape on 24 March 2011. On 26 April 2011, the FBI stated it could not clarify the audiotape due to internal policies prohibiting such action and relinquished custody of the audiotape on 6 July 2011. The FBI recommended the SBI hire the Target Forensic Services Laboratory (“Target Forensic”). An SBI agent sent the audiotape to Target Forensic on 28 July 2011. Target Forensic completed work on the audiotape and sent the SBI a clarified version on 24 April 2012.

Some portions of the audiotape remained inaudible. Anderson made handwritten notes transcribing the content of the conversation on a printed copy of the transcript to supplement the inaudible portions of the audiotape. The SBI prepared a transcript of the conversation that occurred between Anderson and Defendant during their incarceration.

The conversation between Anderson and Defendant did not include a confession to the murders of either Mr. Long or Mr. Kastansis. The conversation contained details of the events surrounding Mr. Kastansis’s death, including the following: (1) Defendant attended Mr. Kastansis’s funeral and blessed the body with a “very . . . theatrical movement[;]” (2) Defendant mentioned investigators had charged the wrong man in connection with Mr. Kastansis’s murder; (3) Defendant’s knowledge of and involvement in an illegal poker scam that Defendant and Mr. Kastansis

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ran out of Avondale Grocery; and, (4) Defendant's comment after investigators showed Defendant a picture of Mr. Kastansis's children, in which Defendant stated "he didn't care about [Mr. Kastansis's] kids."

The remainder of the conversation covered a wide range of criminal activity, including stealing money, acting as hitmen, using firearms to kill, killing a "Gypsy," how to attain serial killer status, committing murder "with control," and how to dismember a body and feed it to catfish. The conversation ended soon after Defendant suspected Anderson was wearing a wire, and said: "[I]t [sic] my life. The rest of my life . . . you're the only one in here I talk to . . . you're the only one here I trust only one I trust . . . you don't think they know that?"

Investigators met with Anderson on 9 December 2011 to determine his willingness to testify at Defendant's trial for the murder of Mr. Kastansis. Anderson told investigators he had refused to testify in Defendant's second trial for Mr. Long's murder "because of the way he was treated" by Union County, while in its custody. Anderson was concerned for his safety because Union County held him with other inmates, who knew he was testifying against someone in a murder trial. Anderson agreed to testify after investigators agreed to some of his stipulations. Anderson reiterated everything he had said during Defendant's trial for the murder of Mr. Long.

The State initiated plea bargain discussions with Defendant in December 2012. The State and Defendant did not reach a plea agreement and discussions ended on 9 April 2013. Defendant filed a motion to dismiss the charges based upon a speedy trial violation on 3 December 2012, before the State began plea negotiations with Defendant.

In his motion, Defendant asserted he was denied his constitutional right to a speedy trial due to the overall length of his imprisonment, as well as a lack of evidence sufficient to obtain a conviction due to Anderson's unwillingness to testify. Defendant also alleged his lengthy imprisonment had "crushed" any ability to post his one million dollar bond. Defendant stated defense counsel had "repeatedly" asked about the State's intentions regarding his cases, but Defendant had "received no definitive answer."

The State provided the following reasons for the potential delay at the hearing on Defendant's motion to dismiss:

- (1) The complex nature of the cases. While factually separate and distinct from one another the two cases are intertwined in that Bill Anderson is the key witness in each case.

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(2) That with two separate murder charges significant amounts of discovery were generated.

(3) Prior to both trials (Long and Kastansis) the State and defense engaged in substantial plea negotiations in an effort to find a resolution that was mutually satisfying to each Party.

(4) The defendant was arraigned on the Long murder on December 16, 2008; tried in this case on September 9, 2009 which resulted in a hung jury and a mistrial on September 15, 2009.

(5) The defendant was retried on the Long murder on March 22, 2010 which resulted in a hung jury and a mistrial on March 30, 2010.

(6) Following the mistrial on March 30, 2010, the State sought to enhance the quality of the audio tape conversation between the defendant . . . and Bill Anderson.

(7) The efforts to clarify the audio recording began in March 2011 and were completed in July 2012.

(8) Efforts to resolve issues with Bill Anderson to secure his testimony in future trials.

On 6 June 2013, the trial court held a hearing on Defendant's motion to dismiss and entered an order denying Defendant's motion on 2 January 2014. In its written order, the trial court made the following conclusions of law:

2. The length of delay 4 years 10 months (November 16, 2004 to September 8, 2009) and 5 years 4 months (November 16, 2004 to March 22, 2010) between the date the defendant was charged and his two trials in Richard Long's murder cases and a period of 8 years 7 months (November 16, 2004 to June 6, 2013) between the date the defendant was charged and the hearing on defendant's Motion to Dismiss (Speedy Trial) is sufficient enough in each case to trigger analysis of the speedy trial factors.

3. The defendant . . . has failed to offer any evidence to establish that neglect or willfulness by the State is the reason for delay in each case.

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4. The State's reasons for the delay in the trial of each murder case . . . are reasonable and valid justifications for the delay in each case.
5. The defendant . . . until his Motion to Dismiss filed on December 3, 2012, never asserted his right to a speedy trial.
6. The defendant . . . failed to establish that he suffered actual, substantial prejudice as a result of the delay in the trial of his two murder cases.
7. The Court in its evaluation and balancing of the four factors enumerated in Baker v. Wingo, concludes as a matter of law that the defendant's right to a speedy trial has not been violated.

The State tried Defendant for the murder of Mr. Kastansis and robbery with a firearm on 7 October 2013. The trial court declared a mistrial after the jury deadlocked. Six months later, Defendant was tried a second time for the murder of Mr. Kastansis and robbery with a firearm on 1 April 2014. Defendant moved to dismiss the charges at the close of the State's evidence, and again at the close of all of the evidence. The trial court denied Defendant's motions.

A jury found Defendant guilty of first-degree murder and robbery with a firearm on 7 April 2014. The trial court arrested judgment on Defendant's conviction for robbery with a dangerous weapon and sentenced Defendant to life imprisonment without parole on the first-degree murder conviction.

Defendant gave notice of appeal in open court.

II. Issues

Defendant asserts three arguments on appeal: (1) that the almost nine years between his arrest in 2004 and his trial for the murder of Mr. Kastansis in 2013 violated his constitutional right under the Sixth Amendment to the United States Constitution and Article I, Section 8 of the North Carolina Constitution; (2) that the trial court should have denied admission of a jailhouse audiotape and corresponding transcript because of its irrelevancy and unfairly prejudicial effect; and (3) that the trial court should have intervened in the State's closing arguments because the State used evidence, limited by the trial court to a narrow purpose, as substantive proof of Defendant's guilt.

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III. AnalysisA. Speedy Trial

[1] Defendant first contends the State violated his state and federal constitutional rights to a speedy trial because an almost nine-year delay occurred between his 2004 indictment for the murder of Mr. Kastansis and Defendant's motion to dismiss in 2012.

1. Standard of Review

This Court applies a *de novo* standard of review for a constitutional issue on appeal. *See State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007). It is a defendant's burden to demonstrate prejudicial and reversible error. If the appellate court finds error, the State carries the burden to rebut by showing the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A 1443 (2013).

2. Analysis

The Supreme Court of the United States established a four-factor balancing test to assess a potential violation of a defendant's right to a speedy trial, as cited by the trial court. *See Barker v. Wingo*, 407 U.S. 514, 530–33, 33 L. Ed. 2d 101, 115–19 (1972). These factors are: (1) the “[l]ength of delay;” (2) “the reason for the delay[;]” (3) “the defendant's assertion of his right[;]” and, (4) “prejudice to the defendant.” *Id.* at 530, 33 L. Ed. 2d at 117.

“[N]one of the four factors identified [are] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.” *Id.* at 533, 33 L. Ed. 2d at 118. While the four factors guide the process, “these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.” *Id.*

The right to a speedy trial is unique among other constitutional guarantees “in that, among other things, deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself[.]” *State v. McKoy*, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978). “[I]t is impossible to determine precisely when the right has been denied; . . . and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.” *Id.*

(a) Length of Delay

In order to “trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold

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dividing ordinary from presumptively prejudicial.” *Doggett v. United States*, 505 U.S. 647, 651–52, 120 L. Ed. 2d 520, 528 (1992) (internal quotation marks omitted). As time passes, “the presumption that pretrial delay has prejudiced the accused intensifies.” *Id.* at 652, 120 L. Ed. 2d at 528. “Depending on the nature of the charges, the lower courts have generally found post-accusation delay ‘presumptively prejudicial’ at least as it approaches one year.” *Id.* at 652 n.1, 120 L. Ed. 2d at 528 n.1.

Here, almost nine years elapsed between the time the State indicted Defendant in 2004 and the time of the June 2013 hearing on his motion to dismiss. This delay clearly passes the demarcation into presumptively prejudicial territory and triggers the *Barker* analysis. *See State v. Flowers*, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997) (explaining “presumptive prejudice does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry” (internal quotation marks omitted)), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998); *see, e.g., Doggett*, 505 U.S. at 652, 120 L. Ed. 2d at 528 (calling an eight-and-one-half-year-long delay “extraordinary”).

The almost nine-year delay, while also “extraordinary,” “is not *per se* determinative of whether a speedy trial violation has occurred,” and requires careful analysis of the remaining factors. *Id.* *See State v. Webster*, 337 N.C. 674, 678-79, 447 S.E.2d 349, 351 (1994) (deciding sixteen-month delay from arrest to trial did not presumptively indicate a speedy trial violation had occurred, but was enough to “trigger examination of the other factors”).

(b) Reason for Delay

A defendant must demonstrate the delay stemmed from either negligence or willfulness on the part of the State. *State v. Marlow*, 310 N.C. 507, 521, 313 S.E.2d 532, 541 (1984). Ordinary or reasonable delays do not create prejudice. *State v. Johnson*, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969). A speedy trial claim prevents only those delays that were “purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort.” *Id.*

“A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice.” *Id.* at 269, 167 S.E.2d at 278. Once a defendant shows a *prima facie* case for negligence or willfulness, the State bears the burden of showing there were reasonable circumstances surrounding the delay. *See McKoy*, 294 N.C. at 143, 240 S.E.2d at 390.

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Defendant has failed to show the delay stemmed from either negligence or willfulness on the part of the State. *Compare Webster*, 337 N.C. at 679, 447 S.E.2d at 351 (finding a sixteen-month delay, where the district attorney calendared the trial six different times, did not demonstrate negligence or willfulness), *with McKoy*, 294 N.C. at 141–42, 240 S.E.2d at 389 (finding delay factor in favor of defendant because defendant presented evidence that the “failure to bring defendant to trial during the next ten months . . . was due to the willful neglect of the prosecution and could have been avoided by reasonable effort”). Defendant presented no evidence of negligence or willfulness by the State in his motion to dismiss, or at the hearing on his motion.

Defendant merely established the timeline showing how the two murder cases had proceeded over time. As discussed *supra*, the length of delay alone does not prove the State denied Defendant a speedy trial. *See Webster*, 337 N.C. at 678, 447 S.E.2d at 351. Although Defendant asserted in his motion to dismiss that defense counsel had asked “repeatedly” for information on the progression of the cases and had received “no definitive answer,” no other motions were filed and Defendant did not present any evidence regarding those inquiries.

Evidence described the timelines of all four trials and the actions the State took to bring the two distinct murder cases to trial. The more significant elements that contributed to the length of the proceedings were: (1) changing the trials for Mr. Long’s and Mr. Kastansis’s murders from capital to non-capital; (2) plea discussions between Defendant and the State; (3) clarification of the audiotape and generation of a transcript, including seeking help from the SBI, the FBI and Target Forensic; (4) securing the testimony of the State’s key witness, Anderson; and, (5) the interconnectedness of the two murders. While we are concerned about the sixteen-month delay from enhancing the audiotape previously used at Defendant’s trials for the murder of Mr. Long, Defendant has failed to carry his burden of showing the reasons for the delays stemmed from either negligence or willfulness on the part of the State.

(c) Assertion of the Right

Defendant’s failure to demand a speedy trial does not result in a waiver of the speedy trial violation. *See Barker*, 407 U.S. at 528, 33 L. Ed. 2d at 115. While a “[d]efendant’s failure to assert his right to a speedy trial sooner in the process does not foreclose his speedy trial claim, [it] does weigh against his contention that he has been denied his constitutional right to a speedy trial.” *Flowers*, 347 N.C. at 28, 489 S.E.2d at 407. Defendant first asserted his right to a speedy trial on 3 December 2012,

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some eight years after Defendant was first indicted in 2004. No evidence in the record shows Defendant requested or moved for a speedy trial any earlier than in 2012.

(d) Prejudice Resulting from Delay

Prejudice “should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect.” *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118. The identified interests the constitutional right to a speedy trial protects are: (1) avoiding prolonged imprisonment; (2) reducing anxiety of the accused; and (3) creating the opportunity for the accused to assert and exercise their presumption of innocence. *See id.* The last of these interests is the most important aspect to the speedy trial right, “because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.” *Id.*

Defendant has not shown any affirmative proof of prejudice. He asserts only his lengthy incarceration “crushed” any financial ability to post his one million dollar bond. Defendant does not argue he was either unduly anxious or that his case preparation was impaired by the delay. *Compare Flowers*, 347 N.C. at 29, 489 S.E.2d at 407 (finding that defendant failed to show prejudice when he was already incarcerated, alleviating concerns over oppressive pretrial incarceration, and any allegation of impairment to his defense was not supported by the record), *with State v. Chaplin*, 122 N.C. App. 659, 665, 471 S.E.2d 653, 657 (1996) (finding prejudice when the defendant could no longer find his key witness).

We have reviewed and considered each of the *Barker* factors. Defendant failed to carry his burden to demonstrate a speedy trial violation. We affirm the trial court’s ruling denying Defendant’s motion to dismiss. We hold the trial court did not err after it determined the State did not violate Defendant’s state or federal constitutional right to a speedy trial. Defendant’s argument is overruled.

B. Admission of Audiotape and Corresponding Transcript

[2] Defendant argues the trial court erred in admitting, over his objection, portions of the audiotape and corresponding transcript, which included a conversation between Defendant and Anderson, while both men were incarcerated.

Defendant challenges portions of the audiotape and transcript in which Defendant discusses: (1) plans to commit a future armed robbery and murder; (2) how many killings it takes to become a serial killer; (3) becoming a hitman; (4) committing murder “with control;” and (5) dismembering a body and feeding it to catfish. Defendant contends the

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evidence was irrelevant under Rules 401 and 404(b) and unfairly prejudicial under Rule 403, and should have been excluded. We disagree.

1. Standard of Review

Our Supreme Court held:

when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court’s Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

“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. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (citation omitted).

2. Analysis(a) 404(b) Evidence

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). However, evidence of a defendant’s prior crimes, statements, actions and conduct is admissible, if relevant to any fact or issue other than the defendant’s character. *Beckelheimer*, 366 N.C. at 130-31, 726 S.E.2d at 159.

North Carolina Rules of Evidence 404(b) is a rule of inclusion, not exclusion. *Id.* at 131, 726 S.E.2d at 159. *See also State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

The rule lists numerous purposes for which evidence of prior acts may be admitted, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. This list is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue [at trial]

Beckelheimer, 366 N.C. at 130, 726 S.E.2d at 159 (internal citations and quotation marks omitted).

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Our Supreme Court has ruled Rule 404(b) is “subject to but *one exception* requiring the exclusion of evidence if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *State v. Lyons*, 340 N.C. 646, 668, 459 S.E.2d 770, 782 (1995) (emphasis in original) (citation omitted).

The trial court found the audiotape and transcript of portions of Defendant’s conversations with Anderson served a “proper purpose,” in that “these statements are necessary to show the full context of the confidential relationship between Mr. Anderson and [Defendant].”

Anderson’s credibility was crucial to the State’s case and this finding clearly falls within the purview of admissible evidence under Rule 404(b). See *State v. White*, 340 N.C. 264, 285-86, 457 S.E.2d 841, 853 (1995) (holding “knowledge of the relationship between [the witness] and defendant was necessary in order for the jury to assess [the witness’s] credibility and determine what weight to give his testimony”); *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (noting 404(b) evidence is admissible if it serves to enhance the natural sequence or development of facts).

This evidence was properly admitted under the North Carolina Rules of Evidence, Rule 404(b). *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54 (holding Rule 404(b) is a rule of inclusion). The trial court also gave the jury a limiting instruction regarding the purpose for which the jury could consider the evidence. The jury is presumed to have followed these instructions. *State v. Montgomery*, 291 N.C. 235, 244, 229 S.E.2d 904, 909 (1976) (citation omitted) (“We assume, as our system for administration of justice requires, that the jurors in this case were possessed of sufficient character and intelligence to understand and comply with th[e limiting] instruction by the court.”).

Defendant’s conversation with Anderson was not admitted to show Defendant had a propensity to commit crimes. Rather, the challenged portions of the conversation were admitted for the limited purposes to show: (1) Defendant trusted and confided in Anderson; (2) the nature of their relationship, in that Defendant was willing to discuss the commission of murder and robbery with Anderson; and (3) relevant factual information to Defendant’s murder charge for which he was on trial. The challenged portions of the conversations bolstered Anderson’s credibility as a witness. The trial court did not err in concluding that Rule 404(b) permitted admission of these statements into evidence.

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(b) Rule 403 – Unfair Prejudice

The trial court's admission of portions of the audiotape and transcript also did not violate Rule 403. "Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Coffey*, 326 N.C. at 281, 389, S.E.2d at 56 (citation omitted). The trial court determined the probative value of this evidence was not substantially outweighed by any prejudicial effect the admission of this evidence would have on Defendant "based on the State's purpose for offering this evidence."

The trial court also gave a specific limiting instruction to the jury, both at the time the audiotape was played before the jury and during the instruction to the jury. This limiting instruction stated:

Evidence has also been received tending to show that Bill Anderson and the defendant . . . engaged in conversations concerning the future commission of criminal acts, serial killing, and the dismembering of a body. *This evidence was received solely for the purpose of showing the nature and context of the relationship between Bill Anderson and . . . [Defendant].*

(emphasis supplied).

The trial court redacted some of the transcript, balanced the factors to allow admission of the remaining portions, and found the admission of the audiotape and transcript was for a permissible purpose under Rule 404(b). The trial court also specifically limited its use in its instructions to the jury. Defendant has failed to show the trial court's process or admission of this evidence constitutes an abuse of discretion.

Defendant argues any relevance of this evidence was outweighed by "danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2013). Under the applicable standard of review, this Court cannot substitute its own judgment for that of the trial court. Given the importance of the credibility of Anderson's testimony to the State's case, we cannot conclude the trial court was manifestly unreasonable in determining the relevance of the redacted version of the transcript, when combined with the limiting instruction, substantially outweighed any unfair prejudice to Defendant. When combined with the trial court's limiting jury instruction, the probative value substantially outweighed any unfair prejudice to Defendant. *Id.* Defendant has failed to show the admission of this evidence violated Rule 403. *State v. Lanier*, 165 N.C. App. 337, 345, 598 S.E.2d 596, 602 (2004) (citation and internal quotation marks omitted)

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“In each case, the burden is on the defendant to show there was no proper purpose for which the evidence could be admitted [under Rule 404(b)].”). Defendant’s argument is overruled.

C. Closing Arguments

[3] Defendant asserts the State’s closing arguments were “grossly improper,” and warrant a new trial. We disagree.

1. Standard of Review

“The standard of review when a defendant fails to object at trial is whether the closing argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*.” *State v. McCollum*, 177 N.C. App. 681, 685, 629 S.E.2d 859, 861-62 (2006) (citation and internal quotation marks omitted).

“In determining whether the prosecutor’s argument was . . . grossly improper, this Court must examine the argument in the context in which it was given and in the light of the overall factual circumstances to which it refers.” *State v. Higgs*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998). “[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.” *Id.* (citation and internal quotation marks omitted).

2. Analysis

The Supreme Court of the United States held for a new trial to be granted for remarks made during closing arguments,

it is not enough that the prosecutor[’s] remarks were undesirable or even universally condemned. The relevant question is whether the prosecutor[’s] comments so infected the trial court with unfairness as to make the resulting conviction a denial of due process.

Darden v. Wainwright, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986) (citations and internal quotation marks omitted).

The State used evidence from the audiotape and transcript throughout its closing argument. However, the State did not mention nor discuss Defendant’s conversations with Anderson about: (1) the commission of criminal acts in the future; (2) serial killing; (3) being a hitman; or, (4) dismembering a body and feeding it to the catfish. These portions of Defendant’s and Anderson’s conversation were admitted into evidence solely for the limited purposes stated above.

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The State did not ask the jury to use the challenged evidence to convict Defendant of the crimes for which he was on trial, nor did the State ask the jury to use the evidence admitted in any other improper manner.

To the extent Defendant's remark that murder must be committed with "control," which occurred during his discussion of serial killers and hitmen, fell within the scope of the trial court's limiting instruction, we cannot conclude the State's references to this statement were so grossly improper that the trial court should have intervened *ex mero motu*. See *State v. Stokes*, 357 N.C. 220, 227, 581 S.E.2d 51, 56 (2003) (prosecutor's comments during closing argument to effect that inculpatory statement murder defendant made to sheriff deputy, offered to impeach defendant, should be considered as substantive testimony, was not so grossly improper that trial court abused its discretion in failing to intervene *ex mero motu*; instruction given was adequate to advise jury that defendant's statement, which he denied making, was being admitted for limited purpose of impeaching defendant's truthfulness).

Defendant failed to object to the State's closing arguments at trial. It is difficult, now on appeal, to credit and accept his argument that the State's closing argument constituted "an extreme impropriety." *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001).

Defendant has failed to establish any gross or plain error or impropriety in the State's closing arguments to warrant a new trial. The State's closing arguments did not "so infect[] the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) (citation omitted), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

IV. Conclusion

Defendant failed to carry his burden of showing either any negligence or willfulness by the State caused the length of delay in his trial. Even with a troubling and "extraordinary" almost nine-year delay, Defendant's state and federal constitutional right to a speedy trial were not violated. *Doggett*, 505 U.S. at 652, 120 L. Ed. 2d at 528.

The challenged portions of the audiotaped conversation between Defendant and Anderson were relevant and properly admitted into evidence under Rules 401, 403, and 404(b). Defendant has failed to demonstrate that the trial court abused its discretion in determining the probative value of the audiotaped conversation substantially outweighed any unfair prejudice.

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Defendant has failed to carry his burden of showing any gross or plain error or impropriety in the State's use of the audiotaped conversation during closing arguments.

Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in Defendant's conviction or the judgment entered thereon.

NO ERROR.

Judge GEER concurs.

Chief Judge McGEE concurs in part and dissents in part in a separate opinion.

McGEE, Chief Judge, concurring in part, dissenting in part.

I concur in the majority's opinion that Defendant failed to carry his burden to demonstrate that the State violated his constitutional right to a speedy trial and that Defendant failed to carry his burden of showing any gross or plain error or impropriety in the State's closing arguments. However, I respectfully dissent from the majority's determination that the challenged portions of the audiotape and corresponding transcript were properly admitted as evidence under N.C. Gen. Stat. § 8C-1, Rule 404(b).

As the majority recognizes, the North Carolina Supreme Court recently held that N.C. Gen. Stat. § 8C-1, Rules 404(b) and 403 require "distinct inquiries with different standards of review." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Specifically, "[w]e review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *Id.*

Rule 404(b) generally is a "rule of *inclusion*" and "evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the accused." *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990) (internal quotation marks omitted). While evidence is not admissible to prove the character of the accused, it ordinarily is admissible for purposes such as "to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, entrapment, or accident," as well as for other purposes not enumerated in the rule. *State v. Cashwell*, 322 N.C. 574, 578, 369 S.E.2d 566, 568 (1988). For

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instance, our Supreme Court has concluded that a defendant's inculpatory statements to another may be properly admitted under Rule 404(b) where such testimony is necessary to "show a confidential relationship between th[at] witness and the defendant," when knowledge of such a relationship "was necessary in order for the jury to assess [the testifying witness's] credibility and determine what weight to give his testimony concerning [the] defendant's confession to th[e] crime." *State v. White*, 340 N.C. 264, 285–86, 457 S.E.2d 841, 853, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995).

In support of Defendant's assertion that the trial court erred by admitting the challenged portions of the audiotape and transcript in which Defendant and Anderson discussed plans to commit a future armed robbery and murder, how many killings it takes to become a serial killer, becoming a hitman, committing murder "with control," and dismembering a body and feeding it to catfish, Defendant directs this Court's attention to *State v. Cashwell*, 322 N.C. 574, 369 S.E.2d 566 (1988), and *State v. White*, 340 N.C. 264, 457 S.E.2d 841 (1995).

In *Cashwell*, the defendant was charged with two counts of first-degree murder. *Cashwell*, 322 N.C. at 574, 369 S.E.2d at 566. While the defendant was in jail for an unrelated charge of the attempted murder of his girlfriend, the defendant told a fellow inmate about the charge for which he was then presently in jail and, about a month later, made incriminating statements to the same inmate concerning the details of the first-degree murder charges. *See id.* at 575–76, 369 S.E.2d at 567. At trial, the State introduced evidence from the inmate and from a detective corroborating the inmate's testimony that the defendant said he was in jail for the attempted murder of his girlfriend. *See id.* at 576, 369 S.E.2d at 567. The State argued that the inmate's testimony and the detective's corroborating testimony about the attempted murder charge "were competent for the purpose of showing the relationship between [the inmate] and [the] defendant that led up to [the] defendant's inculpatory statements a month later" concerning the first-degree murder charges. *Id.* at 577, 369 S.E.2d at 568.

However, the *Cashwell* Court determined that, in accordance with the definition of "relevant evidence" under N.C. Gen. Stat. § 8C-1, Rule 401, "the testimony of these two witnesses that [the defendant] was in jail on a charge of attempted murder of his girlfriend [was] not relevant," because this statement by the defendant "[did] not go to prove the existence of any fact that [was] of consequence in the determination of the two charges of murder on which defendant was found guilty." *Id.* The *Cashwell* Court further determined that such evidence "was not relevant

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to any fact or issue other than the character of the accused[.]” contrary to the proscription of N.C. Gen. Stat. § 8C-1, Rule 404. *Id.* at 578, 369 S.E.2d at 568. Because the Court concluded “[t]he challenged testimony in no way was necessary to show the full context of [the] defendant’s confession, nor was it required in order to show any confidential relationship between [the] defendant and [the testifying inmate,]” *id.*, the Court found this testimony to be “irrelevant and immaterial to the later inculpatory statements made by [the] defendant to [the inmate about the first-degree murder charges.]” *Id.* Accordingly, after determining that the admission of such testimony constituted prejudicial error, the *Cashwell* Court held that the defendant was entitled to a new trial. *Id.* at 580, 369 S.E.2d at 569.

In *White*, the defendant was tried in 1993 for the first-degree murder of her four-year-old stepson. *White*, 340 N.C. at 270–71, 457 S.E.2d at 845. After the child’s death in 1973, which was originally determined to be accidental, the medical examiner “extracted a large piece of a plastic laundry bag from the child’s throat,” which “was tightly wadded up,” “came out in one piece,” and “was large enough to cover [an adult’s] hand and three-fourths of [an adult’s] arm.” *Id.* at 271–72, 457 S.E.2d at 845. Almost twenty years later, the defendant was alleged to have conspired to kill her husband. *Id.* at 272, 457 S.E.2d at 846. During one of the six meetings the defendant had with her co-conspirators to allegedly discuss her husband’s murder, one of the co-conspirators “expressed hesitation about taking someone’s life, and [the] defendant encouraged [him] to murder her husband” by telling him: “‘[I]t’s not that hard to do. I had a step-child. I put a bag over it until it stopped breathing. It was better off.’” *Id.*

At the defendant’s trial in *White* for the murder of her stepson, the defendant moved to exclude the evidence of her alleged involvement in her husband’s murder on the grounds that the admission of this evidence would violate Rules 404(b) and 403, which motion was denied. *Id.* at 281, 457 S.E.2d at 851. The defendant argued that “the only probative value of this evidence was to show that she had the propensity to commit murder and that because she had conspired to murder her husband, she must also have murdered her stepson twenty years before.” *Id.* at 283, 457 S.E.2d at 852.

However, in *White*, the trial court found that the evidence of the defendant’s “involvement in the conspiracy” to murder her husband “was necessary for the natural development of the facts and to complete the story of this murder for the jury, in particular, to explain the context of [the] defendant’s confession to [the co-conspirator] that she murdered

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her stepchild by smothering him with a plastic bag.” *Id.* at 284, 457 S.E.2d at 853. Our Supreme Court agreed that the defendant’s confession to her co-conspirator “would have been difficult to understand without the historical details and context giving rise to the statement,” *id.*, and determined that, “[a]bsent evidence of [the] defendant’s relationship with [the co-conspirator], the jury would have been unable to determine [the witness’s] credibility or what weight to give his testimony.” *Id.* Thus, the Court concluded that, “[e]ven though the two incidents were separated by nineteen years, they were inextricably intertwined, and it would have been impossible to develop this relationship for the jury without revealing [the] defendant’s participation in the conspiracy to murder her husband.” *Id.* at 284–85, 457 S.E.2d at 853. Accordingly, the Court held that this evidence “was not merely probative of [the] defendant’s propensity to commit murder and was properly admitted under Rule 404(b).” *Id.* at 285, 457 S.E.2d at 853.

In *White*, the Court distinguished *Cashwell* by recognizing that, in *Cashwell*, in order to show a confidential relationship between the witness and the defendant, the defendant’s “inculpatory statement to his cellmate about the attempted murder of the defendant’s girlfriend” was “not necessary to show the context” in which the “additional inculpatory statements to his cellmate about a different crime, a double murder, for which he was eventually tried,” were made, because the first statement was “irrelevant and immaterial to the subsequent inculpatory statement.” *White*, 340 N.C. at 285, 457 S.E.2d at 853. However, the Court determined that, in *White*, “knowledge of the relationship between [the co-conspirator] and [the] defendant was necessary in order for the jury to assess [the witness’s] credibility and determine what weight to give his testimony concerning [the] defendant’s confession to th[e] crime.” *Id.* at 285–86, 457 S.E.2d at 853. The Court further determined that the defendant’s statement was “inextricably intertwined with the evidence of [the] defendant’s alleged involvement in her husband’s murder and could not be meaningfully isolated.” *Id.* at 286, 457 S.E.2d at 853–54. Thus, the *White* Court concluded that the challenged testimony was properly admitted under Rule 404(b), and that the trial court did not abuse its discretion under Rule 403 “by concluding that the probative value of the *interwoven evidence* of [the] defendant’s confession and involvement in her husband’s murder outweighed any prejudicial effect such evidence might have had against her.” *Id.* at 286, 457 S.E.2d at 854 (emphasis added).

In the present case, Defendant objected to portions of the transcript that dealt with plans to commit a future armed robbery and murder,

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how many killings it takes to become a serial killer, becoming a hitman, committing murder “with control,” and dismembering a body and feeding it to catfish. As the majority recognizes, “[t]he trial court found the audiotape and transcript of portions of Defendant’s conversations with Anderson served a ‘proper purpose,’ in that ‘these statements [we]re necessary to show the full context of the confidential relationship between [Anderson] and [Defendant].’” However, I disagree with the majority’s conclusion that “this finding clearly falls within the purview of admissible evidence under Rule 404(b).” Without the challenged portions of the audiotape and transcript, the remaining conversation between Defendant and Anderson would have been sufficient to demonstrate the confidential nature of their relationship. In the unchallenged portions of the audiotape and transcript, Defendant and Anderson openly discussed elements surrounding Mr. Kastansis’s death, including Defendant’s “theatrical” blessing of Mr. Kastansis’s body, Defendant’s attempt to implicate a man who sold cigarettes at Avondale Grocery as Mr. Kastansis’s murderer, Defendant’s knowledge and involvement in the illegal poker scam run out of Avondale Grocery, and Defendant’s lack of empathy towards Mr. Kastansis’s children. Furthermore, additional testimony at trial established that Anderson and Defendant knew each other before their incarceration through family connections and by Defendant’s habit of frequenting Avondale Grocery. Thus, unlike *White*, the challenged portions of the audiotape and transcript in the present case were not so “inextricably intertwined” as to require their admission, nor were they “necessary in order for the jury to assess [Anderson’s] credibility and determine what weight to give his testimony[.]” See *White*, 340 N.C. at 285–86, 457 S.E.2d at 853. Instead, as in *Cashwell*, “[t]he challenged testimony in no way was necessary . . . in order to show any confidential relationship between [D]efendant and [Anderson.]” See *Cashwell*, 322 N.C. at 578, 369 S.E.2d at 568.

Therefore, while I agree with the majority that “Anderson’s credibility was crucial to the State’s case,” because I believe the challenged evidence was irrelevant and immaterial and not admitted for a proper purpose under N.C. Gen. Stat. § 8C-1, Rule 404(b), I must respectfully dissent.

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[243 N.C. App. 414 (2015)]

STATE OF NORTH CAROLINA

v.

EZEKIEL ELIGHA GAMBLE, DEFENDANT

No. COA15-71

Filed 6 October 2015

1. Identification of Defendants—photographic lineup—folder method

On appeal from defendant's conviction for armed robbery, the Court of Appeals held that the trial court did not err by admitting the testimony of a police detective concerning an eyewitness's identification of defendant from a photo lineup. The detective's administration of the photo lineup—in which he placed the photos in a folder and shuffled them before presenting them to the eyewitness—met the statutory requirements of the N.C. Eyewitness Identification Reform Act of 2007. The detective's inability to recall which "filler" photos he used did not render his testimony inadmissible.

2. Appeal and Error—effective assistance of counsel—direct appeal

On appeal from defendant's conviction for armed robbery, the Court of Appeals dismissed defendant's ineffective assistance of counsel claim without prejudice to his right to file a motion for appropriate relief in the trial court.

Appeal by Defendant from judgment entered 28 August 2014 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 12 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

Attorney Ryan McKaig, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Ezekiel Gamble ("Defendant") appeals following a jury verdict convicting him of armed robbery in which he received a sentence of 80 to 108 months' imprisonment. On appeal, Defendant argues the trial court committed plain error in allowing eyewitness testimony in violation of the North Carolina Eyewitness Identification Reform Act of 2007 ("EIRA").

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Defendant also argues he received ineffective assistance of counsel at trial. After review we find the court committed no error, much less plain error in admitting the eyewitness testimony. We dismiss Defendant's ineffective assistance of counsel claim without prejudice to the right of Defendant to refile a motion for appropriate relief in the trial court.

I. Factual and Procedural History

On 20 May 2013, Defendant was indicted for armed robbery. Represented by appointed counsel, Wayne T. Baucino, Defendant pled not guilty, and trial began on 26 August 2014 in Guilford County Superior Court.

The State's evidence tended to show the following: On 11 December 2012, Maurice Stimpson lived in an apartment complex in Greensboro, North Carolina. While cleaning inside his home during the early afternoon, he heard the sound of another person outside his home. Mr. Stimpson went outside and saw Defendant running around the building searching for someone. Mr. Stimpson watched Defendant run around for fifteen minutes, and went back inside to finish his cleaning. Shortly thereafter, Defendant knocked on Mr. Stimpson's door. Defendant asked Mr. Stimpson where "Rob" lived, and Mr. Stimpson pointed out Rob's apartment. Then Defendant left with another man in a white Lexus.

About thirty minutes later, Defendant knocked on Mr. Stimpson's door again, asking about Rob. Mr. Stimpson walked outside to talk with Defendant. Once outside, Mr. Stimpson turned and saw a second man standing beside the front door. The second man was holding, but not pointing, a gun. Defendant told Mr. Stimpson to call Rob, and Mr. Stimpson obliged, telling Rob to come home and that two men were looking for him. As soon as Mr. Stimpson hung up, Defendant became upset and "got in [Mr. Stimpson's] face." Defendant insisted on being taken to Rob, but Mr. Stimpson refused. Defendant responded by demanding Mr. Stimpson's wallet. Mr. Stimpson protested to keep his money and reluctantly took out his wallet. Defendant took the wallet from Mr. Stimpson's hand, and removed all of the money, saying, "Somebody got to take the loss today." Defendant then returned the cashless wallet to Mr. Stimpson. The second man with the gun told Mr. Stimpson to take out his I.D. and put it in the man's pocket, which Mr. Stimpson did. Defendant and his accomplice left, and Mr. Stimpson went inside his home and called the police. During Mr. Stimpson's direct testimony, he identified Defendant as his assailant three times. This testimony elicited no objection from defense counsel.

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Officer M. L. Schlanger of the Greensboro Police Department responded to the 911 call, and met with Mr. Stimpson. Mr. Stimpson detailed the events leading up to the robbery, the .38 caliber handgun used in the robbery, and the white Lexus he saw earlier that day. Mr. Stimpson described the robber as an African-American male in his early twenties, with dreadlock style hair, and a white t-shirt. Officer Schlanger and other officers canvassed the apartment complex and found a witness who gave them the license plate number for the suspect's white Lexus. Officer Schlanger ran the license plate number and found it registered to Tynisha Fordham of Thomasville, North Carolina. Officer Schlanger spoke with Detective Curry of the Thomasville Police Department, and informed him of the armed robbery, and asked him to be on the lookout for the suspects and the white Lexus. Detective Curry knew the Lexus owner, Tynisha Fordham, and her brother, Johnston. Detective Curry stated Defendant knew Johnston and Fordham, and Defendant fit the description of the robber. Using this information Officer Schlanger suspected Defendant as a target for further investigation.

Detective Scott Russell of the Greensboro Police Department contacted Mr. Stimpson on 12 December 2012 to arrange a meeting to conduct a photographic lineup. Detective Russell used the information Officer Schlanger had put together to select photographs of eight African-American men in their early twenties with dreadlocks, including Defendant. Detective Russell prepared the photographic lineup before meeting with Mr. Stimpson on 13 December 2012 as follows:

I had eight photographs, but I only used six of those photographs. And what I do, I take one photograph of the possible suspect and five filler photographs of other individuals of similar color, weight, characteristics. And what I do, prior to arriving at Mr. Stimpson's house, I place one photograph in six separate [plain manila] folders. At that point, what I do is I shuffle those. . . . That's so I don't know which photograph is going to be the suspect. . . . I don't make any gestures or inferences to the victim in this case trying to pick out an alleged suspect.

Detective Russell arrived at Mr. Stimpson's residence to conduct the lineup. Detective Russell began by reading the instructions found in section 15A-284.52(b)(3) of the EIRA. Following the instructions, Detective Russell told Mr. Stimpson that he should not feel compelled to make an identification, that it is important to exclude innocent persons, and that the investigation would continue whether or not an identification was made. Both men signed, acknowledging the instructions on a form.

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Detective Russell reshuffled the folders with photos. He then showed the photos to Mr. Stimpson. When Mr. Stimpson came to Defendant's picture, he said, "That's the one." Detective Russell asked Mr. Stimpson how sure he was on a scale of one to ten and Mr. Stimpson answered, "10 out of 10." The State offered all eight photos and the signed instruction sheet into evidence. This testimony elicited no objection from defense counsel.

Following Detective Russell's photographic lineup, an arrest warrant was issued charging Defendant with armed robbery. Defendant was arrested and served with the warrant on 27 January 2013. Defendant posted bond shortly thereafter.

Officer Zach Trotter of the High Point Police Department testified to Defendant's second arrest, stemming from a traffic stop while Defendant was out on bond for the armed robbery charge. On 9 February 2013, Defendant drove alone in High Point, North Carolina. Officer Trotter noticed the car had expired registration tags, and pulled it over. After stopping the car, Defendant fled on foot. In a subsequent search of the car, police found a chrome .38 caliber revolver underneath the front passenger seat. Following the traffic stop, Defendant was arrested and charged with crimes unrelated to the current appeal. While being processed at the jail for these charges, Defendant voluntarily told Officer Trotter the following:

Man, I can't take this gun charge. I'm going to trial for a robbery in Greensboro soon and they are going to think that the gun—that gun is the gun I used in the robbery because it's the same gun—I mean, it's the same type of gun that was used.

Defense counsel cross-examined Officer Trotter about the statement, focusing primarily on Officer Trotter's note taking. The revolver was admitted into evidence during Officer Trotter's direct examination without objection.

The State rested its case and defense counsel moved to dismiss the armed robbery charge on grounds of insufficient evidence. The trial court denied Defendant's motion to dismiss.

Defendant did not testify in his own defense. However, defense counsel recalled Officer Trotter to ask additional questions about his note taking. Defendant called several witnesses for the defense, including Helen Mock, Defendant's mother, Tynisha Fordham, the Lexus owner, and Brittany Davis, Defendant's former girlfriend. Defendant rested his

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case, and at the close of evidence, he renewed his motion to dismiss for insufficient evidence. The trial court denied the renewed motion and began the charge conference.

During the charge conference, Defendant requested an instruction on the identification of Defendant as the perpetrator of the crime under N.C.P.I.—Crim. 104.90. The court granted Defendant's request, instructing the jury:

I instruct you that the State has the burden of proving the identity of the defendant as the perpetrator of the crime charged beyond a reasonable doubt. This means that you, the jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before you may return a verdict of guilty.

Although N.C.P.I.—Crim. 105.65 could have been used, Defendant did not request any other instructions pertaining to the EIRA, and did not object to the omission of any EIRA instructions. After closing arguments, the trial court charged the jury and sent the jury out for deliberation. During deliberation, the jury requested the eight photos from the lineup and Defendant raised no objection. The trial court gave the photos to the jury, and deliberation continued for approximately three hours before the jury reached a unanimous guilty verdict.

The court held the sentencing hearing the next morning, on 28 August 2014. Both parties stipulated to Defendant's prior record level III, for two prior robberies in 2009 and 2011. Defendant delivered his allocution to the court, maintaining his innocence and providing brief insights into his prior robbery convictions. The court imposed a sentence within the presumptive range of the Class D armed robbery felony, sentencing Defendant to 80 to 108 months' imprisonment. Defendant immediately entered his notice of appeal by oral motion, and requested appointed appellate counsel. The court appointed the Appellate Defender.

II. Standard of Review

On appeal, Defendant claims the trial court committed plain error in allowing Detective Russell's testimony, the evidence from the photographic lineup, Mr. Stimpson's in-court identification, and jury instructions that did not discuss the EIRA. Defendant did not preserve any of these claims by objection at trial. On appeal he asked that we review the admission of eyewitness testimony for plain error.

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved

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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); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). Plain error review is to be “‘applied cautiously and only in the exceptional case . . .’ [meaning] the error will often be one that ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

“The North Carolina plain error standard of review . . . requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error.” *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333. “For an error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *Id.* at 518, 723 S.E.2d at 334. Next, “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.* (quoting *Odom*, at 307 N.C. 660, 300 S.E.2d at 378).

III. Analysis

“[E]yewitness identification evidence has a powerful impact on juries. Juries seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime.” *Watkins v. Sowders*, 449 U.S. 341, 352, 101 S. Ct. 654, 661, 66 L.Ed.2d 549 (1981) (Brennan, J., dissenting). North Carolina courts have long recognized this impact, and provided neutral lineup and confrontation procedures to protect suspects’ Due Process rights under the Fifth and Fourteenth Amendments of the United States Constitution and Art. I § 19 of the North Carolina Constitution. *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984); *see also State v. Harris*, 308 N.C. 159, 301 S.E.2d 91 (1983).

When “lineup and confrontation procedures [are] so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification [they] violate due process and are constitutionally unacceptable.” *State v. Smith*, 278 N.C. 476, 481, 180 S.E.2d 7, 11 (1971) (citation and quotation marks omitted). Under a Due Process analysis, the North Carolina Supreme Court has provided a two-part framework:

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First we must determine whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification. If this question is answered in the negative, we need proceed no further. If it is answered affirmatively, the second inquiry is whether, under all the circumstances, the suggestive procedures employed gave rise to a substantial likelihood of irreparable misidentification.

Hannah, 312 N.C. at 290, 322 S.E.2d at 151 (citations omitted).

The North Carolina Supreme Court has developed a totality of the circumstances test to determine if a pretrial procedure was impermissibly suggestive, defining impermissible suggestiveness as “so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice.” *Id.* (citations omitted). In making this determination courts consider several factors: (1) the witness’s opportunity to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Harris*, at 308 N.C. 164, 301 S.E.2d at 95; *see also State v. Johnson*, 161 N.C. App. 68, 73, 587 S.E.2d 445, 448 (2003).

Following our Supreme Court’s decisions, the North Carolina General Assembly recognized the need to protect Due Process rights during identification procedures and passed the North Carolina Eyewitness Identification Reform Act of 2007 (“EIRA”). N.C. Gen. Stat. § 15A-284.52. The EIRA was enacted “to help solve crime, convict the guilty, and exonerate the innocent in criminal proceedings by improving procedures for eyewitness identification of suspects.” N.C. Gen. Stat. § 15A-284.51. Originally the EIRA only applied to photographic lineups, defining a photographic lineup as a “procedure in which an array of photographs is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.” N.C. Gen. Stat. § 15-284.52(a)(7). The General Assembly recently expanded the EIRA’s scope, now applying it to in-person show-ups in addition to photographic lineups. Act of August 11, 2015, ch. 15A, sec. 284.52, 2015 N.C. Sess. Laws 2015-212.

A. North Carolina Eyewitness Identification Reform Act of 2007

[1] The EIRA directs all “State, county, and other local law enforcement” to follow specific requirements in conducting a photographic

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lineup. N.C. Gen. Stat. § 15-284.52(b). The EIRA requirements vary in detail based on whether the lineup administrator is independent or non-independent.

The EIRA provides greater detail for independent administrators under section 15-284.52(b). An independent administrator must give specific instructions to the eyewitness before the lineup: the perpetrator might or might not be present in the lineup; the administrator does not know the suspect's identity; the eyewitness should not feel compelled to make an identification; it is as important to exclude innocent persons as it is to identify the perpetrator; and the investigation will continue whether or not an identification is made. N.C. Gen. Stat. § 15-284.52(b)(3) The suspect's photo must "resemble the suspect's appearance at the time of the offense." N.C. Gen. Stat. § 15-284.52(b)(4). The independent administrator must also use photos of other persons, called "filler photos." N.C. Gen. Stat. § 15-284.52(a)(2). These fillers must "generally resemble the eyewitness's description of the perpetrator, while ensuring that the suspect does not unduly stand out from the fillers." N.C. Gen. Stat. § 15-284.52(b)(5). The photographic lineup must include a minimum of five filler photos in addition to the photo of the suspect. *Id.* No "information concerning any previous arrest, indictment, or conviction of the suspect shall be visible or made known to the eyewitness." N.C. Gen. Stat. § 15-284.52(b)(7). Lastly, the independent administrator "shall seek and document a clear statement . . . as to the eyewitness's confidence level that the person identified in a given lineup is the perpetrator." N.C. Gen. Stat. § 15-284.52(b)(12). If the eyewitness successfully identifies the perpetrator, the administrator "shall not [provide] any information concerning the [perpetrator] before the lineup administrator obtains the eyewitness's confidence statement about the selection." N.C. Gen. Stat. § 15-284.52(b)(13).

Conversely, section 15A-284.52(c) of the EIRA provides greater breadth for non-independent administrators:

Alternative Methods for Identification if Independent Administrator Is Not Used.—In lieu of using an independent administrator, a photo lineup eyewitness identification procedure may be conducted using an alternative method specified and approved by the North Carolina Criminal Justice Education and Training Standards Commission. Any alternative method shall be carefully structured to achieve neutral administration and to prevent the administrator from knowing which photograph is being presented to the eyewitness during the identification

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procedure. Alternative methods may include any of the following:

(1) Automated computer programs that can automatically administer the photo lineup directly to an eyewitness and prevent the administrator from seeing which photo the witness is viewing until after the procedure is completed.

(2) A procedure in which photographs are placed in folders, randomly numbered, and shuffled and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed.

(3) Any other procedures that achieve neutral administration.

N.C. Gen. Stat. § 15A-284.52(c).

Lastly, the EIRA provides remedies for noncompliance in section 15A-284.52(d). Courts must consider noncompliance while hearing motions to suppress or claims of eyewitness misidentification. N.C. Gen. Stat. § 15A-284.52(d)(1)–(2). The EIRA maintains similar scrutiny in jury trials, stating “[w]hen evidence of compliance or noncompliance with the requirements . . . has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identification.” N.C. Gen. Stat. § 15A-284.52(d)(3).

In this case, Detective Russell is a non-independent administrator subject to the broader requirements for alternative lineups under section 15A-284.52(c). Detective Russell testified in detail about his use of the approved folder method, randomizing manila folders so that he could not track any photo. N.C. Gen. Stat. § 15A-284.52(c)(2). He achieved neutral administration by using the statutory method. *Id.* Detective Russell met the additional requirements of the EIRA, instructing Mr. Stimpson with a signed instruction form mirroring the EIRA, using one photo of Defendant and five filler photos of similar looking men, and documenting Mr. Stimpson’s confidence in the identification without providing information on any one suspect. N.C. Gen. Stat. § 15A-284.52(b). We have examined all of the seven filler photos used in this case and we agree with the trial court that they are similar to Defendant’s photo. We hold Detective Russell’s administration of the photographic lineup met the statutory requirements; thus there was no error in admitting this testimony, much less any plain error.

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B. Defendant's Argument

Defendant contends the trial court plainly erred in allowing Detective Russell's testimony because Detective Russell could not identify the specific five filler photos he used, out of the seven filler photos he selected for the lineup. Defendant elaborates on this point as follows:

Here, Detective Russell brought eight photographs [seven fillers and one photo of Defendant] but only used six of them. It is impossible to know which six photographs he used. Detective Russell testified that he didn't remember which of the [filler] photographs he used. As stated above, it is impossible for the photographs used to be admitted into evidence when the detective himself is unsure which ones were used. The eight photographs were admitted into evidence but no one, including Detective Russell, can know which of those were used in the photographic lineup.

We are not persuaded. Although the reliability of Detective Russell's testimony is initially a consideration for the trial judge, the weight to be given his testimony is a question for the jury. We do not hold Detective Russell's failure to recall which five filler photos were used to be of such significance as to render his testimony inadmissible. Rather, his failure to recall goes to the weight to be accorded to his testimony.

The witness's credibility is a matter for the court "when the only testimony justifying submission of the case to the jury is inherently incredible and in conflict with the . . . State's own evidence." *State v. Wilson*, 293 N.C. 47, 51, 235 S.E.2d 219, 221 (1977) (citations omitted). No such conflict exists here. Any issue concerning Detective Russell's credibility, or the weight to be given to his testimony, was a matter for the jury. The trial court therefore did not err, much less commit plain error, in admitting this testimony.

Next, Defendant argues the reliability of Mr. Stimpson's in-court identification of Defendant was tainted by the procedures used by Detective Russell. "The credibility of a witness's identification testimony is a matter for the jury's determination, and only in rare instances will credibility be a matter for the court's determination." *State v. Green*, 296 N.C. 183, 188, 250 S.E.2d 197, 200–201 (1978) (citations omitted). Finding no EIRA violations in the photographic lineup, "there is no danger [the lineup identification] impermissibly tainted the in-court identification[s]." *State v. Lawson*, 159 N.C. App. 534, 539, 583 S.E.2d 354, 358 (2003) (citations omitted). During his direct testimony, Mr. Stimpson identified Defendant as his assailant three times. Given

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Mr. Stimpson's repeated identifications, and the failure of defense counsel to elicit any evidence of improper suggestions made during the lineup, we can discern no plain error in this proceeding.

Lastly, we have reviewed all eight photos from the photographic lineup, marked State's exhibit numbers 1-A, 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, and 1-H. None of the photos contain "information concerning any previous arrest, indictment, or conviction . . ." nor do they conspicuously depict a jail setting or jail clothing. N.C. Gen. Stat. § 15-284.52(b)(7). All seven filler photos, State's exhibit numbers 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, 1-H, "generally resemble" Mr. Stimpson's description of the perpetrator, and ensure that Defendant's photo, State's exhibit 1-A, "does not unduly stand out from the fillers." N.C. Gen. Stat. § 15-284.52(b)(5). The photos did not taint any in-court identification at trial, and the trial court did not err in admitting the photos.

C. Ineffective Assistance of Counsel

[2] Defendant contends that he received ineffective assistance of counsel from his trial counsel. We dismiss this argument without prejudice to the right of Defendant to file a motion for appropriate relief in the trial court.

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citations omitted). "Our Supreme Court has instructed that should the reviewing court determine the [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's rights to reassert them during a subsequent MAR proceeding." *Id.* at 554, 557 S.E.2d at 547 (quotation marks and citation omitted).

The record does not disclose whether the actions of trial counsel, which Defendant contends deprived him of an effective defense, were part of a broader trial strategy. We cannot resolve this question without a fuller record on appeal in which all evidence can be presented. We therefore dismiss this claim without prejudice to the right of Defendant to file a motion for appropriate relief at a later date.

IV. Conclusion

For the foregoing reasons, we find

NO ERROR.

Chief Judge McGEE and Judge DAVIS concur.

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[243 N.C. App. 425 (2015)]

STATE OF NORTH CAROLINA

v.

JERRY LANE HARWOOD, JR., DEFENDANT

No. COA14-971

Filed 6 October 2015

Probation and Parole—violation report filed after probation expired—subject matter jurisdiction

On appeal from the trial court's judgments revoking defendant's probation and activating five consecutive sentences, the Court of Appeals held that the trial court lacked subject matter jurisdiction. Even assuming the trial court that originally placed defendant on probation made a clerical error by failing to check the box to order that defendant's probation begin upon his release from incarceration, pursuant to Rule of Civil Procedure 60(a) the Court of Appeals did not have authority to correct a substantive error. Accordingly, the probation officer filed his violation reports after defendant's probation expired and the trial court lacked subject matter jurisdiction under N.C.G.S. § 15A-1344(f) to revoke defendant's probation.

Appeal by defendant from judgments entered on or about 14 March 2014 by Judge Mark E. Klass in Superior Court, Rowan County. Heard in the Court of Appeals on 19 March 2015.

Attorney General Roy A. Cooper III, by Assistant Attorney General Christine Anne Goebel, for the State.

Peter Wood, for defendant-appellant.

STROUD, Judge.

Jerry Lane Harwood, Jr. ("defendant") appeals from judgments in which the trial court found defendant in willful violation of his probation, revoked his probation, and activated five consecutive sentences. Defendant contends that the trial court lacked subject matter jurisdiction. We vacate.

I. Background

On or about 28 April 2008, a grand jury indicted defendant for one count of felonious burning of a public building and forty-three counts of felonious cruelty to animals for offenses committed in March 2006,

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arising from the burning of the Dan Nicholas Park petting zoo. *See* N.C. Gen. Stat. §§ 14-59, -360(b) (2005). On or about 23 June 2008, a grand jury indicted defendant for two counts of felonious breaking or entering, two counts of felonious larceny pursuant to a breaking or entering, two counts of felonious possession of stolen goods, thirteen counts of felonious breaking or entering a motor vehicle, two counts of financial transaction card theft, one count of possession of burglary tools, twelve counts of misdemeanor larceny, and one count of larceny of a firearm for offenses committed in April 2008.¹ *See id.* §§ 14-54(a), -55, -56, -71.1, -72(a), (b), -113.9(a)(1) (2007). At a 29 May 2009 hearing, defendant pled no contest to all seventy-nine charges.

On or about 29 May 2009, the trial court consolidated defendants' convictions into seven judgments. In the first judgment (No. 08CRS052862), the trial court consolidated one count of felony burning of a public building and seven counts of felonious cruelty to animals, and sentenced defendant to 16 to 20 months' imprisonment. The trial court also credited defendant for 405 days of imprisonment. In the second judgment (No. 08CRS052942), the trial court consolidated two counts of felonious breaking or entering, two counts of felonious larceny pursuant to a breaking or entering, two counts of felonious possession of stolen goods, one count of possession of burglary tools, and one count of larceny of a firearm, and sentenced defendant to 6 to 8 months' imprisonment. In the third judgment (No. 08CRS052871), the trial court consolidated nine charges of felonious cruelty to animals and sentenced defendant to 6 to 8 months' imprisonment. In the fourth judgment (No. 08CRS052880), the trial court consolidated eight charges of felonious cruelty to animals and sentenced defendant to 6 to 8 months' imprisonment. In the fifth judgment (No. 08CRS052888), the trial court consolidated eight charges of felonious cruelty to animals and sentenced defendant to 6 to 8 months' imprisonment. In the sixth judgment (No. 08CRS052896), the trial court consolidated eleven charges of felonious cruelty to animals and sentenced defendant to 6 to 8 months' imprisonment. In the seventh judgment (No. 08CRS052916), the trial court consolidated thirteen charges of breaking or entering a motor vehicle, twelve charges of misdemeanor larceny, and two charges of financial transaction card theft, and sentenced defendant to 6 to 8

1. We note that the indictment for possession of burglary tools lists the offense date as 19 April 2007, whereas the judgment lists this date as 19 April 2008. Given that every other June 2008 indictment lists an offense date in April 2008, we assume that the date listed in the judgment is correct and note that this discrepancy is immaterial to our analysis.

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months' imprisonment. The trial court ordered that defendant serve all seven sentences consecutively.

The trial court suspended the last five sentences (Nos. 08CRS052871, 08CRS052880, 08CRS052888, 08CRS052896, 08CRS052916) and placed defendant on 48 months of supervised probation. The trial court also ordered that defendant pay \$2,337 in restitution, a \$1,000 fine and a \$200 community service fee. The trial court ordered that during his probation, defendant complete 100 hours of community service, which could not involve any animals or any areas where they are kept, housed, or boarded. The trial court also included the following among the conditions of defendant's probation: (1) submit to warrantless searches for stolen goods, controlled substances, contraband, child pornography, weapons, pets, and incendiaries; (2) have no contact with Joshua Dunaway, a co-defendant; and (3) obtain a psychological evaluation and abide by all of its recommendations. In each of the five judgments, the trial court failed to either check the box to order that the probation would begin upon defendant's release from incarceration or the box to order that the probation would begin at the expiration of another sentence. In each of the last four judgments, the trial court checked a box to order that defendant comply with the probation conditions described in the third judgment (No. 08CRS052871).

On 11 June 2010, defendant was released from incarceration.² On 27 January 2014, a probation officer filed probation violation reports alleging that defendant had been convicted by a court in Tennessee for one count of aggravated burglary, four counts of fraudulent use of a credit card, two counts of theft, one count of attempted theft, one count of vandalism, and one count of possession of burglary tools. At a 14 March 2014 hearing, defendant admitted to willfully violating the terms of his probation without lawful justification. On or about 14 March 2014, the trial court revoked defendant's probation, activated all five suspended sentences, and ordered that defendant serve them consecutively. Defendant gave notice of appeal in open court.

II. Subject Matter Jurisdiction

A. Standard of Review

The issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal

2. Under North Carolina Rule of Evidence 201, we take judicial notice of this fact from the Department of Public Safety website's offender search results. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2013); *State v. Surratt*, ___ N.C. App. ___, ___, 773 S.E.2d 327, 331 (2015).

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or by a court *sua sponte*. It is well settled that a court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute. Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction. If the court was without authority, its judgment is void and of no effect.

An appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review.

State v. Gorman, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012) (citations, quotation marks, brackets, and ellipsis omitted). "In a criminal case, . . . North Carolina requires the State to prove jurisdiction beyond a reasonable doubt. . . . The burden of perfecting the trial court's jurisdiction for a probation revocation hearing after defendant's period of probation has expired lies squarely with the State." *State v. Moore*, 148 N.C. App. 568, 570-71, 559 S.E.2d 565, 566-67 (2002).

B. Analysis

In his sole argument on appeal, defendant contends that the 2014 trial court lacked subject matter jurisdiction to revoke his probation, because the probation officer filed the probation violation reports after defendant's probation had expired. Defendant argues that his four-year period of probation began on or about 29 May 2009 and thus expired on or about 29 May 2013, several months before the probation officer filed violation reports on 27 January 2014. N.C. Gen. Stat. § 15A-1344(f) (2013) provides that, in order for a trial court to revoke a defendant's probation after the expiration of the period of probation, the State must have filed a written violation report *before* the expiration of the period of probation, among other conditions.

The State responds that defendant's period of probation actually began upon his release from incarceration on 11 June 2010. According to the State, defendant's four-year period of probation expired 11 June 2014, after the 2014 trial court revoked defendant's probation, and thus the trial court did not violate N.C. Gen. Stat. § 15A-1344(f). The State acknowledges that the 2009 trial court failed to check the box to indicate that the period of probation would begin upon defendant's release from incarceration. But the State argues that this omission was due to a

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clerical mistake and requests that we remand this case to the trial court for correction of that mistake.

N.C. Gen. Stat. § 15A-1346 (2013) provides that the default rule is that a defendant's period of probation runs concurrently with his period of imprisonment:

(a) Commencement of Probation.—Except as provided in subsection (b), a period of probation commences on the day it is imposed and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period.

(b) Consecutive and Concurrent Sentences.—If a period of probation is being imposed at the same time a period of imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. If not specified, it runs concurrently.

North Carolina Rule of Civil Procedure 60(a) provides the rule for clerical errors:

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

N.C. Gen. Stat. § 1A-1, Rule 60(a) (2013). However,

[t]he court's authority under Rule 60(a) is limited to the correction of clerical errors or omissions. Courts do not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions. We have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error.

Gerhauser v. Van Bourgondien, ___ N.C. App. ___, ___, 767 S.E.2d 378, 384 (2014) (citations omitted). In *Gerhauser*, the trial court

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originally held that it had subject matter jurisdiction under N.C. Gen. Stat. § 50A-201(a)(2). *Id.* at ___, 767 S.E.2d at 383. But after the plaintiff filed a Rule 60 motion, the trial court changed its basis for subject matter jurisdiction and held that it had jurisdiction instead under N.C. Gen. Stat. § 50A-201(a)(4). *Id.* at ___, 767 S.E.2d at 382-84. This Court held that this change was substantive, not clerical, because the “trial court did not merely cite an incorrect subsection of N.C. Gen. Stat. § 50A-201 in the [original order]; the trial court quoted large portions of the statute in detail and made findings of fact and conclusions of law based upon the provisions of N.C. Gen. Stat. § 50A-201(a)(2)[.]” *Id.* at ___, 767 S.E.2d at 383.

Here, in each of the five judgments in which the 2009 trial court placed defendant on supervised probation, the 2009 trial court failed to either check the box to order that the probation would begin upon defendant’s release from incarceration or check the box to order that the period of probation would begin at the expiration of another sentence. We first note that the fact that the 2009 trial court made both omissions five times strongly suggests that the trial court did not make a mistake but rather intended for defendant’s probation to run concurrently with his incarceration, as this is the default rule under N.C. Gen. Stat. § 15A-1346. We also note that in each of the last four judgments, the 2009 trial court checked a box to order that defendant comply with the probation conditions described in the third judgment (No. 08CRS052871), which also indicates that the trial court was being careful in ordering the details of defendant’s probation. Additionally, even assuming the 2009 trial court made a mistake, we hold that this mistake would be a substantive error, rather than a clerical one. Changing this provision would retroactively extend defendant’s period of probation by more than one year and would grant the trial court subject matter jurisdiction to activate five consecutive sentences of 6 to 8 months’ imprisonment. Because this provision is substantive, we lack authority to change it under Rule 60(a). *See id.* at ___, 767 S.E.2d at 384.

The State argues that the 2009 trial court’s comments to defendant indicate that it intended for defendant’s probation to begin upon his release from incarceration. At the 29 May 2009 hearing, the trial court addressed defendant: “I want you to know that I have imposed a very strenuous and very serious probation period for you. I do that out of a sincere desire to see you walk on a very straight and narrow path.” But these comments are not inconsistent with a decision that defendant’s probation run concurrently with defendant’s active sentences. Defendant’s total active sentence was 22 to 28 months’ imprisonment. But the 2009 trial court credited defendant 405 days, approximately 13 months, so defendant’s period of incarceration beginning from the

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date of the 29 May 2009 hearing was between 9 to 15 months. Defendant was actually released on 11 June 2010, approximately 12 months after the hearing, which fits within this range. According to the judgments on their face, defendant was on probation until 29 May 2013, almost three years after his release from incarceration on 11 June 2010. During this period, defendant was required to complete 100 hours of community service, which could not involve any animals or any areas where they are kept, housed, or boarded. Defendant was also subject to the following conditions: (1) submit to warrantless searches for stolen goods, controlled substances, contraband, child pornography, weapons, pets, and incendiaries; (2) have no contact with Joshua Dunaway, a co-defendant; and (3) obtain a psychological evaluation and abide by all of its recommendations. Accordingly, we hold that the trial court's comments to defendant at the 29 May 2009 hearing were not inconsistent with the judgments on their face as they impose a lengthy period of probation with several conditions. Additionally, as discussed above, even if the 2009 trial court did make a mistake, we cannot change a substantive error. *See id.*, 767 S.E.2d at 384.

The State next argues that the 2009 trial court intended for defendant's probation to begin upon defendant's release from incarceration, because defendant would not be able to complete his 100 hours of community service otherwise. But as discussed above, according to the judgments on their face, defendant served nearly three years of his probation after being released from incarceration. Because completing 100 hours of community service in three years is certainly feasible, we disagree with the State. The State further argues that given the large number of charges involved in this case, "it is no surprise that such clerical errors were made." But the 2009 trial court properly included all seventy-nine charges in the seven judgments, and no mistake in the judgments is readily apparent from the record.

The State finally points out that in the third judgment (No. 08CRS052871), the 2009 trial court checked the box to order that the first suspended sentence run consecutively to the second active sentence. The State asks, "If the trial court intended for the 48-month probation period to run concurrently with Defendant's two active sentences starting on May 29, 2009, why would this box have been checked, indicating that the sentence was to run after the second of the two active sentences?" The trial court checked this box because it intended for the five suspended sentences of 6 to 8 months' imprisonment to serve as a penalty for a probation violation. At the 29 May 2009 hearing, the trial court emphasized this penalty to defendant: "[I]f you reappear before the Superior Court on probation violations for failure to comply with these

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conditions, then you are looking at five back-to-back six-to-eight sentences. Do you understand that?" The fact that the trial court checked this box indicates that it intended for the first suspended sentence to run consecutively to the second active sentence, but it does not indicate that the trial court intended for the *probation period* to run consecutively to the second active sentence.

In summary, we hold that the State has failed to show from the record that the 2009 trial court intended for defendant's probation to begin upon his release from incarceration. Assuming *arguendo* that the State had made this showing, we would be without authority to make such a substantive change to the judgments. *See id.*, 767 S.E.2d at 384. Accordingly, we hold that defendant's probation expired on or about 29 May 2013, several months before the probation officer filed the probation violation reports. Therefore, under N.C. Gen. Stat. § 15A-1344(f), the 2014 trial court lacked subject matter jurisdiction to revoke defendant's probation and activate his five remaining sentences.³

III. Conclusion

Because we hold that the 2014 trial court lacked subject matter jurisdiction to revoke defendant's probation, we vacate the 2014 judgments.

VACATED.

Judges DILLON and DAVIS concur.

3. We note that N.C. Gen. Stat. § 15A-1344(g) (2009) provides: "If there are pending criminal charges against the probationer in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against the probationer for violation of the terms of this probation, the probation period shall be tolled until all pending criminal charges are resolved. The probationer shall remain subject to the conditions of probation, including supervision fees, during the tolled period. If the probationer is acquitted or if the new charge is dismissed, the time spent on probation during the tolled period shall be credited against the period of probation." But this subsection is inapplicable to defendant because it applies to offenses committed on or after 1 December 2009. 2009 N.C. Sess. Laws 667, 675, 679, ch. 372, §§ 11(b), 20. We also note that Session Law 2009-372 also deleted similar tolling language from N.C. Gen. Stat. § 1344(d) and that this amendment applies to *hearings* held on or after 1 December 2009. 2009 N.C. Sess. Laws 667, 674-75, 679, ch. 372, §§ 11(a), 20. Because defendant committed the underlying offenses before 1 December 2009 and his probation revocation hearing occurred after 1 December 2009, we hold that these tolling provisions are inapplicable here. *See State v. Sitosky*, ___ N.C. App. ___, ___, 767 S.E.2d 623, 627 (2014) ("[W]e conclude that Defendant, who committed her offenses . . . prior to 1 December 2009 but had her revocation hearing after 1 December 2009, was not covered by either statutory provision—§ 15A-1344(d) or § 15A-1344(g)—authorizing the tolling of probation periods for pending criminal charges."), *disc. review denied*, ___ N.C. ___, 768 S.E.2d 847 (2015).

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[243 N.C. App. 433 (2015)]

STATE OF NORTH CAROLINA

v.

ALBERT HENRY

No. COA15-124

Filed 6 October 2015

Evidence—victim’s reputation for violence—introduced in defendant’s case-in-chief

The trial court did not abuse its discretion in a prosecution for second-degree murder by waiting until the defendant’s case-in-chief to allow testimony of the victim’s reputation for violence rather than allowing that testimony during cross-examination. The trial court expressly permitted defendant to keep the witness under subpoena, and defendant was allowed to call numerous witnesses during his case-in-chief to provide the testimony. Defendant appeared to have chosen not to recall this witness and did not demonstrate that he was prejudiced by that decision in any way.

Appeal by Defendant from judgments entered 10 July 2014 by Judge Douglas B. Sasser in Superior Court, Columbus County. Heard in the Court of Appeals 24 August 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel S. Hirschman, for the State.

John R. Mills for Defendant.

McGEE, Chief Judge.

Albert Henry (“Defendant”) appeals from his conviction for second-degree murder. Defendant contends the trial court erred by not allowing him to introduce evidence of the victim’s reputation for violence. We disagree.

I. Background

The underlying facts in this case are not in dispute. Defendant had an argument with Chad Bellamy (“Mr. Bellamy”) on the morning of 15 June 2011. Both men had guns. John Collins, Sr. (“Mr. Collins”) lived nearby and saw the escalating altercation between Defendant and Mr. Bellamy. Mr. Collins yelled to Defendant and Mr. Bellamy that they should “put those guns down and fight each other like men.” Defendant

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and Mr. Bellamy did put their guns on the ground and “began to swing at each other[.]” A few seconds later, Defendant picked up both guns and fatally shot Mr. Bellamy in the back, as Mr. Bellamy ran away.

At trial, Mr. Collins testified during the State’s case-in-chief. On cross-examination, counsel for Defendant sought to elicit testimony from Mr. Collins that Mr. Bellamy had a reputation for violence. The State objected, arguing that it would be more appropriate to allow that evidence during Defendant’s case-in-chief – during which Defendant could present evidence to support a claim that he had acted in self-defense. The trial court agreed and noted that Defendant was simply “not there yet for self-defense as to the character of the victim[.]” Counsel for Defendant stated: “If I can’t ask [Mr. Collins] that question now, I can recall him if it’s relevant.” The trial court responded: “Yes, sir, keep [Mr. Collins] under subpoena[,] and if you wish to call him back to testify . . . he [can] be available to testify.”

During Defendant’s case-in-chief, Defendant was allowed to introduce testimony from numerous witnesses that Mr. Bellamy had a reputation for violence. However, Defendant did not recall Mr. Collins to the stand. The jury found Defendant guilty of second-degree murder and possession of a firearm by a felon. Defendant appeals.

II. Analysis

Defendant contends that the trial court erred by “suppress[ing] testimony” from Mr. Collins that Mr. Bellamy had a reputation for violence. *See* N.C. Gen. Stat. § 8C-1, Rules 404, 405 (2013); *State v. Ray*, 125 N.C. App. 721, 725, 482 S.E.2d 755, 758 (1997) (“Where [a] defendant argues he acted in self-defense, evidence of the victim’s character may be admissible . . . to show [the] defendant’s fear or apprehension was reasonable or to show the victim was the aggressor.” (citation and internal quotation marks omitted)). Defendant’s argument is without merit.

Trial courts have discretion to “exercise reasonable control over the mode and order of interrogating witnesses” at trial. N.C. Gen. Stat. § 8C-1, Rule 611 (2013); *State v. Demos*, 148 N.C. App. 343, 351, 559 S.E.2d 17, 22 (2002). Although Defendant argues at length in his brief before this Court that evidence of Mr. Bellamy’s reputation for violence was *admissible* at trial – a matter which is not in dispute – Defendant has provided this Court with no relevant authority suggesting that the trial court abused its discretion under Rule 611 by waiting until Defendant’s case-in-chief to allow testimony on Mr. Bellamy’s reputation for violence. Defendant also has not demonstrated that he was prejudiced by that decision in any way. *See State v. McAbee*, 120 N.C. App. 674, 683, 463

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S.E.2d 281, 286 (1995) (“In order to obtain relief, a defendant must show that the error asserted is material and prejudicial.”).

Indeed, the trial court did not prevent Mr. Collins from testifying about Mr. Bellamy’s reputation for violence. It expressly permitted Defendant to keep Mr. Collins under subpoena so that Mr. Collins could provide this testimony at a later time. Moreover, Defendant was allowed to call numerous witnesses during his case-in-chief to provide testimony regarding Mr. Bellamy’s reputation for violence. Defendant appears to have *chosen* not to recall Mr. Collins to testify. Accordingly, we find no error by the trial court. *See State v. Almogaded*, 223 N.C. App. 210 (2012) (unpublished) (finding no error on similar facts), *disc. review denied* 366 N.C. 576, 738 S.E.2d 388 (2013).

NO ERROR.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
MATTHEW RAY HOOKS

No. COA15-212

Filed 6 October 2015

1. Appeal and Error—preservation of issues—issue not asserted at trial

Defendant waived his right to appellate review of an alleged fatal variance between the indictment and the evidence where he did not assert the issue at trial.

2. Drugs—methamphetamine—precursor chemical—sufficiency of evidence

The trial court did not err by denying defendant’s motion to dismiss for insufficient evidence charges of possession of pseudoephedrine, a precursor chemical to methamphetamine. Although defendant contended that no pseudoephedrine was found on his person or premises, that there was no evidence that he actually made particular purchases, and that no chemical analysis was performed, substantial evidence was introduced that defendant possessed pseudoephedrine, and that pseudoephedrine is a precursor

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chemical, not a controlled substance, and the State was not required to present evidence that a chemical analysis was performed.

Appeal by defendant from judgment entered 26 August 2014 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 8 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Kimberly P. Hoppin for defendant-appellant.

TYSON, Judge.

Matthew Ray Hooks (“Defendant”) appeals from judgment after a jury convicted him of (1) misdemeanor child abuse; (2) manufacturing methamphetamine; (3) trafficking in methamphetamine; and, (4) thirty-five counts of possession of an immediate methamphetamine precursor. We find no error in Defendant’s conviction or the judgment entered thereon.

I. Factual Background

Defendant, his girlfriend, Brandi Moss (“Moss”), and their eight-year-old son rented a mobile home from Sue Drye (“Ms. Drye”), Moss’s mother, located in Concord, Cabarrus County, North Carolina. They were evicted for non-payment of rent, and Ms. Drye wanted them to move out by 16 October 2011. Ms. Drye owned a storage shed located on the property with the mobile home. She asked Defendant to clean his belongings out of the shed, because she wanted to rent the property to someone else. Defendant became angry, and responded, “Nobody better not [sic] touch my storage building.” Defendant had previously secured the shed with a lock.

On 17 October 2011, Ms. Drye contacted Cabarrus County Sheriff’s Department Detective Jamie Barnhardt (“Detective Barnhardt”). Ms. Drye stated “she had received information from somebody else that [Defendant and Moss] were cooking meth,” and she wanted law enforcement “to come take a look” before she rented the mobile home to anyone else. Ms. Drye expressed concern that “if something [was] left behind, it would put others in danger[.]” Detective Barnhardt agreed to meet with Ms. Drye at the mobile home.

Detective Barnhardt and Ms. Drye walked through the mobile home, room by room. As they were walking outside toward the storage shed and the playhouse, a neighbor alerted them that a trash can between

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the two structures was smoking. Detective Barnhardt lifted the lid of the trash can and discovered a clear bottle filled with a bubbling, white “pasty, chalky substance.” Detective Barnhardt testified he immediately knew this was “part of a meth[] cooking operation,” based on his training and experience.

Detective Barnhardt notified his superiors, fire personnel, and the State Bureau of Investigation (“SBI”). The area was cordoned off as more personnel arrived and law enforcement awaited a search warrant, which provided for the immediate destruction of certain dangerous chemicals.

Law enforcement cut off the lock on the storage shed. Detective Barnhardt testified when they opened the doors, there was “an immediate chemical reaction,” which caused “smoke and some type of gas leak” to emanate from within. More chemical releases occurred throughout the night as law enforcement recovered various items from the shed and the trash can.

Detective Barnhardt testified he saw agents remove several trash bags from the shed, which were filled with plastic bottles “that had tubing that was coming from the inside[.]” The bottles contained a “white, powderish-looking substance,” consistent with what Detective Barnhardt had observed in the original bottle from the trash can. Law enforcement remained on the scene until all evidence was collected, tested by a chemist, and transported so it could be destroyed.

Two days later, Defendant was arrested and charged with one count of manufacturing methamphetamine and one count of misdemeanor child abuse. Detective Barnhardt observed Defendant had chemical burns and staining on his hands during the fingerprinting process of Defendant’s arrest. Detective Barnhardt testified this staining was consistent with the staining he had observed on the walls of the storage shed.

On 31 October 2011, a grand jury indicted Defendant for manufacturing methamphetamine and misdemeanor child abuse. On 9 April 2012, a grand jury also indicted Defendant for: (1) forty counts of possession of an immediate methamphetamine precursor chemical with the intent to manufacture a controlled substance, methamphetamine; (2) maintaining a dwelling place for keeping and selling a controlled substance, methamphetamine; and (3) trafficking in methamphetamine by possession of more than 28 grams but less than 200 grams of methamphetamine.

On 30 April 2012, a grand jury indicted Defendant in fourteen separate superseding indictments for: (1) maintaining a dwelling place for keeping and selling a controlled substance, methamphetamine;

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(2) trafficking in methamphetamine by possession of more than 28 grams but less than 200 grams of methamphetamine; and, (3) forty counts of possession of an immediate methamphetamine precursor chemical, pseudoephedrine, with the intent to manufacture a controlled substance, methamphetamine. Defendant's case proceeded to trial before a jury on 19 August 2014.

Agent Stephanie Raysich ("Agent Raysich"), the North Carolina State Crime Lab forensic scientist who responded to the scene on 17 October 2011, testified as an expert in the investigation of clandestine manufacture of methamphetamine. Agent Carroll Pate ("Agent Pate"), a forensic scientist with the North Carolina State Crime Lab, took over the case after Agent Raysich became ill, and testified as an expert in forensic drug chemistry and the investigation of clandestine manufacture of methamphetamine.

Agent Pate explained this particular case involved manufacturing methamphetamine using the "one-pot" method. Agents Pate and Raysich both testified about numerous items observed at the scene that were consistent with the clandestine manufacture of methamphetamine, including: (1) 79 HC1 (hydrochloric acid gas) generators; (2) two empty one-gallon cans of Coleman fuel; (3) two empty cans of Drano; (4) one empty thirty-two-ounce plastic bottle of charcoal lighter fluid; (5) one empty twelve-ounce plastic bottle of power steering fluid; (6) numerous pieces of plastic and rubber tubing in various sizes and colors; (7) numerous pieces of white paper strips, some of which contained metal material consistent with lithium; (8) empty lithium battery packaging; (9) numerous pieces of burned aluminum foil containing a brown-black powder residue; (10) empty box covers of instant cold packs and empty cold pack plastic bags; (11) four partial plastic straws containing a residue amount of white crystalline material; (12) one box of heavy duty aluminum foil; (13) two empty containers of salt; (14) an empty container of instant starting fluid; (15) a full container of muriatic acid; (16) two empty cans of drain cleaner; (17) a one-milliliter syringe; and, (18) several empty pseudoephedrine boxes and blister packs. Six items were seized for testing in the laboratory, including an old methamphetamine cooking vessel and items containing various residues. The remainder of the items seized at the scene were destroyed.

Agent Pate testified the total amount of pseudoephedrine present from the boxes and blister packs "would yield 18.9 grams methamphetamine at a one hundred percent theoretical yield." Agent Pate conducted a confirmatory test on a glass jar containing a blue sludge material. Agent Pate determined the material, which weighed fifty-one grams, contained

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either pseudoephedrine or ephedrine and an unknown amount of methamphetamine. The other items tested contained traces of methamphetamine, but not in sufficient quantities to weigh.

Becca Clontz (“Ms. Clontz”) bought the mobile home from Ms. Drye, and moved in approximately six weeks after Defendant and Moss moved out. She testified one day she was cleaning the water heater closet and discovered a piece of paper containing what appeared to be a recipe for methamphetamine written on it. Ms. Clontz gave the piece of paper to Ms. Drye, and Ms. Drye subsequently turned it over to law enforcement. Ms. Drye and Moss were familiar with Defendant’s handwriting, and both testified the handwriting on the piece of paper was that of Defendant’s.

William Lanuto (“Lanuto”) was a friend of Defendant and Moss. He testified he had seen Defendant “cook[ing] meth” in the storage shed. He stated he once saw a fire on Defendant’s porch, which appeared to grow larger as rain fell on it. Lanuto testified he purchased pseudoephedrine for Defendant approximately twenty times, beginning in April 2011, with the understanding that Defendant was going to use the pseudoephedrine to “cook meth.”

Lanuto admitted to using methamphetamine with Defendant in exchange for purchasing pseudoephedrine. Lanuto stated he helped Defendant pack and move out of the mobile home during October 2011. Lanuto testified Defendant was “[m]aking meth” throughout that week-end. Lanuto was charged with eleven counts of felony possession of a precursor chemical with the intent to manufacture methamphetamine in relation to this case.

Moss and Defendant no longer maintained a relationship at the time of trial. Moss stated she and Defendant engaged in a relationship for ten years, and parented a child together. Moss testified she had witnessed Defendant “cook methamphetamine” more times than she could count.

Moss admitted she bought pseudoephedrine in order to make methamphetamine and assisted Defendant in the process of manufacturing methamphetamine. At the time of trial, Moss had been charged with and pled guilty to the following charges: (1) manufacturing methamphetamine; (2) trafficking in methamphetamine; (3) eleven counts of possession of a precursor chemical with intent to manufacture methamphetamine; and, (4) misdemeanor child abuse. Moss was currently serving a ten- to thirteen-year term of imprisonment.

Michael Rimiller (“Mr. Rimiller”), a district loss prevention manager for Walgreens, testified about the regulations Walgreens followed with

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regard to the sales of pseudoephedrine. Mr. Rimiller stated individuals were required to produce a valid driver's license in order to purchase pseudoephedrine. Mr. Rimiller explained that during the relevant time period in 2011, Walgreens recorded and tracked pseudoephedrine purchases by reporting the purchases to the National Precursor Log Exchange ("NPLEx").

The NPLEx system collects data of over-the-counter pseudoephedrine and ephedrine sales "in real time at the point of sale and also measures all those purchases against the laws that are in effect[.]" The NPLEx system is used to inform the sales clerk whether to proceed with the sale. The information from the NPLEx system is subsequently made available to law enforcement in a separate report.

James Reilly ("Mr. Reilly"), director of health and wellness at Walmart, testified he was responsible for maintaining pharmacy compliance. Mr. Reilly explained Walmart maintained compliance logs of pseudoephedrine purchases in order to keep track of the daily, monthly, and annual limits of pseudoephedrine purchases. He testified Walmart also required the purchaser of pseudoephedrine to present a valid form of photo identification.

SBI Special Agent William Galloway ("Agent Galloway") responded to reports of a possible "meth lab" at Defendant's former residence on 17 October 2011. Agent Galloway obtained the search warrant and was in charge of crime scene documentation. He conducted witness interviews and obtained Defendant's phone records. Agent Calloway requested the pseudoephedrine purchase records for the eight months prior to the discovery of Defendant's "meth lab" for certain individuals based on frequently dialed phone numbers in Defendant's call log.

Agent Galloway summarized NPLEx records of pseudoephedrine purchases from Walgreens and Walmart made by Defendant, Moss, Lanuto, Aaron Tallent ("Tallent"), and Fred Cook ("Cook"). He testified: Tallent purchased pseudoephedrine six times between 9 July 2011 and 1 September 2011; Lanuto purchased pseudoephedrine seventeen times and was blocked from purchasing pseudoephedrine once between 25 June 2011 and 14 October 2011; Moss purchased pseudoephedrine twelve times between 22 March 2011 and 24 July 2011; and Defendant purchased pseudoephedrine thirty-five times and was blocked from purchasing pseudoephedrine five times between 4 May 2011 and 11 October 2011.

Defendant did not exercise his right to testify at trial, nor did he offer any additional evidence. Defendant moved to dismiss the charges at the close of all of the evidence. The trial court denied Defendant's

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motion. The State dismissed the charges of maintaining a dwelling and five counts of possession of an immediate precursor chemical.

The jury returned a verdict of guilty on all remaining charges. The trial court sentenced Defendant to 83 to 109 months imprisonment for his manufacturing methamphetamine conviction. The trial court also sentenced Defendant to a consecutive mandatory term of 70 to 84 months imprisonment for trafficking in methamphetamine, four consecutive terms of 19 to 23 months imprisonment for the thirty-five counts of possession of a precursor chemical, and a consecutive term of 150 days imprisonment for his misdemeanor child abuse conviction.

Defendant gave notice of appeal in open court.

II. Issues

Defendant argues the trial court erred by (1) denying his motion to dismiss the charge of trafficking in methamphetamine due to a fatal variance between the indictment and the State's evidence at trial; and (2) denying his motion to dismiss the thirty-five counts of possession of the precursor chemical pseudoephedrine due to insufficient evidence.

III. Analysis

A. Fatal Variance

[1] Defendant argues the trial court erred by denying his motion to dismiss the charge of trafficking in methamphetamine and asserts a fatal variance between the indictment and the State's evidence. Defendant contends the superseding indictment alleged he "unlawfully, willfully and feloniously did possess more than 28 grams but less than 200 grams of methamphetamine[,] but the trial court instructed the jury it could convict Defendant of trafficking in methamphetamine, if it found Defendant knowingly possessed "any mixture containing methamphetamine."

1. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted).

A motion to dismiss based on insufficiency of the evidence to support a conviction must be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the crime.

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State v. Cody, 135 N.C. App. 722, 727, 522 S.E.2d 777, 780 (1999) (citation and internal quotation marks omitted).

This Court reviews the sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). “An indictment must set forth each of the essential elements of the offense. . . . To require dismissal any variance must be material and substantial and involve an essential element.” *State v. Pelham*, 164 N.C. App. 70, 79, 595 S.E.2d 197, 203 (citations omitted), *appeal dismissed and disc. review denied*, 359 N.C. 195, 608 S.E.2d 63 (2004).

2. Analysis

[2] “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); *see also State v. Maness*, 363 N.C. 261, 273, 677 S.E.2d 796, 804 (2009), *cert. denied*, 559 U.S. 1052, 176 L. Ed. 2d 568 (2010). A defendant must state at trial a fatal variance is the basis for his motion to dismiss in order to preserve a fatal variance argument for appellate review. *State v. Curry*, 203 N.C. App. 375, 384, 692 S.E.2d 129, 137, *disc. review denied*, 364 N.C. 437, 702 S.E.2d 496 (2010).

Defendant based his motion to dismiss solely on insufficiency of the evidence. Defendant did not allege the existence of a fatal variance between the indictment and the jury instructions. When the trial judge asked the parties if they had any questions regarding the proposed jury instructions, counsel for Defendant replied, “None from the defense, Your Honor.”

Defendant seeks for the first time on appeal to argue the trial court erred by denying his motion to dismiss due to a fatal variance between the indictment and the State’s proof at trial. Defendant failed to raise or make this argument in support of his motion to dismiss at trial. Because Defendant failed to properly preserve this issue, he has waived his right to appellate review on this issue. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (“[T]he law does not permit parties to swap horses between courts in order to get a better mount” on appeal). We decline to address the issue and dismiss this issue.

B. Insufficient Evidence

Defendant argues the trial court erred by denying his motion to dismiss the thirty-five counts of possession of the precursor chemical pseudoephedrine. Defendant contends the State presented insufficient

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evidence to prove (1) he possessed pseudoephedrine; and (2) the chemical composition of the alleged controlled substance.

1. Standard of Review

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation omitted). “When reviewing a defendant’s motion to dismiss, this Court determines only whether there is substantial evidence of (1) each essential element of the offense charged and of (2) the defendant’s identity as the perpetrator of the offense.” *State v. Fisher*, __ N.C. App. __, __, 745 S.E.2d 894, 900-01 (citations and internal quotation marks omitted), *disc. review denied*, 367 N.C. 274, 752 S.E.2d 470 (2013).

In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.

State v. Fritsch, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (citations and internal quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

“If there is any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction, it is for the jury to say whether it is convinced beyond a reasonable doubt of defendant’s guilt.” *State v. Franklin*, 327 N.C. 162, 171-72, 393 S.E.2d 781, 787 (1990) (citation omitted).

2. Analysis(a) Insufficient Evidence of Possession of a Precursor Chemical

Defendant argues the State presented insufficient evidence to prove he had actual or constructive possession of products containing pseudoephedrine, a precursor chemical to methamphetamine. We disagree.

N.C. Gen. Stat. § 90-95(d1)(2) makes it unlawful for any person to “[p]ossess an immediate precursor chemical with intent to manufacture methamphetamine[.]” N.C. Gen. Stat. § 90-95(d1)(2)(a) (2013). “To prove

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that a defendant possessed contraband materials, the State must prove beyond a reasonable doubt that the defendant had either actual or constructive possession of the materials.” *State v. Loftis*, 185 N.C. App. 190, 197, 649 S.E.2d 1, 6 (2007) (citation omitted).

A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use. Constructive possession, on the other hand, exists when the defendant, while not having actual possession, has the intent and capability to maintain control and dominion over the [substance]. When the defendant does not have exclusive possession of the location where the drugs were found, the State must make a showing of other incriminating circumstances in order to establish constructive possession.

State v. Boyd, 177 N.C. App. 165, 175, 628 S.E.2d 796, 805 (2006) (citations and internal quotation marks omitted). “Constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the question will be for the jury.” *State v. Sinclair*, 191 N.C. App. 485, 492, 663 S.E.2d 866, 872 (2008) (citation and internal quotation marks omitted).

Defendant argues the State’s evidence was insufficient to prove he had constructive possession of pseudoephedrine. He asserts no pseudoephedrine was actually located on his person, on his premises, or seized and taken into evidence from any location. Defendant also contends the evidence was insufficient to support his convictions of a precursor chemical because the State did not present any testimony from any pharmacist or store clerk identifying him as the individual who actually made particular purchases of pseudoephedrine on particular dates. We disagree.

The State charged Defendant with thirty-five counts of possession of a precursor chemical based upon his alleged purchases and possession of pseudoephedrine. The trial court admitted into evidence a summary, created by Detective Galloway, of the records of pseudoephedrine purchases for Moss, Lanuto, Tallent, Cook, and Defendant. Detective Galloway testified this summary showed Defendant’s ID was used to purchase pseudoephedrine from Walgreens and Walmart on thirty-five separate occasions. Five additional purchases were blocked when Defendant’s ID was used in attempt to purchase pseudoephedrine.

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Moss testified she and Defendant purchased pseudoephedrine. She admitted she had seen Defendant “cooking meth” numerous times, and assisted him in the process. Lanuto, Tallent, and Cook all testified they had purchased pseudoephedrine for Defendant on several occasions. Lanuto also witnessed Defendant cooking methamphetamine. Agents on the scene documented a number of empty Sudafed and Sufedrin blister packs, and at least two empty Sudafed boxes — both of which are products containing pseudoephedrine.

Substantial evidence was admitted from which a jury could reasonably find and conclude Defendant possessed pseudoephedrine to support his conviction of thirty-five counts of a precursor chemical to methamphetamine. This argument is overruled.

(b) Insufficient Evidence of a Controlled Substance

Defendant argues the State presented insufficient evidence to prove the items he allegedly possessed were actually controlled substances. He asserts no chemical analysis or testimony about the chemical makeup of the particular items purchased was presented. We disagree.

Our Supreme Court has held chemical analysis is required to accurately identify *controlled substances*:

[T]hroughout the lists of Schedule I through VI controlled substances found in sections 90-89 through 90-94, care is taken to provide very technical and “specific chemical designations” for the materials referenced therein. . . . These scientific definitions imply the necessity of performing a chemical analysis to accurately identify *controlled substances* before the criminal penalties of N.C.G.S. § 90-95 are imposed.

State v. Ward, 364 N.C. 133, 143, 694 S.E.2d 738, 744 (2010) (emphasis supplied).

Defendant was charged with, and a jury convicted him of, thirty-five counts of possession of pseudoephedrine, a precursor chemical to methamphetamine, under N.C. Gen. Stat. § 90-95. N.C. Gen. Stat. § 90-95(d1) (2)(a) (2013). The necessity of performing chemical analysis is limited to *controlled substances*. N.C. Gen. Stat. § 90-87 defines “controlled substance” as “a drug, substance, or immediate precursor included in Schedules I through VI of [the North Carolina Controlled Substances Act].” N.C. Gen. Stat. § 90-87(5) (2013). Pseudoephedrine is *not* listed as a controlled substance under Schedules I through VI in N.C. Gen. Stat.

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§§ 90-89 through 90-94. Pseudoephedrine is a precursor chemical, not a controlled substance, and a chemical analysis was not required to support Defendant's convictions of possession of pseudoephedrine. This argument is without merit and is overruled.

IV. Conclusion

Defendant failed to assert and preserve his argument that a fatal variance existed between the indictment and the proof at trial.

The State presented substantial evidence Defendant possessed pseudoephedrine, a precursor chemical to methamphetamine. The State was not required to present evidence that a chemical analysis was performed to establish the identity of pseudoephedrine. The trial court did not err by denying Defendant's motion to dismiss for insufficient evidence.

Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in Defendant's conviction or the judgment entered thereon.

NO ERROR.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA
v.
DERRICK AUNDRA HUEY, DEFENDANT

No. COA15-100

Filed 6 October 2015

1. Homicide—closing arguments—suggestion that defendant and witness lied—ex mero motu intervention

On appeal from defendant's conviction for voluntary manslaughter, the Court of Appeals held that the trial court erred by failing to intervene ex mero motu when the State made improper arguments during closing arguments. The State argued that defendant lied on the stand in cooperation with defense counsel and that his expert witness lied because he was being paid to do so. Because defendant's defense was predicated upon his credibility and the credibility of his witnesses, the error was not harmless, and the Court of Appeals vacated defendant's conviction and remanded the case for a new trial.

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2. Homicide—jury instructions—flight

On appeal from defendant's conviction for voluntary manslaughter, the Court of Appeals held that the trial court did not err by instructing the jury on flight. The evidence showed that defendant shot the victim, drove away for a short period of time, and then returned.

Appeal by Defendant from judgment entered 18 July 2014 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. Heard in the Court of Appeals 12 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Alvin W. Keller, Jr., for the State.

Sarah Holladay for Defendant.

McGEE, Chief Judge.

Derrick Aundra Huey (“Defendant”) shot and killed James Love (“Love”) on 13 October 2011, at approximately 11:00 p.m. According to Defendant's evidence, Defendant has an IQ of 61, and his mental faculties were additionally impaired as a result of an attempted suicide by automobile crash, resulting in head trauma. Defendant has reported hallucinations and has been treated with antipsychotic and antidepressant medications.

Further, according to Defendant's evidence, on 13 October 2011, he was attempting to purchase drugs from an unidentified man when Love, with whom Defendant had had altercations in the past, approached and threatened Defendant and the unidentified man. Earlier that same evening, Love had also threatened Defendant in the apartment of Defendant's girlfriend. According to Defendant, Love hit Defendant in the head, and threatened Defendant with what Defendant believed was a knife. The unidentified man drew a handgun while Love continued to threaten Defendant. Defendant grabbed the weapon from the unidentified man and fired a warning shot. When the warning shot did not stop Love, Defendant fired another shot that struck Love, killing him. Love was known to carry a box cutter for protection, and a box cutter was found near Love's body. According to Defendant, the unidentified man took the gun and ran away. At trial, Defendant's psychological expert witness, Dr. George Patrick Corvin (“Dr. Corvin”), testified, *inter alia*, concerning Defendant's low I.Q. and brain trauma, and how these conditions affected Defendant's decision-making process.

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The State presented evidence that Defendant called 911 and reported the shooting, stating: “I shot a motherf*****. I . . . I hope I killed that son of a bitch[,]” but Defendant did not identify himself. A neighbor reported seeing Defendant drive away from the scene shortly after the shooting, but Defendant returned very shortly thereafter. When initially interviewed by the police, Defendant denied having shot Love, claiming that the unidentified man shot Love. Defendant gave multiple accounts of the events of that night. After Defendant listened to the 911 call, he admitted that he shot Love. At trial, the State argued that Defendant again changed his position before trial, and that Defendant intended to claim he did not shoot Love. According to the State, Defendant maintained this position until approximately four months before the trial. The State argued that only after Defendant sat down with his attorney and Dr. Corvin, did Defendant decide to again admit to shooting Love, and to argue that Love was shot in self-defense.

Defendant’s trial on first-degree murder commenced on 7 July 2014. The jury found Defendant guilty of voluntary manslaughter on 18 July 2014. Defendant was sentenced to seventy-three months’ to ninety-seven months’ imprisonment. Defendant appeals.

I.

[1] In Defendant’s first argument, he contends “the trial court erred by failing to intervene *ex mero motu* when the State made improper statements during closing arguments[.]” We agree.

Our Supreme Court has recently reminded us that:

During closing arguments, prosecutors are barred by statute from “becom[ing] abusive, inject[ing their] personal experiences, [and] express[ing their] personal belief 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 (2014). Within those confines, however, we have long recognized that “ ‘generally, prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.’ ” This latitude is reflected in our deferential standards of review. When opposing counsel objects during a closing argument, we review for abuse of discretion. When there is no objection, we review for gross impropriety. In all cases, we view the remarks “in context and in light of the overall factual circumstances to which they refer.”

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Judicial deference, however, is not unlimited. In particular, “we have found grossly improper the practice of flatly calling a witness or opposing counsel a liar when there has been no evidence to support the allegation.” [See] *State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 70 (1978) (“It is improper for a lawyer to assert his opinion that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar.” (citations and internal quotation marks omitted)).

State v. Hembree, __ N.C. __, __, 770 S.E.2d 77, 88-89 (2015) (citations omitted).

In *Hembree*, the State argued the following in its closing argument:

He [defendant] has manipulated his attorneys. Don't let him manipulate you. Don't let him work the system again. . . . [Y]ou heard video confessions of how he killed Heather Catterton and Randi Saldana. And then the defense started, they started putting up these smoke screens, started to try to confuse you.

. . . .

[A]t no point, no point in the last 18 months since this has been pending trial, has he ever recanted killing Heather or Randi. Never. Not until two years later when he could look at everything, when he can study the evidence, when he can get legal advi[c]e from his attorneys, does he come up with this elaborate tale as to what took place.

. . . .

Two years later, after he gives all these confessions to the police and says exactly how he killed Heather and Randi Saldana . . . the defense starts. The defendant, along with his two attorneys, come together to try and create some sort of story.

. . . .

Think back to December 5th of 2009 when he knew nothing, when he had no legal advice; consistently, voluntarily told the police everything, and it was consistent with what the evidence showed. . . . For hours you watched this man confess to killing Heather and Randi Saldana, and now, after 18 months to two years, the defense begins and they

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put up smoke screens and they tried to confuse you? . . .
We've got two women dead, and he killed them.

Id. at ___, 770 S.E.2d at 89. Our Supreme Court then held:

In context, the import of these arguments is clear: The State argued to the jury, not only that defendant had confessed truly and recanted falsely, but that he had lied on the stand in cooperation with defense counsel. Whether or not defendant committed perjury, there was no evidence showing that he had done so at the behest of his attorneys. Accordingly, we hold that the prosecutor's statements to this effect were grossly improper, and the trial court erred by failing to intervene *ex mero motu*.

Id.

In the case now before this Court, the State argued the following in closing:

Innocent men don't lie. Innocent men don't lie because they don't have to. The truth is not something you practice. Telling the truth is not something you have to rehearse. The truth just is, and the truth in this case is James Love was shot because of an insult.

. . . .

[N]ow, up until about four months ago [D]efendant had planned to come in here and tell you all he didn't do it; he changed his mind, and he's now testified under oath that he is, in fact, the man who fatally shot James Love[.]

. . . .

I'm going to say this again, innocent men don't lie, they simply don't have to. The truth shall set you free unless, of course, you're on trial for a murder that you committed.

. . . .

When you look back at 2011 you'll be able to find the truth.

You're not going to find it over there, not anymore. [D]efendant is not going to give you the truth. He's spent years planning to come in here to tell you he didn't do it, and then in the past four months he's come up with another story, and he's decided to go with that instead. But

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he's going to stick to that story, *that story that he developed after he sat down with his attorney and his defense experts and decided on what he wanted to tell you. You're not going to find the truth there.*

But even when [D]efendant tries to hide the truth from you all, it slips out here and there. For example, it slips out when [D]efendant says things to his defense expert *like my attorneys want me to go with self-defense at trial.*

. . . .

Now, all of a sudden you heard Dr. Corvin. *He sat down with [Defendant's attorney] and [D]efendant and made sure the defendant understood the law, understood what he was charged with, what the elements were, and understood the defenses and what they meant and the law about the defenses.* As he sits there on the stand, as he sits there right now, it has been explained to [D]efendant you're supposed to consider the fierceness of the assault that he was victim to. *So isn't it interesting that four months ago it went from a grab to it went [to] a punch, a slash, a hack, not just at me but at everybody.* All of a sudden a grab went to a wild-armed (phonetic) handle. *Now that the law has been explained to him, now that he's been talked out of claiming I didn't do it.*

. . . .

[Defendant's attorney] tells you all we're trying to hide from this. All the evidence shows the box cutter was involved, the box cutter was involved, all the evidence. Do you know who's not a witness in this case? [Defendant's attorney]. He wasn't there. *He's paid to defend [D]efendant.*

. . . .

There's no real threat. There's no real threat except for the one *that was created sometime four months ago to try and sell you on something.*

. . . .

Now, I want to talk a little bit about Dr. Corvin, some of his opinions. But before we do that, we've got to make something clear. Make no mistake. *Dr. Corvin has a client here. He works for [D]efendant. He is not an impartial*

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mental-health expert. There are several who know [D]efendant: Drs. Fuller, Castro, Abramowitz. He didn't call any of those, he called Dr. Corvin. *Dr. Corvin is part of the defense team, he has a specific purpose, and he's paid for it. You heard Dr. Corvin earns over \$300,000 a year just working for criminal defendants. He is not impartial. In fact, I'd suggest to you he's just a \$6,000 excuse man. That's what he is.*

. . . .

So according to Dr. Corvin, [D]efendant []formed the intent to kill himself, but for some reason that he never explained to you, he's taken the stand to say, well, he can certainly intend to kill himself, but in his opinion he can't intend to kill James Love. *Does that make a lick of sense or does that just show you that Dr. Corvin came in here and did exactly what he was paid to do?* And, again, what else might show you this?

Again, many doctors have met [D]efendant. Many who were not hired to help him in the defense, you didn't hear from a single one.

During cross-examination, the State questioned Dr. Corvin about his initial meeting with Defendant, which only included Defendant and Dr. Corvin, and from which Dr. Corvin produced notes. In that meeting, Defendant told Dr. Corvin he did not shoot Love, but that his attorney was trying to get him a plea deal, or to go to trial arguing self-defense. The State asked Dr. Corvin: "So, when you end your meeting in January, though, [D]efendant is dead set, I didn't do it, that's some drug dealer shot James, I had nothing to do with it, right?" Dr. Corvin responded that that was correct. The State then asked Dr. Corvin about a subsequent meeting with Defendant that Defendant's attorney also attended, and compared it with the first meeting:

Q. And in that two hours [during the first meeting], safe to say you took about 11 pages of notes?

A. That sounds about right. I can count them, but something like that.

Q. Now, that was in January.

A. Yes.

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Q. In March you went back to talk to [D]efendant, right?

A. Yes.

Q. The first meeting was in January. That was by yourself.

A. Yes.

Q. Second meeting in March, you go with [Defendant's attorney].

A. Yes.

Q. Anybody else go with you?

A. I don't think so. No, not by my memory.

Q. But you did meet [D]efendant in person.

A. Yes. This was a contact visit, yes.

Q. And you spent probably another two hours talking to him.

A. A little south of that, but close, yes.

Q. Now, when you went in January, you took 11 pages of notes in two hours.

A. Yes.

Q. How many pages of notes did you take the two hours you spent in March?

A. None. Well, none, but I authored a report shortly thereafter, which is sometimes done for clinical reasons, yes.

Q. Now, at the end of the March meeting [D]efendant had agreed to go with self-defense.

A. Well, I don't know what he had agreed to. I don't discuss that strategy with him. What I can tell you is that he described a sequence of events that in my mind was self-defense.

The State focused on the fact that, when Dr. Corvin met with Defendant alone the first time, Defendant maintained he did not shoot Love, and that Dr. Corvin had taken copious notes. The implication from the State was that, in the second meeting attended by Defendant's attorney, Dr. Corvin decided not to record what was discussed because the discussion was about coming up with an "excuse." The further implication

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was, as a result of that meeting, Defendant decided to change his story. This was also the State's argument in closing.

As our Supreme Court stated in *Hembree*: "In context, the import of these arguments is clear[.]" *Hembree*, __ N.C. at __, 770 S.E.2d at 89. The State, in this case, argued to the jury not only that Defendant was a liar, "but that he had lied on the stand in cooperation with defense counsel" and Dr. Corvin. *Id.* "Whether or not [D]efendant committed perjury, there was no evidence showing that he had done so at the behest of his attorney" or Dr. Corvin. *Id.* In addition, taken in context, it is clear the State was arguing that Dr. Corvin would say whatever the defense wanted him to say, because he was being paid to do so.

Further, the State implied that Dr. Corvin was committing perjury because "he [was] just a \$6,000 excuse man[.]" and would do "exactly what he was paid to do." The State also indicated that the jury should not trust Defendant's counsel because he was "paid to defend the defendant." This was improper. *State v. Rogers*, 355 N.C. 420, 460-63, 562 S.E.2d 859, 883-86 (2002). "In light of the cumulative effect of the improprieties in the prosecutor's cross-examination of defendant's expert and the prosecutor's closing argument, we are unable to conclude that defendant was not unfairly prejudiced." *Id.* at 465, 562 S.E.2d at 886 (citation omitted). "Accordingly, we hold that the prosecutor's statements to this effect were grossly improper, and the trial court erred by failing to intervene *ex mero motu*." *Hembree*, __ N.C. at __, 770 S.E.2d at 89. Because Defendant's entire defense was predicated on his credibility and the credibility of his witnesses, we cannot deem this error to have been harmless. We vacate Defendant's conviction and sentence and remand for a new trial.

II.

[2] Because this issue will likely reoccur upon retrial, we address Defendant's second argument. In Defendant's second argument, he contends "the trial court erred by instructing the jury on flight when this instruction was not supported by the evidence." We disagree.

Evidence introduced at trial tends to show that Defendant shot Love, then got into his vehicle, drove off for a short period of time, and returned. The firearm Defendant used to shoot Love was never recovered.

"So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be

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other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977) (citation omitted). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991) (citation omitted). There is some evidence in the record supporting the theory that Defendant drove away briefly in order to dispose of the firearm he used to shoot Love. This argument is without merit.

NEW TRIAL.

Judges HUNTER, JR. and DAVIS concur.

STATE OF NORTH CAROLINA
v.
NICHOLAS STANRICK JEFFERIES, DEFENDANT

No. COA15-137

Filed 6 October 2015

1. Witnesses—expert—fire marshal—whether fire intentionally set

There was no error, much less plain error, in a prosecution for burning personal property where a fire marshal was allowed to testify. It has been held that a fire marshal may, with a proper foundation, offer an expert opinion as to whether a fire was intentionally set.

2. Arson—burning private property—instruction—defendant's presence at scene

The trial court did not err in a prosecution for burning personal property by failing to instruct the jury regarding defendant's presence at the scene of the crime. Defendant's presence was not required to prove a fact necessary to establish any element of the crime or a lesser-included offense.

3. Criminal Law—prosecutor's argument—no intervention *ex mero motu*

The trial court did not err when it did not intervene on its own motion during the prosecutor's closing argument in a prosecution for burning personal property where the prosecutor made

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a flat statement that the victim's testimony was extraordinarily credible. Although the statement was improper, it did not undermine the integrity of the entire trial and did not rise to the level of gross impropriety.

4. Appeal and Error—preservation of issues—fatal variance—review by discretionary authority

While defendant did not preserve his fatal variance argument for appeal, the Court of Appeals exercised its discretionary authority to review the argument to prevent manifest injustice.

5. Indictment and Information—variance—indictment and instruction—not fatal

There was no fatal variance and no plain error in a prosecution for burning personal property where the trial court instructed the jury to find defendant guilty if it found that he set fire to the bedding of the victim while the indictment charged defendant with setting fire to the victim's bed, jewelry, and personal clothing. The jewelry and the clothing were surplusage and not necessary to establish defendant's guilt. The variance between bed and bedding was not material because there was no evidence to suggest that the bedding was located anywhere other than the bed.

6. Sentencing—habitual felon—predicate felonies—ambiguous verdict

A conviction for burning personal property and being a habitual felon was remanded for a new trial on the habitual felon charge or for entry of a new judgment based solely on burning personal property where the indictment charging habitual felon status identified three predicate felonies but the trial court instructed on four felonies. The verdict sheet did not identify the felonies, so that it was impossible to tell whether any of the jurors relied on the fourth felony.

Appeal by Defendant from judgment entered 22 August 2014 by Judge Richard D. Boner in Cleveland County Superior Court. Heard in the Court of Appeals 27 August 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Matthew L. Liles, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Jillian C. Katz, for the Defendant.

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DILLON, Judge.

Nicholas Stanrick Jefferies (“Defendant”) appeals from a judgment entered upon jury verdicts finding him guilty of burning personal property and attaining the status of an habitual felon. We find no error in part, reverse in part, vacate the judgment, and remand the case for further proceedings consistent with this opinion.

I. Background

The evidence at trial tended to show the following: On 5 April 2011, Defendant attended a cookout with the victim and two of her children. After consuming a considerable amount of alcohol, Defendant disciplined the victim’s son in a manner the victim considered inappropriate. She confronted him about it, whereupon a heated argument broke out between them. As the victim took her children to leave the cookout, Defendant beat on the windows of the vehicle she was driving and yelled threats at her. The victim and her children spent the evening at her sister’s home.

Later that evening, police responded to a call reporting a break-in at the victim’s home. Upon arriving, the officers approached the house and knocked on the front door. Eventually, Defendant emerged from the house and shut the door behind himself.

As soon as Defendant exited the house, an officer noticed a strong smell of smoke coming from inside. The officer immediately dispatched the fire department. The officer then investigated to determine the origin of the smoke and whether there were other occupants. He found thick black smoke emanating from a back room, but no other occupants.

Firefighters arrived, discovering and extinguishing a fire in the rear bedroom. The fire had consumed the top of the bed and some other items of personal property.

Defendant was indicted for burning personal property and for attaining the status of an habitual felon. The matter came on for trial and the jury found Defendant guilty of both charges. The trial judge entered a judgment, sentencing Defendant to prison for 96 to 125 months. Defendant entered notice of appeal in open court.

II. Analysis

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

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A. Fire Marshal Testimony

[1] Defendant first argues that the trial court committed plain error in allowing the State’s expert in fire investigation, Fire Marshal Raymond Beck, to testify that the fire had been intentionally set. Specifically, Defendant contends that Fire Marshal Beck’s expert opinion was inadmissible because he merely deduced that the fire had been intentionally set rather than reaching this conclusion based on his expertise in the field of fire investigation. We disagree.

“Unpreserved error . . . is reviewed only for plain error.” *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). “For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred . . . [that] had a *probable* impact on the jury’s finding[.]” *Id.* at 518, 723 S.E.2d at 334 (internal marks and citation omitted) (emphasis added).

In the present case, after being accepted as an expert in the field of fire investigation, Fire Marshal Beck testified that he had concluded that the fire was caused by “the application of an open flame to . . . combustible material,” and that the fire had been “ruled as incendiary.” When asked to clarify what he meant by “incendiary,” Fire Marshal Beck explained that he meant that the fire was not accidental in nature but rather had been intentionally set.

Generally, the admission of expert opinion testimony is only allowed where “the opinion expressed is . . . based on the special expertise of the expert[.]” *State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E.2d 905, 911 (1978). However, our Supreme Court has held that, with a proper foundation laid as to his expertise, a fire marshal may offer his expert opinion as to whether a fire was intentionally set. *State v. Hales*, 344 N.C. 419, 424-25, 474 S.E.2d 328, 330-31 (1996). Therefore, we hold that the trial court in the present case did not err, much less plainly err, in allowing this testimony. Accordingly, this argument is overruled.

B. Jury Instructions

[2] Defendant next argues that the trial court erred in failing to instruct the jury regarding his presence at the scene of the crime. Specifically, Defendant contends that his presence was a material feature of the crime with which he was charged; that there was evidence that he was present at the scene of the crime; and that the trial court was required to instruct the jury regarding his presence at the scene of the crime. Notwithstanding Defendant’s casting of this issue as an instructional error, we do not agree that the trial court erred in this regard.

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“The prime purpose of a court’s charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence.” *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). Where there is evidence of a lesser-included offense of a crime with which a defendant stands accused, the trial court must instruct the jury on the lesser-included offense. *See, e.g., State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000). However, where no such lesser-included offense exists, neither does the requirement that the jury be given a corresponding instruction. *Id.* Furthermore, the mere denial of guilt by a defendant does not, by itself, controvert any material fact required for proof of that defendant’s guilt, nor does it require the trial court to instruct the jury on any lesser-included offense. *See, e.g., State v. Smith*, 351 N.C. 251, 267-68, 524 S.E.2d 28, 40 (2000).

The crime of burning personal property is codified at N.C. Gen. Stat. § 14-66, which defines the offense in relevant part as follows:

If any person shall wantonly and willfully set fire to or burn, or cause to be burned, or aid, counsel or procure the burning of . . . personal property of any kind, . . . with intent to injure or prejudice . . . any [] person, . . . he shall be punished as a Class H felon.

N.C. Gen. Stat. § 14-66 (2011). Thus, the elements of burning personal property are (1) an intentional burning (2) of personal property of another (3) with the intent thereby to injure or to prejudice another’s rights with respect to that property. *See id.; State v. Jordan*, 59 N.C. App. 527, 529, 296 S.E.2d 823, 825 (1982).

In the present case, the evidence of Defendant’s presence at the scene of the crime was not required to prove a fact necessary to establish any element of the crime of burning personal property, nor was it evidence of any lesser-included offense thereof. Indeed, proof of the commission of this offense is possible where the defendant is *never* present at the scene of the intentional burning, but instead “cause[s]” “aid[s],” “counsel[s],” or “procure[s]” the burning from afar. *See* N.C. Gen. Stat. § 14-66 (2011). Furthermore, rather than present any evidence of a lesser-included offense of burning personal property at trial, which, if believed by the jury, “would permit [] [it] rationally to find him guilty of [a] lesser offense and acquit him of the greater,” *see Leazer*, 353 N.C. at 237, 539 S.E.2d at 924, Defendant simply denied all wrongdoing. Therefore, we hold that the trial court did not err in failing to instruct the jury regarding Defendant’s presence at the scene of the crime.

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We rejected a similar argument in *State v. Chapman*, 154 N.C. App. 441, 572 S.E.2d 243 (2002). In *Chapman*, we held that where there was no evidence of aiding and abetting or acting in concert – modes of criminal liability where the defendant’s presence at the scene of the crime *does* bear on the defendant’s participation in the commission of the offense – the trial court did not err in refusing to instruct the jury on mere presence, even though such an instruction was requested. *Id.* at 446, 572 S.E.2d at 247. In that case, there was no *material* evidence – i.e., evidence probative of any fact necessary to prove an element of a crime with which the defendant was charged, or any lesser-included offense thereof – to support the requested instruction. *Id.* Therefore, as in *Chapman*, it would not have been error for the trial judge to refuse to give the instruction, had it been requested, because there was no *material* evidence to support it. *See id.* Furthermore, even assuming, *arguendo*, it would have been error, it would not have been plain error, as it is not *probable* that the jury’s ultimate finding of guilt would have differed if the trial court had given an unrequested instruction unsupported by the evidence. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Accordingly, this argument is overruled.

C. State’s Closing Argument

[3] Defendant next argues that the trial court erred in failing to intervene and strike certain portions of the State’s closing argument. Specifically, Defendant contends that the court erred in failing to strike comments by the prosecutor relating to the credibility of certain witness testimony. Although some of these statements may have been objectionable, we do not believe they so contaminated the proceedings as to require a new trial.

Generally, “[t]he control of the argument of the district attorney and counsel must be left largely to the discretion of the trial judge and his rulings thereon will not be disturbed in the absence of gross abuse of discretion.” *State v. Hunter*, 297 N.C. 272, 278, 254 S.E.2d 521, 524 (1979). N.C. Gen. Stat. § 15A-1230(a) states that a prosecutor may not express his “*personal* belief as to the truth or falsity of the evidence[.]” N.C. Gen. Stat. § 15A-1230(a) (2014). He may, however, comment on the *strength* of the evidence. *State v. Best*, 342 N.C. 502, 518, 467 S.E.2d 45, 55 (1996). Furthermore, the prosecutor may – and indeed, should – argue, on the basis of such evidence, whether certain witness testimony should be believed. *See, e.g., State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 345 (1967) (“It is improper for a lawyer in his argument to assert his opinion that a witness is lying. He can argue to the jury that [it] should not believe a witness, but he should not call him a liar.”).

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We review a trial court's failure to intervene on its own motion and strike unobjected-to remarks made in closing argument for gross impropriety, "view[ing] the remarks in context and in light of the overall factual circumstances to which they refer." *State v. Hembree*, ___ N.C. ___, ___, 770 S.E.2d 77, 88 (2015) (internal marks omitted). Our Supreme Court has held that "[t]o merit a new trial, the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair." *State v. Phillips*, 365 N.C. 103, 136, 711 S.E.2d 122, 146 (2011) (internal marks omitted).

In *Phillips*, our Supreme Court identified two categories of objectionable prosecutorial comment under N.C. Gen. Stat. § 15A-1230(a). *Id.* at 138-39, 711 S.E.2d at 147-48. First, the court observed that a "prosecutor's flat statement that [a witness's] testimony was 'wholly unbelievable' was [] improper." *Id.* at 139, 711 S.E.2d at 148. The court also identified a second category of prosecutorial comment of more dubious propriety, reasoning that a prosecutor's remark to the effect that he "would say [the witness] was not very credible" was susceptible of interpretation as either a contention to the jury or an inappropriate statement of personal belief, and being susceptible of both interpretations, "skirt[ed] the strictures of the statute." *Id.* (emphasis added). Nevertheless, despite one wholly improper remark and another of dubious propriety, the court concluded that, based on the evidence in that case, the objectionable remarks did not "pervert or contaminate the trial to such an extent as to render the proceedings fundamentally unfair." *Id.*

In the present case, the prosecutor made the following remarks during closing argument:

Folks, we gave you everything that you need. You have a motive with this argument with [the victim]. And while I bring up [the victim], my goodness, *credibility, credibility, credibility*. That testimony was *extraordinarily credible*. . . . You saw [the defendant] trying to control her even in a court of law, a court of law, trying to control her from over there, pointing at her, telling her to quit talking.¹ . . . She did phenomenal. *I will contend to you she was extraordinarily credible*.

(Emphasis added.) Thus, while the prosecutor's *contention* regarding the victim's testimony was within the bounds of appropriate argument

1. Defendant waived his right to counsel, representing himself at trial. The victim was subject to a lengthy cross-examination.

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under N.C. Gen. Stat. § 15A-1230(a), the prosecutor's 'flat statement' that the victim's "testimony was extraordinarily credible," like the other references to her credibility, was either the entirely improper expression of opinion identified by our Supreme Court in *Phillips*, or at least, was susceptible of interpretation as such.

However, even assuming, *arguendo*, that all these remarks were objectionable, we do not believe their presence in the prosecutor's closing argument undermined the integrity of the entire trial. See *Phillips*, 365 N.C. at 139, 711 S.E.2d at 148. That is, based on the evidence before the jury, we hold that these remarks did not rise to the level of gross impropriety. Accordingly, this argument is overruled.

D. Fatal Variance

[5] Defendant next argues that the trial court committed plain error in instructing the jury on the offense of burning personal property where the instructions varied materially from the indictment.² Specifically, Defendant contends that the court plainly erred in instructing the jury to find him guilty if it found that he had "intentionally set fire to the bedding of [the victim]" where the indictment charged him with setting fire to the victim's "bed, jewelry and personal clothing." We disagree.

Generally speaking, "[a] variance between the criminal offense charged and the offense established by the evidence is . . . a failure of the State to establish the offense charged." *State v. Glenn*, 221 N.C. App. 143, 147, 726 S.E.2d 185, 188 (2012). The purpose of prohibiting a variance "is to enable the defendant to prepare a defense against the crime with which the defendant is charged and to protect the defendant from another prosecution for the same incident." *State v. Taylor*, 203 N.C. App. 448, 455-56, 691 S.E.2d 755, 762 (2010). However, "[a]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972).

In the present case, one of the items of personal property was identified both in the indictment and in the jury instructions – namely, the bed.

2. **[4]** "Defendant must preserve the right to appeal a fatal variance." *State v. Mason*, 222 N.C. App. 223, 226, 730 S.E.2d 795, 798 (2012). In the present case, Defendant moved to dismiss the charge against him based on an alleged insufficiency of the evidence. However, fatal variance was not a basis of his motion. Therefore, Defendant has failed to preserve this argument for appellate review. See *State v. Pickens*, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997). Nevertheless, we retain discretionary authority to review this argument "[t]o prevent manifest injustice to a party," see N.C. R. App. P. 2, and we elect to do so now.

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The other two items identified in the indictment – to wit, the victim’s jewelry and personal clothing – were omitted from the jury instructions. However, the jewelry and personal clothing identified in the indictment were mere surplusage. No proof of an intentional burning of either item was necessary to establish Defendant’s guilt, as there was evidence of the requisite intentional burning of the bed.

Defendant makes a great deal, however, of the difference between “the bed” identified in the indictment and “the bedding” to which the trial court referred in its instructions to the jury, arguing that this difference amounts to a fatal variance between the indictment and the evidence presented at trial. Specifically, Defendant contends that while a “bed” is a piece of furniture on which one sleeps, “bedding” is the material *in* which one sleeps.

We hold that this ‘variance’ is not fatal. *See, e.g., State v. Lilly*, 195 N.C. App. 697, 700, 673 S.E.2d 718, 720 (2009) (“In order for a variance between the indictment and the evidence presented at trial to warrant reversal of a conviction, that variance must be material.”). That is, assuming, *arguendo*, that there is a variance between the words “bedding” and “bed,” this variance is not *material* because there is no evidence in the record to suggest that what Defendant refers to as the “bedding” was located anywhere other than the bed. For example, there is no evidence in the record that Defendant set fire to bedding *in the closet* of a different room *where there was no bed*. Rather, the evidence presented at trial was of an intentional burning of material composing the bedding lying on top of a bed or the top of that bed itself, including such material. Therefore, we hold that any variance between the indictment and the evidence presented at trial was not material. That is, we are unable to discern how Defendant was unfairly surprised, misled, or otherwise prejudiced in the preparation of his defense by the indictment’s failure to identify the “bedding” rather than the “bed.” *See State v. Spivey*, ___ N.C. App. ___, ___, 769 S.E.2d 841, 844 (2015) (“whether the variance is material depends upon whether the defendant was surprised, misled, or otherwise prejudiced *because of* the variance”) (emphasis in original). Likewise, this discrepancy does not imperil Defendant’s right to be free from double jeopardy. *See State v. Greene*, 289 N.C. 578, 586, 223 S.E.2d 365, 370 (1976). *A fortiori*, the court’s instructions did not constitute plain error because it is not reasonably *possible* – much less reasonably *probable* – that the jury’s ultimate finding of guilt would have differed had the court’s instructions on the charge differed. Accordingly, this argument is overruled.

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E. Prior Conviction

[6] Finally, Defendant argues that the trial court erred in instructing the jury regarding his prior conviction for selling cocaine. Specifically, Defendant contends that the court erred in instructing the jury that it could find that he had attained the status of an habitual felon based on his prior conviction for selling cocaine where the indictment did not allege this conviction as a predicate to his attaining the status. We agree.

This argument presents a question of first impression. Under North Carolina's Habitual Felon Act, "[a]ny person who has been convicted of or pled guilty to three felony offenses . . . is declared to be an habitual felon[.]" See 1967 N.C. Sess. Laws 1241 (codified at N.C. Gen. Stat. § 14-7.1 (2011)). Our Supreme Court has held that "[b]eing an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime." *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977). However, the Habitual Felon Act also requires that the indictment charging a defendant as an habitual felon allege *when* the prior felonies were committed, the jurisdiction *where* such felonies were committed, *the dates* when pleas of guilty or convictions of those felonies were *entered* or *returned*, and *the court* where those pleas or convictions occurred. N.C. Gen. Stat. § 14-7.3 (2011). The purpose of these requirements is to "provide[] notice to a defendant that he is being tried as a recidivist." *State v. Williams*, 99 N.C. App. 333, 335, 393 S.E.2d 156, 157 (1990).

Moreover, by both statutory mandate and constitutional guarantee, defendants in jury trials have a right to a unanimous verdict under North Carolina law. See N.C. Const. art. 1, § 24 (2011) ("No person shall be convicted of any crime but by the unanimous verdict of a jury in open court."); N.C. Gen. Stat. § 15A-1237(b) (2011) ("[V]erdict[s] must be unanimous, and must be returned by the jury in open court."). Therefore, our Supreme Court has held that "[w]here the trial court erroneously submits the case to the jury on alternative theories, . . . and . . . it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles defendant to a new trial." *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990).

In the present case, the indictment charging Defendant with attaining the status of an habitual felon identified three predicate felonies to establish his status. However, the trial court instructed the jury on *four* felonies – the three identified in the indictment, and another – sale of cocaine. Moreover, the verdict sheet did not recite the felonies that the jury considered, but simply stated that the jury found Defendant guilty.

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Therefore, it is impossible for us to discern whether any of the jurors relied on the fourth felony, which was not listed in the indictment, in finding Defendant guilty of attaining the status. Accordingly, “we must assume the jury based its verdict on the theory for which it received an improper instruction.” *State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993).

Our Supreme Court encountered a similar situation in *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), and we find the Supreme Court’s analysis in *Pakulski* controlling. In *Pakulski*, the jury found two defendants guilty of two felonies – armed robbery and felonious breaking and entering. *Id.* at 564, 356 S.E.2d at 321. Based on these convictions, the jury also found the defendants guilty of felony murder, though “the [jury’s] verdict form [did] not reflect the [felony] upon which the jury based its finding of guilty[.]” *Id.* at 574, 356 S.E.2d at 326. On appeal, our Supreme Court held that the evidence was sufficient to support the armed robbery charge but was not sufficient to support the felonious breaking and entering charge; and, there being no specification on the verdict form to resolve the ambiguity created by the instructional error, the court reasoned it was impossible to determine whether the jury relied on the predicate felony unsupported by the evidence. *Id.* Accordingly, the court concluded that it was required to resolve the ambiguity created by the errant instruction in favor of the defendants, *see id.*, granting them a new trial on the felony murder conviction, *see id.* at 576, 356 S.E.2d at 327.

As in *Pakulski*, we cannot discern from the record on appeal in the present case whether the jury disregarded the errant instruction. As in *Pakulski*, “the verdict form does not reflect the theory upon which the jury based its finding of guilty,” *see id.*, as would allow us to resolve the ambiguity created by the erroneous instruction. Therefore, we must resolve the ambiguity created by the erroneous instruction in favor of Defendant. *See Petersilie*, 334 N.C. at 193, 432 S.E.2d at 846. Defendant is entitled to a new trial on this charge. Accordingly, we vacate the judgment entered upon Defendant’s conviction for attaining the status of an habitual felon and remand the case for a new trial on this charge or for entry of a new judgment based solely on Defendant’s conviction for burning personal property.

III. Conclusion

We find no error in Defendant’s conviction for burning personal property. However, we reverse Defendant’s conviction on the charge of attaining the status of an habitual felon and we vacate the judgment

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entered upon these convictions. On remand, the court must conduct further proceedings consistent with this opinion.

NO ERROR IN PART; REVERSED AND REMANDED IN PART;
VACATED IN PART.

Judges HUNTER, JR. and DIETZ concur.

STATE OF NORTH CAROLINA
v.
JORGE JUAREZ, DEFENDANT

No. COA15-152

Filed 6 October 2015

1. Homicide—felony murder—discharge of weapon into occupied vehicle—merger doctrine not applied

The trial court did not err by refusing to dismiss a charge of felony murder where the underlying felony was discharging a firearm into an occupied vehicle in operation. Although defendant argued that the doctrine of merger applied, a person may be found guilty of this underlying offense even if there was no bodily harm to anyone.

2. Homicide—felony murder—self-defense—lesser offenses

The trial court erred in a first-degree felony murder prosecution by denying defendant's request to instruct the jury on the lesser offenses of second-degree murder and voluntary manslaughter. A finding that defendant acted in reasonable self-defense would have rendered him not guilty of a charge of discharging a firearm into an occupied vehicle; however, the evidence would have been sufficient to support a lesser-included offense.

3. Homicide—felony murder—instructions—self-defense

The trial court committed plain error in a prosecution for first-degree felony murder by instructing the jury that defendant could not receive the benefit of self-defense if he was found to be the aggressor. Even assuming that defendant was the aggressor in the initial encounter, his withdrawal removed him from that role.

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Appeal by defendant from judgment entered 6 June 2014 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 26 August 2015.

Roy Cooper, Attorney General, by I. Faison Hicks, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Emily H. Davis, Assistant Appellate Defender, for defendant-appellant.

ZACHARY, Judge.

Where the felony of discharging a firearm into an occupied vehicle while it is in operation does not merge into felony murder, the trial court did not err in denying defendant's motion to dismiss the charge of first-degree murder based upon the felony murder rule. Where perfect self-defense was a defense to the underlying felony, the trial court erred in refusing to instruct the jury on lesser included offenses to felony murder. Where evidence showed that defendant withdrew, the trial court committed plain error in instructing the jury on the aggressor doctrine of self-defense.

I. Factual and Procedural Background

On the evening of 29 October 2012, Jorge Juarez (defendant) was drinking beer and smoking marijuana with Marcos Chaparro, Karen Gonzales, Erick Martinez, and Karina Rodriguez at Chaparro's residence in Durham. Around 11:30 p.m., the group traveled in Chaparro's four-door Acura to take Rodriguez to her home at the Foxhall Village development in Raleigh. At approximately 12:00 a.m. on 30 October 2012, the vehicle arrived at Rodriguez' house in Foxhall Village. After dropping Rodriguez off, Chaparro and Martinez proceeded to break into vehicles nearby to steal car stereos. Martinez took Chaparro's baseball bat along for protection. Chaparro asked to carry defendant's gun, but defendant refused.

Awakened by the noise, Foxhall Village resident Alfonso Canjay and his wife Silvia looked out of their window and saw Chaparro and Martinez "trying to steal something." Canjay chased Chaparro and Martinez, who fled back to the Acura; Canjay pursued them with a machete in his white Ford Focus. After eluding Canjay, Chaparro and Martinez returned to his residence and stole a stereo. Minutes later, Canjay, in his Ford Focus, spotted Chaparro and Martinez in the Acura and sped towards them, colliding twice with their vehicle. After the second impact, defendant fired one gunshot at Canjay's vehicle, shattering the driver's window.

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Immediately after the shooting, Gonzalez drove Chaparro, Martinez, and defendant back to Durham.

Defendant was indicted for the first-degree murder of Canjay. On 6 June 2014, a jury found defendant guilty of first-degree murder pursuant to the felony murder rule, with the underlying felony being discharging a firearm into an occupied vehicle that is in operation. The trial court sentenced defendant to life imprisonment without parole.

Defendant appeals.

II. Motion to Dismiss

[1] In his first argument, defendant contends that the trial court erred in denying his motion to dismiss. We disagree.

A. Standard of Review

The standard of review is not disputed. “This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “Upon defendant’s motion for dismissal, the question for the 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 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. Analysis

At the close of the State’s evidence, defendant moved to dismiss the charge of first-degree murder. This motion was denied, renewed at the close of all the evidence, and denied again. Defendant contends that the trial court erred in denying this motion because the underlying felony of discharging a firearm into an occupied vehicle could not support a felony murder conviction.

Felony murder is “[a] murder . . . committed in the perpetration or attempted perpetration of any arson, rape, or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon,” and constitutes first-degree murder, punishable

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by life imprisonment. *State v. Wall*, 304 N.C. 609, 612, 286 S.E.2d 68, 70 (1982) (emphasis in original) (citations omitted); *see also* N.C. Gen. Stat. § 14-17 (2013). The existence of some underlying felony is an essential element of felony murder.

Defendant contends that, pursuant to the doctrine of merger, the underlying felony of discharging a firearm into an occupied vehicle merges into the charge of first-degree murder and thus cannot support the charge. This analysis, however, is inaccurate.

The doctrine of merger provides that:

[A] defendant may not be punished both for felony murder and for the underlying, ‘predicate’ felony, even in a single prosecution. The underlying felony supporting a conviction for felony murder merges into the murder conviction. The underlying felony provides no basis for an additional sentence, and any judgment imposed thereon must be arrested.

State v. Barlowe, 337 N.C. 371, 380, 446 S.E.2d 352, 358 (1994) (citations and quotations omitted). The merger doctrine does not preclude indictments for both the murder and the underlying felony, nor a guilty verdict for both; rather, it requires that, *if a defendant is found guilty of both felony murder and the underlying felony*, the judgment on the underlying felony is arrested, and “merges” into the felony murder conviction. We have held that:

The felony murder merger doctrine provides that “[w]hen a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction.” *State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770 (2002). “[W]hen the sole theory of first-degree murder is the felony murder rule, a defendant cannot be sentenced on the underlying felony in addition to the sentence for first-degree murder[.]” *State v. Wilson*, 345 N.C. 119, 122, 478 S.E.2d 507, 510 (1996) (quoting *State v. Small*, 293 N.C. 646, 660, 239 S.E.2d 429, 438–39 (1977)); compare *State v. Lewis*, 321 N.C. 42, 50, 361 S.E.2d 728, 733 (1987) (stating that if a defendant’s conviction of first-degree murder is based on both the felony murder rule and premeditation and deliberation, a defendant may be sentenced for both first-degree murder and the underlying felony).

State v. Rush, 196 N.C. App. 307, 313-14, 674 S.E.2d 764, 770 (2009).

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In support of his position, defendant cites *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000). In *Jones*, the defendant was charged with two counts of first-degree murder and several counts of assault after striking a vehicle from behind, causing a collision which injured multiple passengers and resulted in the death of two. The defendant was found guilty of first-degree murder under the felony murder rule and of multiple charges of assault against the surviving passengers. In dictum, the Supreme Court observed that the definition of felony murder includes a blanket category of “other felon[ies] committed or attempted with the use of a deadly weapon,” which includes such crimes as [assault with a deadly weapon inflicting serious injury] and shooting into an occupied dwelling or vehicle.” *Id.* at 167, 538 S.E.2d at 924. In a footnote, the Court in *Jones* further noted:

Although this Court has expressly disavowed the so-called “merger doctrine” in felony murder cases involving a felonious assault on one victim that results in the death of another victim . . . cases involving a single assault victim who dies of his injuries have never been similarly constrained. In such cases, the assault on the victim cannot be used as an underlying felony for purposes of the felony murder rule. Otherwise, virtually all felonious assaults on a single victim that result in his or her death would be first-degree murders via felony murder, thereby negating lesser homicide charges such as second-degree murder and manslaughter.

Id., at 170 n. 3, 538 S.E.2d at 926 n. 3.

The offense of discharging a firearm into an occupied vehicle while the vehicle is in operation differs, however, from ordinary assault. In the instant case, the underlying offense of discharging a firearm into an occupied vehicle is defined thus:

(a) Any person who willfully or wantonly discharges or attempts to discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.

(b) A person who willfully or wantonly discharges a weapon described in subsection (a) of this section into an occupied dwelling or into any occupied vehicle, aircraft,

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watercraft, or other conveyance that is in operation is guilty of a Class D felony.

(c) If a person violates this section and the violation results in serious bodily injury to any person, the person is guilty of a Class C felony.

N.C. Gen. Stat. § 14-34.1 (2013). Of particular significance is the fact that a person may be found guilty of discharging a firearm into an occupied vehicle that is in operation even if defendant's conduct does not cause bodily injury to any person. Moreover, "[t]his Court . . . has expressly upheld convictions for first-degree felony murder based on the underlying felony of discharging a firearm into occupied property." *Wall*, 304 N.C. at 612-13, 286 S.E.2d at 71 (citing *State v. Swift*, 290 N.C. 383, 226 S.E.2d 652 (1976); *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973); *State v. Capps*, 134 N.C. 622, 46 S.E. 730 (1904)).

In *Wall*, the defendant, a store clerk, attempted to stop a shoplifter by firing a gun into her departing vehicle, resulting in the death of the driver. The defendant was charged with first-degree murder under the felony murder statute. On appeal, defendant urged our Supreme Court to apply the merger doctrine. The Court noted that the rule is attributed to the California case of *People v. Ireland*, 70 Cal.2d 522, 450 P.2d 580, 75 Cal.Rptr. 188 (1969). In *Ireland*, the California court held that "a ... felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged." *Wall*, 304 N.C. at 612, 286 S.E.2d at 71 (emphasis in original) (quoting *Ireland*, 70 Cal.2d at 539, 450 P.2d at 590, 75 Cal.Rptr. at 198). Our Supreme Court noted that "[t]he felony of discharging a firearm into occupied property, G.S. 14-34.1, appears to be such an integral part of the homicide in the instant case as to bar a felony-murder conviction under the California merger doctrine." *Id.* The Court went on to observe that "[t]his Court, however, has expressly upheld convictions for first-degree felony murder based on the underlying felony of discharging a firearm into occupied property." *Id.* Based upon North Carolina precedent, the Court held that discharging a firearm into occupied property, specifically into a vehicle while it was in operation, did not merge into felony murder in such a manner as to preclude the homicide charge. Relying on *Wall*, our courts have repeatedly declined to extend the merger doctrine into this area. *See e.g. State v. Mash*, 305 N.C. 285, 288, 287 S.E.2d 824, 826 (1982); *State v. King*, 316 N.C. 78, 81-82, 340 S.E.2d 71, 73-74 (1986); *State v. Jackson*, 189 N.C. App. 747, 752, 659 S.E.2d 73, 77 (2008); *State v. Hicks*, ___ N.C. App. ___,

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___, 772 S.E.2d 486, 489 (2015). Our precedent clearly states that discharging a firearm into occupied property is a felony involving a deadly weapon, and as such supports a charge of first-degree murder based upon the felony murder theory.

In the case at bar, the offense underlying felony murder was the willful or wanton discharge of a firearm into a vehicle, which is a felony irrespective of the outcome. Defendant's arguments that it should merge into felony murder, and that as a result the charge of felony murder should have been dismissed, are specious.

This argument is without merit.

III. Lesser Offenses

[2] In his second argument, defendant contends that the trial court erred in denying his request to instruct the jury on the lesser offenses of second-degree murder and voluntary manslaughter. We agree.

A. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *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).

B. Analysis

At trial, defendant requested that the jury be instructed on the lesser included offenses of second-degree murder and voluntary manslaughter. The trial court denied this request, and the jury was instructed only on the charge of first-degree murder pursuant to the felony murder theory. Defendant contends that this constituted reversible error.

Defendant first maintains that there was conflict concerning the underlying felony, which defendant argues merges into felony murder. We have discussed and dismissed this argument in section II B of this opinion, above.

Defendant next asserts that there was conflict regarding whether defendant acted in self-defense. Self-defense is not a defense to first-degree murder under the felony murder rule; it may be a defense solely to the underlying felony, and then only if it is perfect self-defense. *State v. Richardson*, 341 N.C. 658, 668-69, 462 S.E.2d 492, 499 (1995). We

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further note that, in the instant case, the jury was instructed on perfect self-defense. Our Supreme Court in *Millsaps* established when instructions on lesser included offenses were to be given with respect to felony murder:

(i) If the evidence of the underlying felony supporting felony murder is in conflict and the evidence would support a lesser-included offense of first-degree murder, the trial court must instruct on all lesser-included offenses supported by the evidence whether the State tries the case on both premeditation and deliberation and felony murder or only on felony murder. *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555.

...

(iii) If the evidence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder, the trial court is not required to instruct on the lesser offenses included within premeditated and deliberate murder if the case is submitted on felony murder only. *See State v. Covington*, 290 N.C. 313, 226 S.E.2d 629.

Millsaps, 356 N.C. at 565, 572 S.E.2d at 773-74.

The evidence supporting the underlying felony is in conflict. As previously discussed, the underlying felony of discharging a firearm into an occupied vehicle while it is in operation requires simply that a defendant (1) willfully or wantonly discharges (2) a weapon (3) into an occupied vehicle (4) that is in operation. N.C. Gen. Stat. § 14-34.1(b). There is no question that this transpired. Defendant fired a gun into Canjay's vehicle while Canjay was driving it. The evidence also showed, however, that defendant and his associates were leaving from in front of Canjay's home when Canjay pursued them in his vehicle, ramming into their vehicle twice. This evidence is sufficient to support a finding that defendant had a reasonable fear for his safety and was within his rights to fire his gun in self-defense.

A finding that defendant acted in reasonable self-defense would have rendered him not guilty of a charge of discharging a firearm into an occupied vehicle and would have necessarily precluded a finding of guilt for first-degree murder based upon felony murder. The evidence, however, would have been sufficient to support a lesser included offense. As such, we hold that defendant has adequately demonstrated that it was

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error to deny defendant's request that the jury be instructed on the lesser included offenses of second degree murder and voluntary manslaughter.

IV. Self-Defense

[3] In his third argument, defendant contends that the trial court committed plain error by instructing the jury that defendant could not receive the benefit of self-defense if he was found to be the aggressor. We agree.

A. Standard of Review

The North Carolina Supreme Court "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).

[T]he plain error rule ... is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

B. Analysis

At trial, the trial court instructed the jury that defendant was not entitled to the benefit of self-defense on the felony of discharging a firearm into an occupied vehicle if defendant was the aggressor in that situation. As defendant failed to object to this instruction at trial, we review it for plain error.

Our courts have consistently held that it is reversible error to instruct the jury on the aggressor doctrine of self-defense where there is no evidence that the defendant was the initial aggressor. *See e.g. State v. Washington*, 234 N.C. 531, 535, 67 S.E.2d 498, 501 (1951); *State*

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v. Jenkins, 202 N.C. App. 291, 299, 688 S.E.2d 101, 106-07 (2010); *State v. Tann*, 57 N.C. App. 527, 530-31, 291 S.E.2d 824, 827 (1982). The initial aggressor doctrine provides that “the right of self-defense is only available to a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so.” *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977). Although our courts have not explicitly defined an “initial aggressor,” we have held that withdrawing from conflict is a means by which a person can avoid that status.

In the instant case, the evidence at trial tended to show that: (1) defendant waited in the Acura while his associates broke into vehicles to steal car stereos; (2) Canjay discovered the break-ins, grabbed a machete, and chased defendant’s associates back to the Acura; (3) after eluding Canjay, defendant and his associates returned to Canjay’s residence and stole a stereo from a vehicle nearby; (4) Canjay spotted defendant’s associates and pursued the Acura in his own car; (5) Canjay used his car to ram the Acura twice; and (6) defendant fired into Canjay’s vehicle. Even if we were to assume that defendant’s conduct rose to the level of aggression, his withdrawal in the Acura removes him from the realm of the initial aggressor. Canjay’s pursuit of defendant and his associates reframes the conflict, placing Canjay in the role of aggressor when he used force against defendant and his companions. As there was no evidence to support a determination that defendant was the initial aggressor, the trial court erred in issuing an instruction on the initial aggressor exception to self-defense.

NO ERROR IN PART, REVERSED AND REMANDED IN PART.

Judges STEPHENS and McCULLOUGH concur.

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STATE OF NORTH CAROLINA

v.

ALLYSON S. MASTOR

No. COA15-365

Filed 6 October 2015

1. Sexual Offenses—convicted sexual offender—not synonymous with registered sexual offender

The superior court's findings of fact supported its determination that a mother was in indirect criminal contempt where she entered into a child custody agreement that included a provision forbidding contact between the children and "any convicted sex offender"; the mother entered into a relationship with a man convicted of felony secret peeping (Kistel); and Kistel was in the presence of the children on New Year's Eve. Although the mother contended that Kistel was not a "convicted sex offender" because he was not required to register as a sex offender, the inherent sexual nature of Kistel's conduct was apparent, the trial court could have exercised its discretion to require Kistel to register as a sex offender, and the fact that the term "convicted sex offender" is not specifically defined in the North Carolina criminal statutes does not foreclose the Court of Appeals' ability to determine the intended meaning of the words. Kistel was a convicted sex offender.

2. Sex Offenders—convicted sex offender—meaning within terms of consent agreement

In an action in which a mother was held in criminal contempt for violating a child custody consent order by allowing the children to be around a convicted sex offender (Kistrel), Kistrel was a "convicted sex offender" within the meaning of the consent order where the parties stipulated to the district court finding that Kistrel was a convicted sex offender as that term was agreed to by the parties and included in the consent order.

3. Appeal and Error—preservation of issues—constitutional issue—not raised at trial

Defendant did not preserve for appeal the issue of whether "sex offender" is unconstitutionally vague where the issue was not raised below.

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4. Contempt—criminal—willful violation of consent order—not raised below

The finding in a criminal contempt proceeding that defendant willfully failed to comply with a consent order was supported by the unchallenged findings from the district court, to which the parties stipulated, and competent evidence in record and from the contempt hearing. Defendant argued that she did not willfully violate the consent order by allowing her children to be in the presence of a convicted sex offender because of the ambiguity of the term. The term “convicted sex offender” was not ambiguous.

Appeal by defendant Allyson S. Mastor from order entered 24 October 2014 by Judge Julia Lynn Gullet in Iredell County Superior Court. Heard in the Court of Appeals 22 September 2015.

Attorney General Roy Cooper, by Assistant Attorney General Rebecca E. Lem, for the State.

Arnold & Smith, PLLC, by Kyle A. Frost and J. Bradley Smith, for defendant-appellant Allyson S. Mastor.

Homesley & Wingo Law Group, PLLC, by Andrew J. Wingo and Clark D. Tew for amicus curiae Jason E. Mastor.

TYSON, Judge.

Allyson S. Mastor (“Defendant”) appeals from order entered holding her in criminal contempt. We affirm.

I. Factual Background

Defendant and Jason E. Mastor (“Jason”) married on 7 February 1998. The parties separated on 8 January 2012. Three children were born of the marriage: twin girls J.M.M. and M.B.M., born 20 September 2000, and J.E.M., born 24 May 2006. On 21 September 2012, Defendant filed a complaint, in which she sought: (1) custody and child support; (2) alimony/post-separation support; (3) equitable distribution; and, (4) attorney’s fees. Jason filed an answer and counterclaim, in which he alleged Defendant had been having an affair with Carl Kistel (“Kistel”) since 2010, and Kistel was indicted on pending felony charges as an alleged sex offender.

The parties entered into a consent order (“the Consent Order”) on 18 December 2012, in which they agreed to share joint legal custody of

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the minor children. The Consent Order specified “[n]either party shall have any convicted sex offender in the presence of the minor children.”

Kistel was involved in his own civil domestic divorce matter during October 2012. At a temporary child custody hearing, Kistel admitted to placing a camera in his shoe and “photograph[ing] up to fifteen clips of improper graphics of adult females.” The district court entered an order finding Kistel engaged in conduct that resulted in indictment for felony secret peeping, pursuant to N.C. Gen. Stat. § 14-202 (2013). The district court ordered Kistel to “enroll in an intensive behavioral oriented psychotherapy program” and that he “continue to not expose the children to any pornography, nude photographs, or sexually explicit material in the nature of television, telephone, audio, video, etc.” The criminal charges against Kistel were still pending in Lincoln County Superior Court at the time the district court entered the Consent Order at bar.

On 24 January 2014, Jason filed a motion for contempt against Defendant for violating the Consent Order. Jason alleged Kistel had pled guilty to felony secret peeping, and was a convicted sex offender. Jason also averred Kistel and Defendant were involved in a romantic relationship, and Defendant had allowed Kistel to be in the presence of their children.

Jason attached to his motion for contempt a copy of Kistel’s 7 May 2013 guilty plea, judgment, and sentencing. The Lincoln County Superior Court sentenced Kistel to a suspended sentence of 5-6 months incarceration. Kistel was placed on 24 months supervised probation and ordered to “not possess any video recording devices with exception of a smart phone which is subject to inspection by [probation officer] at any time; not possess any sex oriented, pornographic or video materials” and required his “computer [to be] subject to inspection by [probation officer] at any time[.]”

A hearing was held on Jason’s motion for contempt on 28 May 2014. The district court made the following findings of fact and entered an order on 4 June 2014:

3. That an Order was entered into by the parties on December 18, 2012, in which the Order provided, among other things:

B9. “Neither party shall have any convicted sex offender in the presence of the minor children.”

4. That Carl J. Kistel, III was convicted of felony secret peeping on May 7, 2013 in the Superior Court of Lincoln County.

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5. That [Defendant] willfully and voluntarily allowed Mr. Kistel to be in the presence of the minor children on New Year's Eve 2013, where Mr. Kistel was at the house of [Defendant], ate food with the minor children and stayed with [Defendant] and the minor children until after the ball dropped.

6. That [Jason] has proved beyond a reasonable doubt that [Defendant] has willfully and voluntarily brought the minor children into the presence of a convicted sex offender in violation of the December 18, 2012 consent order.

The district court held Defendant in indirect criminal contempt of the Consent Order based on its findings of fact. The district court ordered Defendant to pay a \$500.00 fine. Defendant appealed the order to superior court.

Defendant's appeal came on for hearing in Iredell County Superior Court on 5 September 2014. The parties stipulated to all of the findings of fact set forth in the district court's order prior to the hearing. The only matter at issue before the superior court was the legal sufficiency of the district court's order, as it pertained to the term "convicted sex offender." The superior court entered an order holding Defendant in criminal contempt on 24 October 2014. The superior court concluded as follows:

4. N.C.G.S. § 14-202(d) [the felony secret peeping statute] provides that any person who secretly uses any device to create a photographic image of another person in that room for the purpose of arousing or gratifying the sexual desire of any person shall be guilty of a Class I felony.

5. Although the term "sex offender" is not specifically defined in the North Carolina General Statutes, N.C.G.S. § 14-208.5 provides that protection of the public from sex offenders is a paramount governmental interest. The Class I felony of secret peeping is included in the list of criminal offenses for which a person may be required to register as a sex offender if the sentencing judge deems it necessary. The Court recognizes that the sentencing in the underlying offense of Mr. Kistel did not require Mr. Kistel to register as a sex offender, *but the Court finds that the judge's decision to not require the defendant to register does not change the nature of the crime. Therefore, the Court concludes that a violation of N.C.G.S. § 14-202(d) is indeed*

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a sex offense within the meaning of the December 18, 2012 Consent Order.

6. It is the responsibility of the parties to a contract or proposed consent order to make sure they understand the terms of the contract before each party signs a consent order.

7. That the December 18, 2012 Consent Order . . . is a valid, enforceable order of the Court, and it was entered into freely and voluntarily by the Defendant and Jason Mastor.

8. That the Court concludes as a matter of law that the Defendant has, and without just cause, failed to comply with the previous Order of the Court and as such is in indirect criminal contempt pursuant to N.C.G.S. § 5A-11(a)(3).

(emphasis supplied). The superior court also imposed a \$500.00 criminal fine against Defendant.

Defendant gave timely notice of appeal to this Court.

II. Issue

Defendant argues the trial court erred by holding her in criminal contempt for willfully violating the Consent Order provision which forbade her from allowing the children to be in the presence of a convicted sex offender.

Defendant contends (1) Kistel is not a “convicted sex offender” under North Carolina law; (2) the term “convicted sex offender” is unconstitutionally vague because it is undefined in the North Carolina criminal statutes; and (3) Defendant’s noncompliance with the Consent Order was not “willful.”

III. Standard of Review

Defendant appeals an order holding her in criminal contempt under N.C. Gen. Stat. § 5A-11(a)(3) (2013). A contempt hearing is a non-jury proceeding.

The standard of appellate review for a decision rendered in a non-jury trial is whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary.

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Sessler v. Marsh, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001) (citations omitted).

“The trial court’s conclusions of law drawn from the findings of fact are reviewable *de novo*.” *Curran v. Barefoot*, 183 N.C. App. 331, 335, 645 S.E.2d 187, 190 (2007) (citation omitted).

IV. Analysis**A. “Sex Offender”: North Carolina Law and the Consent Order****1. North Carolina Law**

[1] Defendant argues she did not violate the Consent Order because Kistel is not a “convicted sex offender” under North Carolina law. Defendant attempts to argue the term “convicted sex offender,” as used in the Consent Order, carries the same legal meaning as the term “registered sex offender.” Defendant contends Kistel is not a “convicted sex offender” because Kistel was not required to register as a sex offender. We disagree.

The fact that the term “convicted sex offender” is not specifically defined in the North Carolina criminal statutes does not foreclose this Court’s ability to determine the intended meaning of the words.

“Questions of statutory interpretation are questions of law[.] . . . The primary objective of statutory interpretation is to give effect to the intent of the legislature. The plain language of a statute is the primary indicator of legislative intent.” *First Bank v. S & R Grandview, L.L.C.*, __ N.C. App. __, __, 755 S.E.2d 393, 394 (2014) (internal citations omitted).

“If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning. When, however, a statute is ambiguous, judicial construction must be used to ascertain the legislative will.” *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citations and internal quotation marks omitted). “Statutory language is ambiguous if it is fairly susceptible of two or more meanings.” *Purcell v. Friday Staffing*, __ N.C. App. __, __, 761 S.E.2d 694, 698 (2014) (citations and internal quotation marks omitted).

Black’s Law Dictionary defines “sexual offense” as “[a]n offense involving unlawful sexual conduct, such as prostitution, indecent exposure, incest, pederasty, and bestiality.” *Black’s Law Dictionary*, 712 (10th ed. 2014).

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Kistel pled guilty to the criminal offense of felony secret peeping under N.C. Gen. Stat. § 14-202. It is unclear from the record under which subsection — (d), (e), or (f) — Kistel pled guilty. Both N.C. Gen. Stat. §§ 14-202(d) and (f) explicitly prohibit secret peeping “*for the purpose of arousing or gratifying the sexual desire of any person.*” N.C. Gen. Stat. §§ 14-202(d), (f) (2013) (emphasis supplied).

An individual convicted of felony secret peeping under N.C. Gen. Stat. §§ 14-202(d)-(f) may be required to register as a sex offender “[i]f the sentencing court rules that the person is a danger to the community” and registration would “further the purposes” of the Sex Offender Registration Program. N.C. Gen. Stat. § 14-202(1) (2013). N.C. Gen. Stat. § 14-202(e) does not explicitly use the language: “for the purpose of arousing or gratifying the sexual desire of any person.” N.C. Gen. Stat. §§ 14-202(d), (f). Its inclusion as a reportable offense, subject to enrollment under the North Carolina Sex Offender Registration Program clearly indicates the offense is one of a sexual nature.

The conduct proscribed by the felony secret peeping statute constitutes a “sexual offense,” based on the Black’s Law Dictionary definition, and subject to the statute’s express limitation in subsections (d) and (f) that a defendant’s actions are “*for the purpose of arousing or gratifying the sexual desire of any person.*” *Id.* (emphasis supplied).

Kistel pled guilty to felony secret peeping under the statute containing the language above, and was sentenced under the felony secret peeping statute. The trial court could have exercised its discretion to require Kistel to register as a sex offender. Kistel is a convicted sex offender.

Defendant argues only those individuals convicted of offenses, which statutorily require them to actually register as sex offenders, or whose sentence imposed by the court requires them to register as sex offenders, are in fact convicted sex offenders. Defendant asserts “convicted sex offender” is synonymous with “registered sex offender.” Defendant’s argument is misplaced. If Defendant’s assertion is correct, there would be no need for the General Assembly to set forth which convicted sex offenders are required to enroll in the state’s sex offender registry, those which are not, and those offenses for which enrollment is within the trial court’s discretion. *See generally* N.C. Gen. Stat. § 14-202(1).

This Court has recognized not all convicted sex offenders, such as Kistel, are required to enroll in the sex offender registry. *See* N.C. Gen. Stat. § 14-208.5 (2013). In *State v. Pell*, this Court analyzed the requirement that an individual convicted of a sex offense pose a “danger to

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the community” in order to compel sex offender registration. We held “[w]hen examining the purposes of the sex offender registration statute, it is clear that ‘danger to the community’ refers to those sex offenders who pose a risk of engaging in sex offenses following release from incarceration or commitment.” 211 N.C. App. 376, 379, 712 S.E.2d 189, 191 (2011). A finding of “danger to the community” by the sentencing court would be unnecessary and redundant were we to accept Defendant’s contention. *Id.*

Kistel’s guilty plea to felony secret peeping stemmed from behavior in which he hid a camera in his shoe and intentionally positioned his shoe in an area to allow him to film up and underneath women’s skirts and dresses, without their knowledge or consent. The inherent sexual nature of Kistel’s conduct is apparent. Kistel’s behavior was motivated by “the purpose of arousing or gratifying [his] sexual desire” and is a sexual crime. N.C. Gen. Stat. § 14-202(d). Kistel pled guilty to a sex offense, and after judgment was entered thereon, became a “convicted sex offender” under North Carolina law, regardless of whether the sentencing court required him to enroll in the sex offender registry.

2. “Convicted Sex Offender” as Intended in the Consent Order

[2] Kistel is a “convicted sex offender” within the meaning of the Consent Order, to support Defendant’s criminal contempt.

On appeal to the superior court, the parties stipulated to “the findings and the underlying basis of the District Court Order.” The district court’s findings of fact provided, in pertinent part:

5. That [Defendant] willfully and voluntarily allowed Mr. Kistel to be in the presence of the minor children on New Year’s Eve 2013, where Mr. Kistel was at the house of [Defendant], ate food with the minor children and stayed with [Defendant] and the minor children until after the ball dropped.

6. That [Jason] has proved beyond a reasonable doubt that Carl J. Kistel, III is a convicted sex offender.

“[S]tipulations duly made during the course of a trial constitute judicial admissions on the parties and [dispense] with the necessity of proof.” *State v. Simon*, 185 N.C. App. 247, 255, 648 S.E.2d 853, 858 (2007) (citation and quotation marks omitted). The district court found as fact and beyond a reasonable doubt that Kistel was a “convicted sex offender,” as that term was agreed to by the parties and included in the Consent Order. The parties stipulated to this finding of fact on appeal to

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the superior court. Defendant is bound by this stipulation. *See Estate of Carlsen v. Carlsen*, 165 N.C. App. 674, 679, 599 S.E.2d 581, 585 (2004) (holding stipulation signed by parties prior to trial was binding as a judicial admission).

The circumstances surrounding the Consent Order also indicate Jason's concern that Kistel might become a "convicted sex offender," for purposes of that order. Jason's answer to Plaintiff's original complaint made numerous references to Kistel's status as an "alleged sex offender" while the indictment was pending, and his concern for the well-being and safety of his children, if they were allowed to be in Kistel's presence. The record clearly shows the inclusion of the "convicted sex offender" provision in the Consent Order was specifically targeted at Defendant's relationship with Kistel. Kistel's felony secret peeping charges, which Jason knew of, were pending at this time, and became final upon Kistel's guilty plea.

Defendant's "stipulat[i]on] to the findings and the underlying basis of the District Court Order" also shows Kistel is a "convicted sex offender," both under North Carolina law and within the meaning of the Consent Order, regardless of whether he was required by the sentencing judge to enroll in the sex offender registry. This argument is overruled.

B. Impermissible Vagueness

[3] Defendant argues she cannot be held in criminal contempt for violating the Consent Order because the term "sex offender" is unconstitutionally vague. Defendant makes this argument for the first time, on appeal.

"A constitutional issue not raised at trial will generally not be considered for the first time on appeal." *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (citation and quotation marks omitted). Here, Defendant did not raise or argue any constitutional vagueness objections, before either the district or superior courts. Defendant has failed to preserve this issue for appellate review. We decline to review Defendant's constitutional argument for the first time on appeal. This argument is dismissed.

C. "Willfulness"

[4] Defendant argues she cannot be held in criminal contempt for violating the Consent Order because she did not do so willfully.

A party "may be held in contempt for failure to comply with the terms of an agreement, *only if [her] failure is willful.*" *Cavanaugh*

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v. Cavanaugh, 317 N.C. 652, 660, 347 S.E.2d 19, 25 (1986) (emphasis in original) (citation omitted).

Defendant's argument is based on her primary contention, discussed *supra*, that the term "convicted sex offender" is ambiguous as it appears in the North Carolina statutes. Defendant argues she did not willfully violate the Consent Order by allowing her children to be in the presence of a "convicted sex offender," because of the ambiguity of the term. We have determined the term "convicted sex offender" is not ambiguous, either under the North Carolina criminal statutes, or the Consent Order.

The district and superior courts found Defendant "willfully and voluntarily allowed Mr. Kistel to be in the presence of the minor children[.]" While Defendant may have believed or hoped the terms "convicted sex offender" and "registered sex offender" were synonymous, the unchallenged findings of fact from the district court, to which the parties stipulated, and competent evidence in the record and from the contempt hearing support this finding. This argument is overruled.

V. Conclusion

The district court found and determined, beyond a reasonable doubt, Kistel was a "convicted sex offender," as provided in the Consent Order. Kistel pled guilty to felony secret peeping. North Carolina law and the Consent Order support the district court's determination. The parties' stipulated, before the superior court, to the district court's finding of fact that Kistel was a "convicted sex offender." Defendant is bound by this determination.

Defendant failed to raise her constitutional vagueness argument before either trial court. Defendant has failed to preserve this argument for appellate review.

The superior court's finding of fact that Defendant willfully allowed her children to be in the presence of a "convicted sex offender" is supported by the stipulated findings of fact and competent evidence. The superior court's findings of fact support its determination that Defendant was in indirect criminal contempt of the Consent Order. The superior court's order is affirmed.

AFFIRMED.

Judges BRYANT and DIETZ concur.

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[243 N.C. App. 486 (2015)]

STATE OF NORTH CAROLINA

V.

JIMMIE RODGERS McLAMB

No. COA15-39

Filed 6 October 2015

Indictment and Information—sexual offender registration—failure to report change of address in writing

There was no error in a prosecution for failure to register as a sex offender where defendant contended that the indictment was required to allege that he failed to report his change of address in writing and within three business days. Defendant had notice of the requirements of the statute, had complied on prior occasions, and did not argue that his trial preparation was prejudiced. The indictment in this case was couched in the language of the statute and sufficiently alleged this element of the offense.

Appeal by defendant from judgment entered 21 July 2014 by Judge Phyllis M. Gorham in Sampson County Superior Court. Heard in the Court of Appeals 13 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Hal F. Askins, for the State.

Guy J. Loranger for defendant-appellant.

McCULLOUGH, Judge.

Jimmie Rodgers McLamb (“defendant”) appeals from judgment entered upon his conviction for failure to register as a sex offender. On appeal, defendant contends that the indictment was insufficient to confer subject matter jurisdiction upon the trial court. For the following reasons, we find no error.

I. Background

On 13 June 2007, defendant pleaded guilty to sexual battery in violation of N.C. Gen. Stat. § 14-27.5A(a) in Duplin County Superior Court. As a result of this conviction, defendant was required to register as a sex offender under N.C. Gen. Stat. § 14-208.7 *et seq.* Defendant was later arrested on 21 May 2013 by Captain Julian Carr of the Sampson County Sheriff’s Office during “Operation Southern Watch,” an initiative under

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the Sampson County Sheriff's Office Registering Verification Campaign. On 16 October 2013, a Sampson County Grand Jury indicted defendant for failure to register as a sex offender in violation of N.C. Gen. Stat. § 14-208.11. Defendant pleaded not guilty and his case was called for trial in Sampson County Superior Court before the Honorable Phyllis M. Gorham on 21 July 2014.

At trial, the State presented evidence tending to establish the following facts: On 21 May 2013, defendant was discovered residing at 206 Smith Key Lane in Clinton. Defendant had previously been evicted in December 2012 from the address where he last registered, 1134 Renfrow Road in Clinton. After a period of homelessness, defendant moved to 206 Smith Key Lane sometime in January 2013, where he had taken residence for approximately four months.

Before his 21 May 2013 arrest, defendant was first registered with the Duplin County Sheriff's Office on 20 June 2007. On 1 May 2009, defendant moved to Sampson County and updated his address with the Sampson County Sheriff's Office. On 1 April 2011, defendant acknowledged his duty to register and initialed his understanding for each of the registration requirements on State Bureau of Investigation (S.B.I.) Form CIIS – 65, Sex Offender Duty to Register Offender Acknowledgement. This acknowledgement was completed and signed by defendant at the Sampson County Sheriff's Office. On 21 September 2012, defendant moved within Sampson County to 1134 Renfrow Road and again updated his address with the Sampson County Sheriff's Office. This was the last address defendant registered before his arrest. On 12 March 2013, the S.B.I. mailed a Verification of Information letter to defendant. On 18 March 2013, defendant brought the letter to the Sampson County Sheriff's Office and signed the document to certify that his address information and all information provided on file was true and complete. Daomi Strickland, Supervisor of Sampson County Sheriff's Office clerical staff, testified at trial that when defendant verified his address on 18 March 2013, he affirmed that he still lived at 1134 Renfrow Road and did not change his address.

At the close of the State's evidence, defendant moved to dismiss the charges, and the motion was denied by the trial court. Defendant testified on his own behalf and disputed the dates and locations to where he moved after his December 2012 eviction and his understanding of his ongoing duty to register as a sex offender. Defendant acknowledged in his testimony that he no longer lived at his last registered address and that he did not update the Sampson County Sheriff's Office after his eviction. Defendant also testified that he did not provide an updated address

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on 18 March 2013 when he reported to the Sheriff's Office to verify his information. After the completion of his testimony, defendant did not present additional evidence. Defendant instead renewed his motion to dismiss the charges. The trial court denied defendant's motion and gave the case to the jury.

After a period of deliberation, the jury returned a verdict finding defendant guilty of failure to register as a sex offender. The trial court then entered judgment sentencing defendant in the mitigated range to a term of 17 to 30 months imprisonment, awarding credit for 254 days of pre-trial confinement. Defendant gave oral notice of appeal in open court.

II. Discussion

Now on appeal, defendant argues that the trial court lacked subject matter jurisdiction where the indictment charging him with failure to register as a sex offender lacked allegations that he failed to provide "written notice" of his address change "within three business days" of the change. Consequently, defendant argues that his indictment was fatally flawed and his conviction must be vacated. We disagree.

Our Court reviews the sufficiency of an indictment under the *de novo* standard. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). N.C. Gen. Stat. § 15A-924(a)(5) requires an indictment to 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) (2013). Our Supreme Court has stated that an indictment "is sufficient if it charges the offense in a plain, intelligible and explicit manner." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972). The purposes of the indictment are "to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). "An indictment couched in the language of the statute is generally sufficient to charge the statutory offense." *State v. Singleton*, 85 N.C. App. 123, 126, 354 S.E.2d 259, 262 (1987) (citing *State v. Palmer*,

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293 N.C. 633, 239 S.E.2d 406 (1977)). It is also generally true that indictments need only allege the ultimate facts constituting the elements of the criminal offense. *Id.* Further, “[o]ur courts have recognized that[,] while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.” *State v. Harris*, 219 N.C. App. 590, 592, 724 S.E.2d 633, 636 (2012).

The three essential elements of the offense described in N.C. Gen. Stat. § 14-208.9 are: (1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change.” *State v. Barnett*, 223 N.C. App. 65, 69, 733 S.E.2d 95, 98 (2012). In this case, defendant’s argument on appeal only challenges the sufficiency of the indictment relating to the third element. It is clear the first two elements are sufficiently alleged.

Although an unpublished opinion of this Court does not constitute controlling legal authority, *see* N.C. R. App. P. 30(e)(3) (2015), on appeal, defendant primarily relies on this Court’s unpublished decision in *State v. Osborne*, No. COA 13-1372, 2014 N.C. App. LEXIS 700, 2014 WL 2993855 (N.C. App. July 1, 2014). In *Osborne*, this Court determined an indictment for failure to register was fatally defective because “(1) it [did] not allege that [the defendant] failed to notify the [sheriff’s office] in *writing*, and (2) it [did] not specify the time requirement as within three *business* days of [the defendant’s] move to a new address.” *Id.* 2014 N.C. App. LEXIS 700, at *8, 2014 WL 2993855, at *3 (emphasis in original). As this Court has recognized, “[i]n effect, the *Osborne* Court imposed two additional essential elements of the offense set forth in N.C. Gen. Stat. § 14-208.9(a)—the ‘written notice’ requirement and the ‘three business days’ requirement.” *State v. Leaks*, __ N.C. App. __, __, 771 S.E.2d 795, 798 (emphasis omitted), *disc. review denied*, __ N.C. __, __ S.E.2d __ (2015).

Similar to *Osborne*, defendant contends the indictment in the present case was insufficient because it lacked allegations that he failed to provide “written notice” of his address change “within three business days.” We are not persuaded.

Since *Osborne*, this Court has issued separate opinions rejecting the notions that the ‘written notice’ requirement and the ‘three business days’ requirement are essential to the validity of an indictment. *See Leaks*, __ N.C. App. at __, 771 S.E.2d at 799 (holding the failure to provide in the indictment that notice of a change of address must be made

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in “writing” did not constitute a fatal defect), *State v. James*, __ N.C. App. __, __ S.E.2d __ (July 7, 2015) (holding the failure to provide in the indictment that notice of a change of address must be made within three “business” days did not constitute a fatal defect). In both cases, this Court emphasized that *Osborne* was not binding and held the essential elements of the offense of failure to report a change of address as a sex offender were sufficiently alleged in the indictments to put the defendants on notice of the charge against them.¹

In line with this Court’s recent published cases, we hold the indictment in this case, which alleged “defendant . . . did, as a person required by Article 27A of Chapter 14 of the General Statutes to register, failed to notify the last registering sheriff of a change of address in that he moved from 1134 Renfrow Road in Clinton, North Carolina, on or about December 18, 2012 to 206 Smith Key Lane in Clinton, North Carolina without notifying the Sampson County Sheriff[,]” was couched in the language of the statute and sufficiently alleged the third element of the offense. To hold otherwise would be to subject the indictment to hyper technical scrutiny where in this case, over a period of months, defendant failed to give any notice to the sheriff of his change of address.

As stated earlier, the purpose of the indictment is to provide notice so that a proper defense can be prepared. *Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731. Defendant did not argue at trial, nor has he convinced this Court on appeal, that his trial preparation was in any way prejudiced. We take notice from the record that defendant had actual notice of the requirements of the statute and that he acknowledged those requirements on prior occasions. Furthermore, the record shows that following prior changes of address, defendant notified the Sheriff’s Office in accordance with the statutory requirements. After a careful review of the record and the issues presented, this Court sees no valid basis to hold that the indictment was fatally flawed.

III. Conclusion

While we note that the better practice would have been for the indictment to have alleged that defendant failed to report his change of

1. Despite the fact that *Osborne* is unpublished and not binding, we further note that it is easily distinguished from the present case because the statutory reference in the indictment in *Osborne*, which alleged a violation of N.C. Gen. Stat. § 14-208.11A(2), did not correspond to the charging language, which clearly attempted to allege a violation of N.C. Gen. Stat. § 14-208.11(a)(2). *Osborne*, 2014 N.C. App. LEXIS 700, at *8, 2014 WL 2993855, at *3.

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address “in writing” and “within three business days,” for the reasons discussed above, we hold that the indictment was sufficient to confer subject matter jurisdiction upon the trial court.

NO ERROR.

Judges STROUD and INMAN concur.

JOHNNIE WILKES, EMPLOYEE, PLAINTIFF

v.

CITY OF GREENVILLE, EMPLOYER, SELF-INSURED (PMA MANAGEMENT GROUP,
THIRD-PARTY ADMINISTRATOR), DEFENDANT

No. COA14-1193

Filed 6 October 2015

1. Workers’ Compensation—additional treatment—anxiety and depression—Parsons presumption not applied—remanded

The Industrial Commission erred in a workers’ compensation case by failing to apply the presumption from *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, to plaintiff’s request for additional medical treatment and compensation for anxiety and depression. The *Parsons* presumption says that an employer must provide medical compensation for the treatment of compensable injuries, which includes additional medical treatment. It was evident from the Commission’s opinion that the Commission did not apply the rebuttable *Parsons* presumption to plaintiff’s psychological symptoms, and the matter was remanded for application of that presumption and a new determination.

2. Workers’ Compensation—temporary total disability benefits—futility of job search

The Industrial Commission in a workers’ compensation case erred by concluding that plaintiff was no longer entitled to temporary total disability benefits. Plaintiff demonstrated the futility of engaging in a job search and defendant made no attempt to show that suitable jobs were available to plaintiff.

Appeal by plaintiff from opinion and award entered 9 April 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 April 2015.

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The Hunt Law Firm, PLLC, by Anita B. Hunt, for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Matthew P. Blake, for defendant-appellee.

DAVIS, Judge.

Johnnie Wilkes (“Plaintiff”) appeals from the Opinion and Award of the North Carolina Industrial Commission (“the Commission”) determining that he (1) failed to demonstrate that his anxiety and depression were causally related to his work-related accident; and (2) was no longer entitled to temporary total disability benefits. After careful review, we reverse in part, vacate in part, and remand for further proceedings.

Factual Background

Plaintiff is a 62-year-old man who, at the time of his accident, had been employed by the City of Greenville (“Defendant”) for approximately nine years. On 21 April 2010, Plaintiff was driving one of Defendant’s trucks when a third party ran a red light and collided into the truck. The force of the accident caused the truck to collide with a tree, breaking the windshield and deploying the airbags. Plaintiff was transported to Pitt County Memorial Hospital, where he was treated for an abrasion on his head, broken ribs, and various injuries to his neck, back, pelvis, and left hip. At the hospital, Plaintiff underwent a brain MRI, which appeared “negative for acute infarction but . . . showed mild paranasal sinus disease resulting from a concussion.” Plaintiff was discharged from the hospital the next day.

On 22 April 2010, Defendant filed a Form 19, reporting to the Commission that Plaintiff had in the course of performing his duties as a landscaper for the Recreation and Parks Department sustained injuries in a multi-vehicle accident. One week later, on 29 April 2010, Defendant filed a Form 60, admitting Plaintiff’s entitlement to compensation for his injury by accident.

In January 2011, both parties filed a Form 33 requesting that the claim be assigned for hearing. Defendant’s Form 33 stated that the “[p]arties disagree about the totality of plaintiff’s complaints related to his compensable injury and need for additional medical evaluations.” Plaintiff’s Form 33 alleged that Plaintiff “is in need of additional medical treatment . . . specifically an evaluation by a neurosurgeon.” On 4 February 2011, Deputy Commissioner Theresa B. Stephenson entered an order requiring Defendant to “send Plaintiff for a one time evaluation

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to a neurosurgeon of their choosing. If that neurosurgeon recommends additional neurological or neuropsychological treatment, Defendant shall provide this and direct treatment.”

On 21 September 2011, a hearing was held before Deputy Commissioner Mary C. Vilas on Defendant’s Form 33 Request for Hearing. The record was closed on 18 July 2012 and then reopened by order on 10 January 2013 to allow the parties to submit three additional stipulated exhibits. Deputy Commissioner Vilas entered an opinion and award on 1 February 2013 determining that Plaintiff’s low back and knee pain, anxiety, depression, sleep disorder, tinnitus (ringing in one’s ears), headaches, and temporomandibular joint pain were causally related to his 21 April 2010 compensable injury and ordering Defendant to pay all of Plaintiff’s medical expenses incurred or to be incurred with regard to treatment of these conditions. Deputy Commissioner Vilas also concluded that Plaintiff demonstrated “that he is capable of some work but that it would be futile to seek work at this time because of preexisting conditions of his age, full-scale IQ of 65, education level and reading capacity at grade level 2.6, previous work history of manual labor jobs, and his physical conditions resulting from his April 21, 2010 compensable injury” such that he was entitled to temporary total disability compensation.

Defendants appealed to the Full Commission, and the Commission heard the matter on 4 November 2013. On 9 April 2014, the Commission entered its Opinion and Award reversing Deputy Commissioner Vilas’ decision. Specifically, the Commission concluded that (1) Plaintiff failed to meet his burden of demonstrating that his anxiety and depression were caused by his work-related accident; and (2) Plaintiff was no longer entitled to total temporary disability benefits because he “presented insufficient evidence that a job search would be futile.” The Commission found that Plaintiff’s tinnitus, however, was causally related to his 21 April 2010 accident and therefore ordered Defendant to pay all of Plaintiff’s past and future medical expenses “that are reasonably required to effect a cure, provide relief or lessen any disability” related to his tinnitus. Plaintiff filed a timely appeal to this Court.

Analysis

Appellate review of an opinion and award of the Industrial Commission is “limited to consideration of whether competent evidence supports the Commission’s findings of fact and whether the findings support the Commission’s conclusions of law.” *Philbeck v. Univ. of Mich.*, ___ N.C. App. ___, ___, 761 S.E.2d 668, 671 (2014) (citation and quotation marks omitted). “The findings of fact made by the Commission are

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conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. The Commission's conclusions of law, however, are reviewed *de novo*." *Morgan v. Morgan Motor Co. of Albemarle*, ___ N.C. App. ___, ___, 752 S.E.2d 677, 680 (2013) (internal citation omitted), *aff'd per curiam*, ___ N.C. ___, 772 S.E.2d 238 (2015).

Here, Plaintiff makes two primary arguments on appeal. First, he contends that the Commission misapplied the law when considering whether he was entitled to medical compensation for his anxiety and depression. Second, he argues that the Commission erred in concluding that he was not entitled to disability benefits because he "has not presented evidence of a reasonable job search and has presented insufficient evidence that a job search would be futile." We address each of these arguments in turn.

I. Request for Additional Medical Compensation

[1] Plaintiff first argues that the Commission erred by failing to apply the presumption arising from our decision in *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), to his request for additional medical treatment and compensation for his complaints of anxiety and depression. We agree.

Pursuant to N.C. Gen. Stat. § 97-25, an employer must provide medical compensation for the treatment of compensable injuries, which includes "additional medical treatment . . . directly related to the compensable injury" that is designed to effect a cure, provide relief, or lessen the period of disability. *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 292 (2005), *disc. review improvidently allowed*, 360 N.C. 587, 634 S.E.2d 887 (2006); N.C. Gen. Stat. § 97-25 (2013) (explaining that "[m]edical compensation shall be provided by the employer" for treatment of compensable injuries and employer's responsibility for such compensation includes any changes in treatment so long as "the change is reasonably necessary to effect a cure, provide relief, or lessen the period of disability").

It is well established that an employee seeking compensation for an injury bears the burden of demonstrating that the injury suffered is causally related to the work-related accident. *Hedges v. Wake Cty. Pub. Sch. Sys.*, 206 N.C. App. 732, 734, 699 S.E.2d 124, 126 (2010), *disc. review denied*, 365 N.C. 77, 705 S.E.2d 746 (2011). Once the employee meets this initial burden, however, a presumption arises — often referred to as the *Parsons* presumption — that "additional medical treatment is directly related to the compensable injury." *Perez*, 174 N.C. App. at 135,

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620 S.E.2d at 292; *see also Pomeroy v. Tanner Masonry*, 151 N.C. App. 171, 182, 565 S.E.2d 209, 216-17 (2002) (“When additional medical treatment is required, there is a rebuttable presumption that it is directly related to the original compensable injury and the employer has the burden of producing evidence showing the treatment is not directly related to the compensable injury.”).

In *Parsons*, the plaintiff worked as an assistant manager at one of the defendant’s stores and was injured when two men entered the store and assaulted her, striking her in the forehead and shooting her four times with a stun gun. *Parsons*, 126 N.C. App. at 540, 485 S.E.2d at 868. The plaintiff sought workers’ compensation benefits, and the Industrial Commission entered an opinion and award determining that she had suffered compensable injuries as a result of this work-related incident and ordering the defendant to pay her medical expenses for these injuries, which consisted primarily of frequent headaches. *Id.* at 540-41, 485 S.E.2d at 868. Neither party appealed from this opinion and award. Eight months later, the plaintiff sought medical compensation for the treatment of her headaches. *Id.* at 541, 485 S.E.2d at 868. The Commission denied the plaintiff’s request for medical compensation, ruling that the plaintiff “‘ha[d] not introduced any evidence of causation between her injury and her headache complaints at the time of the hearing’ and . . . ‘failed to meet her burden of proof for showing the necessity of continued or additional medical treatment.’” *Id.* at 541, 485 S.E.2d at 869.

The plaintiff appealed to this Court, arguing that the Commission had erred in placing the burden on her to prove that her current headaches were caused by the employment-related assault. *Id.* at 541, 485 S.E.2d at 868. We agreed, explaining that

[a]t the initial hearing, plaintiff’s main injury complaint was headaches. At that time, it was her burden to prove the causal relationship between her 30 April 1991 accident and her headaches. Plaintiff met this burden, as evidenced by the Commission’s initial opinion and award, from which there was no appeal, granting her medical expenses and future medical treatment. In effect, requiring that plaintiff once again prove a causal relationship between the accident and her headaches in order to get further medical treatment ignores this prior award. Plaintiff met her causation burden; the Industrial Commission ruled that her headaches were causally related to the compensable accident. Logically, defendants now have the responsibility to prove the original finding of compensable injury

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is unrelated to her present discomfort. To require plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the Act in favor of injured employees.

Id. at 542, 485 S.E.2d at 869 (internal citation omitted).

This Court has applied the *Parsons* presumption to additional medical treatment not only when the initial determination of compensability is made by the Commission in an opinion and award, *see id.*, but also when the employer makes an admission of compensability by filing a Form 60, *see Perez*, 174 N.C. App. at 136, 620 S.E.2d at 293 (“As the payment of compensation pursuant to a Form 60 amounts to a determination of compensability, we conclude that the *Parsons* presumption applies in this context.”).

Plaintiff asserts that because Defendant filed a Form 60, which admitted that he had suffered a compensable injury by accident, he was entitled to the presumption that the additional medical treatment he sought for his symptoms of anxiety and depression was directly related to his compensable injury. Defendant contends that Plaintiff is not entitled to the *Parsons* presumption because it admitted compensability only as to the injuries Plaintiff suffered to his “ribs, neck, legs and entire left side” and not to Plaintiff’s complaints relating to anxiety and depression. However, our caselaw since *Perez* has made clear that the *Parsons* presumption applies even where the injury or symptoms for which additional medical treatment is being sought is not the precise injury originally deemed compensable. *See Carr v. Dep’t of Health & Human Servs. (Caswell Ctr.)*, 218 N.C. App. 151, 156, 720 S.E.2d 869, 874 (2012) (rejecting defendant’s argument that “the *Parsons* presumption does not apply when plaintiff’s injury is a wholly different injury from the one accepted on the Form 60” where plaintiff sought additional medical treatment for a neck injury after defendant had admitted the compensability of her left hand injury).

This Court addressed this same issue in *Perez*. The plaintiff in *Perez* was employed as a flight attendant and slipped and fell while carrying luggage down a stairway. *Perez*, 174 N.C. App. at 129, 620 S.E.2d at 289. The plaintiff immediately felt pain in her leg, hip, and lower back, and the defendant-employer filed a Form 60 shortly after the incident admitting the compensability of her injury, which was described on the Form 60 as a “Sprain, Strain Lower Back.” *Id.* at 129, 137 n.1, 620 S.E.2d at 289,

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293 n.1. The plaintiff returned to work as a flight attendant for several years before changing careers. *Id.* at 130, 620 S.E.2d at 289.

Approximately four years after the injury, the plaintiff's lower back pain "started to intensify again," and she sought medical treatment for her symptoms. *Id.* The plaintiff sought medical compensation for this treatment from the defendant, which the Commission awarded. *Id.* The defendant-employer appealed, arguing that the plaintiff was not entitled to additional medical compensation because she failed to produce evidence that her current symptoms were causally related to the compensable injury that had occurred four years earlier. *Id.* at 130-31, 620 S.E.2d at 290. Specifically, the defendant-employer contended that the *Parsons* presumption did not apply to the plaintiff because the plaintiff's "herniated disc was a different injury from the injury stated on the Form 60 and, therefore, the admission of compensability does not cover this later and distinct injury." *Id.* at 136 n.1, 620 S.E.2d at 293 n.1. We rejected this argument, explaining that

[t]he presumption of compensability applies to future symptoms allegedly related to the original compensable injury. We can conceive of a situation where an employee seeks medical compensation for symptoms completely unrelated to the compensable injury. *But the burden of rebutting the presumption of compensability in this situation, although slight, would still be upon the employer.*

Id. at 137 n.1, 620 S.E.2d at 293 n.1 (emphasis added).

In the present case, Plaintiff requested additional medical treatment for his anxiety and depression, which he alleged was the result of the 21 April 2010 accident. Plaintiff has been evaluated by several medical and psychological professionals, who expressed differing opinions both as to Plaintiff's veracity in reporting these symptoms and as to whether the psychological complaints were, in fact, causally linked to the 21 April 2010 accident. In its Opinion and Award, the Commission denied Plaintiff additional medical compensation for his anxiety and depression, stating that based on the conflicting testimony of the physicians and psychologists who evaluated him, "Plaintiff has not met his burden of showing that his alleged depression and anxiety is a result of the 21 April 2010 work-related accident."

Thus, it is evident from the Opinion and Award that the Commission did not apply the rebuttable presumption under *Parsons* to Plaintiff's psychological symptoms and instead kept the burden on Plaintiff to demonstrate causation despite Defendant's prior admission of

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compensability in the Form 60. Based on our Court's decisions in *Parsons*, *Perez*, and *Carr*, we hold that doing so was a misapplication of the law. Consequently, we remand this matter to the Commission so that it may apply the *Parsons* presumption and then make a new determination as to whether Plaintiff's psychological symptoms are causally related to the 21 April 2010 injury. See *Reininger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 260, 523 S.E.2d 720, 723-24 (1999) (remanding "this case to the Commission for a new determination of causation" where the Commission's findings indicated that it "failed to give Plaintiff the benefit of the presumption that his medical treatment now sought was causally related to his 1995 compensable injury"); see also *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) ("When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." (citation and quotation marks omitted)).

We express no opinion on the question of whether the evidence of record is sufficient to rebut the presumption that Plaintiff's current complaints are directly related to his initial compensable injury. On remand, it is the role of the Commission to make this determination by evaluating the applicable evidence in order to determine whether the presumption has, in fact, been rebutted. See *Miller v. Mission Hosp., Inc.*, ___ N.C. App. ___, ___, 760 S.E.2d 31, 35 (2014) ("The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury. If the defendant rebuts the *Parsons* presumption, the burden of proof shifts back to the plaintiff." (internal citations and quotation marks omitted)).

II. Disability Benefits

[2] Plaintiff next argues that the Commission erred in concluding that he was no longer entitled to temporary total disability benefits. We agree.

"'Disability,' within the meaning of the North Carolina Workers' Compensation Act, is defined as incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." *Demery v. Perdue Farms, Inc.*, 143 N.C. App. 259, 264, 545 S.E.2d 485, 489 (citation and quotation marks omitted), *aff'd per curiam*, 354 N.C. 355, 554 S.E.2d 337 (2001). Thus, in order for the Commission to conclude that a plaintiff is entitled to disability benefits to compensate him for the loss in wage-earning capacity, it must find

- (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the

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same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

A plaintiff seeking to demonstrate disability may prove these first two elements of disability through several methods, including

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted); see *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 422, 760 S.E.2d 732, 737 (2014) (“[The plaintiff] may prove the first two elements [under *Hilliard*] through any of the four methods articulated in *Russell*, but these methods are neither statutory nor exhaustive. In addition, a claimant must also satisfy the third element, as articulated in *Hilliard*, by proving that his inability to obtain equally well-paying work is because of his work-related injury.”).

Once an employee meets his initial burden of production under *Russell*, the burden shifts to the employer to rebut the evidence of disability by demonstrating “not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.” *Johnson v. S. Tire & Serv.*, 358 N.C. 701, 708, 599 S.E.2d 508, 513 (2004) (citation and quotation marks omitted); see also *Thompson v. Carolina Cabinet Co.*, 223 N.C. App. 352, 360, 734 S.E.2d 125, 129 (2012). Our Supreme Court has explained that a suitable job is “one that is available to the employee and that the employee is capable of performing considering, among other things, his physical limitations” and that an employee is capable of obtaining a suitable job “when there exists a reasonable likelihood that he would be

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hired if he diligently sought the job.” *Johnson*, 358 N.C. at 708-09, 599 S.E.2d at 514 (citations, quotation marks, and ellipses omitted).

Here, the Commission concluded as a matter of law that Plaintiff, who was receiving total disability benefits from Defendant since the date of the 21 April 2010 accident, was no longer entitled to such benefits as of 18 January 2011, the date Defendant filed its Form 33 challenging the totality of Plaintiff’s physical complaints related to his compensable injury. The Commission concluded that Plaintiff had failed to prove disability because he did not demonstrate that he had engaged in a reasonable job search and “presented insufficient evidence that a job search would be futile.”

It is well established that “[t]he determination of whether a disability exists is a conclusion of law that must be based upon findings of fact supported by competent evidence.” *Parker v. Wal-Mart Stores, Inc.*, 156 N.C. App. 209, 212, 576 S.E.2d 112, 113 (2003). In its Opinion and Award, the Commission cited the testimony of Dr. Kurt Voos (“Dr. Voos”), an orthopedic surgeon who examined Plaintiff and — after several follow-up appointments — “authorized Plaintiff to return to work at sedentary duty with permanent restrictions including lifting up to 10 lbs with occasional walking and standing” and then made a factual finding that Plaintiff was “incapable of returning to his previous job but is capable of working in sedentary employment.”

However, the Commission also took note of several of Plaintiff’s personal characteristics that relate to his employability. Specifically, the Commission found that Plaintiff (1) was 60 years old at the time of the hearing; (2) had been employed as a landscaper with Defendant since 2001; (3) had been employed in medium and heavy labor positions throughout his entire adult life; (4) attended school until the tenth grade; (5) was physically incapable of performing his former job as a landscaper/laborer; (6) has “difficulty reading and comprehending” written material as evidenced during his evaluation with Dr. Peter Schulz; and (7) has “an IQ of 65, putting him in the impaired range.”

Plaintiff asserts that this uncontroverted evidence, which the Commission found as fact, was sufficient to meet his initial burden of showing that he was incapable of earning his pre-injury wages because his preexisting personal characteristics made it futile for him to seek sedentary employment — the only type of employment within his physical restrictions. We agree.

As our Supreme Court explained in *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986),

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[i]f preexisting conditions such as the employee's age, education and work experience are such that an injury causes the employee a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the actual incapacity he or she suffers, and not for the degree of disability which would be suffered by someone younger or who possesses superior education or work experience.

It follows where occupational . . . disease [or injury by accident] incapacitates an employee from all but sedentary employment, and because of the employee's age, limited education or work experience no sedentary employment for which the employee is qualified exists, the employee is entitled to compensation for total disability.

Id. at 441, 342 S.E.2d at 808.

We find our decision in *Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 656 S.E.2d 608, *aff'd per curiam*, 362 N.C. 676, 669 S.E.2d 319 (2008), instructive on this issue. In *Johnson*, the plaintiff was a 38-year-old high school graduate who worked for the defendant as a custodian for approximately 15 years before his physician excused him from work after diagnosing him with bilateral carpal tunnel syndrome. *Id.* at 384-85, 656 S.E.2d at 611. In its opinion and award, the Commission concluded that the plaintiff had suffered a compensable injury and demonstrated disability under the first prong of *Russell* by showing he was physically incapable of work in any employment. *Id.* at 389, 656 S.E.2d at 613. The defendant appealed to this Court, and “[w]hile we agree[d] with the Full Commission’s ultimate conclusion that [p]laintiff [was] totally disabled and entitled to temporary total disability benefits,” we concluded that the plaintiff had met his burden of proving disability under the *third* — rather than the *first* — prong of *Russell*. *Id.* That is, we concluded that although the plaintiff was capable of performing some work, his preexisting personal characteristics made a job search futile.

While the defendant argued that the plaintiff had failed to prove that engaging in a job search would be futile, we disagreed, first noting that “the fact that [p]laintiff can perform light-duty work does not in itself preclude the Full Commission from making an award of total disability if the evidence shows that, because of preexisting limitations, [p]laintiff is not qualified to perform the kind of light-duty jobs that might be available in the marketplace” and then explaining that

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the uncontradicted evidence established that [p]laintiff has only a high school education, had been working as a custodian for [d]efendant for almost his entire adult working life, and has a litany of medical problems There was no evidence that [p]laintiff was offered or received any kind of vocational rehabilitation services. Given [p]laintiff's limited education, limited work experience, and limited training, in addition to his poor health, his compensable injury causes him a greater degree of incapacity than the same injury would cause some other person with superior education or work experience, or who is in better health. Thus, all the evidence tends to show that any current effort by [p]laintiff to obtain sedentary light-duty employment, the only employment Dr. DeFranzo testified that [p]laintiff is physically capable of performing, would have been futile.

Id. at 391-92, 656 S.E.2d at 615.

The circumstances of the present case — specifically the fact that Plaintiff has an IQ in the “impaired range” coupled with limited education and training and has been employed for his entire working life in a line of work he is no longer physically capable of performing — are analogous to those in *Johnson*. As we clarified in that case, when determining whether disability exists, “the relevant inquiry is whether *Plaintiff himself* is capable of working and earning wages, not whether all or some persons with Plaintiff's degree of injury have such capacity.” *Id.* at 391, 656 S.E.2d at 614 (emphasis added). Thus, the question before the Commission was whether *Plaintiff* — who is in his sixties and has intellectual limitations, difficulties with reading, and no other job experience outside of physical labor — would be able to obtain a position in sedentary employment.

We conclude that by introducing evidence of these preexisting facts, Plaintiff offered sufficient evidence that engaging in such a job search would be futile so as to shift the burden to his employer “to show that suitable jobs are available and that [he was] capable of obtaining a suitable job taking into account both physical and vocational limitations.” *Thompson*, 223 N.C. App. at 360, 734 S.E.2d at 129 (holding that plaintiff met initial burden concerning futility by producing evidence that he had only completed high school, his work experience was limited to heavy labor jobs, he still suffered substantial pain from his injury, and his work restrictions foreclosed the possibility of performing manual

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labor); *see also Weatherford v. Am. Nat'l Can Co.*, 168 N.C. App. 377, 383, 607 S.E.2d 348, 352-53 (2005) (concluding that plaintiff established futility based on evidence that he was 61, had worked all of his life in maintenance positions, had only a GED, and was restricted from repetitive bending, stooping or walking for more than a few minutes at a time).

Thus, because Plaintiff demonstrated the futility of engaging in a job search and Defendant made no attempt to show that suitable jobs were available to Plaintiff, the Commission erred in ruling that Plaintiff was not temporarily totally disabled. The Commission's conclusions of law reaching the opposite result were not supported by the findings of fact contained within its Opinion and Award. *See White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 670, 606 S.E.2d 389, 398 (2005) (explaining that conclusions concerning existence and extent of disability "must be based upon findings of fact supported by competent evidence").

Defendant attempts to rely on our recent decision in *Fields v. H & E Equip. Servs., LLC*, ___ N.C. App. ___, 771 S.E.2d 791 (2015), in arguing for a contrary result on this issue. In *Fields*, the plaintiff was employed as a mechanic for the defendant for 11 years when he sustained a back injury at work. *Id.* at ___, 771 S.E.2d at 792. The Commission concluded the plaintiff was temporarily totally disabled because "it has been and continues to be futile for him to seek competitive employment that comports with the work restrictions [his doctor] has placed on him." *Id.* at ___, 771 S.E.2d at 794. This Court reversed, holding that the plaintiff did not demonstrate that engaging in a job search would be futile because he "failed to provide competent evidence *through expert testimony* of his inability to find any other work as a result of his work-related injury" *Id.* at ___, 771 S.E.2d at 792 (emphasis added).

Specifically, we stated that the plaintiff

offered no testimony from a vocational expert that his pre-existing condition made it futile to seek any other employment opportunities in his job market. There was no evidence presented of any labor market statistics stating that his pre-existing condition made him incapable of re-entering the labor market. Plaintiff's medical expert did not state that it was impossible for him to work, only that he should not continue in his current role. Without any expert testimony establishing that [p]laintiff's job with [d]efendant is the only job obtainable, or any evidence demonstrating that no other man of his age, education, experience, and physical capabilities is currently working

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anywhere, [p]laintiff did not meet his burden of proof of disability under *Russell* prong three.

Id. at ___, 771 S.E.2d at 795.

While we believe *Fields* is distinguishable from the present case on its facts — given that Plaintiff here lacks transferable skills such as computer proficiency and offered evidence from medical, psychological, and neuropsychological professionals that he is intellectually impaired with a full-scale IQ of 65, a 2.6 grade reading level, borderline nonverbal reasoning skills, and impaired verbal comprehension and processing speed — we take this opportunity to note that our prior caselaw has made clear that “a plaintiff is *not required* to present medical evidence or the testimony of a vocational expert on the issue of futility.” *Thompson*, 223 N.C. App. at 358, 734 S.E.2d at 129 (emphasis added). Therefore, to the extent that the above-quoted language in *Fields* can be read to conflict with our Court’s opinions in *Johnson*, *Thompson*, and *Weatherford* concerning futility, we are obligated to follow these earlier cases. See *Respass v. Respass*, ___ N.C. App. ___, ___, 754 S.E.2d 691, 701 (2014) (“[W]here there is a conflicting line of cases, a panel of this Court should follow the older of those two lines.” (citation and quotation marks omitted)).

Accordingly, we conclude that the evidence establishing Plaintiff’s cognitive limitations, in combination with his age and lack of any other training, adequately demonstrates that searching for employment within his physical restrictions would be futile. See *Peoples*, 316 N.C. at 444, 342 S.E.2d at 809 (“Where . . . an employee’s effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist.”).

Conclusion

For the reasons stated above, we reverse the Commission’s termination of Plaintiff’s total temporary disability benefits, vacate the portion of the Opinion and Award concerning Plaintiff’s request for additional treatment for anxiety and depression, and remand for further proceedings consistent with this opinion.

REVERSED IN PART; VACATED AND REMANDED IN PART.

Judges BRYANT and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 OCTOBER 2015)

ABELLS v. ABELLS No. 15-88	Wilson (09CVD2139)	Affirmed in Part; Remanded in Part
CASTRO v. THOMAS No. 14-1177	Guilford (13CVS5900)	New Trial
DELGADO v. PETRUK No. 15-34	Mecklenburg (13CVS10624)	Dismissed
FAIRCLOTH v. FAIRCLOTH No. 15-179	Rockingham (12CVD1455)	Vacated and Remanded
HARDIN v. HARDIN No. 14-1124	Cumberland (12CVD7133)	Reversed and Remanded in Part
IN RE A.D.B. No. 15-400	Greene (13JT17) (13JT19)	Affirmed
IN RE A.K.L.N. No. 15-429	Caldwell (13JA5)	Affirmed
IN RE C.M.G. No. 15-609	Moore (14JA67)	Affirmed in Part and Reversed in Part
IN RE C.T.M. No. 15-494	Rockingham (10JT147) (13JT41)	Affirmed
IN RE D.L.B. No. 15-531	New Hanover (14JT100)	Affirmed
IN RE J.H. No. 15-398	Harnett (14JA48)	Affirmed
IN RE K.A. No. 15-262	Mecklenburg (13JA253) (13JA254)	Affirmed in Part and Reversed in Part
IN RE M.D. No. 15-432	Cumberland (12JA624) (12JA625) (12JA626)	Affirmed

IN RE M.L.N. No. 15-301	Chatham (12JA41-42)	Vacated and Remanded in Part; Dismissed in Part.
IN RE P.E.B. No. 14-1364	Wake (12JT299-302)	Affirmed
IN RE R.D. No. 15-330	Mecklenburg (12JA150)	Affirmed
IN RE S.V.C. No. 15-359	Forsyth (09JT274-275) (12JT37-38) (13JT141)	Affirmed
IN RE T.F.L. No. 15-114-2	Wilkes (12JT154-156)	Affirmed
IN RE WILL OF FULLER No. 15-125	Guilford (11E1739)	Reversed
IZYDORE v. CITY OF DURHAM No. 14-1378	Durham (09CVS7031)	Affirmed
MORRISON v. WAL-MART No. 15-274	N.C. Industrial Commission (Y13108)	Affirmed
STATE v. ALLEY No. 15-43	Person (09CRS1009) (09CRS52132)	No Error
STATE v. BLACK No. 15-107	Lincoln (08CRS52876-78) (11CRS290) (11CRS292-94)	No error in part; dismissed in part.
STATE v. DAVIS No. 15-220	Rowan (13CRS2645) (13CRS54764)	No Error
STATE v. HACKNEY No. 15-82	Wake (13CRS226535)	No Error
STATE v. KERSEY No. 15-240	Mecklenburg (12CRS217536) (12CRS33966)	No error in part, Vacated and Remanded in Part

STATE v. LAYNE No. 15-98	Wilkes (12CRS53547) (13CRS592)	No Error in Part, Dismissed in Part.
STATE v. McCULLOUGH No. 15-221	Forsyth (13CRS52447) (13CRS5891)	No Error
STATE v. O'NEAL No. 14-1403	Brunswick (12CRS55699)	Affirmed
STATE v. SANCHEZ No. 14-1381	Gaston (13CRS59025)	No Error
STATE v. WILSON No. 15-234	Henderson (11CRS97)	No Error

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POINT SOUTH PROPERTIES, LLC, AND SANCO BUILDERS CORPORATION, PLAINTIFFS
 v.
 CAPE FEAR PUBLIC UTILITY AUTHORITY AND NEW HANOVER COUNTY, DEFENDANTS
 AND
 CB WINDSWEPT, LLC, SELLAR'S COVE, LLC, TELFAIR SUMMIT, LLC, AND CB SNOWS
 CUT LANDING, LLC, PLAINTIFFS
 v.
 CAPE FEAR PUBLIC UTILITY AUTHORITY AND NEW HANOVER COUNTY, DEFENDANTS

No. COA15-371 and 15-374

Filed 20 October 2015

1. Statutes of Limitation and Repose—impact fees—limitation not based on defendants' duty

The claims of plaintiff developers concerning impact fees were not subject to the three-year statute of limitations for a claim based on a liability set out in N.C.G.S. § 1-52(2). Plaintiffs asserted that defendant-public authorities lacked the authority to impose impact fees under N.C.G.S. § 162A-88 and did not ask defendants to provide water or sewer service or complain of defendants' failure to provide service. Although N.C.G.S. § 162A-88 granted defendants the authority to levy fees for water and sewer services furnished or to be furnished, the statute did not impose any duty on defendants or expose them to liability.

2. Statutes of Limitation and Repose—impact fees—not based on contract

Plaintiffs' claims involving impact fees were not barred by the two-year statute of limitations set out in N.C.G.S. § 1-53(1) for an "action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied." Although defendants-public authorities contended that plaintiffs were seeking damages based on an implied contract, plaintiffs were actually contending that defendants lacked authority to impose the impact fees at issue.

3. Statutes of Limitation and Repose—impact fees—catch-all ten-year period

The proper statute of limitations for plaintiffs' action concerning impact fees was the residual or "catch all" ten-year limitation period of N.C.G.S. § 1-56. It was undisputed that plaintiffs filed suit within ten years of their payment of the challenged impact fees and their claims were not barred by the statute of limitations.

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4. Laches—impact fees—no prejudice by delay

Plaintiffs' claims concerning impact fees were not barred by the doctrine of laches where the cases cited by defendants involved equitable relief but plaintiff's claims were legal. Moreover, defendants did not contend that they undertook any expenditures that would not have been otherwise necessary, that their legal position was negatively impacted by the passage of time, or that they were prejudiced by plaintiffs' delay in bringing suit.

5. Public Works—impact fees—no definite plans for property

The trial court did not err in a case involving impact fees by granting summary judgment in favor of plaintiff-developers. There was no evidence that defendant-public utilities ever planned for water and sewer service to be furnished to the subject properties, although the record did demonstrate that defendant-public authorities had stated their intention to extend service to specific locations. If defendants' contention that the documents indicating a generalized goal of extending water and sewer service to unspecified parts of the county at an unspecified time in the indefinite future were sufficient to authorize imposition of impact fees for services "to be furnished," then fees could be imposed whenever a water and sewer board expressed even the vaguest intention to *possibly* extend service at some unspecified time in the future.

6. Public Works—impact fees—source of payments—damages

Summary judgment was properly granted in a case involving impact fees where defendants argued that genuine issues of material fact remained regarding the amount of damages to which plaintiffs could be entitled. Defendants argued that the contested impact fees were paid directly by plaintiff-developers in some cases but in others were paid by a third party; however, defendants did not articulate a defense that would be established by this evidence or cite evidence to support the assertion that the impact fees were passed on to purchasers of homes.

Appeal by defendants from orders entered 23 September 2014 by Judge W. Douglas Parsons in New Hanover County Superior Court. Heard in the Court of Appeals 23 September 2015.

Shipman & Wright, LLP, by William G. Wright and Gary K. Shipman for plaintiffs-appellees.

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Ward and Smith, P.A., by Jeremy M. Wilson and Ryal W. Tayloe for defendants-appellants.

ZACHARY, Judge.

In Court of Appeals Case COA 15-371, Cape Fear Public Utility Authority (CFPUA) and New Hanover County (collectively referred to as defendants) appeal from an order granting summary judgment in favor of Point South Properties, LLC and Sanco Builders Corporation (Point South plaintiffs), on plaintiffs' claims arising from the payment of impact fees assessed by defendants. Similarly, in Court of Appeals Case COA 15-374, the same defendants appeal from summary judgment entered in favor of CB Windswept, LLC; Sellar's Cove, LLC; Telfair Summit, LLC; and CB Snows Cut Landing, LLC (Windswept plaintiffs), on claims arising from plaintiffs' payment of impact fees. Pursuant to the provisions of N.C.R. App. P. 40, the cases were consolidated for oral argument by this Court. Moreover, in that "both appeals involve common questions of law, as evidenced by defendants' decision to submit virtually identical appellate briefs in each case," the Court has consolidated "these appeals for the purpose of rendering a single opinion on all issues properly before the Court." *Putman v. Alexander*, 194 N.C. App. 578, 580, 670 S.E.2d 610, 613 (2009).

On appeal defendants argue that plaintiffs' claims were barred by the statute of limitations and the doctrine of laches, that defendants were entitled to charge water and sewer impact fees to plaintiffs, and that plaintiffs' constitutional claims lack merit. We conclude that plaintiffs' claims were not barred by the statute of limitations or the doctrine of laches, that the trial court properly entered summary judgment for plaintiffs on their claim that defendants' imposition of impact fees was *ultra vires*, and that it is not necessary to reach the merits of plaintiffs' constitutional claims.

I. Factual and Procedural Background

In 1983 New Hanover County created the New Hanover County Water and Sewer District (NHCWSD), which provided water and sewer service in the unincorporated areas of the county. In 1987 NHCWSD established an impact fee policy, pursuant to the terms of which the payment of a water and sewer impact fee was a precondition for a developer to receive a building permit. The rationale for this policy was that "the Water and Sewer District was working to expand out its infrastructure with the goal of providing water and sewer services to everybody throughout the county." In 2007 New Hanover County and the City of

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Wilmington entered into an interlocal agreement and created CFPUA, a water and sewer authority. Pursuant to the agreement creating CFPUA, all assets and liabilities of NHCWSD were transferred to CFPUA. In 2008 CFPUA replaced the previous ordinances of NHCWSD and of the City of Wilmington with a single CFPUA ordinance that did not assess impact fees for developments prior to the time that service was provided.

Plaintiffs are companies engaged in residential development in southern New Hanover County. Between 2003 and 2006, plaintiffs developed certain properties in New Hanover County (the subject properties). In order to obtain the necessary building permits, plaintiffs were required to pay NHCWSD impact fees associated with the provision of water and sewer service. The fees totaled approximately \$238,000 paid by the Point South plaintiffs, and approximately \$220,000 paid by the Windswept plaintiffs.

Aqua North Carolina, Inc., (Aqua) is a private utility company providing water and sewer service in various locations throughout North Carolina. At all times since their construction, Aqua has provided water and sewer service for the subject properties. When plaintiffs were first assessed impact fees, they informed defendants that water and sewer service was provided by Aqua and argued that they should not have to pay the fees because plaintiffs' properties were already served by Aqua and therefore the subject properties would not have any impact on the water or sewer facilities operated by NHCWSD. Defendants would not capitulate and ultimately plaintiffs paid the required fees in order to obtain building permits.

As early as 1976, defendants identified the unincorporated areas in the southern part of New Hanover County as a potential location for expansion of water and sewer service. Accordingly, defendants have included this area, which includes the subject properties, in their long range estimates of possible future demand for water and sewer service. It is undisputed, however, that defendants have never made an official decision to extend water and sewer service to any of the subject properties or taken any steps towards extending water and sewer service in these specific developments.

On 21 November 2012 the Point South plaintiffs filed suit against defendants, seeking the refund of the impact fees plaintiffs had paid, together with interest and attorney's fees. The Point South plaintiffs alleged that defendants' actions in assessing impact fees were *ultra vires* and violated plaintiffs' rights to due process and equal protection under the United States and North Carolina Constitutions. On

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27 December 2012, defendants filed an answer and a motion to remove the Point South plaintiffs' action to the United States District Court for the Eastern District of North Carolina, on the basis of the Point South plaintiffs' inclusion in their complaint of claims arising under the U.S. Constitution. The parties each filed an amended complaint and answer in federal court. Thereafter, the Point South plaintiffs dismissed their federal constitutional claims and moved for remand to state court. On 26 March 2013 the case was remanded to the Superior Court of New Hanover County. On 5 November 2013 the Point South plaintiffs filed their second amended complaint. On 3 January 2014 defendants filed their answer, raising various defenses, including allegations that the Point South plaintiffs' claims were barred by the applicable statute of limitations and the doctrine of laches, and that the impact fees were authorized by statute. The Point South plaintiffs and defendants moved for summary judgment on 21 August 2014 and 27 August 2014, respectively.

On 27 March 2013 the Windswept plaintiffs filed a complaint seeking damages arising from their payment of impact fees, including refund of the payments with interest and attorneys' fees. The Windswept plaintiffs' complaint similarly alleged that defendants' imposition of impact fees was *ultra vires* and violated plaintiffs' rights to due process and equal protection under the North Carolina Constitution. As the Windswept plaintiffs did not assert any claims arising under the federal constitution, the issue of removal to federal court did not arise in connection with their lawsuit. On 5 February 2014 Judge William G. Wright granted the Windswept plaintiffs' motion to amend their complaint. On the same date, the Windswept plaintiffs filed an amended class action complaint on behalf of themselves and others similarly situated. On 6 March 2014 defendants filed an answer denying the material allegations of the Windswept plaintiffs' complaint and asserting various defenses, including the statute of limitations and the doctrine of laches. The Windswept plaintiffs filed a motion for class action certification on 28 March 2014, which was denied by Judge W. Allen Cobb, Jr., on 18 July 2014. The Windswept plaintiffs filed a motion for summary judgment on 21 August 2014 and defendants filed a motion for summary judgment on 27 August 2014.

As discussed above, the procedural histories of the claims filed by the Point South plaintiffs and the Windswept plaintiffs are slightly different, given that the Point South plaintiffs initially brought claims under the federal constitution and the Windswept plaintiffs initially sought class certification. Nevertheless, because the Point South plaintiffs

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voluntarily dismissed their federal claims, and the Windswept plaintiffs did not appeal the denial of their motion for class certification, the parties' summary judgment motions raised the same issues in both cases. Accordingly, on 4 September 2014 the trial court conducted a single hearing on the summary judgment motions of the parties in both cases, at which all plaintiffs were represented by the same law firm. On 23 September 2014 the trial court entered identical orders in both cases granting summary judgment for the plaintiffs in each case. Defendants timely entered notices of appeal from both summary judgment orders. As defendants have raised the same appellate issues in both cases and the plaintiffs have presented the same defenses, in the remainder of this opinion the term "plaintiffs" shall refer to both the Point South plaintiffs and the Windswept plaintiffs.

II. Standard of Review

The standard of review of a trial court's summary judgment order is well-established. Under N.C. Gen. Stat. § 1A-1, Rule 56(c), summary judgment is properly entered "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." " ' In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) [(2013)], and must be viewed in a light most favorable to the non-moving party.' " *Patmore v. Town of Chapel Hill, N.C.*, __ N.C. App. __, __, 757 S.E.2d 302, 304 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (internal citation omitted)), *disc. review denied*, 367 N.C. 519, 758 S.E.2d 874 (2014). "If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision." *Nifong v. C.C. Mangum, Inc.*, 121 N.C. App. 767, 768, 468 S.E.2d 463, 465 (1996) (citing *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989)). "We review trial court orders granting or denying a summary judgment motion utilizing a de novo standard of review." *Davis v. Woodlake Partners, LLC*, __ N.C. App. __, __, 748 S.E.2d 762, 766 (2013) (citing *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008)).

III. Statute of Limitations

[1] Defendants argue initially that plaintiffs' claims are barred by the applicable statute of limitations. We disagree.

We first clarify the nature of the parties' dispute as it relates to the statute of limitations. Defendants assert that plaintiffs' claims are based

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on N.C. Gen. Stat. § 162A-88, which grants defendants the authority to levy fees for water and sewer “services furnished or to be furnished.” Based on their contention that plaintiffs’ claims arise from this statute, defendants assert that plaintiffs’ claims were subject to the three year statute of limitations set out in N.C. Gen. Stat. § 1-52(2) for claims based upon a “liability created by statute.” We conclude, however, that defendants’ position is based upon a misapprehension both of plaintiffs’ complaint and of the provisions of N.C. Gen. Stat. § 162A-88.

Defendants contend that the parties have no disagreement over defendants’ authority to impose the impact fees at issue and that plaintiffs “simply allege that the manner in which Defendants have exercised this statutory authority has resulted in liability.” In addition, defendants maintain that plaintiffs have claimed that defendants “acted improperly under these statutes by not actually providing sewer service to the Properties.” Defendants do not cite a basis in the record evidence for this contention. Our own review of plaintiffs’ complaint reveals that plaintiffs assert that defendants lacked the authority to impose impact fees under N.C. Gen. Stat. § 162A-88, and that in their complaint plaintiffs do *not* ask defendants to provide water or sewer service, or complain of defendants’ failure to provide service. Moreover, at the hearing on the parties’ summary judgment motions, plaintiffs’ counsel stated that:

[Defense counsel] says that we are alleging that there is some implied obligation to provide services within a designated period of time. Hear me again loud and clear, we’re not alleging that at all. We’re alleging that they levied these fees without authority, period. We don’t want them to provide service. We don’t need them to provide service. So, we’re not alleging that there’s some obligation to provide service, we’re saying they had no authority to extract the fees.

We conclude that plaintiffs neither conceded defendants’ authority to levy the impact fees at issue nor based their claims on defendants’ failure to provide water and sewer service for the subject properties, and that plaintiffs do not contend that defendants breached a duty owed under N.C. Gen. Stat. § 162A-88. Instead, it is defendants who raise the statute as a defense to plaintiffs’ claims, by arguing that the impact fees were authorized under N.C. Gen. Stat. § 162A-88.

In support of their position that the three year statute of limitations in N.C. Gen. Stat. § 1-52(2) applies to the instant case, defendants cite several cases in which the plaintiff sought to recover damages based on

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a statute that established the defendant's alleged liability. For example, defendants cite *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 506, 398 S.E.2d 586, 593 (1990), *rehearing denied*, 328 N.C. 336, 402 S.E.2d 844 (1991), in which the plaintiffs sought damages under N.C. Gen. Stat. § 143-215.93, which provides in part that “[a]ny person having control over oil or other hazardous substances which enters the waters of the State . . . shall be strictly liable, without regard to fault, for damages to persons or property, public or private, caused by such entry[.]” In *Wilson*, our Supreme Court held that the plaintiffs’ “statutory claim based on N.C.G.S. § 143-215.93 is barred by the statute of limitations found in N.C.G.S. § 1-52(2)[.]” Defendants contend that because plaintiffs’ claims are based on N.C. Gen. Stat. § 162A-88, plaintiffs are therefore seeking recompense based on a “liability created by statute.” Although N.C. Gen. Stat. § 162A-88 grants defendants the authority to levy fees for water and sewer “services furnished or to be furnished,” the statute does not impose any duty on defendants, or expose them to liability. Accordingly, the cases cited by defendants are clearly distinguishable from the instant case.

We conclude that plaintiffs’ claims are not based upon defendants’ alleged breach of a duty or liability established by N.C. Gen. Stat. § 162A-88 and that the statute itself does not expose defendants to liability. Therefore, we hold that plaintiffs’ claims are not subject to the three year statute of limitations for a claim based on a liability created by statute.

[2] Defendants also assert, in the alternative, that plaintiffs’ claims are barred by the two year statute of limitations set out in N.C. Gen. Stat. § 1-53(1) for an “action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied.” Defendants allege that plaintiffs are seeking damages based on an “implied” contract, and assert that “[p]laintiffs apparently attempt to argue that NHCWSD was obligated to immediately provide them with sewer services.” Defendants do not cite to any allegations of plaintiffs’ complaint for their position, and we conclude that plaintiffs do not maintain that defendants were obligated to provide them with water and sewer service either “immediately” or within some other time limit, but that defendants lacked authority to impose the impact fees at issue. Defendants’ argument that plaintiffs’ claims are subject to the two year statute of limitations for an action arising under a contract is without merit.

[3] Plaintiffs contend that the ten year statute of limitations set out in N.C. Gen. Stat. § 1-56 applies to their claims. N.C. Gen. Stat. § 1-56 provides that “[a]n action for relief not otherwise limited by this subchapter may not be commenced more than 10 years after the cause of action has accrued.” Plaintiffs argue that, because no other statute establishes the

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statute of limitations for their claim, the residual or “catch all” period of ten years set out in N.C. Gen. Stat. § 1-56 applies. We agree.

Plaintiffs cite *Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 698 S.E.2d 404 (2010), which applied the ten year statute of limitations in N.C. Gen. Stat. § 1-56 to the plaintiffs’ claim for damages arising from payments of allegedly *ultra vires* impact fees, with Judge Jackson dissenting on the basis that plaintiffs’ appeal was interlocutory. Upon appeal of *Amward Homes* to our Supreme Court, during which time Justice Jackson was seated on the Supreme Court and did not take part in the consideration of this case, in *Amward Homes, Inc. v. Town of Cary*, 365 N.C. 305, 716 S.E.2d 849 (2011), the Supreme Court stated that the remaining members of the Court were equally divided and that “[a]ccordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.” *Amward*, 365 N.C. at 306, 716 S.E.2d at 850. As a result, this Court’s holding in *Amward* does not constitute binding precedent.

Plaintiffs also direct our attention to *Tommy Davis Constr., Inc. v. Cape Fear Pub. Utility Authority*, 2014 U.S. Dist. LEXIS 92449 (E.D.N.C. July 7, 2014), in which the federal district court for the Eastern District of North Carolina granted summary judgment in favor of the plaintiff. In *Tommy Davis*, which is very similar to the case at hand, the plaintiff real estate developer sued the current defendants for damages based on plaintiff’s payment of impact fees. In the opinion, which discusses the same issues raised in the present appeal, the court held that the statute of limitations for the plaintiff’s claims was ten years. Although neither *Amward* nor *Tommy Davis* constitutes binding precedent, we agree with the holdings of these cases that the proper statute of limitations is ten years. It is undisputed in the case at bar that plaintiffs filed suit within ten years of their payment of the challenged impact fees, and we conclude that plaintiffs’ claims are not barred by the statute of limitations.

IV. Laches

[4] Defendants also argue that plaintiffs’ claims are barred by the doctrine of laches. “We [have] previously held, ‘laches is an equitable defense and is not available in an action at law.’ When a ‘[p]laintiff’s claims are legal in nature, not equitable[,]’ laches cannot support judgment for the defendant.” *Cater v. Barker*, 172 N.C. App. 441, 448, 617 S.E.2d 113, 118 (2005) (quoting *City-Wide Asphalt Paving, Inc. v. Alamance County*, 132 N.C. App. 533, 537, 513 S.E.2d 335, 338, *disc. rev. denied and appeal dismissed*, 350 N.C. 826, 537 S.E.2d 815 (1999)

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(internal citations omitted)), *aff'd*, 360 N.C. 357, 625 S.E.2d 778 (2006). In the cases cited by defendants, the plaintiffs sought injunctive or other equitable relief, while in this case plaintiffs' claims are legal rather than equitable. Therefore, the doctrine of laches is not applicable to this case.

Moreover, defendants have failed to produce evidence that they were prejudiced by plaintiffs' delay in bringing suit. Defendants assert that they invested the impact fees "into expansion of wastewater service capacity in order to, in part, eventually provide services to communities in southern New Hanover County." It is undisputed, however, that defendants' proposed expansion of wastewater service capacity remains at the planning stage, and that expansion is required without regard to whether or not the subject properties are ever serviced by defendants. Defendants contend that their calculation of projected needs included reference to the subject properties, but have failed to articulate any prejudice arising from inclusion in planning documents of a figure representing the subject properties. Defendants do not contend that they undertook any expenditures that would not have been otherwise necessary, or that their legal position has been negatively impacted by the passage of time. We conclude that plaintiffs' claims are not barred by the doctrine of laches.

V. Authority to Impose Impact Fees

[5] Defendants argue that the trial court erred by granting summary judgment for plaintiffs, on the grounds that defendants' imposition of impact fees was authorized by N.C. Gen. Stat. § 162A-88, which provides in relevant part that:

The inhabitants of a county water and sewer district created pursuant to this Article are a body corporate and politic . . . [and] may establish, revise and collect rates, fees or other charges and penalties for the use of or [for] the services furnished or to be furnished by any sanitary sewer system, water system or sanitary sewer and water system of the district[.] . . .

Defendants contend that the impact fees were for services "to be furnished." We disagree, and conclude that plaintiffs produced uncontradicted evidence establishing that defendants could not present a *prima facie* case that defendants have ever decided or planned for water and sewer service "to be furnished" to the subject properties. Defendants have not responded to plaintiffs' evidence with any evidence demonstrating a genuine issue of material fact, making entry of summary judgment for plaintiffs proper in this case.

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As a preliminary matter, we again spell out the nature of the parties' dispute, this time as it relates to defendants' authority to assess the impact fees at issue. At the hearing on this matter and in their appellate brief, defendants characterize their dispute with plaintiffs as an issue of whether defendants have been sufficiently prompt in arranging to extend water and sewer service to the subject properties. For example, defendants state in their appellate brief that "Plaintiffs contend that NHCWSD's actions were *ultra vires* because NHCWSD charged impact fees for properties that would not immediately be connected to its wastewater system." Plaintiffs' complaint, however, does not fault defendants for failing to "immediately" extend water and sewer service to the subject properties, or allege that it is the timeline of defendants' actions that renders the impact fees *ultra vires*. Rather, plaintiffs assert in their complaint that imposition of the impact fees was "beyond the statutory authority of the Defendants and any of their predecessors in interest," and assert in their appellate brief that the "Impact Fees were *ultra vires* as the fees assessed to Plaintiffs were neither for services that were furnished nor to be furnished." We conclude that the issue before us is not, as defendants have urged, whether defendants were required to "immediately" extend water and sewer service to plaintiffs after assessment of impact fees. Rather, we must decide whether there is evidence from which it might reasonably be found that defendants have ever evidenced a commitment to extending water and sewer service to the subject properties, regardless of the timeline.

The record demonstrates that defendants previously have stated their intention to extend service to specific locations and have set out a target timeline for doing so. For example, the 9 June 2010 CFPUA minutes includes the following:

Mr. Fletcher provided an overview of [CFPUA's] anticipated CIP [Capital Improvement Program] through FY [Fiscal Year] 2018. Water CIP was summarized as follows:

In Fiscal Year 2011, Porters Neck customers will be added and plans for the extension of a water line down 23rd Street to Castle Hayne Road will begin.

In Fiscal Year 2012, extensions are planned for Bald Eagle Lane, and bulk sales should be underway with Pender County and Figure 8 Island. The distribution system along Kerr Avenue will be continued. FY2012 includes plans to extend water service down Carolina Beach Road to the South. . . .

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In Fiscal Year 2013, . . . [the] Authority plans to expand into the Middle Sound area[.] . . . Extensions will continue in the Southern part of the County and along River Road.

In Fiscal Year 2014, the Sweeny plant expansion will be completed . . . [and the] Authority plans to extend service into the Bayshore area.

No new growth is anticipated for Fiscal Years 2015 and 2016. In Fiscal Year 2017, additional growth is expected in the Porters Neck area and along Castle Hayne road. In Fiscal Year 2018, the Authority expects to continue building the system in the Northern part of the County.

The wastewater CIP was summarized as follows:

In Fiscal Year 2011 . . . [through] 2013, the Authority will address pump station upgrades[.] . . .

In Fiscal Year 2014, the Authority expects to work closely with the New Hanover County Health Department to address failing septic systems in the Southern part of the County. No new expansion is anticipated for Fiscal Years 2015 and 2016.

In Fiscal Year 2017, . . . [the Authority will] continue to increase pump station capacity.

In Fiscal Year 2018, the Authority expects to extend wastewater services in the Heritage Park, Wrightsboro and Prince George Estates areas.

Defendants do not allege that their capital improvement plan includes any specific commitment to extend water and sewer service to any of the developments that comprise the subject properties. Given that these plans extend through Fiscal Year 2018, it appears that the CFPUA has no plans in the foreseeable future to extend service to the subject properties.

Moreover, at all times since their construction, water and sewer service for the subject properties has been provided by Aqua, and the defendants do not have the authority to condemn Aqua's property. N.C. Gen. Stat. § 40A-5, entitled "Condemnation of property owned by other condemnors," provides that a public condemnor, as defined in N.C. Gen. Stat. § 40A-3, "may condemn the property of a private condemnor if such property is not in actual public use or not necessary to the operation of the business of the owner." N.C. Gen. Stat. § 40A-5(b). Under N.C.

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Gen. Stat. § 40A-42(c), if a public condemnor such as CFPUA attempts to condemn

property [that] is owned by a private condemnor, the vesting of title in the condemnor and the right to immediate possession of the property shall not become effective until the superior court has rendered final judgment (after any appeals) that the property is not in actual public use or is not necessary to the operation of the business of the owner, as set forth in G.S. 40A-5(b).

In this case, it is undisputed that Aqua has continuously provided water and sewer service and, as a result, that the property owned by Aqua is both in actual use and “necessary to the operation of the business of the owner.” Therefore, defendants do not have the authority to exercise the right of eminent domain in order to condemn Aqua’s property for their own use. In addition, the uncontroverted affidavit of Thomas J. Roberts, the president and Chief Operating Officer of Aqua, avers in relevant part that, as regards the Point South plaintiffs:

4. In 2005, Aqua North Carolina, Inc. was granted a Certificate of Public Convenience and Necessity for several subdivisions in southern New Hanover County, including Willow Glen at Beau Rivage subdivision and Point South Apartment complexes.

...

6. Aqua North Carolina, Inc. has entered into sewer and water agreements with the developers of Willow Glen at Beau Rivage subdivision and Point South Apartment complexes and provides sewer and water service to the subdivision and apartment complexes.

7. To the best of my knowledge and belief no other entity, including the New Hanover County Water & Sewer District or the Cape Fear Public Utility Authority furnished any water or sewer services to Willow Glen at Beau Rivage subdivision and Point South Apartment complexes since their creation and construction.

8. To the best of my knowledge and belief no other entity, including the New Hanover County Water & Sewer District or the Cape Fear Public Utility Authority currently furnishes any water or sewer services to Willow Glen at Beau Rivage subdivision and Point South Apartment complexes.

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9. Aqua North Carolina, Inc.'s intent and plan is to continue to provide water and sewer services to Willow Glen at Beau Rivage subdivision and Point South Apartment complexes and other subdivisions in southern New Hanover County, north of Snow's Cut in accordance with the terms and provisions of its tariff. Aqua North Carolina, Inc. has no current intent or plans to abandon or sell those services and infrastructure and would not anticipate taking any such action for the foreseeable future.

10. I have informed the Cape Fear Public Utility Authority of Aqua North Carolina, Inc.'s intent and plan as stated above.

11. Aqua North Carolina, Inc. has never been presented with any offer from the Cape Fear Public Utility Authority to purchase Aqua North Carolina, Inc.'s services or infrastructure in southern New Hanover County.

Mr. Roberts also executed an affidavit in regards to the Windswept plaintiffs, which was essentially identical except for the names of the relevant subdivisions. Thus, the uncontradicted record evidence establishes that Aqua has always provided water and sewer service to the subject properties, intends to continue providing water and sewer service, and that defendants have never contacted Aqua about purchasing the right to extend service to the subject properties.

To summarize, the uncontradicted record evidence shows that at the time that defendants required plaintiffs to pay impact fees and at all times since then, the following circumstances have existed:

1. Since 1976 defendants have represented that they have a generalized long range plan to expand water and sewer service to the southern part of New Hanover County, where the subject properties are located.
2. Although defendants have stated their intention to extend water and sewer service to other specific locations within a projected timeframe, defendants have never expressed any decision or official commitment to expand service to any of the subject properties.
3. At all times, the water and sewer service for the subject properties have been provided by Aqua, and defendants have never announced an official decision to take

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concrete steps towards replacing Aqua as the water and sewer service provider for these properties.

5. Defendants have not contacted Aqua about purchasing Aqua's infrastructure or entered into negotiations or communications with Aqua about this possibility.

6. Defendants have never stated a timeline, or even an aspirational target year, for provision of service to any of the subject properties.

We conclude that there is no evidence in the record that defendants have ever planned for water and sewer service "to be furnished" to the subject properties. We hold that under these factual circumstances defendants have failed to show any evidentiary basis for their contention that the fees were for service "to be furnished."

If we were to accept defendants' contention that the documents indicating a generalized goal of extending water and sewer service to unspecified parts of New Hanover County at an unspecified time in the indefinite future are sufficient to authorize imposition of impact fees for services "to be furnished," then fees could be imposed whenever a water and sewer board expressed even the vaguest intention to *possibly* extend service at some unspecified time in the future. This would be an absurd result, and it is well established that:

"The Court will not adopt an interpretation which resulted in injustice when the statute may reasonably be otherwise consistently construed with the intent of the act. Obviously, the Court will, whenever possible, interpret a statute so as to avoid absurd consequences."

Sutton v. Aetna Casualty & Surety Co., 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989) (quoting *Insurance Co. v. Chantos*, 293 N.C. 431, 440, 238 S.E.2d 597, 603 (1977)).

This Court's holding that defendants have failed to show that impact fees were assessed for water and sewer service "to be furnished" is based solely upon the specific facts of this case, in which defendants produced *no* evidence that they had ever made a decision to furnish water and sewer service to the subject properties, and had taken *no* steps towards extending service to these locations. Accordingly, this Court expressly declines to state any criteria, guidelines, or standards for determination of whether the evidence in a particular case is adequate to support assessment of impact fees for services "to be furnished."

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Moreover, it is noted that in *McNeill v. Harnett County*, 327 N.C. 552, 570, 398 S.E.2d 475, 485 (1990), our Supreme Court held “that the provisions of N.C.G.S. § 162A-88 authorizing user fees for services ‘to be furnished’ [are] not limited to the financing of maintenance and improvements of existing customers.” In *McNeill*, however, there was no question that sewer service would be provided to the plaintiffs. On the facts of this case, we agree with the analysis in *Tommy Davis*, which distinguished *McNeill* and stated that:

[D]efendants in the instant matter have been developing “plans” to provide water and sewer services to the southern portion of New Hanover County, which includes [the subject properties], since 1976. As plaintiff points out, these plans are at best vague, and some plans even indicate that water and sewer services will not need to be provided by the government because service is already available through Aqua NC. Defendants have not taken concrete steps to actually provide water and sewer services to [the subject properties]. As of the time of filing the instant motions, Aqua NC continued to provide services to [the properties], eight years after plaintiff paid the impact fees, and Aqua NC intends to continue to provide those services. Aqua NC is unaware of any plan by any other entity, including defendants, to ever provide water and sewer services to [the subject properties] or any other areas in southern New Hanover County that are serviced by Aqua NC. Because no clear steps have been taken over the past decade since [the properties were] first permitted for defendants to provide water and sewer services, the assessment of impact fees was not a reasonable exercise of defendants’ powers, but an *ultra vires* act beyond their statutory authority.

Tommy Davis, 2014 U.S. Dist. LEXIS 92449 at *9. We conclude that plaintiffs produced evidence showing that defendants could not make a *prima facie* case that the impact fees were properly imposed for water and sewer service “to be furnished,” and that defendants failed to produce evidence to rebut plaintiffs’ showing. As a result, the trial court did not err by granting summary judgment in favor of plaintiffs.

In reaching this conclusion, we have rejected defendants’ arguments urging us to reach a contrary result. Defendants direct our attention to N.C. Gen. Stat. § 153A-4, which states that:

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It is the policy of the General Assembly that the counties of this State should have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.

Nonetheless, “[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.” *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted). The language of N.C. Gen. Stat. § 162A-88 is clear and unambiguous:

Section 153A-4 does state that any legislative act affecting counties should be “broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.” N.C. Gen. Stat. § 153A-4 [(2013)]. . . . But, in conjunction with our general rules of statutory construction, only if there is an ambiguity in a statute found in chapter 153A should section 153A-4 be part of the courts’ interpretative process. If, however, the statute is clear on its face, the plain language of the statute controls and section 153A-4 remains idle.

Durham Land Owners Ass’n v. County of Durham, 177 N.C. App. 629, 633-34, 630 S.E.2d 200, 203, *disc review denied*, 360 N.C. 532, 633 S.E.2d 678 (2006). We conclude that N.C. Gen. Stat. § 153A-4 is not applicable to the present case.

Defendants also contend that their assessment of impact fees was authorized under local ordinances. Assuming, without deciding, that the local ordinances cited by defendants might grant a broader right to impose impact fees than is allowed under N.C. Gen. Stat. § 162A-88, N.C. Gen. Stat. § 162A-19 provides that “[a]ll general, special or local laws, or parts thereof, inconsistent herewith are hereby declared to be inapplicable to the provisions of this Article.” We conclude that defendants cannot rely upon a local ordinance to extend the right to assess impact fees beyond what is allowed under N.C. Gen. Stat. § 162A-88.

Defendants have also filed a Memorandum of Additional Authority citing this Court’s unpublished opinion in *Quality Built Homes Inc. v. Town of Carthage*, 2015 N.C. App. LEXIS 656 (N.C. Ct. App. Aug. 4, 2015). “An unpublished opinion ‘establishe[s] no precedent and is not

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binding authority[.]” *Long v. Harris*, 137 N.C. App. 461, 470, 528 S.E.2d 633, 639 (2000) (quoting *United Services Automobile Assn. v. Simpson*, 126 N.C. App. 393, 396, 485 S.E.2d 337, 339, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 37 (1997)). Furthermore, the primary issue in *Quality Built Homes* was whether the Town of Carthage was authorized to impose fees for service “to be furnished,” and the case did not address the question of whether the assessment of impact fees was a reasonable exercise of governmental authority under circumstances similar to those presented in this appeal to this Court. We conclude that *Quality Built Homes* does not indicate that we should reach a different result in the present case.

[6] Finally, defendants argue in their appellate brief that “genuine issues of material fact remain regarding the amount of damages to which plaintiffs may be entitled.” This argument is without merit.

Plaintiffs produced records in discovery detailing the impact fees that were assessed against them, and defendants do not dispute the accuracy of the amounts stated in these records. Defendants’ designee, Mr. Frank Styers, CFPUA’s Chief Operating Officer, acknowledged in his deposition that these documents were defendants’ business records and accurately set out the impact fees at issue. Thus, defendants do not challenge plaintiffs’ contentions regarding the amounts that were paid. Instead, defendants argue that a genuine issue of material fact arises from the fact that in some instances plaintiffs paid the fees directly, while in other instances the fees were initially paid by a builder or other third party who was then reimbursed by plaintiffs. “An issue is ‘genuine’ if it can be proven by substantial evidence and a fact is ‘material’ if it would constitute or irrevocably establish any material element of a claim or a defense.” *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citation omitted). Defendants do not articulate a defense to plaintiffs’ claims that would be established by evidence that plaintiffs paid some of the impact fees directly and others as reimbursement to a builder. Defendants also assert, without citation to any evidence, that plaintiffs may have increased the sale price of the subject properties or “passed on” the impact fees to purchasers of homes. Defendants’ contention in this regard is mere speculation. In addition, defendants do not argue that the legal relationship of the parties would be affected if, as defendants allege, plaintiffs included their expenses, including impact fees, in their calculation of the price at which properties were sold. We conclude that defendants have failed to demonstrate that a genuine issue of material fact exists that made it improper for the trial court to award summary judgment in favor of plaintiffs.

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We have held that the trial court did not err by granting summary judgment for plaintiffs on their claim that, on the facts of this case, defendants' imposition of impact fees was *ultra vires* and beyond their authority, and for recovery of plaintiffs' damages resulting therefrom. Having reached this conclusion, we have no need to address the parties' arguments regarding plaintiffs' claims under the North Carolina Constitution. We hold that the trial court did not err and that its order should be

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

 DONALD G. MILLER, PLAINTIFF

v.

MELINDA L. MILLER (NOW CROWELL), DEFENDANT

No. COA15-309

Filed 20 October 2015

1. Divorce—excess payment—post-separation support—income

The amount plaintiff paid in excess of his legal obligation for post-separation support was income in excess of plaintiff's obligation rather than post-separation support or alimony, neither of which should have been considered by the trial court. The trial court did not violate N.C.G.S. § 50-20 by considering in its equitable distribution award the income plaintiff paid to defendant in excess of his court-ordered obligation to pay post-separation support.

2. Divorce—excess payment—post-separation support—alimony

In an equitable distribution action where plaintiff had overpaid his post separation obligation and defendant argued that the overpayment should have been reserved for her pending alimony claim, the extent to which defendant's estate was affected by the judgment on equitable distribution could be a factor for argument in determining alimony.

3. Witnesses—expert—calculation corrected on eve of trial—new calculation excluded—old calculation not reliable

The trial court did not abuse its discretion in an equitable distribution action when it excluded the first of two reports from the

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same expert valuing the parties' physical therapy business and the expert's opinion testimony. In the original report, the expert failed to factor in certain taxes but corrected the report upon realizing the mistake; however, the opposing party received the corrected report on the eve of trial and it was excluded. The original report was unreliable and not helpful to the finder of fact.

Appeal by defendant from order entered 8 September 2014 by Judge Jane V. Harper in Cleveland County Superior Court. Heard in the Court of Appeals 22 September 2015.

Tison Redding, PLLC by Joseph R. Pellington and David G. Redding, for plaintiff-appellee.

The Jonas Law Firm, P.L.L.C., by Johnathan L. Rhyne, Jr. and Rebecca J. Yoder, for defendant-appellant.

TYSON, Judge.

Melinda L. Miller (now Crowell) ("Defendant") appeals from the trial court's judgment on equitable distribution. We affirm.

I. Background

Plaintiff and Defendant married in 2004 and separated on 29 March 2009. No children were born of the marriage. Plaintiff is a licensed physical therapist. In 1996, he founded Cleveland Physical Therapy Associates ("CPTA"). Prior to the marriage, Plaintiff transferred seven percent of the stock in CPTA to his younger brother, and retained the remaining ninety-three percent of the stock. Plaintiff transferred ten percent of CPTA's stock to Defendant during their marriage.

Defendant began working at CPTA shortly after the parties married. Her duties included, but were not limited to, administrative tasks and maintaining accounts receivables. Defendant served as Executive Vice President of Operations for CPTA from 2004 until 2010. Defendant continued to work for CPTA for approximately six months after the parties separated. She continued to perform certain tasks for the company from her home office. In October 2009, Defendant's employment ceased pursuant to agreement between the parties.

On 18 April 2011, Plaintiff filed a complaint seeking divorce and equitable distribution. Defendant filed an answer and counterclaim seeking divorce from bed and board, post-separation support, alimony and equitable distribution.

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On 10 May 2012, Judge Meredith A. Shuford entered an order addressing Defendant's claim for post-separation support. The court found Plaintiff had voluntarily kept Defendant on CPTA's payroll from March 2009 through April 2012, after the separation, rather than individually paying her post-separation support. The court found the payments made by CPTA to Defendant were for spousal support.

The court further found Plaintiff was paid her normal salary of \$8,333.33 per month, totaling \$100,000.00 per year, through October 2011. From November 2011 through April 2012, CPTA decreased her income by fifteen percent. After the parties separated, CPTA continued to pay Defendant monthly payments in the aggregate of \$281,227.88. CPTA additionally paid Defendant's health insurance, car payments, and miscellaneous other expenses totaling \$53,804.18. Judge Shuford found the total value of the income from Plaintiff and CPTA to Defendant between March 2009 and April 2012 was \$335,032.06.

The court found: (1) Defendant was entitled to post-separation support from March 2009 through April 2012 in the amount of \$4,700.00 per month; (2) the total obligation over that time period is \$178,600.00; and, (3) Defendant had received income in excess of Plaintiff's obligation for post-separation support. The court concluded "[P]laintiff is entitled to a credit against the award for the voluntary payments that were made by [CPTA]."

The parties' equitable distribution claims were heard before the trial court on three dates in March and June 2014. The trial court entered judgment on 8 September 2014. With regard to Plaintiff's "overpayment" of post-separation support to Defendant, the court found:

152. The distributional factor of excessive compensation paid to Defendant, post-separation, relates to Judge Shuford's Post-Separation Support Order from May 2012. Judge Shuford found that payments to Defendant (salary and other benefits) totaled \$335,032.00 between March 2009 and April 2012. Plaintiff's post-separation support obligation during the same period was found to be \$178,600.00.

153. While Judge Shuford's order does not quantify the excess income paid to Defendant, subtraction of the lower from the higher figures shows it to be \$156,432.00.

154. Plaintiff exceeded his post-separation support obligation to Defendant in the amount of \$156,432.00.

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155. Judge Shuford concluded that Plaintiff is “entitled to a credit against the award for the voluntary payments that were made by the company.” Judge Shuford did not specify whether the credit should be applied toward any distributional award to Defendant from the Equitable Distribution case or toward Defendant’s alimony claim, which is still pending.

156. Plaintiff’s overpayment of post-separation support to the Defendant should be applied as a distributional factor in Plaintiff’s favor[.]

The court found an equal distribution would not be equitable, and Defendant should receive a greater share of the marital estate than Plaintiff. The court ruled an equitable, unequal distribution in Defendant’s favor required a distributive award of \$138,216.00 to Defendant. The court further found, “[h]alf of the credit from Judge Shuford’s order – \$78,216.00 – should be immediately applied toward the distributive award, reducing the total distributive award [to Defendant] to \$60,000.00.” The court set guidelines for Plaintiff’s payment of the \$60,000.00 to Defendant, as follows:

- a. Payment of the \$60,000.00 distributive award shall be deferred for one year from the entry of this Order.
- b. If within one year from the entry of this Order, Defendant fails to prosecute her claim for alimony OR Defendant’s claim for alimony fails OR Defendant’s claim for alimony is dismissed, the entire credit from Judge Shuford’s Order – \$156,432.00 – shall be applied toward the \$60,000.00 distributive award in equitable distribution, resulting in Plaintiff owing nothing to Defendant. For purposes of the this paragraph, the phrase ‘claim for alimony fails’ means that Defendant prosecutes her claim but that Plaintiff is not ordered to pay Defendant any amount of alimony and should include, but not be limited to, the circumstance whereby the court finds Plaintiff has already satisfied his spousal support obligation to Defendant.
- c. If within one year from the entry of this Order, Defendant prosecutes her claim for alimony AND Plaintiff is ordered to pay Defendant some amount of alimony, the amount of alimony Plaintiff is ordered to pay Defendant should be offset by the remaining credit of \$78,216.00.

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For example, if the total award of alimony is \$90,000.00, Plaintiff shall be ordered to pay Defendant a total alimony award of \$11,784.00 ($\$90,000.00 - \$78,216.00 = \$11,784.00$), as well as the \$60,000.00 distributive award in equitable distribution. If the total award of alimony to Defendant does not exceed the credit of \$78,216.00, then the credit shall first be applied against the alimony award and the difference between the credit (a higher amount) and the amount Plaintiff is ordered to pay in alimony (a lower amount) should next be applied against the distributive award in equitable distribution. For example, if the total award of alimony is \$40,000.00, then the credit of \$78,216.00 should first be applied against the alimony award, reducing the alimony award to zero. The remaining credit amount of \$38,216.00 ($\$78,216.00 - \$40,000.00 = \$38,216.00$) should next be applied against the distributive award of \$60,000.00, resulting in Plaintiff owing Defendant \$21,784.00 as a distributive award in equitable distribution.

(emphasis in original).

Defendant appeals from the trial court's determination of equitable distribution.

II. Issues

Defendant argues the trial court erred by: (1) considering post-separation support as a distributional factor and by ordering a credit pending the outcome of her pending alimony claim; and, (2) excluding Defendant's expert's testimony and report from evidence.

III. Credit for Overpayment of Post-Separation Support

A. Standard of Review

[1] "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). An abuse of discretion will be found only (1) "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) (citation omitted), or (2) when "the trial judge failed to comply with the statute." *Wiencek-Adams*, 331 N.C. at 691, 417 S.E.2d at 451.

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B. Analysis

N.C. Gen. Stat. § 50-20 governs the distribution of marital and divisible property. “Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of [the statute].” N.C. Gen. Stat. § 50-20(a) (2013). The court shall determine the net values of the marital property and the divisible property and divide the property equally between the parties unless, as the court determined in this case, an equal division is not equitable. N.C. Gen. Stat. § 50-20(c) (2013). The statute lists twelve factors for the court’s consideration to determine whether an equal division of the property is equitable. *Id.* Here, the trial court found Defendant should receive a greater share of the net marital estate.

Under the statute, “[d]istributive award’ means payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance which are treated as ordinary income to the recipient under the Internal Revenue Code.” N.C. Gen. Stat. § 50-20(b) (3) (2013). The statute further provides, “[t]he court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties.” N.C. Gen. Stat. § 50-20(f) (2013)

In the unchallenged and binding post-separation support order, Judge Shuford found Plaintiff had paid Defendant \$156,432.00 more than Defendant was entitled to receive as post-separation support. In the subsequent equitable distribution order, the court found that Judge Shuford’s post-separation support order “[does] not specify whether the credit should be applied toward any distributional award to Defendant from the Equitable Distribution case or toward Defendant’s alimony claim, which is still pending.” The court found an unequal distribution in Defendant’s favor was equitable, and would require a distributive award of \$138,216.00. The trial court used half of Plaintiff’s \$156,432.00 “credit” to immediately offset the distributive award, and retained the remaining half as potential credit to Plaintiff if Defendant failed to prosecute her pending alimony claim, or her alimony claim failed. Due to the court’s inclusion of the overpayment credit as a distributional factor, Defendant received \$78,216.00 less than the court determined her distributive award to be. This amount may be further reduced based upon the outcome of her alimony claim.

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Defendant argues the overpayment of post-separation support is not divisible property pursuant to N.C. Gen. Stat. § 50-20, and the court's application of the credit to offset Plaintiff's obligation under the distributive award violates the statute. We disagree.

The parties agree that it would be error for the court to consider Plaintiff's obligation for post-separation support as a distributional factor in equitable distribution. Judge Shuford found Defendant was entitled to receive \$178,000.00 in post-separation support. Pursuant to N.C. Gen. Stat. §§ 50-20(b)(3) and (f), it would have been error for the trial court to consider that \$178,000.00 in its equitable distribution order.

Plaintiff had paid Defendant \$156,432.00 in excess of his legal obligation for post-separation support. This amount, considered by the court in its equitable distribution order, was not post-separation support or alimony. It was, as Judge Shuford found as fact, "*income in excess of [P]laintiff's obligation for post-separation support.*" (emphasis supplied).

Precedents from our Court are instructive on this issue. In *Morris v. Morris*, 90 N.C. App. 94, 98, 367 S.E.2d 408, 411 (1988), *overruled on other grounds by Armstrong v. Armstrong*, 322 N.C. 396, 403, 368 S.E.2d 595, 599 (1988), the husband argued the trial court erred by not "allowing him credit for," or considering as a distributional factor in equitable distribution, his post-separation mortgage payments on the marital residence. The husband had made those payments to the wife pursuant to an alimony pendente lite order. This Court affirmed the trial court's refusal to consider the husband's post-separation mortgage payments, because those payments were made pursuant to an alimony order. To award him credit would have been a plain violation of N.C. Gen. Stat. 50-20(f). *Id.* at 99, 367 S.E.2d at 411.

The husband in *Morris* relied on *Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E.2d 519 (1987). In *Hunt*, this Court held the trial court should have given the husband credit in equitable distribution for post-separation mortgage payments. The husband made post-separation mortgage payments to the wife, while not under a court order to do so. He argued he should get credit for those payments in equitable distribution, but the trial court determined the payments were spousal support and not eligible for consideration. *Id.* at 490, 355 S.E.2d at 523. This Court held:

The payments made by defendant after separation . . . consisted entirely of defendant's separate property. From the record before us, it would appear that defendant should be credited with at least the amount by which he decreased

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the principal owed on the marital home. Upon remand the court shall make a determination as to this issue.

Id. at 491, 355 S.E.2d at 523.

According to this Court's holdings in *Morris* and *Hunt*, the trial court is prohibited from considering post-separation payments made pursuant to an alimony order under the statute, but is not prohibited from considering post-separation payments made outside of a court-ordered spouse's support obligation. Here, the trial court was prohibited from giving Plaintiff any credit for the \$178,600.00 of post-separation support he was ordered to pay Defendant, and the court gave no consideration to that amount. The trial court did not violate N.C. Gen. Stat. § 50-20 by considering the income Plaintiff paid to Defendant in *excess* of his court-ordered obligation to pay post-separation support in its equitable distribution award.

[2] Defendant also argues the overpayment should have been reserved for the court in determining her pending alimony claim. If and when Defendant prosecutes her claim for alimony, the court may properly consider the estates of the parties, which would include the allocation of assets under the equitable distribution judgment. *See* N.C. Gen. Stat. § 50-20(f) ("After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony . . . should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7."); N.C. Gen. Stat. § 50-16.3A(b) (2013) (setting forth the factors for the court to consider in determining alimony, including "[t]he relative assets and liabilities of the spouses" and "[a]ny other factor relating to the economic circumstances of the parties that the court finds to be just and proper"). The extent to which Defendant's estate is affected by the judgment on equitable distribution may be a factor she may possibly argue to the trial court determining an award of alimony for Defendant. This argument is overruled.

IV. Expert Testimony and Report

[3] Defendant argues the trial court erred by excluding the testimony and report of her expert, Graham D. Rogers ("Rogers"). We disagree.

A. Standard of Review

Trial courts have "wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). Decisions "regarding what expert testimony to admit will be reversed only for an abuse of

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discretion.” *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005) (citation omitted).

B. Analysis

Plaintiff and Defendant each retained their own experts to prepare a valuation of CPTA. Defendant retained Rogers to review the financial records of CPTA and to render an expert opinion of the value of CPTA as of the date of marriage, the date of separation, and as of 31 December 2011. Rogers has twenty-five years of financial, accounting and business expertise in the context of business valuation. After *voir dire*, the court accepted Rogers as an expert in business valuation.

Rogers prepared a report dated 17 June 2014 containing his conclusions of the fair market value of CPTA as of those three dates. The parties exchanged their expert reports on the Wednesday prior to trial.

Rogers realized he had made a mistake on his report by failing to factor in taxes on CPTA’s earnings prior to applying his capitalization rate. Rogers notified Defendant’s attorney of the mistake at approximately 11:00 p.m. on the Friday prior to trial. Rogers provided Defendant’s attorney with a new report on Saturday evening. Defendant’s attorney forwarded it to Plaintiff’s attorney. The trial court did not allow the corrected report into evidence because Plaintiff’s attorney had received it on the eve of trial.

The court heard *voir dire* testimony from Rogers and ruled upon the admissibility of the original, 17 June 2014 report. The court permitted Plaintiff’s counsel to *voir dire* Rogers about the facts and data he used, the reliability of his principles and methods as applied to those facts, and whether his report would assist the trier of fact. The court found Rogers’s report contained material errors and his conclusions as to value contained in the report were unreliable. The court excluded the report under Rule of Evidence 702 and determined the report would not assist the trier of fact. N.C. Gen Stat § 8C-1, Rule 702 (2013).

Defendant has failed to show the trial court abused its discretion by excluding the 17 June 2014 report, which Graham admitted contained an inaccurate opinion of the value of CPTA. Rogers’s reliance on incorrect data rendered the report unreliable. The trial court did not abuse its discretion when it excluded the report and Rogers’s opinion testimony based upon inaccurate data. This argument is overruled.

V. Conclusion

The trial court properly considered income Plaintiff paid to Defendant in excess of his court-ordered obligation to pay post-separation support,

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and allowed Plaintiff a credit to offset the amount owed to Defendant under the equitable distribution award.

The trial court properly excluded Graham's 17 June 2014 report and testimony. The report was unreliable and not helpful to the finder of fact. We affirm the trial court's order.

AFFIRMED.

Judges BRYANT and GEER concur.

ALAN SAVAGE, PLAINTIFF

v.

JULIE ANNE ZELENT A/K/A JULIE ANNE PHILLIPS
A/K/A JULIE A. McSWAIN, DEFENDANT

No. COA15-282

Filed 20 October 2015

1. Judgments—foreign-country money judgment—attorney fees—arising from action for support in family matters—enforceable under N.C. Uniform Foreign-Country Money Judgments Recognition Act

Where plaintiff filed a Motion to Recognize a Foreign-Country Money Judgment, the trial court did not err by concluding that a Scottish judgment for attorney fees and expenses was not a judgment for support in family matters and therefore was recognizable under the North Carolina Uniform Foreign-Country Money Judgments Recognition Act. Even though the judgment arose out of an action for support in family matters, the plain language of the statute read in conjunction with the General Assembly's express change in the Act to recognize judgments like the one here supported the trial court's conclusion.

2. Judgments—foreign-country money judgment—failure to appear or appeal—judgment not repugnant to public policy

Where the trial court granted plaintiff's Motion to Recognize a Foreign-Country Money Judgment, the trial court did not err by concluding that the \$148,516.75 Scottish judgment for attorney fees and expenses was not repugnant to the public policy of North Carolina. Defendant invoked the jurisdiction of the Scottish courts but failed

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to appeal after she lost on the merits, and she also failed to participate in the proceedings to determine expenses. Defendant was therefore precluded from arguing the result was unfair.

Appeal by defendant from orders entered 25 August and 14 October 2014 by Judge John E. Nobles in Carteret County Superior Court. Heard in the Court of Appeals 8 September 2015.

Poyner Spruill LLP, by Daniel G. Cahill and Caroline P. Mackie, for plaintiff-appellee.

Jeffrey S. Miller for defendant-appellant.

BRYANT, Judge.

Where a proper statutory interpretation of the North Carolina Uniform Foreign-Country Money Judgments Recognition Act and evidence in the record support the trial court's order that a Scottish judgment at issue (1) was not a judgment for alimony, support, or maintenance in matrimonial or family matters, and (2) was not fundamentally unfair or repugnant to the public policy of North Carolina, we affirm the judgment of the trial court.

Plaintiff Alan Savage and Defendant Julie Anne Zelent met in June 2006 and subsequently developed a romantic relationship. In the same year, defendant moved from England to Inverness, Scotland, where plaintiff and defendant cohabited from 1 September 2006 to 24 August 2007. The pair temporarily separated, but resumed cohabitation in February 2008. Plaintiff and defendant permanently separated in October 2008, after which defendant eventually moved to Carteret County, North Carolina.

In 2011, defendant filed suit against plaintiff in Inverness Sheriff Court in Scotland under the Family Law (Scotland) Act of 2006, Section 28(2)(a), alleging that she sustained economic disadvantage as a result of her relationship with plaintiff and that she was entitled to financial contribution. After a seven day proof (trial), which took place over the course of November 2011, December 2011, and January 2012, the Sheriff (judge) found that defendant was not entitled to financial contribution from plaintiff. Defendant was entitled to appeal the judgment but failed to do so.

After the proof concluded, defendant's counsel withdrew from representing her. Under Scottish Sheriff Court procedure, when a party

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becomes *pro se*, the Sheriff calls for a Peremptory Diet (hearing). If the *pro se* party fails to attend, the hearing may be held without the *pro se* party. On 17 August 2012, the Sheriff held the Peremptory Diet to determine whether legal costs should be awarded. Defendant, who had received notice of the Peremptory Diet, wrote an email in response but did not attend. The Sheriff awarded expenses to plaintiff in an amount to be determined by the Auditor of Court.

Under Scottish law, the Auditor of Court is tasked with scheduling a Diet of Taxation (hearing), during which the Auditor assesses the validity of the entry in the Account of Expenses before determining the final sum to be awarded. Again, defendant did not attend the Diet of Taxation, send a representative, seek any corrections, or make any submissions to the Auditor.

On 19 June 2013, the Auditor awarded expenses to plaintiff and submitted the report to the Sheriff. The Sheriff then approved the Auditor's Report and entered an award of attorneys' fees and expenses in the amount of £148,516.75 ("the Scottish judgment") against defendant. Defendant, having previously failed to exercise her right to appeal on the merits, again failed to exercise her right to appeal the amount of expenses awarded. Defendant made no payments on the Scottish judgment.

On 16 January 2014, plaintiff served defendant with a Complaint to Recognize a Foreign-Country Money Judgment filed in Carteret County Superior Court. Defendant answered, asserting a defense pursuant to North Carolina Rule of Civil Procedure 12(b)(6) for failure to state a claim. On 27 June 2014, plaintiff filed a Motion to Recognize a Foreign-Country Money Judgment, along with a brief in support of the motion. On 7 July 2014, the matter came on for hearing in Carteret County Superior Court, the Honorable John E. Nobles presiding. By written order entered on 25 August 2014, Judge Nobles granted plaintiff's Motion to Recognize a Foreign-Country Money Judgment.

Defendant's subsequent Motion for a New Trial was denied by Judge Nobles by written order entered on 14 October 2014. Defendant appeals.

On appeal, defendant raises the following issues: whether the trial court erred (I) in recognizing the Scottish judgment under the North Carolina Uniform Foreign-Country Money Judgments Recognition Act; and (II) whether the Scottish judgment is fundamentally unfair or repugnant to North Carolina public policy.

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I

[1] Defendant argues that the trial court erred in concluding as a matter of law that the Scottish judgment was not a judgment for alimony, support, or maintenance in matrimonial or family matters. Defendant also argues that the attorneys' fees awarded to plaintiff in defendant's action for support under the Family Law (Scotland) Act constituted a judgment for "support . . . in matrimonial or family matters" within the meaning of N.C. Gen. Stat. § 1C-1852 (2009). We disagree, noting that defendant's argument is one which requires our interpretation of the statute at issue in this case.

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *Jenner v. Ecoplus*, 224 N.C. App. 275, 277, 737 S.E.2d 121, 123 (2012) (quoting *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003)). "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." *Applewood Props., LLC v. New S. Props. LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013) (quoting *Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013)). The Court's statutory analysis thus begins with the statutory words themselves. *Jenner*, 224 N.C. App. at 278, 737 S.E.2d at 123. "[I]f [the words] are clear and unambiguous, they are to be given their plain and ordinary meanings." *Id.* (citation omitted). However, "[w]here a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Id.* Furthermore, "[u]nder the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list." *Patmore v. Town of Chapel Hill N.C.*, ___ N.C. App. ___, ___, 757 S.E.2d 302, 307 (2014) (quoting *Evans v. Diaz*, 333 N.C. 774, 779–80, 430 S.E.2d 244, 247 (1993)).

The North Carolina Uniform Foreign-Country Money Judgments Recognition Act ("Recognition Act") applies to foreign country judgments that grant or deny recovery of a sum of money and are final, enforceable judgments under the law of the foreign country. N.C.G.S. § 1C-1852. The Act also states, in pertinent part, that: "(b) This Article does not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is . . . (3) A judgment for alimony, support, or maintenance in matrimonial or family matters." N.C.G.S. § 1C-1852(b)(3). The North Carolina Act is based on the Uniform Foreign-Country Money Judgments Recognition Act ("Uniform Act") as approved in 2005 by the National Conference of Commissioners on Uniform State Laws. N.C. Gen. Stat. § 1C-1850, North

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Carolina Comment (2009).¹ This Court has previously noted that “[t]he Recognition Act is a statute of inclusion with a strong presumption that foreign-country judgments will be recognized.” *Jenner*, 275 N.C. App. at 279, 737 S.E.2d at 124. Further, “[a] party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition . . . exists.” *Id.* (quoting N.C.G.S. § 1C-1853(g)).

As noted, the North Carolina Act is based on the Uniform Act. However, “[t]he General Statutes Commission inserted ‘North Carolina’ in the title and short title of the Article because of variations made to the text of the Uniform Act.” *Id.* Notably, one such variation is explained in the North Carolina Comment to N.C. Gen. Stat. § 1C-1852(b)(3), which emphasizes the deliberate elimination and substitution of particular language from the Uniform Act:

In subdivision (b)(3), the General Statutes Commission substituted “alimony, support, or maintenance in matrimonial or family matters” for the Uniform Act language “divorce, support, or maintenance, or other judgment rendered in connection with domestic relations.” This change was due to concern that the Uniform Act’s language could prevent recognition of an award based on a claim that was brought as part of a divorce action, for example, a tort action against one spouse for damage to the individual property of the other spouse.

N.C.G.S. § 1C-1852(b)(3) Official Comment.

Defendant asserts that the intent of the Recognition Act is that “North Carolina courts maintain a ‘hands off’ attitude to ‘judgments for support in matrimonial or family matters’ and consequent judgments for costs, attorneys’ fees, etc.” Defendant asserts that the attorneys’ fees awarded against defendant in her action for support in a family law matter was in fact a judgment for support or alimony within the meaning of N.C. Gen. Stat. § 1C-1852. We disagree with defendant’s assertions. To

1. While the policy reasons for excluding judgments for alimony, support, or maintenance in matrimonial matters are not explicitly laid out in either the Recognition Act itself or the official commentary, the following may shed some light on the matter. For instance, the United States, as a nation, is generally reluctant to enter into any international family support agreements, as explained by John L. Saxon in his article “International Establishment and Enforcement of Family Support.” See John L. Saxon, *International Establishment and Enforcement of Family Support*, 1999 FAM. L. BULL. 1, 11–12 n.24 (1999).

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refuse recognition of the Scottish judgment as defendant would have us do, would require that we read the statute to substitute the word “for” and replace it with the phrase “arising out of,” in effect revising the statute to read “judgment [arising out of] a claim for alimony, support, or maintenance.” This we decline to do.

Here, the statute clearly precludes recognition of judgments “for” alimony, “for” support, or “for” maintenance. *See* N.C.G.S. § 1C-1852(b) (3). The Scottish judgment, rather, is a judgment “for” attorneys’ fees and expenses incurred by plaintiff and awarded against defendant. The purpose of the judgment was to reimburse plaintiff for expenses in defense of a claim brought by plaintiff and denied by the Scottish court. The plain language of the Scottish judgment reads as follows:

The Sheriff, having considered the report by the Auditor of Court taxing the Defender’s Account of Expenses in the sum of ONE HUNDRED AND FORTY THOUSAND FIVE HUNDRED AND SIXTEEN POUNDS SEVENTY FIVE PENCE (\$148516.75) which included £8370.00 of an Audit fee, Approved of the same and *decerned for payment to the Defender’s solicitor* of the said sum.

(emphasis added).

This is a *judgment* for attorneys’ fees and costs, determined by an Auditor, reviewed and approved by the Sheriff in conformity with the Scottish legal system, and awarded because defendant failed in her efforts to recover anything on her claims against plaintiff. “Because the word ‘judgment’ is unambiguous,” the Court “must refrain from judicial construction and accord [the term its] plain and definite meaning.” *Akins v. Mission St. Joseph’s Health Sys.*, 193 N.C. App. 214, 218, 667 S.E.2d 255, 258 (2008). “Judgment means the final decision of the court resolving the dispute and determining the rights and obligations of the parties, and the law’s last word in a judicial controversy.” *Id.* (quoting *Poole v. Miller*, 342 N.C. 349, 352, 464 S.E.2d 409, 411 (1995)) (internal quotation marks omitted). The word “judgment” implies no reference to the initial claims of an action. Indeed, the Recognition Act only applies to final judgments, and therefore, the initial claims of an action are not relevant when applying the Recognition Act. Thus, even though the Scottish judgment for attorneys’ fees resulted from a failed claim for maintenance, because the judgment itself is one “for” attorneys’ fees and not one “for” maintenance, application of the Recognition Act is not precluded. *See* N.C.G.S. § 1C-1852(b)(3).

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The issue is a pretty fine one in that “for” could be read, under other circumstances, as defendant asserts, to mean “arising out of”; however, here the North Carolina General Assembly’s change to the statutory language as noted in the Official Comment, undercuts defendant’s argument and supports the trial court’s holding that the Scottish judgment is subject to the Recognition Act. The removal of the language “or other judgment in connection with domestic relations” from the Uniform Act supports our interpretation that attorneys’ fees, even those resulting from a failed domestic action, can be properly recognized under the Recognition Act. The doctrine of *expressio unius est exclusio alterius* implies the exclusion of situations not contained in the list. See *Patmore*, ___ N.C. App. at ___, 757 S.E.2d at 307. Under that doctrine, the Official Comment to N.C. Gen. Stat. § 1C-1852 makes plain that the exclusion of the language “rendered in connection with domestic relations” from the statute was more than implied and rather was quite explicit. This deliberate change evidences the legislature’s intent that judgments like the Scottish judgment are to be properly recognized pursuant to the Recognition Act.

Finally, for the sake of uniformity of interpretation, the legislature endorses examination of cases from other jurisdictions in interpreting the North Carolina Recognition Act. “In applying and construing this Article, consideration may be given to promoting uniformity with respect to its subject matter among states that enact it.” N.C. Gen. Stat. § 1C-1859 (2009). Two courts have addressed this narrow issue.

The Ohio Court of Appeals in a similar case held that an English judgment awarding costs to the prevailing spouse in a divorce proceeding “was a judgment for costs, consisting of attorneys’ fees. It was, therefore, not an award of support.”² *Hazzledine v. Hazzledine*, No. 95-CA-35, 1996 Ohio App. LEXIS 1405, *1–2, 5 (Ohio Ct. App. Apr. 5, 1996). The court stated:

In our view, the record clearly reflects that the judgment of the English court is an award of costs under the English rule that the prevailing party is normally awarded attorneys fees. Accordingly, while the underlying cause of action in which the judgment was awarded may have

2. Ohio’s Uniform Foreign-Money Judgments Recognition Act, defining “foreign country judgment” reads as follows: “(B) ‘Foreign country judgment’ means any judgment of a foreign country that grants or denies the recovery of a sum of money, *other than the following types of judgments*: . . . (3) *A judgment for support involving matrimonial or family matters.*” Ohio Rev. Code Ann. § 2329.90(B)(3) (LexisNexis 1985) (emphasis added).

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involved matrimonial or family matters, the judgment is not for support

Id. at *1–2. The Ohio court noted, while an award of attorneys’ fees in a domestic relations case might constitute support, it nonetheless held that, in the absence of any evidence that the judgment was intended to support the prevailing party, it was not a judgment for support based on the nature of the English rule (to award costs to the prevailing party). *Id.* at *5–6.

Like the English judgment in *Hazzledine*, the Scottish judgment here is an award of attorneys’ fees in favor of the prevailing party, plaintiff, and against the party seeking the support, defendant. Similarly, no evidence shows that the Scottish judgment could constitute an award of support for plaintiff since he did not initiate the action seeking support from defendant. Under the reasoning in *Hazzledine*, and consistent with our own interpretation of the North Carolina Recognition Act, the Scottish judgment is not a judgment for support but rather a judgment based on an award of attorneys’ fees.

A New York appellate court faced a similar issue in *Burrelle v. Gilbert*, No. 2004-1639 S C., 2005 WL 2276677 (N.Y. App. Term Sept. 16, 2005). There, the judgment was a Canadian order for equitable distribution arising out of a divorce proceeding. *Id.* at *1. The defendant, like defendant here, argued that the judgment was barred based on New York’s Recognition of Foreign Country Money Judgments Act because it was a “judgment for support in matrimonial or family matters.”³ *Id.* The New York court disagreed, holding that the judgment was not an award of support, “even though entered in a matrimonial proceeding.” *Id.* Similarly, the judgment at issue here is not an award of support but is rather a reimbursement of attorneys’ fees and expenses.

We recognize that these cases are not controlling authority. However, with no North Carolina case law on point and the legislature’s recommendation that other states’ interpretations of their Foreign Country Money Judgments Recognition Acts may be considered, the Ohio and New York cases, while unpublished decisions, are persuasive authority that supports our holding that the Scottish judgment awarding attorneys’ fees is not a judgment “for alimony, support, or maintenance.”

3. New York’s applicable statute, the Recognition of Foreign Country Money Judgments, reads, in pertinent part, as follows: “(b) Foreign country judgment. ‘Foreign country judgment’ in this article means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.” N.Y. C.P.L.R. 5301(b) (McKinney 1979).

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Based on the plain language of the statute, the General Assembly's express change in the Recognition Act in order to recognize judgments like the Scottish judgment, and persuasive authority from other states, we hold the trial court did not err in concluding that the Scottish judgment was not a judgment for support in family matters. The trial court properly recognized the judgment as one for attorneys' fees. Accordingly, defendant's argument is overruled.

II

[2] Defendant argues that the Scottish proceeding under which plaintiff obtained the judgment for attorneys' fees was fundamentally unfair and the rationale employed was repugnant to the public policy of North Carolina, therefore violating North Carolina law. Defendant argues that the Scottish judgment was rendered in circumstances which question the integrity of the rendering court and that the "essential elements of impartial administration and basic procedural fairness" were not met in the foreign proceeding pursuant to N.C. Gen. Stat. § 1C-1853 (2009), *amended by* 2015 N.C. Sess. Laws 2015-264, eff. June 24, 2015.⁴ We disagree.

Defendant invoked the jurisdiction of the Scottish court and availed herself of the procedures and processes applicable to her case. Thereafter, once her case was lost on the merits, she did not avail herself of the process or procedures for appealing her case. Further, she declined to participate in the proceedings for expenses—the Peremptory Diet and the Diet of Taxation—that were a continuing part of her case, and she did not avail herself of any appellate process. From the record we have of the proceedings defendant initiated in the Scottish Court, there is nothing to indicate that her failure to avail herself of additional processes, including appeals, was due to a perception by defendant of flaws or lack of fairness in the proceedings. Therefore, defendant should be precluded from arguing the integrity and fairness of the very system she chose to litigate her claims. Notably, the official commentary to N.C. Gen. Stat § 1C-1853(4)(c), addresses just such a situation:

[I]f the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the foreign-country judgment, then there

4. N.C. Gen. Stat. § 1C-1853 can be considered the denial of recognition part of the Act. We also note that the amendment to N.C. Gen. Stat. § 1C-1853, effective June 24, 2015, while not relevant to the case here, made no substantive changes to the act or to the subsections at issue here. *See* 2015 N.C. Sess. Laws 2015-264, eff. June 24, 2015 (making changes to subsection (j)).

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may or may not be other factors in the particular case that would cause the forum court to decide to recognize the foreign-country judgment. For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case *because the party resisting recognition failed to raise the issue on appeal from the foreign-country judgment in the foreign country*, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.

N.C.G.S. § 1C-1853, cmt. 12 (emphasis added). Nevertheless, we will address plaintiff's argument.

As stated previously, “[q]uestions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court.” *Jenner*, 224 N.C. App. at 277, 737 S.E.2d at 123. Additionally, defendant bears the burden of presenting evidence to demonstrate that this Court should not allow recognition of the Scottish judgment. N.C.G.S. § 1C-1853(g).

The portion of the Recognition Act at issue here states, in pertinent part, that:

(c) If a court of this State finds that any of the following exist with respect to a foreign-country judgment for which recognition is sought, recognition of the judgment shall be denied unless the court determines, as a matter of law, that recognition would nevertheless be reasonable under the circumstances:

...

(7) The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment.

N.C.G.S. § 1C-1853(c)(7). Official Comment 11 to subsection (c)(7) further states that denial of recognition of the foreign judgment under this subsection “requires a showing of corruption *in the particular case* that had an impact on the judgment that was rendered.” N.C.G.S. § 1C-1853 cmt. 11 (emphasis added). Defendant asserts that Mr. William M. Cochrane, Interim Auditor of Court Grampian Highland & Islands, who rendered the Scottish money judgment, had “a substantial doubt about the integrity of the opinion,” and, therefore, the proceeding was

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fundamentally unfair. Defendant relies on the following excerpt from the Scottish judgment, which defendant asserts is an unfair “rubber stamping” of the attorneys’ fees awarded and indicates the Auditor’s “substantial doubt”:

Although I still had difficulty in deviating from the practice of Auditors of Court in Grampian Highland & Islands disallowing such expenses such as these in fairness to the other party, I accepted that in the direction that the award was on Solicitor/Client, client paying basis, greatly reduced the ability of the Auditor of Court to carry out his normal function in taxing an account prepared on that basis and subject to the test ‘that such expenses have been expressly or impliedly approved by the client’ before, allowing to all intents and purposes, the rubber stamping the account save for some necessary corrections

Yet, the Auditor also stated “that the Account [of expenses] although lengthy was fairly straight forward and all entries appeared to [be] fairly stated and at no time [was there] any indication of being excessive.”

We note defendant’s argument that the comments defendant urges us to concentrate on suggest the Auditor had doubt about the fairness of the expenses in this case. However, we must reject this argument; for even if the Auditor had doubt about the *fairness* of expenses, such doubt does not rise to the level of “corruption in the particular case” required to deny recognition. *See* N.C.G.S. § 1C-1853 cmt. 11. Clearly, the Auditor also took into consideration the background and complexity of the case:

[I]t was an action in which the pursuer [defendant] sought payment of a capital of some £500,000.00 from the defender [plaintiff] in terms of section 28(2)(a) of the Family Law (Scotland) Act 2006 and this case in question was at that time one of the first in Scotland and in ‘value’ exceeded that of the case of *Gow v. Grant* . . . which is the leading case on this section.

Finally, the Auditor stated that he “spent some considerable time reviewing the Account prior to the Diet of Taxation” and ultimately concluded that the award was not excessive.

Additionally, at the Diet of Taxation, where the court’s award of expenses was independently examined by the Auditor, defendant had notice of the Diet, an opportunity to be heard, and have counsel

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represent her. She chose not to appear, nor did counsel appear on her behalf. Defendant also had the opportunity to appeal the adverse decision on her underlying claims as well as the award of costs, and chose not to pursue an appeal of either decision. Thus, defendant's argument regarding the fundamental unfairness of the proceeding is unpersuasive.

Defendant next argues that the "Solicitor/Client, client paying" method of allowing fees and expenses and the amount of the award runs counter to the North Carolina concept of what is fair and just in awarding attorney's fees and that such a scheme is against public policy. We disagree.

The commentary to North Carolina General Statutes section 1C-1853(c)(3) of the Recognition Act reveals a stringent test for finding a public policy violation:

Public policy is violated only if recognition of the foreign-country judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of the law, or would undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel."

N.C.G.S. § 1C-1853 cmt. 8 (quoting *Hunt v. BP Exploration Co. (Libya) Ltd.*, 492 F. Supp. 885, 901 (N.D. Tex. 1980)). "[A] difference in law, even a marked one, is not sufficient to raise a public policy issue." *Id.* "Nor is it relevant that the foreign law allows a recovery that the forum state would not allow." *Id.*

Here, the Auditor concluded in his report "that the Account [of expenses] although lengthy was fairly straight forward and all entries appeared to [be] fairly stated and at no time [was there] any indication of being excessive." Even though defendant asserts that "reasonableness" is the key factor under all North Carolina attorneys' fee statutes, the fact that Scottish law differs from North Carolina law is "not sufficient to raise a public policy issue." *Id.*; see *GE Betz, Inc. v. Conrad*, ___ N.C. App. ___, ___, 752 S.E.2d 634, 655-56 (2013) (discussing "reasonableness" of attorneys' fees and factors to be considered under North Carolina law).

Finally, defendant cites plaintiff's wealth and argues that enforcement of the Scottish judgment will pose a risk of allowing wealthy litigants to "run up" fees in a "loser pays" system, knowing that if the wealthy person prevails, he can financially ruin his opponent through a post-trial "award of expenses." Defendant argues that this poses the

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additional risk of deterring non-wealthy persons from taking their cases to court. This argument nevertheless fails to demonstrate how awarding attorneys' fees in this case is repugnant to North Carolina public policy.

North Carolina statutory law explicitly authorizes the award of attorneys' fees in domestic relations matters. *See* N.C. Gen. Stat. § 50-16.4 (2010) (authorizing the award of attorneys' fees in an action for alimony or post-separation support); N.C. Gen. Stat. § 50-13.6 (1973) (authorizing the award of attorneys' fees in an action or proceeding for the custody or support of a minor child). Further, defendant's argument could be equally applicable to a wealthy litigant in North Carolina, where attorneys' fees and costs are regularly taxed to the losing party. *See* N.C. Gen. Stat. § 6-21.1 (2013) (allowing counsel fees as part of costs in certain cases); *Bryson v. Cort*, 193 N.C. App. 532, 668 S.E.2d 84 (2008) (affirming an award of attorneys' fees to prevailing party in a personal injury action); *Robinson v. Shue*, 145 N.C. App. 60, 550 S.E.2d 830 (2001) (affirming an award of attorneys' fees to prevailing party in an automobile negligence action).

Despite the arguably large amount of the attorneys' fees awarded in this case, (£148,516.75), the Auditor indicated in the Scottish judgment that this award was not "excessive," particularly considering that this was the largest claim for support ever made in Scotland under section 28(2)(a) of the Family Law (Scotland) Act of 2006. Both the statutory interpretation of the Recognition Act and the evidence in the record support the trial court's determination that the Scottish judgment is not repugnant to North Carolina public policy. Accordingly, defendant's argument is overruled.

We hold that the trial court did not err in concluding that the Scottish judgment is (I) not a judgment for alimony, support, or maintenance in matrimonial or family matters, and (II) not repugnant to the public policy of North Carolina.

AFFIRMED.

Judges GEER and TYSON concur.

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JOHN JAMES SCHEFFER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JEREMY
TALBOT SCHEFFER, DECEASED, PLAINTIFF

v.

NATHANIEL EUGENE DALTON, DEFENDANT

No. COA15-264

Filed 20 October 2015

1 Evidence—partially redacted accident report—no prejudice—information admitted elsewhere

There was no prejudice in an automobile accident wrongful death case where a partially redacted accident reported was admitted into evidence. Information about the plaintiff's alcohol or drug use was redacted while information about defendant's alcohol or drug use was not (there was none). Although plaintiff argued that the contrast raised a presumption of the plaintiff's guilt, the same information was admitted without objection elsewhere.

2. Negligence—contributory—moped—improvised light

The trial court did not err in an automobile accident wrongful death case by submitting contributory negligence to the jury where the victim was riding a moped with an inoperable headlight and a bicycle light velcroed to the handlebars.

3. Negligence—last clear chance—traffic accident—left turn

The trial court erred in an automobile accident wrongful death case by not submitting the issue of last clear chance to the jury. Issues existed as to whether defendant should have discovered plaintiff's peril, whether sufficient time and means existed to avoid the accident, and whether defendant adequately looked through the intersection, behind a passing car, to determine if his path was clear before entering the oncoming lane of travel to make a left turn.

Appeal by plaintiff from order entered 25 July 2014 by Judge Timothy S. Kincaid in Iredell County Superior Court. Heard in the Court of Appeals 8 September 2015.

Mills and Levine, P.A., by Michael J. Levine, for plaintiff-appellant.

William F. Lipscomb for defendant-appellee.

TYSON, Judge.

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John James Scheffer (“Plaintiff”) appeals from the trial court’s judgment entered after a jury’s verdict determined the death of Jeremy Talbot Scheffer (“Scheffer”) was caused by the negligence of Nathaniel Eugene Dalton (“Defendant”), but also found Scheffer’s contributory negligence contributed to his death. We affirm in part, reverse in part, and remand for a new trial.

I. Background

On 20 November 2012, Plaintiff, as Administrator of Scheffer’s estate, filed a complaint against Defendant. Plaintiff alleged Defendant’s negligence resulted in the wrongful death of Scheffer. Defendant filed an Answer and alleged Scheffer’s negligence contributed to the accident and barred any recovery. Plaintiff filed a Reply to Defendant’s Answer and alleged contributory negligence does not bar Plaintiff’s recovery and asserted Defendant had the last clear chance to avoid injury to Scheffer.

Scheffer used a “moped,” a portmanteau of “motor” and “pedal,” as his primary means of transportation. He was employed at The Spirited Cyclist, a bicycle shop located in Huntersville. On 27 November 2010, Scheffer left the bicycle shop just after 6:30 p.m. The factory installed headlight on the front of Scheffer’s moped had been broken in a previous accident. Scheffer had attached a bicycle light to the front of the moped. The light Scheffer used was a “Blackburn Flea 2.0.” This particular model of bicycle light was sold at The Spirited Cyclist. Scheffer would often charge the batteries for the light at the bicycle shop. No evidence was presented tending to show whether Scheffer charged the bicycle light battery on the day of the accident.

Kathryn Turner (“Turner”) was traveling south on North Carolina Highway 115 in Mooresville on 27 November 2010. She testified she saw a “very, very faint little light” on the road ahead. She stated it was not a headlight or a fixed light. Turner first saw the light when it was about two car lengths away. She initially believed it was someone walking because the light was “moving back and forth.” Turner “had no idea” what the light was. She looked in her rearview mirror after the light passed her car and saw nothing. Turner also testified it was very dark that evening. The distance from where Turner saw this light to the scene of the accident is 1.15 miles.

The next morning, Turner learned from television news reports that a moped driver had been killed in the area where she had observed the faint light. She told a co-worker, the wife of a Mooresville police officer, about seeing the light while driving on Highway 115. Several weeks later, Officer Bucky Goodale was investigating the accident and called

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Turner to request a statement about what she had seen that evening on Highway 115.

James Cockrell (“Cockrell”) also observed an incident that evening. Cockrell stopped his vehicle at the intersection of Highway 115 and Faith Road and prepared to turn right onto northbound Highway 115. Cockrell looked both ways, saw a northbound car approaching, and waited for the car to pass. He did not see either a moped or a light behind the car.

Cockrell looked left again and began to take his foot of the brake to pull onto Highway 115 when he observed “just a streak went by me, and I thought it was a motorcycle.” Cockrell was certain he did not see any lights on the moped. He testified he almost pulled out in front of the “streak” or “motorcycle.” Cockrell turned onto Highway 115 after the object passed.

Defendant was traveling south on Highway 115 in his 1993 Honda Accord. He approached the intersection of Steam Engine Drive, where he intended to turn left. This four-way intersection is fully signalized with dedicated right and left turn lanes on Highway 115. Steam Engine Drive is approximately 0.3 mile north of Faith Road, where Cockrell had observed the “streak” pass in front of him. Defendant slowed, turned on his left turn signal, entered into the left turn lane, and waited for an oncoming northbound vehicle to pass. Defendant testified he did not see anything else located or travelling behind the vehicle.

Defendant began turning left from Highway 115 onto Steam Engine Drive after the vehicle passed. He did not come to a complete stop before he began to execute the left turn on the green light. Defendant began to execute the turn early, without driving completely into the intersection. He crossed the double yellow line that delineated his lane of travel, the turn lane, from Scheffer’s lane of travel, the northbound lane of Highway 115. Defendant crossed the double yellow line twenty-eight feet before the painted stop line. His car was heading towards the outbound, improper lane of Steam Engine Drive.

Scheffer’s moped collided with Defendant’s car. The collision occurred within Scheffer’s lane of travel as Defendant was turning left. Defendant testified, “as soon as the car passed, I was making the left turn, and there was a collision, and I didn’t know – I didn’t even know what happened.” Defendant testified he did not see Scheffer, a moped, or anything else, prior to the collision.

Cockrell arrived at the intersection and saw Scheffer land on the ground, but did not see the collision. He testified the lighting at

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the intersection of Steam Engine Road and Highway 115 is “a whole lot better” than the Faith Road intersection where he had observed “the streak” go by him.

Sean Dennis (“Dennis”), an accident reconstructionist, testified as an expert witness on behalf of Plaintiff. Dennis calculated that Defendant had coasted at a speed of slightly less than seven miles per hour for several seconds before turning left on the green light. The investigating officer calculated Defendant’s speed prior to the impact as less than six miles per hour. Dennis measured thirty-four feet and nine inches of skid marks left by Scheffer’s moped prior to the collision. The left front tire of Defendant’s car left two feet of skid marks on the road. Defendant testified he immediately slammed on brakes after the impact and “it scared [him] pretty bad, because [he] didn’t know what happened.”

The Blackburn Flea 2.0 light was apparently affixed to the left handlebar of Scheffer’s moped. Plaintiff’s expert, Dennis, testified the light on Scheffer’s moped was a bicycle light and was not intended to be used on a motorized vehicle. Scheffer’s bicycle light was inoperable following the accident, and Dennis performed his testing and inspection using an “exemplar” light. No physical evidence showed whether Scheffer’s light was operating or on at the time of the accident or whether its battery remained charged.

According to Dennis, mounting the light on the left handlebar of a moped causes the light to point fifteen degrees to the left, rather than straight ahead. The four LED bulbs protrude beyond their housing, causing the light to be visible for one-hundred eighty degrees around the light. Dennis testified the “exemplar” light he used for testing was visible at 500 feet and remained visible until the battery died. Dennis answered in the affirmative when asked if the light, “would have been pointing right at Mr. Dalton” in the moments leading up to the accident had it been illuminated.

Officer Goodale investigated the accident and prepared a Mooresville Police Department Traffic Crash Reconstruction Report (“the accident report”), which was admitted into evidence and published to the jury. Officer Goodale inspected the factory installed headlamp housing of the moped and debris at the accident scene. The plastic headlamp assembly did not contain a bulb. The headlamp assembly required a bulb to be placed inside, turned clockwise, and locked into place in the socket. Officer Goodale concluded the metal portion of the bulb that locks into place would have remained present in the socket, even if the bulb had been destroyed in the crash. He concluded Scheffer’s moped did not have a functioning headlamp at the time of the accident.

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Officer Goodale sifted through the debris from the accident and found a small LED Blackburn Flea light. Velcro was attached to the left handlebar of the moped. One of Scheffer's co-workers told Officer Goodale that Scheffer had attached a "bike light" to his moped, which resembled the LED light found at the accident scene. The co-worker also stated Scheffer's front, factory-installed headlamp on the moped was broken due to another collision Scheffer was involved in approximately one month prior to the collision with Defendant.

Cockrell testified he estimated Scheffer was driving his moped approximately forty to fifty miles per hour and "maybe faster" when Scheffer passed by his vehicle. The manufacturer specifications for Scheffer's moped were incorporated into the accident report. The specifications state the moped has a top speed of twenty-seven miles per hour. Dennis testified the moped's engine did not appear to have been modified or exchanged. Dennis opined Scheffer was driving the moped at a speed of not less than nineteen miles per hour and not more than thirty-two miles per hour.

No evidence was presented to show alcohol contributed to the accident. The trial court granted Plaintiff's motion *in limine* regarding any "mention, reference, implication, or depiction of alcohol." At trial, defense counsel moved to introduce the Mooresville Police Department's complete investigative file as Defendant's Exhibit 1. Plaintiff's counsel objected because references to alcohol were contained on the two DMV-349 Forms contained within the file. The portions of the DMV-349 Forms containing the reference to Scheffer's drug or alcohol use was redacted prior to submission to the jury. The portion of the DMV-349 Form intended for the officer to record Defendant's drug or alcohol use was not redacted. On the handwritten DMV-349 Form, the fields for Defendant's drug and alcohol use were left blank. On the other type-written form, the fields for Defendant's drug and alcohol use were filled with zeros.

The report also states Scheffer was wearing non-reflective clothing, including a black leather jacket and chaps, and a gray helmet. The moped was also painted black. Officer Goodale testified a street light was located near the southwest corner of the intersection, but it did not illuminate the area where the crash had occurred.

At the close of Defendant's evidence, Plaintiff moved for a directed verdict on the issue of contributory negligence. The trial court denied the motion. The trial court submitted four theories of negligence on the part of Defendant to the jury: (1) failure to use ordinary care by failing to

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maintain a reasonable look-out; (2) failure to use ordinary care by failing to keep his vehicle under proper control; (3) violation of a safety statute by failing to yield the right-of-way when turning left in an intersection; and, (4) violation of a safety statute by failing to keep his vehicle in the proper lane of travel.

The trial court declined Plaintiff's request for a jury instruction on the doctrine of last clear chance and stated "[b]ecause all the evidence shows that [Defendant] never saw [Scheffer]." The court determined Defendant could not have had the last clear chance to avoid Scheffer if he never saw him.

The jury returned a verdict finding Defendant's negligence proximately caused Scheffer's death, and that Scheffer was contributorily negligent. Plaintiff filed a motion for judgment notwithstanding the verdict and motion for new trial, which were both denied. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred by: (1) allowing a partially redacted accident report showing evidence of alcohol use to be published to the jury; and, (2) submitting the issue of contributory negligence to the jury and denying Plaintiff's request to submit the issue of last clear chance to the jury.

III. Accident Report

[1] Plaintiff argues the trial court erred by allowing Defendant to introduce the partially redacted accident report into evidence, which redacted the drug and alcohol use section of the accident report pertaining to Scheffer, but showed no drug or alcohol use on the part referring to Defendant.

A. Standard of Review

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013). "Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2013). "Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and quotation marks omitted).

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“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]” N.C. Gen. Stat. § 8C-1, Rule 403 (2013). The standard of review regarding a Rule 403 determination is abuse of discretion. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). “An abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (citations and quotation marks omitted).

When considering evidentiary errors on appeal, “[t]he burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred.” *Suarez v. Wotring*, 155 N.C. App. 20, 30, 573 S.E.2d 746, 752 (2002) (citations omitted), *disc. rev. denied and cert. denied*, 357 N.C. 66, 579 S.E.2d 107 (2003).

B. Prejudice

The Mooresville Police Department’s investigative file contains both a handwritten DMV-349 Form and a typewritten DMV-349 Form. The typewritten form is dated 29 November 2010, two days after the date of the accident. The handwritten form is dated 2 March 2011.

The forms are divided into columns, each with parallel, identical fields to be evaluated for each party involved in an accident. The parties’ drug and alcohol information is listed side by side on the form. On the typewritten form, Scheffer’s column included the following fields:

No. 37: Alcohol/Drugs Suspected 7

No. 38: Alcohol/Drugs Test 3

No. 39: Results (if known) 5

Those fields were marked “0” in Defendant’s column. The handwritten form contained the same fields but with different results for Scheffer:

No. 37: Alcohol/Drugs Suspected 2

No. 38: Alcohol/Drugs Test 3

No. 39: Results (if known) 2/.03

Those fields were left blank in Defendant’s column.

At Plaintiff’s request Scheffer’s information on both the handwritten and typewritten forms was redacted prior to submission to the jury.

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The fields for drugs and alcohol were redacted for Scheffer with what appears to be correction fluid or tape. Those fields on the forms were not redacted for Defendant.

Plaintiff argues that publishing the irrelevant alcohol status of Defendant next to the redacted alcohol status of Scheffer highlighted the fact that those fields were hidden in Scheffer's column. Plaintiff asserts this inevitably raised a presumption of Scheffer's guilt.

Defendant's use or non-use of alcohol would be relevant. The accident report was admitted into evidence without objection and contains the following information:

The driver of Unit Two (Nathaniel E. Dalton) remained on scene and was interviewed and gave a written statement later on that night. He was questioned by several officers, including myself, just moments after the collision to determine if there were signs of impairment. I spoke with Mr. Dalton while he sat in the rear of a patrol car in depth about the collision. Mr. Dalton appeared normal and there were no signs of impairment noted.

Officer Goodale's trial testimony was similar. He testified he observed Defendant from a close proximity and did not notice any signs of alcohol consumption or impairment. The evidence presented through the crash report and Officer Goodale's testimony was the same information plaintiff argues should have been redacted from the DMV-349 Forms.

Our Court has held:

Verdicts and judgments are not to be set aside for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, and that a different result likely would have ensued, with the burden being on the appellant to show this. . . . Presuming error, [the appellant] has not shown prejudice and we will not speculate whether such error was prejudicial.

Boykin v. Morrison, 148 N.C. App. 98, 102, 557 S.E.2d 583, 585 (2001) (citation and quotation marks omitted).

Here, plaintiff has failed to meet his burden of showing the trial court's admission of the "partially redacted" DMV-349 Forms was prejudicial. The information on the forms which Plaintiff claims was erroneously admitted and prejudicial, was also presented, without objection,

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through the accident report and Officer Goodale's testimony. This argument is overruled.

IV. Contributory Negligence

[2] Plaintiff argues the trial court erred in submitting the issue of contributory negligence to the jury because Defendant failed to satisfy his burden of showing Scheffer was contributorily negligent. We disagree.

A. Standard of Review

In North Carolina, a plaintiff's right to recover in a personal injury or wrongful death action is barred upon a finding of contributory negligence. *Brewer v. Harris*, 279 N.C. 288, 298, 182 S.E.2d 345, 350 (1971); *Prior v. Pruett*, 143 N.C. App. 612, 622-23, 550 S.E.2d 166, 173 (2001), *disc. rev. denied*, 355 N.C. 493, 563 S.E.2d 572 (2002). "In determining the sufficiency of the evidence to justify the submission of an issue of contributory negligence to the jury, [the appellate court] must consider the evidence *in the light most favorable to the defendant and disregard that which is favorable to the plaintiff.*" *Prevette v. Wilkes General Hospital, Inc.*, 37 N.C. App. 425, 427, 246 S.E.2d 91, 92 (1978) (emphasis supplied) (citation omitted). "If different inferences may be drawn from the evidence on the issue of contributory negligence, some favorable to [the] plaintiff and others to the defendant, it is a case for the jury to determine." *Id.* (citation and quotation marks omitted).

"If there is more than a scintilla of evidence that plaintiff is contributorily negligent, the issue is a matter for the jury, not for the trial court." *Cobo v. Raba*, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998) (citation and quotation marks omitted). Any evidence that Scheffer was contributorily negligent in that "he failed to use ordinary care to protect himself from the asserted injury, or that his behavior was a proximate cause of his injury, would dictate the submission of this issue to the jury." *Id.*

B. Analysis

"Contributory negligence is the breach of duty of a plaintiff to exercise due care for his or her own safety, such that the plaintiff's failure to exercise due care is the proximate cause of his or her injury." *Prior*, 143 N.C. App. at 622, 550 S.E.2d at 173 (citation omitted). "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 v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980).

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Two elements, at least, are necessary to constitute contributory negligence: (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. . . . There must be not only negligence on the part of the plaintiff, but *contributory* negligence, a real causal connection between the plaintiff's negligent act and the injury, or it is no defense to the action.

Ellis v. Whitaker, 156 N.C. App. 192, 195, 576 S.E.2d 138, 141 (2003) (citations omitted) (emphasis in original).

The trial court instructed the jury as follows:

With respect to the defendant's first contention [pertaining to contributory negligence], the Court would instruct you as follows:

The lighting requirements for a moped are different from the lighting requirements for a motorcycle. A moped is a vehicle that has two or three wheels, no external shifting device, and a motor that does not exceed 50 cubic centimeters piston displacement, and cannot propel the vehicle at a speed greater than 30 miles an hour on a level surface. A motorcycle is a vehicle having a saddle for the use of a rider and designed to travel on not more than three wheels in contact with the ground, including motor scooters and motor driven bicycles.

The motor vehicle law provides that every moped shall be operated upon a highway during the period from sunset to sunrise, and shall carry on the left side one or more lighted lamps or lanterns projecting a white light visible under normal atmospheric conditions from a distance of not less than 500 feet to the front of such vehicle, and visible under light conditions from a distance of not less than 500 feet to the rear of such vehicle. The Court instructs you that a lamp is a light constructed to project a powerful beam and to defuse this beam through a reflector and special lens in order to better illuminate the road ahead in serving as a warning to other vehicles. A failure to carry or maintain such lighting is negligence within itself.

With respect to the defendant's second contention, the motor vehicle law provides it is unlawful to operate a

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motor vehicle on a highway at a speed greater than reasonable and prudent under the conditions then existing. A violation of this safety statute is negligence in and of itself. In determining whether the vehicle was being operated at a speed greater than was reasonable and prudent, you should consider all the evidence about the physical features at the scene, the hour of day or night, the weather conditions, the extent of other traffic, the width and nature of the roadway, and other such circumstances as are shown to exist. Considering all such circumstances, the rate of speed may be unreasonable and prudent even though it is within the posted maximum speed limit at the time and at the scene.

Evidence was presented tending to show: (1) Scheffer was operating a moped on Highway 115 on a dark night; (2) Scheffer had attached a battery-powered bicycle light to the left handlebar of his moped because the factory installed headlamp had been broken a month earlier; (3) Turner, who passed Scheffer on his moped 1.15 miles from the accident scene, described the light on the moped as “a very, very faint little light,” and she did not see the light until it was two car lengths away; (4) Cockrell did not see Scheffer until he was passing right in front of his car and was “certain” he did not see a light on the moped; (5) Defendant did not see the light from Scheffer’s moped or anything else prior to executing the left turn; and (6) no street lights illuminated the area where the collision occurred.

The trial court was required to submit the issue of contributory negligence to the jury, if Defendant presented “more than a scintilla” of evidence to show Scheffer drove his moped without sufficient lighting to be adequately seen by other drivers or in an imprudent manner. *Cobo*, 347 N.C. at 545, 495 S.E.2d at 365. Considering the evidence in the light most favorable to Defendant, and “disregard[ing] that which is favorable to [P]laintiff,” sufficient evidence required the trial court to submit the issue of Scheffer’s contributory negligence to the jury. *Prevette*, 37 N.C. App. at 427, 246 S.E.2d at 92. This argument is overruled.

V. Last Clear Chance

[3] Plaintiff asserts the trial court erred in failing to submit the issue of last clear chance to the jury. Plaintiff argues the doctrine of last clear chance applies because, after the oncoming car passed, Defendant failed to look down the highway to determine if any other vehicles were approaching before executing the left turn. We agree.

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A. Standard of Review

The issue of last clear chance “[m]ust be submitted to the jury if the evidence, when viewed in the *light most favorable to the plaintiff*, will support a reasonable inference of each essential element of the doctrine.” *Culler v. Hamlett*, 148 N.C. App. 372, 379, 559 S.E.2d 195, 200 (2002) (emphasis supplied) (citation omitted). Plaintiff bears the burden to show and establish whether the doctrine of last clear chance is applicable to the facts of his case. *Vernon v. Crist*, 291 N.C. 646, 654, 231 S.E.2d 591, 596 (1977).

B. Analysis

Our Supreme Court has articulated the elements a plaintiff must establish to invoke the doctrine of last clear chance as follows:

Where an injured [plaintiff] who has been guilty of contributory negligence invokes the last clear chance or discovered peril doctrine against the driver of a motor vehicle which struck and injured him, he must establish these four elements: (1) That the [plaintiff] negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the [plaintiff’s] perilous position and his incapacity to escape from it before the endangered [plaintiff] suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered [plaintiff] by the exercise of reasonable care after he discovered, or should have discovered, the [plaintiff’s] perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered [plaintiff], and for that reason struck and injured him.

Wade v. Jones Sausage Co., 239 N.C. 524, 525, 80 S.E.2d 150, 151 (1954) (citations omitted).

“In situations where this doctrine applies, the focus is not on the preceding negligence of the defendant or the contributory negligence of the plaintiff which would ordinarily defeat recovery.” *Culler*, 148 N.C. App. at 379, 559 S.E.2d at 200-01 (citing *Clodfelter v. Carroll*, 261 N.C. 630, 135 S.E.2d 636 (1964)). “A negligent plaintiff who is unable to avoid the harm placing [him] in helpless peril immediately before the accident which results in [his] injury may recover against a defendant who has

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the means and ability to avoid the accident but fails to do so.” *Overton v. Purvis*, 154 N.C. App. 543, 545, 573 S.E.2d 219, 224 (2002) (Thomas, J., dissenting) (emphasis removed) (citation omitted), *rev’d for reasons stated in dissenting opinion*, 357 N.C. 497, 586 S.E.2d 265 (2003).

Evidence was presented tending to show that, “immediately before the accident,” Scheffer “negligently placed himself in a position of peril from which he could not escape.” *Id.*; *Wade*, 239 N.C. at 525, 80 S.E.2d at 151. Evidence was presented tending to show Plaintiff’s moped was insufficiently illuminated and Defendant did not see Scheffer before executing the left turn. Plaintiff’s expert, Dennis, testified Scheffer’s moped created thirty-five feet of skid marks on the road prior to the accident. This evidence raises a “reasonable inference” to suggest Scheffer’s attempt to extricate himself from peril. *Overton*, 154 N.C. App. at 545, 573 S.E.2d at 224.

Scheffer’s perilous situation did not occur solely as a result of driving his moped without sufficient lighting. His perilous position occurred when Defendant began executing the left turn off Highway 115 toward Steam Engine Road into on-coming traffic, rendering Scheffer unable to stop his moped in time to escape without injury. Scheffer’s peril began at the moment he applied his brakes in an attempt to stop his moped before hitting Defendant’s car.

With regard to the second element of the doctrine of last clear chance, Plaintiff argues Defendant, by exercising reasonable care and maintaining a proper lookout before executing the left turn, “knew, or by the exercise of reasonable care could have discovered” Scheffer. *Wade*, 239 N.C. at 525, 80 S.E.2d at 151. The trial court instructed the jury that Defendant owed Scheffer a duty to maintain a proper lookout for oncoming traffic, keep his vehicle under proper control, yield to oncoming traffic when turning left at the intersection, and maintain his vehicle in the proper lane of travel. Neither the verdict sheet nor the record indicates under which theory or theories the jury found Defendant was negligent.

Viewed in the light most favorable to Plaintiff, the evidence is sufficient to submit the question to the jury of whether Defendant, after he began to turn left, “by the exercise of reasonable care *could have discovered*” Scheffer’s peril. *Id.* (emphasis supplied). This is an issue of fact appropriate for the jury, and not for a court to determine as a matter of law.

With regard to the third element, it is also a jury issue to determine whether Defendant “had the time and means to avoid injury to [Scheffer] by the exercise of reasonable care after he discovered, or could have

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discovered” Scheffer’s peril. *Id.* Evidence was presented which tends to show as Scheffer saw Defendant’s car begin to turn left, he applied his brakes, and his moped left thirty-five feet of skid marks before striking the front right corner of Defendant’s car. A question of fact exists to whether Defendant could have taken some action to avoid Scheffer striking his vehicle after he knew, or with the “exercise of reasonable care could have discovered,” Scheffer approaching him. *Id.*

It is well established that to satisfy the third element of last clear chance there must be “an appreciable interval of time between plaintiff’s negligence and his injury during which the defendant, by the exercise of ordinary care, could or should have avoided the effect of plaintiff’s prior negligence.” *Ingram v. Smokey Mountain Stages, Inc.*, 225 N.C. 444, 448, 35 S.E.2d 337, 340 (1945); *see also Bass v. Johnson*, 149 N.C. App. 152, 158, 560 S.E.2d 841, 846 (2002) (holding the trial court did not err in finding defendant did not have the time and means to avoid the accident based on the defendant’s testimony that he “couldn’t see [the plaintiff’s car] until it was too late.”); *Watson v. White*, 309 N.C. 498, 506, 308 S.E.2d 268, 273 (1983) (holding that while the interval of 1.28 seconds may have been sufficient for a last possible chance to avoid an injury, such interval did not amount to a last clear chance). The doctrine of last clear chance “contemplates a last ‘clear’ chance, not a last ‘possible’ chance to avoid the accident; it must have been such a chance as would have enabled a reasonably prudent man in like position to have acted effectively.” *Battle v. Chavis*, 266 N.C. 778, 781, 147 S.E.2d 387, 390 (1966).

In *Bass* and *Watson*, both the defendants saw the plaintiffs, but neither had sufficient time to avoid the accident. *Bass*, 149 N.C. App. at 158, 560 S.E.2d at 846; *Watson*, 309 N.C. at 506, 308 S.E.2d at 273. Here, issues exist as to whether Defendant should have discovered Scheffer’s peril, and whether sufficient “time and means” existed to avoid the accident. *See Harrison v. Lewis*, 15 N.C. App. 26, 32-33, 189 S.E.2d 662, 665-66 (1972) (holding the doctrine of last clear chance was properly submitted to the jury where, had a driver maintained a proper lookout, he could have observed a pedestrian in the act of crossing the highway and could have avoided striking him by merely turning slightly).

Sufficient evidence was also presented for the jury to determine the fourth element, whether Defendant negligently failed to use the available time and means to avoid injury to Scheffer. Defendant was asked whether he “look[ed] before [he] turned left.” He stated, “Yes, I was already looking in the direction of travel.” Defendant’s statement is unclear and could be reasonably interpreted that he was looking through the intersection, or that he was looking toward the left. Viewed

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in the light most favorable to Plaintiff, evidence tends to raise an issue of fact of whether Defendant adequately looked through the intersection, behind the passing car, to determine if his path was clear before entering the oncoming lane of travel.

Where “the evidence, when viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine,” the issue of last clear chance should have been submitted to the jury. *Nealy v. Green*, 139 N.C. App. 500, 504, 534 S.E.2d 240, 243 (2000) (citation omitted). Here, evidence was presented tending to show each element of the doctrine to support a jury instruction on the doctrine of last clear chance. The trial court should permit the jury to determine the issue.

VI. Conclusion

The trial court did not commit prejudicial error by allowing the accident report into evidence, which showed redactions for Scheffer’s alcohol use and zeros or blanks for Defendant’s alcohol use. Other unchallenged and admitted evidence showed Defendant was not under the influence of alcohol through other evidence and testimony. Plaintiff failed to show any prejudice to warrant a different result at trial.

The evidence, viewed in the light most favorable to Defendant, was sufficient to allow the jury to consider the issue of contributory negligence. The trial court did not err in submitting this issue to the jury.

Evidence was presented tending to raise an issue of fact regarding the four elements of last clear chance. The jury should be allowed to determine whether Defendant had the last clear chance to avoid the accident. We affirm in part, reverse in part, and remand for a new trial.

AFFIRMED IN PART; REVERSED IN PART; REMANDED FOR NEW TRIAL.

Judges BRYANT and GEER concur.

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STATE OF NORTH CAROLINA

v.

THOMAS CRAIG CAMPBELL, DEFENDANT

No. COA13-1404-2

Filed 20 October 2015

1. Constitutional Law—effective assistance of counsel—failure of counsel to object—inadmissible evidence

Defendant was not denied effective assistance of counsel in a prosecution for breaking or entering a place of religious worship where his counsel did not object to evidence that he committed another breaking or entering the same night. The evidence tended to show intent and was not inadmissible under Rule 404(b).

2. Evidence—other offense—breaking and entering—intent—probative value not substantially outweighed by prejudice

Defendant did not prevail on an ineffective assistance of counsel claim in a prosecution for breaking or entering a place of religious worship where his counsel did not object to evidence that he committed another break-in on the same night. The evidence's probative value was not substantially outweighed by the danger of unfair prejudice, given the temporal proximity of the breaking or entering offenses, the evidence's tendency to show that defendant's intent in entering the church was to commit a larceny, and the trial court's instruction that the jury not consider a prior conviction as evidence of defendant's guilt.

3. Indictment and Information—fatal variance—larceny from church—ownership of stolen property

The trial court erred by failing to dismiss a larceny charge due to a fatal variance between the indictment and the evidence as to the ownership of the stolen property. The larceny indictment alleged that the stolen property belonged to "Andy Stevens and Manna Baptist Church," but the evidence at trial did not demonstrate that Pastor Stevens held title to or had any sort of ownership interest in the stolen property. Possession by an employee of the owner is not a sufficient type of special property interest.

Appeal by defendant from judgment entered on or about 12 June 2013 by Judge Linwood O. Foust in Superior Court, Cleveland County. Originally heard in the Court of Appeals on 7 May 2014, with opinion filed

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1 July 2014. An opinion reversing the decision of the Court of Appeals and remanding for consideration of issues not previously addressed by this Court was filed by the Supreme Court of North Carolina on 11 June 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Allison A. Angell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jason Christopher Yoder, for defendant-appellant.

STROUD, Judge.

Thomas Craig Campbell (“defendant”) appeals from a judgment entered on a jury verdict finding him guilty of breaking or entering a place of religious worship with intent to commit a larceny therein and larceny after breaking or entering. Defendant contends that (1) the indictment for larceny was fatally defective because it failed to allege that Manna Baptist Church was an entity capable of owning property; (2) insufficient evidence supports his conviction for breaking or entering a place of religious worship with intent to commit a larceny therein; (3) he was deprived of effective assistance of counsel, because his counsel failed to object to the admission of evidence that defendant had committed a separate breaking or entering offense; (4) the trial court erred in failing to dismiss the larceny charge due to a fatal variance as to the ownership of the property; (5) insufficient evidence supports his larceny conviction; and (6) the trial court violated his constitutional right to a unanimous jury verdict with respect to the larceny charge. On 1 July 2014, this Court agreed with defendant on issues (1) and (2) and therefore failed to address defendant’s remaining arguments. *State v. Campbell*, ___ N.C. App. ___, ___, 759 S.E.2d 380, 387 (2014). But on 11 June 2015, on discretionary review, the North Carolina Supreme Court reversed this Court’s decision and held that (1) the larceny indictment was valid on its face even though it did not specify that Manna Baptist Church was an entity capable of owning property; and (2) sufficient evidence supported defendant’s conviction for breaking or entering a place of religious worship with intent to commit a larceny therein. *State v. Campbell*, ___ N.C. ___, ___, 772 S.E.2d 440, 444-45 (2015). The North Carolina Supreme Court remanded the case to this Court for consideration of any remaining issues. *See id.* at ___, 772 S.E.2d at 445.

Accordingly, we examine the remaining issues (3), (4), (5), and (6). We disagree with defendant on issue (3) but agree with defendant

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on issue (4). Because we agree with defendant on issue (4), we do not address issues (5) and (6). We find no error in part, vacate in part, and remand.

I. Background

We review our discussion of the factual and procedural background from our previous opinion:

On 8 October 2012, defendant was indicted for breaking or entering a place of religious worship and larceny after breaking or entering. The larceny indictment alleged that on 15 August 2012 defendant “willfully and feloniously did steal, take, and carry away a music receiver, microphones, and sounds [sic] system wires, the personal property of Andy [Stevens] and Manna Baptist Church, pursuant to a breaking or entering in violation of N.C.G.S. 14-54.1(a).” Defendant pled not guilty and proceeded to jury trial.

At trial, the State’s evidence tended to show that Pastor Andy [Stevens] of Manna Baptist Church, located on Burke Road in Shelby, North Carolina, discovered after Sunday services on 19 August 2012 that a receiver, several microphones, and audio cords were missing. The cords were usually located at the front of the church, by the sound system, or in the baptistery changing area. It appeared that the sound system had been opened up and items inside had been moved around. Pastor [Stevens] found a wallet in the baptistery changing area that contained a driver’s license belonging to defendant.

Pastor [Stevens] testified that when the church secretary arrived on Thursday morning earlier that week, she had noticed that the door was unlocked. She assumed that it had been left unlocked after Wednesday night services, which had ended around 9 p.m. Although the front door is normally locked at night, on cross-examination, Pastor [Stevens] admitted that the church door had been left unlocked overnight before. Pastor [Stevens] said that the secretary did not notice anything amiss on Thursday morning.

After Pastor [Stevens] realized that the audio equipment was missing he called the Cleveland County Sheriff’s

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Office. Deputy Jordan Bowen responded to the scene. The deputy examined the premises but found no signs of forced entry. He recovered defendant's wallet from the pastor.

Investigator Jessica Woosley went to speak with defendant at the Cleveland County Detention Center, where he was being held on an unrelated breaking or entering charge. When Investigator Woosley introduced herself, defendant said, "[T]his can't possibly be good. What have I done now that I don't remember?" Investigator Woosley read defendant his *Miranda* rights and defendant invoked his right to counsel. Investigator Woosley tried to end the interview, but defendant continued talking.

Defendant admitted that he had been to Manna Baptist Church on the night in question, but stated that he could not remember what he had done there. He explained that he had mental issues and blacked out at times. Defendant claimed to be a religious man who had been "on a spiritual journey." He said that he remembered the door to the church being open, but that he did not remember doing anything wrong.

After speaking with defendant, Investigator Woosley searched through a pawn shop database for any transactions involving items matching those missing from the church but did not find anything. The missing items were never recovered.

At the close of the State's evidence, defendant moved to dismiss the charges. The trial court denied the motion. Defendant then elected to present evidence and testify on his own behalf. Defendant testified that he was a [fifty-one-year-old] man with a high school education and one semester of college. He said that on 15 August 2012, he had been asked to leave the home he was living in, so he packed his possessions in a duffel bag and left. He started walking toward a friend's house but dropped the bag in a ditch because it was too heavy to carry long-distance.

Around midnight, defendant arrived at his friend's house, but his friend's girlfriend asked him to leave, so he did. Defendant continued walking down the road until

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he came upon the church. He noticed that the door was cracked slightly and a “sliver of light” was emanating from within. Defendant explained that after all his walking, he was thirsty and tired, so he went into the church looking for water and sanctuary. He said that while he was inside, he got some water, prayed, and slept. He claimed that he did not intend to take anything and did not take anything when he left around daybreak.

After leaving the church, defendant began walking down the road again. He soon began having chest pains and called 911. Defendant explained that he was on a variety of medications at the time, including powerful psychotropic medication. An ambulance arrived and took him to Cleveland Memorial Hospital.

Calvin Cobb, the Emergency Medical Technician (EMT) who responded to defendant’s call, also testified on defendant’s behalf. Mr. Cobb said that they received a dispatch call around 6:30 a.m. When they arrived at the intersection of Burke Road and River Hill Road, they saw defendant near an open field, sitting on the back of a fire truck that had been first to respond. Defendant told Mr. Cobb that he had been wandering all night. Mr. Cobb noticed that defendant looked disheveled and worn out, and that defendant had worn through the soles of his shoes. Mr. Cobb did not see defendant carrying anything and did not find anything in his pockets.

After defendant rested his case, the State called another officer in rebuttal. The State wanted to offer his testimony regarding defendant’s prior breaking or entering arrest. The trial court asked the State to explain the relevance of the prior incident. The State argued that it contradicted part of defendant’s testimony regarding what happened before he got to the church, but did not elaborate on how it contradicted defendant’s testimony and did not otherwise explain its relevance. The trial court excluded the rebuttal testimony under [North Carolina Rule of Evidence 403]. At the close of all the evidence, defendant renewed his motion to dismiss all charges, which the trial court again denied.

The jury found defendant guilty of both charges. The trial court consolidated the charges for judgment and

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sentenced defendant to a split sentence of 13-25 months [of] imprisonment, suspended for 24 months of supervised probation, and an active term of 140 days in jail. Defendant gave timely written notice of appeal.

Campbell, ___ N.C. App. at ___, 759 S.E.2d at 382-83 (first alteration in original).

II. Discussion

We examine defendant's remaining issues (3), (4), (5), and (6). Defendant contends that (3) he was deprived of effective assistance of counsel, because his counsel failed to object to the admission of evidence that defendant had committed a separate breaking or entering offense; (4) the trial court erred in failing to dismiss the larceny charge due to a fatal variance as to the ownership of the property; (5) insufficient evidence supports his larceny conviction; and (6) the trial court violated his constitutional right to a unanimous jury verdict with respect to the larceny charge. We disagree with defendant on issue (3) but agree with defendant on issue (4). Because we agree with defendant on issue (4), we do not address issues (5) and (6).

A. Ineffective Assistance of Counsel ("IAC")

[1] Defendant argues that his trial counsel rendered ineffective assistance, because he failed to object to the admission of evidence of defendant's breaking or entering a house on the same night that he entered the church. Defendant argues that his trial counsel should have (1) filed a motion *in limine* objecting to this evidence; (2) moved to redact the audio recording of defendant's interview with Investigator Woosley, in which he admits to breaking or entering the house; and (3) objected when the prosecutor cross-examined defendant about breaking or entering the house. Because defendant complains of the admission of evidence, we need no further factual development to address defendant's IAC claim. *See State v. Davis*, 158 N.C. App. 1, 15, 582 S.E.2d 289, 298 (2003) ("[IAC] claims may . . . be raised on direct appeal when the cold record reveals that no further factual development is necessary to resolve the issue.").

To prevail in a claim for IAC, a defendant must show that his (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

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As to the first prong of the IAC test, a strong presumption exists that a counsel's conduct falls within the range of reasonable professional assistance. Further, if there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient.

State v. Smith, ___ N.C. App. ___, ___, 749 S.E.2d 507, 509 (2013) (citations, quotation marks, and brackets omitted), *cert. denied*, 367 N.C. 532, 762 S.E.2d 221 (2014).

Defendant specifically contends that he received ineffective assistance of counsel, because the evidence was inadmissible under North Carolina Rules of Evidence 403 and 404(b). N.C. Gen. Stat. § 8C-1, Rules 403, 404(b) (2013). Rule 404(b) provides:

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

Id. § 8C-1, Rule 404(b). Although Rule 404(b) is a rule of inclusion, it is still "constrained by the requirements of similarity and temporal proximity." *State v. Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012). The State argues that this evidence was admissible for the purpose of proving motive, plan, and intent. In the police interview, defendant admitted that he broke into a house on the same night that he entered the church. This evidence tends to show that defendant's intent in entering the church was to commit a larceny therein and tends to contradict defendant's later testimony that he entered the church for sanctuary. Because the two breaking or entering offenses occurred on the same night and because the evidence tends to show that defendant's intent in entering the church was to commit a larceny therein, we hold that Rule 404(b) does not bar the admission of this evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 404(b); *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159.

[2] Defendant also argues that this evidence was inadmissible under Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* § 8C-1, Rule

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403 (emphasis added). “Unfair prejudice” means “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, on an emotional one.” *State v. Baldwin*, ___ N.C. App. ___, ___, 770 S.E.2d 167, 171 (2015) (brackets omitted). When defendant’s trial counsel objected to this evidence during the State’s rebuttal, the trial court excluded the evidence under Rule 403. Defendant argues that this ruling shows that his trial counsel should have objected earlier to this evidence. But in responding to defendant’s objection, the prosecutor failed to make a Rule 404(b) argument, and the trial judge misquoted Rule 403 when he ruled that “[i]ts prejudicial effect outweighs the probative value.” Because defendant committed the two breaking or entering offenses on the same night and because the evidence tends to show that defendant’s intent in entering the church was to commit a larceny therein, we hold that its probative value was not substantially outweighed by the danger of unfair prejudice. *See* N.C. Gen. Stat. § 8C-1, Rule 403. Accordingly, we hold that this evidence was admissible under Rule 403.

Defendant further argues that his trial counsel should have requested a limiting instruction that the jury could not consider the evidence of defendant’s breaking into a house as evidence of his character to act in conformity therewith. We agree that a limiting instruction would have mitigated any potential unfair prejudice resulting from the evidence’s admission. *See State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 74-75 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). But we hold that any resulting unfair prejudice did not substantially outweigh the evidence’s probative value, given the temporal proximity of the breaking or entering offenses and the evidence’s tendency to show that defendant’s intent in entering the church was to commit a larceny therein. Additionally, we note that in the context of impeachment evidence, the trial court properly instructed the jury to not consider a prior conviction as evidence of defendant’s guilt in this case.

Because defendant has failed to show that the evidence’s admission was error, we hold that he cannot prevail on an IAC claim. *See State v. Chappelle*, 193 N.C. App. 313, 330, 667 S.E.2d 327, 337, *appeal dismissed and disc. review denied*, 362 N.C. 684, 670 S.E.2d 568 (2008).¹

1. We note that the North Carolina Reports, 362 N.C. 684 (2008), incorrectly states that the defendant’s petition for discretionary review was allowed, and that the State’s motion to dismiss was denied.

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B. Fatal Variance as to the Ownership of the Stolen Property

i. Rule 2

[3] Defendant next contends that the trial court erred in failing to dismiss the larceny charge due to a fatal variance between the indictment and the evidence as to the ownership of the stolen property. Defendant's trial counsel failed to raise this issue at trial, so defendant requests that we invoke North Carolina Rule of Appellate Procedure 2, or, alternatively, that we review this issue for ineffective assistance of counsel. N.C.R. App. P. 2 ("To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]"). In *State v. Gayton-Barbosa*, this Court invoked Rule 2 to review a similar fatal variance argument and held that this type of error is "sufficiently serious to justify the exercise of our authority under [Rule 2]." 197 N.C. App. 129, 134, 676 S.E.2d 586, 589-90 (2009). Accordingly, we exercise our discretion under Rule 2 to review this issue.

ii. Analysis

Defendant contends that the trial court erred in failing to dismiss the larceny charge due to a fatal variance as to the ownership of the stolen property. Defendant specifically argues that a fatal variance occurred "because the State never proved the property was owned by both Andy Stevens and Manna Baptist Church." Defendant relies on *State v. Hill* for the proposition that where an indictment alleges multiple owners, the State must prove that there were in fact multiple owners. *See* 79 N.C. 656, 658-59 (1878).

In *Hill*, the indictment alleged that the stolen property belonged to "Lee Samuel and others," but the evidence at trial showed that the stolen property belonged to Lee Samuel alone. 79 N.C. at 658. Our Supreme Court held that this inconsistency constituted a fatal variance. *Id.* at 658-59. *Hill* has been consistently cited and followed as binding precedent by North Carolina courts since 1878. *See, e.g., State v. Albarty*, 238 N.C. 130, 131-32, 76 S.E.2d 381, 382 (1953); *State v. Hicks*, 233 N.C. 31, 34, 62 S.E.2d 497, 499 (1950); *State v. Williams*, 210 N.C. 159, 161, 185 S.E. 661, 662 (1936); *State v. Corpening*, 191 N.C. 751, 753, 133 S.E. 14, 15 (1926); *State v. Harbert*, 185 N.C. 760, 762, 118 S.E. 6, 7 (1923). Most recently, our Supreme Court cited *Hill* in *State v. Ellis*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (No. 405PA14) (Sept. 25, 2015). The Court did not overrule *Hill* or suggest that its holding is no longer binding precedent in the fatal variance context, as is the case here. *Id.* at ___, ___ S.E.2d at ___. In fact, in *Ellis*, our Supreme Court carefully distinguished between

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cases raising the issue like the one addressed by *Ellis*, the “facial sufficiency of the underlying criminal pleading” and the issue raised here, whether “a fatal variance exist[s] between the crime charged in the relevant criminal pleading and the evidence offered by the State at trial[.]” *Id.* at ___, ___ S.E.2d at ___. Our Supreme Court discussed *Hill* as part of its explanation of this distinction:

According to defendant, this Court’s decisions establish that, where a criminal pleading purporting to charge the commission of an injury to personal property lists two entities as property owners, both entities must be adequately alleged to be capable of owning property for the pleading to properly charge the commission of the crime. Although defendant cites numerous cases in support of this position, each decision on which he relies involves a claim that a fatal variance existed between the crime charged in the relevant criminal pleading and the evidence offered by the State at trial, rather than a challenge to the facial sufficiency of the underlying criminal pleading. For example, in *State v. Greene*, 289 N.C. 578, 585-86, 223 S.E.2d 365, 370 (1976), this Court held that there was no fatal variance between the indictment and the evidence in a case in which both men listed as property owners in the indictment were shown to have an ownership interest in the property. Similarly, we concluded in *State v. Hill*, 79 N.C. 656, 658-59 (1878), that a fatal variance did exist in a case in which the indictment alleged that the property was owned by “Lee Samuel and others” while the evidence showed that Lee Samuel was the sole owner of the property in question. Finally, in *State v. Burgess*, 74 N.C. 272, 272-73 (1876), we determined that a fatal variance existed in a case in which the indictment alleged that the property was owned by Joshua Brooks while the evidence tended to show that the property in question was owned by both Mr. Brooks and an individual named Hagler.

Id. at ___, ___ S.E.2d at ___. Thus, if the State fails to present evidence of a property interest of some sort in both of the alleged owners, there is a fatal variance between the indictment and the proof. *See id.* at ___, ___ S.E.2d at ___.

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This Court recently summarized the types of property interest that constitute a “special property interest,” which, if proven, are consistent with a larceny indictment’s allegation of ownership:

According to well-established North Carolina law, “the indictment in a larceny case must allege a person who has a property interest in the property stolen and that the State must prove that that person has ownership, meaning title to the property or some special property interest.” *State v. Greene*, 289 N.C. 578, 584, 223 S.E.2d 365, 369 (1976). “It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.” *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940). In other words, “the allegation and proof must correspond.” *Id.* “A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.” [*State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971).] “In indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal.” *State v. Mason*, 35 N.C. 341, 342 (1852).

However, if it can be shown that the person named in the indictment, though not the actual owner of the stolen item, had a “special property interest” in the item, then the defect in the indictment will not be fatal. *State v. Craycraft*, 152 N.C. App. 211, 213, 567 S.E.2d 206, 208 (2002) (“The State may prove ownership by introducing evidence that the person either possessed title to the property or had a special property interest. If the indictment fails to allege the existence of a person with title or special property interest, then the indictment contains a fatal variance.” (citation omitted)).

Our Courts have evaluated circumstances in which a special property interest has been established. *See e.g. State v. Adams*, 331 N.C. 317, 331, 416 S.E.2d 380, 388 (1992) (spouses have a special property interest in jointly possessed property, though not jointly owned); *State v. Schultz*, 294 N.C. 281, 285, 240 S.E.2d 451, 454-55 (1978) (a “bailee or a custodian” has a special property interest in items in his or her possession); *State v. Salters*, 137

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N.C. App. 553, 555-56, 528 S.E.2d 386, 389 (2000) (parents have a special property interest in their children's belongings kept in their residence, but "that special interest does not extend to a caretaker of the property even where the caretaker had actual possession"), *cert. denied*, 352 N.C. 361, 544 S.E.2d 556 (2000)]; *State v. Carr*, 21 N.C. App. 470, 471-72, 204 S.E.2d 892, 893-94 (1974) (where a car was registered to a corporation, the son of the owner of that corporation had a special property interest in the car because he was the sole user of the car and in exclusive possession of it).

Conversely, our Courts have established situations in which a special property interest does not exist. *See e.g. State v. Eppley*, 282 N.C. 249, 259-60, 192 S.E.2d 441, 448 (1972) (owner of a residence did not have a special property interest in a gun kept in his linen closet, but owned by his father); *State v. Downing*, 313 N.C. 164, 167-68, 326 S.E.2d 256, 258-59 (1985) (the owner of a commercial building did not have a special property interest in items stolen from that building as the items were actually owned by the business that rented the building); *Craycraft*, 152 N.C. App. at 214, 567 S.E.2d at 208-09 (landlord did not have a special property interest in furniture he was maintaining after evicting the tenant-owner).

Gayton-Barbosa, 197 N.C. App. at 135-36, 676 S.E.2d at 590-91 (brackets omitted).

Here, the larceny indictment alleges that the stolen property belonged to "Andy Stevens and Manna Baptist Church[.]" But the evidence at trial simply does not demonstrate that Pastor Stevens held title to or had any sort of ownership interest in the stolen property. All of the evidence tends to show that he dealt with the property only in his capacity as an employee of Manna Baptist Church. Pastor Stevens testified that he was employed as the pastor of Manna Baptist Church and lived on the church property, and the entirety of the evidence relevant to his interest in the property, if any, was as follows:

[Prosecutor:] On August 19th of 2012, did you arrive at the church for Sunday services?

[Pastor Stevens:] I did.

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[Prosecutor:] And upon entering the church that day, what did you observe?

[Pastor Stevens:] We had normal services in the morning. It wasn't until at the end of the service that we were aware that some of the equipment was missing.

[Prosecutor:] Okay. And how was it that you became aware of that?

[Pastor Stevens:] The sound man was trying to record the message and had to divert back to the pulpit [microphone] because the lapel [microphone] was not picking up and at the close of the service, we found that the receiver was missing.

[Prosecutor:] Okay. Were there any other items besides the receiver that were missing?

[Pastor Stevens:] Yes, sir. There were some microphones and some audio cords.

[Prosecutor:] Where are those generally stored in your church?

[Pastor Stevens:] Usually at the front. The cords are usually at the front or in the baptistery changing area in the back and there are also a couple by the sound system.

[Prosecutor:] And how many microphones and cords were missing?

[Pastor Stevens:] I know that there [were] three—three, maybe four microphones and probably a similar amount of cords.

[Prosecutor:] Do you know what the value or have an estimate as to what the value of those items were?

[Pastor Stevens:] We estimated about five hundred dollars.

....

[Prosecutor:] Were you able to recover any of the items that were taken?

[Pastor Stevens:] No, sir.

[Prosecutor:] Has the church had to replace those items?

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[Pastor Stevens:] We have. We replaced the receiver.

Pastor Stevens testified that “we” had the church service, discovered the missing items, reported this to the police, estimated the value of the items, and replaced the receiver. He does not state who is included in the term “we,” although from context he seems to be referring to the entire congregation in regard to having the church service, to himself and the “sound man” in regard to discovering the missing items, and probably to himself and various other persons as to the estimation of value and the replacement of the receiver. In any event, he never identifies any sort of special property interest in the items stolen and he clearly identifies himself as an employee of Manna Baptist Church.

Based upon our Supreme Court’s opinion in this case on discretionary review, Manna Baptist Church was an entity capable of owning property. *Campbell*, ___ N.C. at ___, 772 S.E.2d at 444 (“[W]e hold that alleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a “company” or “incorporated,” signifies an entity capable of owning property, and the line of cases from the Court of Appeals that has held otherwise is overruled.”). The evidence showed that Manna Baptist Church owned the property, but no evidence suggests that Pastor Stevens individually had any sort of ownership interest in the property. Additionally, the fact that Pastor Stevens is an employee of Manna Baptist Church, the true owner of the property, does not cure the fatal variance. In *State v. Greene*, our Supreme Court quoted *State v. Jenkins*, 78 N.C. 478, 479-80 (1878), in support of the rule that an employee in possession of property on behalf of the employer does not have a sufficient ownership interest in the property:

“The property in the goods stolen must be laid to be either in him who has the *general* property or in him who has a *special* property. It must [in] all events be laid to be in some one [sic] who has a *property* of some kind in the article stolen. It is not sufficient to charge it to be the property of one who is a mere servant, although he may have had actual possession at the time of the larceny; because having no *property*, his possession is the possession of his master.”

The Court then gave the following example:

“A is the general owner of a horse; B is the special owner, having hired or borrowed it, or taken it to keep for a time; C grooms it and keeps the stable and the key, but

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is a mere servant and has no property at all;—if the horse be stolen, the property may be laid to be either in *A* or *B*; but not in *C* although he had the actual possession and the key in his pocket.” (Emphasis added). *State v. Jenkins*, *supra* at 480. *Accord*, *State v. Allen*, 103 N.C. 433, 435, 9 S.E. 626, 627 (1889).

Greene, 289 N.C. at 584, 223 S.E.2d at 369 (brackets omitted). Based upon the example given by our Supreme Court in *Jenkins*, Pastor Stevens was in the position of *C*, the groom who cared for the horse, while Manna Baptist Church is in the position of *A*, the owner. Even if Pastor Stevens had actual possession of the property, he had no ownership interest in it. *See id.*, 223 S.E.2d at 369.

In *Greene*, the indictment alleged that the defendant stole “one Ford Diesel Tractor and one set of Long Brand Boggs of one Newland Welborn and Hershel Greene[.]” *Id.*, 223 S.E.2d at 369 (ellipsis omitted). But the evidence showed that “Welborn had legal title to the tractor and that Greene had legal title to the disk boggs and had loaned them to Welborn, who was using them on his tractor for his farming.” *Id.*, 223 S.E.2d at 369. The defendant argued that there was a fatal variance because “alleging a property interest in both Greene and Welborn automatically means that the allegation is that they are joint owners.” *Id.* at 585, 223 S.E.2d at 370. Our Supreme Court rejected this argument because the State’s evidence showed that both alleged owners had either legal title or a special ownership interest in the property: “Welborn was the bailee or special owner of the disk boggs, and Greene had legal title to them.” *Id.* at 585-86, 223 S.E.2d at 370. Our Supreme Court also noted that in the indictment, “the order in which the property was listed corresponded to the order that the title holders of the respective pieces of property were listed”; that is, Welborn owned the tractor, and Greene owned the disk boggs. *Id.* at 586, 223 S.E.2d at 370.

In this case, the State’s evidence did not show that Pastor Stevens had any special property interest in the stolen items. As noted above, the evidence showed that they belonged solely to Manna Baptist Church and Pastor Stevens dealt with the property only as an employee of the church. Although both *Jenkins* and *Hill* are very old cases, they have been followed by our courts for many years, and this Court is not at liberty to disregard them. Based upon these binding precedents, the State must demonstrate that both alleged owners have at least some sort of property interest in the stolen items. In addition, possession by an employee or servant of the actual owner is not a type of special property interest which will support this indictment.

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Following *Greene* and *Hill*, we hold that a fatal variance exists because the evidence showed that the stolen property belonged to the church only. *See id.* at 584, 223 S.E.2d at 369; *Hill*, 79 N.C. at 658-59.

III. Conclusion

We hold that the trial court committed no error in convicting defendant of breaking or entering a place of religious worship with intent to commit a larceny therein. But we vacate defendant's conviction for larceny after breaking or entering. Because the trial court consolidated these convictions for sentencing, we remand this case to the trial court for resentencing.

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
VICTOR JAY CRISCO, JR.

No. COA15-272

Filed 20 October 2015

1. Evidence—clergy privilege—statements to third party about conversation with pastor—not privileged

The clergy-communicant privilege did not apply in a first-degree murder prosecution where defendant told another witness about talking to a pastor. N.C.G.S. § 8-53.2 does not restrict the applicability of the privilege based upon which party initiates the communication, but it applies only to communications between defendant and the pastor. There was no privilege between defendant and the third party.

2. Evidence—clergy privilege—statements to third party about conversation with pastor—no prejudice

In a first-degree murder prosecution, even assuming error in the admission of defendant's statements to a third party about his conversation with a pastor, there was no prejudice where the State presented other relevant and substantial evidence from which the jury could conclude that defendant was guilty.

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Appeal by defendant from judgment entered 15 August 2014 by Judge James Floyd Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 8 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Gilda C. Rodriguez for defendant-appellant.

TYSON, Judge.

Victor Jay Crisco, Jr. (“Defendant”) appeals from his conviction of first-degree murder. We find no prejudicial error.

I. Background

Defendant was tried and convicted by a jury of murdering Carrie Welch (“Welch”). On 2 July 2010, a lineman employed with the power company was relocating power lines in Fayetteville when he discovered Welch’s body. The body was found on Neptune Drive, a dirt road off of Bragg Boulevard, and behind the former Stereo World building. The lineman immediately called his supervisor, who called the police.

Fayetteville Police Officer John Newland arrived on the scene where the body was discovered. Although Officer Newland was very familiar with Welch, it took him ten or fifteen minutes to identify the body, due to the presence of blood and disfigurement of the face.

Dr. Jonathan Privette, a staff pathologist in the Medical Examiner’s office, performed the autopsy on Welch’s body. He was admitted and testified as an expert witness in forensic pathology, and opined that Welch died as a result of blunt force injuries to her head. He also testified that Welch was struck at least seven times on the head. Dr. Privette was unable to determine with certainty the type of instrument which caused the injuries, but testified they could have been caused by a baseball bat.

The State’s evidence tended to show Welch and her husband, Patrick Welch (“Patrick”), rented a residence owned by Defendant located on Rhew Street in Fayetteville. Patrick’s mother paid Welch and Patrick’s rent. Patrick’s mother died approximately one month before Welch was murdered. Defendant lived about two blocks from the house he rented to Welch and Patrick.

Marisha Garland (“Garland”) supplied drugs to Welch, Patrick, and Defendant. Garland had known Welch for about ten years. On

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24 June 2010, Defendant called Garland's cellphone from the Cumberland County jail. Defendant was trying to reach Welch, who was present with Garland at the time. Garland handed the phone to Welch, who spoke with Defendant. According to Garland, Defendant wanted money retrieved from his house to use for his bail. Garland heard Welch say to Defendant that "she would have to get Patrick to do it because she couldn't go do it." According to Garland, Defendant agreed Patrick was to go into Defendant's house and get money to bail him out of jail.

Patrick and an acquaintance went to Defendant's house. Shortly thereafter, Officer Rodney Miller responded to a complaint of someone loitering behind Defendant's house. When he arrived, he saw Patrick enter the back door of Defendant's house. Officer Miller called for backup and the officers entered the house. Patrick stated he had permission from Defendant to be in the house to get money for Defendant's bail. Defendant, who was still in jail, was contacted and told the police that no one was allowed to be in his house. Patrick and his acquaintance were arrested for breaking and entering. They were released the same day with unsecured bonds.

Patrick failed to appear in court on the breaking and entering charge. A week later, on 1 July 2010, Defendant telephoned Officer Trevor Durham. Officer Durham testified that Defendant was out of jail and "irate" because Welch and Patrick broke into his house while he was in jail. Defendant wanted them immediately arrested and told Officer Durham where Patrick was located. The same evening, Officer Durham arrested Patrick for failing to appear in court on the breaking and entering charge.

The same day, 1 July 2010, Welch called her sister-in-law, Wanda Wingard ("Wingard") around 10:00 p.m. from Defendant's cellphone. Welch asked Wingard for \$300.00 to bail Patrick out of jail. Ms. Wingard asked her to call back the following morning so that she could verify the information given by Welch.

A. Garland's Testimony

According to Garland, Welch engaged in prostitution to raise the money needed to bail Patrick out of jail. Garland picked Welch up from a gas station after her last "date." They saw Defendant at the gas station. Garland drove Welch to Defendant's house around 3:00 a.m. Defendant arrived home approximately five minutes later. Garland went inside Defendant's house and stayed for approximately twenty minutes. She sold drugs to Welch and gave drugs to Defendant to "watch over" Welch because Welch was "scared."

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Garland testified Welch was supposed to call her around 8:00 a.m. for them to meet at 9:00 a.m. to go post Patrick's bail. At approximately 5:00 a.m., Garland received a call from Defendant's cellphone. Garland did not answer the call and a voicemail message was left. When Garland listened to the voicemail message, she heard loud "Elvis" music playing in the background and Welch screaming hysterically "wait, wait, wait." Garland testified Defendant often listened to "Elvis" music.

Garland went to Defendant's house around 10:00 a.m. and spoke with Defendant, who was standing outside. She testified that Defendant appeared "normal" and was smoking a cigarette. Garland did not go inside the house, nor did she later describe the subject matter of that conversation with Defendant.

Garland thereafter learned that Welch's body had been found behind the former Stereo World building. She returned to Defendant's house around 2:00 p.m. and entered Defendant's residence through the back door. She observed Defendant cleaning and wiping the kitchen floor. The house smelled of "a lot of Clorox, or bleach." She stated, "[t]he box said bleach."

The day after Welch's murder, Defendant went to Wingard's house to collect Welch and Patrick's rent. Wingard told Defendant that the "money trail" stopped with the death of her mother-in-law. They would not be paying Welch and Patrick's rent. Defendant then asked Wingard if she had heard about Welch's death and stated there was a rumor going around the neighborhood that he had killed Welch.

B. Matthew Black's Testimony

Matthew Black ("Black") was an acquaintance of Defendant's since grade school. Black would occasionally perform handyman repair services for Defendant. One day in early 2011, Defendant called Black and stated he wanted Black to board up some windows in his house. Black picked Defendant up and the two men drove to Defendant's house. Upon arrival, they sat in Black's truck for a while. Black testified Defendant stated he had "an eerie feeling" about going inside the house. While they were inside the house, Defendant stated to Black that he was a "prime suspect" in the Carrie Welch murder case. Defendant also asked Black about applying polyurethane to the kitchen cabinets.

Defendant and Black later purchased a bottle of tequila and went to Black's mother's house. They began drinking shots of the tequila. According to Black, Defendant told him that he had killed Welch with a baseball bat in his kitchen. Defendant explained to Black that Patrick

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Welch was in jail, and that Defendant had pending charges and would be going to jail. Defendant claimed Welch was blackmailing him. Defendant stated Welch told him “if he didn’t take care of her . . . he was going to become [Patrick’s] bitch.”

Defendant went to the bathroom. Black called his wife, Michelle, and told her to stay on the phone and just listen. Defendant returned and Black and Defendant continued to discuss Welch’s murder. Defendant told Black again that he had killed Welch. He stated he burned the baseball bat in the fire pit outside his house and took the body to a remote area off Bragg Boulevard near the former Stereo World building. Defendant spent that night at Black’s mother’s house. The next morning Defendant told Black to forget what he had told him the previous night.

Michelle Black testified her husband called her and told her to listen, but not talk. She heard her husband ask a man, whose voice she recognized as Defendant’s, to repeat what he had just said. Defendant stated he and Welch were in the kitchen, he beat her with a baseball bat, and took her body to Bragg Boulevard.

In February 2011, Matthew Black placed two calls to Crime Stoppers to report what Defendant had told him. Crime Stoppers offers rewards for tips that lead to criminal convictions. Michelle Black testified her husband called Crime Stoppers the day after Defendant confessed to the murder.

Detective Jason Sondergaard received the tips from Crime Stoppers on 14 February 2011. He contacted Black on 28 February 2011 and set up an interview. Detective Sondergaard interviewed Black and his wife on 1 March 2011.

Sometime later, Defendant contacted Black and asked him if he had contacted the police. Black lied and told Defendant he had not. Defendant stated to Black that he had told a preacher from Sanford about the murder. Defendant told Black he regretted telling the preacher, because the preacher was now acting differently. Defendant also told Black he did not believe the preacher would keep the information to himself.

C. Search of Defendant’s Residence

On 1 March 2011, Fayetteville police officers and SBI agents executed a search warrant on Defendant’s residence. Officer Dianne Bettis, a K-9 handler certified in cadaver recovery, searched the house with a cadaver dog. The dog alerted on a set of drawers located in the kitchen.

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Chadrick Barefoot (“Agent Barefoot”), an SBI crime scene agent, searched the house for evidence of blood. He observed dark red stains in a linear pattern on the kitchen ceiling. Agent Barefoot also discovered blood stains on the wooden floor in a room adjacent to the kitchen and underneath the floorboards. He applied Luminol to areas throughout the home and observed a pale blue glow, indicating a positive result for the presence of blood. These areas included the kitchen floor; an area near the bathroom and bedroom; on the couch in the living room; and in the area between the living room and kitchen.

Jessica Posto, a former SBI expert witness in body fluid identification, examined items located in Defendant’s house for the presence of blood. The swabbings from the kitchen ceiling and a deadbolt lock in the kitchen returned a positive chemical reaction to indicate the presence of blood.

Sharon Hinton (“Hinton”), a forensic analyst at the North Carolina State Crime Laboratory, tested the blood samples collected from Defendant’s house to determine whether the DNA profile contained in the samples matched Welch’s DNA profile. Hinton testified three blood samples obtained from the house completely matched Welch’s DNA profile. Those three samples were obtained from the kitchen ceiling, the kitchen wall near a door, and underneath a wooden floor board in an additional room in the house.

Charles Lee Newcomb (“Newcomb”), an SBI fire and arson investigator, examined three pieces of burned wood recovered from Defendant’s backyard fire pit. Newcomb testified that the pieces of wood had a “very tight grain pattern” and a slight curvature. He testified that each piece of charred wood could have been portions of a baseball bat.

Defendant was indicted for Welch’s murder on 19 March 2012. On 11 August 2014, Defendant filed a motion to suppress from the jury any confession Defendant made to Ronnie Roy (“Pastor Roy”), pastor at Messiah Baptist Ministries, pursuant to N.C. Gen. Stat. § 8-53.2. Defendant also filed a motion *in limine* to exclude Matthew Black’s testimony that Defendant told him he had confessed to a preacher. This motion requested the court to order the State to “refrain from directly or indirectly eluding to a confession made by the defendant to his pastor” pursuant to N.C. Gen. Stat. § 8-53.2 and Rules 402 and 403 of the Rules of Evidence. This motion asserted Black had been interviewed several times by the State and defense counsel, and had only mentioned Defendant’s confession to a pastor within the ten days preceding the filing of the motion.

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The court heard the motions immediately prior to the commencement of trial. The court heard *voir dire* testimony from Black and Pastor Roy. Black testified to the statements Defendant made to him at his mother's house about Welch's murder. Black also testified about Defendant's phone call to him in which he asked Black if he had talked to the police and stated he had told a preacher in Sanford about the murder.

Pastor Roy testified at the motion hearing that he was ordained by Bethel Bible College in Sanford. He had previously served as the pastor of Messiah Baptist Church in Harnett County. Pastor Roy met Defendant, while both were students at Fayetteville Technical Community College, and they became acquaintances. The two men later lost touch and Pastor Roy became ordained as a pastor.

Pastor Roy stated he had not spoken with Defendant for a "long time." He re-connected with Defendant after he saw Defendant's name in a "crime magazine" pertaining to an unrelated charge. Pastor Roy contacted Defendant and informed him that he had become a pastor, saw that Defendant was in trouble, and offered to help Defendant. Pastor Roy thereafter contacted Defendant once or twice per week and they talked. Defendant accepted Pastor Roy's offer to participate in counseling sessions with him. Defendant stated he wanted to stop using drugs and to change his life.

During one of the counseling sessions, Defendant and Pastor Roy discussed truthfulness as part of Pastor Roy's program: "12 Steps to Freedom in Christ." Defendant told Pastor Roy he murdered Welch by beating her to death with a baseball bat, disposed of her body, and attempted to clean up the murder scene. Defendant also told Pastor Roy that Welch was trying to raise money to get her husband out of jail, but Defendant was afraid of her husband and did not want him to be out of jail. Defendant also told Pastor Roy that Welch came to his house one night and believed Defendant was going to give her money. While Welch was on the phone, Defendant picked up a baseball bat and beat her to death.

Pastor Roy stated Defendant participated in several more counseling sessions with him over the next few weeks. On these occasions, Defendant would ask him whether their conversation was being recorded or if he had called the police. Pastor Roy stated he became fearful of Defendant and called the police. Pastor Roy testified at the motion hearing only, out of the presence of the jury.

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The trial court ruled the clergy-communicant privilege did not exist because Pastor Roy had initially sought Defendant and offered to help him. The trial court determined Defendant was not seeking counsel and advice from his minister. If the privilege did exist, the court determined it was waived when Defendant confessed to Black and told Black he had told a preacher about the murder. Pastor Roy was present at trial, but was not called to testify.

The jury found Defendant guilty of first-degree murder. The trial court sentenced him to life in prison without the possibility of parole. Defendant appeals.

II. Issue

Defendant argues the trial court erred in concluding the clergy-communicant privilege did not apply and by denying Defendant's motion to suppress and motion *in limine* concerning his statements.

III. Clergy-Communicant Privilege

A. Standard of Review

[1] This Court's review of the trial court's order denying 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. Stanley*, 175 N.C. App. 171, 174, 622 S.E.2d 680, 682 (2005) (citations omitted). The trial court's conclusions of law are reviewed *de novo*. *State v. Campbell*, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724 (2008) (citation omitted).

B. Application of Privilege

N.C. Gen. Stat. § 8-53.2, entitled "Communications between clergymen and communicants," provides:

No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing

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out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred.

N.C. Gen. Stat. § 8-53.2 (2013).

Our Supreme Court has held that § 8-53.2 has two requirements for the clergy-communicant privilege to apply: (1) the defendant must be seeking the counsel and advice of his minister; and (2) the information must be entrusted to the minister as a confidential communication. *State v. West*, 317 N.C. 219, 223, 345 S.E.2d 186, 189 (1986). This statute expressly allows the communicant to waive the privilege in open court. N.C. Gen. Stat. § 8-53.2.

The State did not call Pastor Roy to testify before the jury. However, the trial court's denial of Defendant's motion to suppress and motion *in limine* allowed evidence that Defendant had communicated with Pastor Roy to be admitted into evidence through the testimony of other witnesses. Black testified as follows:

Q: During any conversation he – Mr. Crisco said what to you about – you started to say a preacher?

A: Yeah, he said that he had met a preacher in Sanford and that he had told the preacher about it and he was uncomfortable that he had told the preacher about it, and that — that the preacher wasn't acting right about him telling him, you know, like he would keep it to himself or something. I don't –

Q: Now, you said "it" a lot, like what you're talking about; he told the preacher about what?

A: The murder.

The trial court *ex mero moto* also asked Black about Defendant's conversation with Pastor Roy in front of the jury:

THE COURT: Can you tell me exactly what Mr. Crisco said about any conversation with a preacher?

THE WITNESS: Yes, sir. He told me that he – the preacher was helping him in Sanford get on his feet, and then he told me that he had told the preacher about this murder, and that he wished he wouldn't had [sic] told him that, that the preacher kind of – in other words, wasn't going to — he didn't think he was going to keep it to himself, something of that nature, that he was telling.

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The State brought up the subject of the preacher again during its direct examination of the lead detective, Detective Sondergaard, its last witness:

Q: Were you present in the courtroom when Matthew Black during his testimony mentioned a phone call that he received from Mr. Crisco and discussed talking to a preacher, that Mr. Crisco spoke to a preacher; do you recall that testimony?

A: Yes.

Q: Right now just answer with a yes or no: Throughout the course of your investigation, were you contacted by a preacher?

A: Yes.

Q: What was –

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled as to that.

BY [THE PROSECUTOR]:

Q: What was his name?

A: Ronnie Roy.

Q: Is he present in the courtroom?

A: Yes, he is.

By its plain and ordinary meaning, N.C. Gen. Stat. § 8-53.2, applies to the competency of clergyperson's testimony, and only applies to communications between Defendant and Pastor Roy. Although Pastor Roy was not called and did not testify before the jury at trial, Defendant argues the State circumvented Defendant's privileged communication to Pastor Roy by eliciting testimony from Black and Detective Sondergaard about the privileged communication. Even without calling the preacher to testify, Defendant argues the State was able to show the jury Defendant had confessed to a preacher, and the preacher was real and present before them, all in violation of the privilege.

A party who communicates and makes disclosures to his preacher does not have "any reason to expect confidentiality" when the disclosures are made in the presence of a third party. *West*, 317 N.C. at 223, 345 S.E.2d at 189 (holding the defendant's admissions to his preacher

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were not “entrusted” to the preacher in pursuit of counsel and advice when the preacher’s wife was present). In the context of the clergy-communicant privilege, our appellate courts have not considered whether a disclosure made to clergy can be waived by an out of court, voluntary disclosure of the substance of the communication to a third party.

However, “[i]t is well established in this state that even absolutely privileged matter may be inquired into where the privilege has been waived by disclosure.” *Industrotech Constructors, Inc. v. Duke University*, 67 N.C. App. 741, 743-44, 314 S.E.2d 272, 274 (1983) (holding any privilege of confidentiality in arbitration transcripts had been waived by the university’s disclosure of the materials to a non-party). The plain language of the statute itself allows waiver in open court.

N.C. Gen. Stat. § 8-53.2 applies only to “confidential” communication between clergy and communicant. The statute does not restrict the applicability of the privilege based upon which party initiates the communication. Presuming Defendant was seeking the counsel and advice of Pastor Roy when he confessed to Welch’s murder, Defendant’s statements were “entrusted” to Pastor Roy under the privilege. N.C. Gen. Stat. § 8-53.2.

Defendant told Black, a third party and not a pastor, that he had confessed to “a preacher in Sanford” about the murder. *West*, 317 N.C. at 223, 345 S.E.2d at 189. No recognized privilege exists between Defendant and Black. The statement by Defendant to Black that Defendant had confessed to a preacher is not privileged. The State was permitted to present evidence of statements Defendant made to Black because N.C. Gen. Stat. 8-53.2, by its express terms, does not apply to or exclude those statements.

D. Prejudice

[2] Even if we accept Defendant’s argument that the trial court erred in admitting Black’s testimony that Defendant stated he had told “a preacher from Sanford” about the murder or Detective Sondergaard’s testimony, Defendant has failed to show prejudice to warrant a new trial. Erroneous admission of evidence requires a new trial only when the error is prejudicial. *State v. Locklear*, 349 N.C. 118, 149, 505 S.E.2d 277, 295 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). “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) (2013). The burden rests upon Defendant to show prejudice. *Id.*

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The State presented other relevant and substantial evidence from which a jury could find beyond a reasonable doubt that Defendant killed Carrie Welch and committed first-degree murder: (1) Garland left Welch with Defendant at his home in the early morning hours of 1 July 2010; (2) around 5:00 a.m., Welch called Garland from Defendant's cellphone; (3) in the voicemail message left on Garland's phone, "Elvis" music was playing and Welch was hysterically screaming "wait, wait, wait"; Defendant regularly played "Elvis" music; (4) around 2:00 p.m. the same day, Garland returned to Defendant's home and saw Defendant wiping his kitchen floor; (5) the residence smelled of bleach and Garland saw a box of bleach; (6) Defendant told Black he killed Welch in his kitchen with a baseball bat; (7) Michelle Black heard Defendant state he beat Welch to death with a baseball bat and took her body to Bragg Boulevard; (8) blood was found on Defendant's kitchen ceiling, the kitchen wall, and the floor in an additional room, which matched Welch's DNA profile; (9) charred pieces of wood with a "very tight grain pattern" and slight curvature were found in Defendant's backyard; (10) an SBI fire and arson expert testified each piece of charred wood could have been portions of a baseball bat.

Defendant has failed to show a reasonable possibility exists that a different result would have been reached by the jury if Black or Detective Sondergaard had not been permitted to testify Defendant stated to him that he told "a preacher in Sanford" about the murder. The admission of Black's testimony was not prejudicial error to warrant a new trial.

IV. Conclusion

The clergy-communicant privilege set forth in N.C. Gen. Stat. § 8-53.2 does not depend upon which party initiates the communication. The privilege does not apply to Defendant's statements to Black, a third party and non-pastor, about his confession to "a preacher in Sanford" regarding the murder. No privilege exists between Defendant and Black to exclude Black's testimony.

Even if the admission of Black's or Detective Sondergaard's testimony was error, Defendant has failed to show prejudice. Defendant received a fair trial, free from prejudicial errors he preserved and argued.

NO PREJUDICIAL ERROR.

Judges BRYANT and GEER concur.

STATE v. GETTYS

[243 N.C. App. 590 (2015)]

STATE OF NORTH CAROLINA

v.

RALPH LEWIS GETTYS

No. COA15-51

Filed 20 October 2015

1. Jury—motion to strike venire—denied—no systematic exclusion

The trial court did not err in a prosecution for second-degree murder and related offenses by denying defendant's motion to strike the jury venire where defendant conceded the absence of the third prong of *Duren v. Missouri*, 439 U.S. 357 (1979), systematic exclusion of a group. A single venire that fails to proportionally represent a cross-section of the community does not constitute systematic exclusion.

2. Evidence—recording of interview—admitted for corroboration and impeachment

The trial court did not abuse its discretion in a prosecution for second-degree murder and related offenses by admitting a recording of a witness's police interview for both corroboration and impeachment in light of court's abundance of caution.

3. Evidence—recording admitted for corroboration and impeachment—not logically contradictory

Contrary to defendant's contention in a prosecution for second-degree murder and related offenses, admitting a recording of a witness's interview with officers for both corroboration and impeachment was not logically contradictory and counterintuitive. The State did not introduce one statement to serve both purposes; rather, it introduced a recording of a police interview which included both contradictory and impeaching statements.

4. Evidence—transcript of recorded interview—read for clarification—statements made in reader's presence

The trial court did not err in a prosecution for second-degree murder and related offenses by allowing a detective to read from the transcript of an interview with a witness and to clarify portions of the recording. The detective merely read or clarified statements that had been made in her presence; additionally, the trial court gave a limiting instruction to the jury.

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5. Criminal Law—special instruction—reviewed for abuse of discretion

Defendant's request for a special instruction on sequestration in a prosecution for second-degree murder was reviewed for abuse of discretion where defendant's initial request was not in writing and his second, written request came after the jury had been charged and had left the courtroom to begin its deliberations.

6. Criminal Law—special instruction refused—no abuse of discretion—not dispositive issue

The trial court did not abuse its discretion in a prosecution for second-degree murder and related offenses by refusing a requested special instruction where the instruction did not relate to a dispositive issue in the case.

7. Constitutional Law—right to presence—sequestration—prosecutor's argument

In a prosecution for second-degree murder and other offenses, it was noted that defendant's constitutional right to presence was not violated by the prosecutor's argument concerning sequestration.

Appeal by defendant from judgments entered on or about 16 January 2014 by Judge Lucy N. Inman in Superior Court, Mecklenburg County. Heard in the Court of Appeals on 6 May 2015.

Attorney General Roy A. Cooper III, by Assistant Attorney General Brandon L. Truman, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

STROUD, Judge.

Ralph Lewis Gettys ("defendant") appeals from judgments entered after a jury found him guilty of second-degree murder, possession of a firearm by a felon, and simple assault. Defendant contends that the trial court erred in (1) denying his motion to strike the jury venire; (2) admitting a recording of a police interview and allowing a police detective to read from a transcript of that recording; and (3) denying defendant's request for a special jury instruction on sequestration. We find no error.

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I. Background

In the early hours of 15 December 2012, defendant worked as a bouncer at a “liquor house” in Charlotte. Defendant patted down customers for firearms, among whom were Joshua Lampkins and Raymona Abraham. Around 5:00 a.m. or 6:00 a.m., defendant told his brother that he wanted to leave the liquor house. Defendant’s brother gave him the keys to his car, which he had parked down the street, so that defendant could move the car in front of the liquor house and then they could leave together. Defendant’s ex-girlfriend, Teshalla Dunlap, accompanied defendant as he walked down the street to the car. With Dunlap as a passenger, defendant drove the car back up the street and parked it in front of the liquor house. When defendant and Dunlap got out of the car, Lampkins and Abraham confronted them and claimed that defendant had hit Lampkins with the car. Lampkins and Abraham demanded that defendant pay them fifty dollars, and when defendant refused, they threatened to attack him. When the conflict escalated, Dunlap walked toward the liquor house to tell defendant’s brother to come outside. During the confrontation, defendant shot and killed Abraham and beat Lampkins unconscious. As part of the investigation of the homicide, Detectives Carter and Greenly interviewed Dunlap and recorded the interview.

On or about 7 January 2013, a grand jury indicted defendant for murder, possession of a firearm by a felon, and simple assault. *See* N.C. Gen. Stat. §§ 14-17, -33(a), -415.1 (2011). At trial, defendant moved to strike the petit jury venire, but the trial court denied his motion. On 16 January 2014, the jury found defendant guilty of second-degree murder, possession of a firearm by a felon, and simple assault. The trial court sentenced defendant to 339 to 419 months’ imprisonment for the second-degree murder offense, 21 to 35 months’ imprisonment for the possession of a firearm by a felon offense, and 60 days of imprisonment for the simple assault offense. The trial court ordered that defendant serve the second-degree murder sentence and possession of a firearm by a felon sentence consecutively and serve the simple assault sentence concurrently. Defendant gave notice of appeal in open court.

II. Motion to Strike the Jury Venire

[1] Defendant first contends that the trial court erred in denying his motion to strike the jury venire. Defendant alleges that his venire was racially disproportionate to the demographics of Mecklenburg County and therefore deprived him of his constitutional right to a jury of his peers.

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A. Standard of Review

We review alleged violations of constitutional rights *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

B. Analysis

Our state and federal Constitutions protect a criminal defendant's right to be tried by a jury of his peers. 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. However, the Sixth Amendment does not guarantee a defendant the right to a jury composed of members of a certain race or gender.

The burden is upon the defendant to show a *prima facie* case of racial systematic exclusion. In order for a defendant to establish a *prima facie* violation for disproportionate representation in a venire, he must show the following:

- (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.

State v. Jackson, 215 N.C. App. 339, 341-42, 716 S.E.2d 61, 64 (2011) (emphasis added and citations, quotation marks, and brackets omitted) (quoting *Duren v. Missouri*, 439 U.S. 357, 364, 58 L. Ed. 2d 579, 587 (1979)).

A single venire that fails to proportionately represent a cross-section of the community does not constitute systematic exclusion. *See State v. Williams*, 355 N.C. 501, 549-50, 565 S.E.2d 609, 638 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). "The fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the Equal Protection Clause." *Jackson*, 215 N.C. App. at 343, 716 S.E.2d at 65 (brackets omitted). Systematic exclusion occurs

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when a procedure in the venire selection process consistently yields non-representative venires. *See Duren*, 439 U.S. at 366-67, 58 L. Ed. 2d at 588-89 (holding that a venire selection process favoring female exemption from jury duty constituted systematic exclusion).

Defendant argues that Mecklenburg County's computer program, Jury Manager, generated a racially disproportionate venire and thus deprived him of a jury of his peers. Defendant relies on *Turner v. Fouche*, 396 U.S. 346, 359, 24 L. Ed. 2d 567, 578 (1970). But in interpreting *Turner*, our Supreme Court noted:

[T]he United States Supreme Court did not conclude that the *prima facie* case was solely based upon the disparity of representation of African-Americans in the jury venire. Rather, that Court's conclusion ultimately rested upon the finding that the underrepresentation was the result of the systematic exclusion of African-Americans in the jury-selection process. Under our interpretation of *Turner*, merely showing a disparity under the second prong of the *Duren* test, standing alone, will not establish a *prima facie* case of disproportionate representation.

State v. Bowman, 349 N.C. 459, 469, 509 S.E.2d 428, 434 (1998) (citation omitted), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999). Although defendant asserts that there is a disparity under the second prong of *Duren*, he concedes the absence of systematic exclusion under the third prong. Because defendant has failed to satisfy the third *Duren* prong, systematic exclusion, we hold that the trial court did not err in denying defendant's motion to strike the jury venire. *Id.*, 509 S.E.2d at 434-35; *see also Williams*, 355 N.C. at 549-50, 565 S.E.2d at 638; *State v. Avery*, 299 N.C. 126, 134-35, 261 S.E.2d 803, 808-09 (1980).

III. Admission of Evidence

[2] Defendant argues that the trial court erred in admitting the recording of Dunlap's police interview for both corroboration and impeachment. Defendant further contends that the trial court erred in allowing Detective Carter to read portions of the transcript of that recording. We find no error in either circumstance.

A. Standard of Review

The standard of review for this Court assessing evidentiary rulings is abuse of discretion. 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

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been the result of a reasoned decision. The abuse of discretion standard applies to decisions by a trial court that a statement is admissible for corroboration.

State v. Tellez, 200 N.C. App. 517, 526, 684 S.E.2d 733, 739 (2009) (citations and quotation marks omitted). We also review for an abuse of discretion a trial court's decision to admit a statement for impeachment. *State v. Banks*, 210 N.C. App. 30, 38, 706 S.E.2d 807, 814 (2011).

Relying on *Sherrod v. Nash General Hospital, Inc.*, defendant argues that the proper standard for reviewing a trial court's decision to admit a statement for corroboration is *de novo*. See 126 N.C. App. 755, 762, 487 S.E.2d 151, 155 (1997), *aff'd in part and rev'd in part*, 348 N.C. 526, 500 S.E.2d 708 (1998). But there, this Court did not discuss a trial court's ruling on whether evidence was admissible for corroboration; rather it discussed a trial court's ruling on whether evidence was relevant under N.C. Gen. Stat. § 8C-1, Rule 401. *Id.*, 487 S.E.2d at 155. Accordingly, we hold that *Sherrod* is inapposite.

B. Corroboration and Impeachment

The prior consistent statements of a witness may be offered at trial for corroborative, nonhearsay purposes. Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. The trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes.

State v. Duffie, ___ N.C. App. ___, ___, 772 S.E.2d 100, 104 (2015) (citations and quotation marks omitted). "Prior statements of a witness which are inconsistent with his present testimony are not admissible as substantive evidence because of their hearsay nature. Even so, such prior inconsistent statements are admissible for the purpose of impeachment." *State v. Bishop*, 346 N.C. 365, 387, 488 S.E.2d 769, 780 (1997); see also N.C. Gen. Stat. § 8C-1, Rule 607 (2013). "[I]mpeachment evidence has been defined as evidence used to undermine a witness's credibility, with any circumstance tending to show a defect in the witness's perception, memory, narration or veracity relevant to this purpose." *State v. Allen*, 222 N.C. App. 707, 721, 731 S.E.2d 510, 520 (citations, quotation

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marks, and brackets omitted), *appeal dismissed and disc. review denied*, 366 N.C. 415, 737 S.E.2d 377 (2012), *cert. denied*, ___ U.S. ___, 185 L. Ed. 2d 876 (2013).

A trial court may admit evidence for both corroboration and impeachment. *See State v. Ayudkya*, 96 N.C. App. 606, 610, 386 S.E.2d 604, 606-07 (1989) (holding that a pretrial statement that supported a witness's direct testimony but contradicted his cross-examination testimony was admissible to either corroborate or impeach, "whichever the jury found"). "Where a witness's prior statement contains facts that manifestly contradict his trial testimony, however, such evidence may not be admitted under the guise of corroborating his testimony." *State v. Alexander*, 152 N.C. App. 701, 704, 568 S.E.2d 317, 319 (2002) (quotation marks omitted). Additionally, this Court in *Ayudkya* cautioned that courts must apply carefully this combination of the evidentiary rules of corroboration and impeachment; otherwise, a party could introduce "almost any out-of-court statement made by a witness." *Ayudkya*, 96 N.C. App. at 610, 386 S.E.2d at 606-07.

Here, the trial court admitted the recording of Dunlap's police interview for both corroboration and impeachment. Before admitting the recording, the trial court carefully reviewed the transcript of the recording and addressed defendant's concern that the State had called Dunlap as a witness only to introduce her prior inconsistent statements, which would have been otherwise inadmissible as hearsay:

Now, as I understand what happened here, the State put on the witness. I would—I don't think the State expected [Dunlap] to not say something consistent. What she said was 90 percent consistent with what she said before. This is not a case where the State has put on a witness the State knows has changed his or her story, that the State doesn't reasonably expect to testify about what the witness said before for the pure purpose of pre-textually getting in that prior statement.

As a matter of fact, here the State has put on a witness who has testified largely consistent[ly] with what she said.

The trial court also gave a limiting instruction to the jury before the recording was played to them:

Ladies and gentleman, you're going to hear evidence of Ms. Dunlap's earlier statement to the police in the

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interview. I instruct you that you must not consider this earlier statement as evidence of the truth of what was said at that earlier time because the earlier statement was not made under oath at this trial. If you believe that the earlier statement was made and that any portions of the earlier statement conflict with or are consistent with the testimony of Ms. Dunlap at this trial, you may consider these prior statements and all other facts and circumstances bearing upon Ms. Dunlap's truthfulness in deciding whether you will believe or disbelieve Ms. Dunlap's testimony at this trial.

The trial court later included a similar limiting instruction in the jury charge:

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 the 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 the witness at this trial, you may consider this and all other facts and circumstances bearing upon the witness's truthfulness in deciding whether you will believe or disbelieve the witness's testimony.

In light of the trial court's abundance of caution as demonstrated in its conscientious review of the transcript of the recording and its limiting instructions, we hold that under *Ayudkya*, the trial court did not abuse its discretion in admitting the recording for both corroboration and impeachment. *See Ayudkya*, 96 N.C. App. at 610, 386 S.E.2d at 606-07; *Tellez*, 200 N.C. App. at 527-28, 684 S.E.2d at 740-41 (approving of a similar limiting instruction).

[3] Defendant contends that admitting the recording for both corroboration and impeachment is "logically contradictory and counterintuitive." But the State did not introduce a single pretrial statement for both corroboration and impeachment; rather, it introduced a recording of Dunlap's police interview, which included many pretrial statements, some of which tended to corroborate Dunlap's testimony and some of which tended to impeach her testimony.

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Defendant relies on *State v. Frogge* for the proposition that prior contradictory statements do not corroborate a witness's testimony and may not be admitted under such a theory. See 345 N.C. 614, 618, 481 S.E.2d 278, 280 (1997). But *Frogge* is distinguishable, because here, the State proffered and the trial court admitted Dunlap's pretrial statements for both corroboration and impeachment purposes.

Defendant next attempts to distinguish *Ayudkya*. There, the pre-trial statement corroborated the witness's direct testimony "although it tended to impeach his cross-examination testimony." *Ayudkya*, 96 N.C. App. at 610, 386 S.E.2d at 606. Defendant argues that *Ayudkya* is distinguishable, because "the State was not offering Ms. Dunlap's previous statement[s] . . . in an attempt to rehabilitate her by corroborating her direct testimony and impeaching her cross-examination testimony." But nothing in *Ayudkya* suggests that its holding is limited to this particular situation. See *id.*, 386 S.E.2d at 606-07. Following *Ayudkya*, we hold that the trial court did not err in admitting the recording of the police interview for both corroboration and impeachment purposes. See *id.*, 386 S.E.2d at 606-07.

C. Reading from Transcript

[4] Defendant also contends that the trial court's decision to allow Detective Carter to read aloud portions of the transcript that the State believed were not clearly audible from the recording intruded upon the province of the jury. But because Detective Carter was one of the detectives who interviewed Dunlap, she had personal knowledge of the interview. An individual who has personal knowledge of a matter may testify directly about that matter at trial. See N.C. Gen. Stat. § 8C-1, Rule 602 (2013); *State v. Cole*, 147 N.C. App. 637, 645, 556 S.E.2d 666, 671 (2001), *appeal dismissed and disc. review denied*, 356 N.C. 169, 568 S.E.2d 619 (2002). Here, Detective Carter merely read or clarified statements that had been made in her presence. Additionally, the trial court gave the following limiting instruction to the jury:

Ladies and gentleman, I will instruct you that—I will instruct you that you need to listen as carefully as you can and not give any greater weight to those portions of the statement that Detective Carter reads than you give to the portions of the statement that you only hear. I instruct you to treat them all—all without regard to whether you only heard them on the [recording] or also heard the detective say them.

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Because Detective Carter had personal knowledge of Dunlap's interview, we hold that the trial court did not err by allowing her to read from the transcript and clarify portions of the recording to the jury. *See* N.C. Gen. Stat. § 8C-1, Rule 602; *Cole*, 147 N.C. App. at 645, 556 S.E.2d at 671.

IV. Jury Instruction Request

[5] Defendant finally contends that the trial court erred by denying his request for a special jury instruction on sequestration. N.C. Gen. Stat § 1-181 provides:

(a) Requests for special instructions to the jury must be—

- (1) In writing,
- (2) Entitled in the cause, and
- (3) Signed by counsel submitting them.

(b) Such requests for special instructions must be submitted to the trial judge before the judge's charge to the jury is begun. However, the judge may, *in his discretion*, consider such requests regardless of the time they are made.

(c) Written requests for special instructions shall, after their submission to the judge, be filed as a part of the record of the same.

N.C. Gen. Stat § 1-181 (2013) (emphasis added).

In closing argument, the prosecutor argued:

[Defendant is] cherry-picking the best parts of everybody's story after he's had a year to think about it and after he's had a year—or after he's had the entire trial to listen to what everybody else would say. You'll notice that our witnesses didn't sit in here while everybody else was testifying.

In response, defendant made two requests for a special jury instruction on sequestration. Defendant first orally requested an instruction before the trial court read the jury charge, and the trial court responded that it would examine the requested instruction when defendant submitted it in writing. This initial request was not written and thus did not satisfy subsection (a)(1). *See id.* §§ 1-181(a)(1), 15A-1231(a) (2013); *State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997) (“[A] trial court's ruling denying requested instructions is not error where the defendant

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fails to submit his request for instructions in writing.”), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998).

Defendant later renewed his request in writing after the jury had been charged and had left the courtroom to begin its deliberations. The request was for the following instruction:

In this case, all witnesses allowed by law were sequestered at the request of the State. These witnesses could not be present in court except to testify until they were released from their subpoenas, or to discuss the matter with other witnesses or observers in court.

By law, the defendant and lead investigator for the State cannot be sequestered.

This written request satisfied N.C. Gen. Stat § 1-181(a)(1), but we analyze the trial court’s decision under subsection (b), because defendant made the written request *after* the jury was charged; accordingly, we review for an abuse of discretion. *See* N.C. Gen. Stat § 1-181(b). “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.” *Tellez*, 200 N.C. App. at 526, 684 S.E.2d at 739.

[6] In denying defendant’s written request, the trial court properly exercised its discretion:

THE COURT: . . . I don’t think this instruction is required. I don’t think this instruction goes to any issue that is going to be dispositive or even close to dispositive in this case. And I agree with [the State] that, you know, sometimes if the Court forgets an instruction or a pattern instruction in something that’s given in every case, you have to call the jury back in because you forgot it. But for a special instruction that I was not inclined to give, to call them back in—I do think it would give undue—

[Defendant’s counsel]: I had only put this in, to be honest, Your Honor—you had already ruled, in my opinion. I just simply put this in because the rules of procedure say there has to be a copy. And so I did not—to be honest, I hadn’t expected you to give it. I simply wanted to put it in the record[.]

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Given that the requested instruction did not relate to a dispositive issue in the case, we hold that the trial court did not abuse its discretion in denying defendant's request.¹

V. Conclusion

For the foregoing reasons, we hold that the trial court committed no error.

NO ERROR.

Judges CALABRIA and TYSON concur.

1. [7] We note that the prosecutor's argument did not violate defendant's constitutional right to presence. *See Portuondo v. Agard*, 529 U.S. 61, 73, 146 L. Ed. 2d 47, 59 (2000) ("In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth.").

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STATE OF NORTH CAROLINA

v.

TAE KWON HAMMONDS

No. COA15-53

Filed 20 October 2015

1. Confessions and Incriminating Statements—involuntarily committed defendant—no Miranda warnings—findings

The trial court did not err in an armed robbery prosecution by not suppressing statements made to officers without *Miranda* warnings while defendant was involuntarily committed to a hospital after a suicide attempt. Defendant only challenged small portions of the trial court's findings, which were supported by the record, and did not demonstrate prejudice.

2. Confessions and Incriminating Statements—involuntary commitment to hospital—not automatically in custody

A defendant who was involuntarily committed to a hospital was not automatically “in custody” for purposes of *Miranda* warnings. While involuntary commitment places a person in custody and his freedom of movement may be restricted, the courts have not considered the fact that the defendant was incarcerated as determinative where the questions concerned questions crimes unrelated to the current imprisonment. While persons in government-imposed confinement retain various rights secured by the Bill of Rights, they retain them in forms qualified by the exigencies of prison administration..

3. Confessions and Incriminating Statements—involuntary commitment to hospital—not custodial—totality of circumstances

A defendant who was interviewed by officers without *Miranda* warnings after he was involuntarily committed to a hospital was not in custody based on the totality of the circumstances. A reasonable person in defendant's position would understand that the restriction on his movement was due to his involuntary commitment to receive medical treatment, not police interrogation.

4. Confessions and Incriminating Statements—involuntary commitment—statement without Miranda warnings—high degree of care

The trial court correctly concluded, based on the totality of the circumstances, that statements made during a police interview were

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voluntary where the interview took place without *Miranda* warnings in the hospital to which defendant was committed after a suicide attempt. A high degree of care should be exercised to ensure that the rights of a person in defendant's condition are protected.

5. Confessions and Incriminating Statements—statements to officers—no threats or promises

Although an armed robbery defendant contended that his confession was not voluntary because police officers made threats, promises, and accusations of lying, the police officers never threatened defendant and promised only that they would tell the district attorney about his cooperation and that he would be in a superior position to others if he told the facts of the of the incident before others. The trial court's findings supported its conclusion that defendant's confession was voluntary.

6. Sentencing—restitution—amount—evidence not sufficient

An order of restitution in an armed robbery prosecution was remanded for a new hearing on the amount where there was some evidence to support the award but the evidence was not specific enough to support the amount.

Judge INMAN dissenting.

Appeal by defendant from judgment entered on or about 2 July 2014 by Judge Tanya T. Wallace in Superior Court, Union County. Heard in the Court of Appeals on 13 August 2015.

Attorney General Roy A. Cooper III, by Assistant Attorney General Joseph E. Elder, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.

STROUD, Judge.

Tae Kwon Hammonds ("defendant") appeals from a judgment entered after a jury found him guilty of robbery with a dangerous weapon. Defendant argues that the trial court erred in (1) denying defendant's motion to suppress statements made to police officers while he was involuntarily committed; and (2) ordering that defendant pay \$50 in restitution. We find no error in part, vacate in part, and remand.

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I. Background

The following evidence was presented by the State at trial: At approximately 8:30 p.m. on 10 December 2012, Stephanie Gaddy was walking to her car in a Wal-Mart parking lot in Monroe when she noticed three men and a woman leaning against a vehicle about ten parking spaces away. She was about to get into her vehicle when she was approached from behind by a man who said “give me the money” and demanded her purse. Ms. Gaddy noticed that the man was carrying a handgun and realized she was being robbed. The man took her purse and cellphone. At trial, she described the perpetrator as an African-American male with a deep voice but did not identify defendant or any other individual as the perpetrator.

The next day, on 11 December 2012, defendant attempted suicide by taking an overdose of “white pills” and was brought to Carolinas Medical Center Union Hospital (“CMC Union”). At 3:50 p.m., while defendant was being treated at the hospital, a Union County magistrate ordered that defendant be involuntarily committed. Defendant was placed under 24-hour watch, during which a “sitter” was required to continuously observe him and accompany him when he left his room. That night, defendant became agitated and attempted to leave the hospital but was escorted back to his room by hospital security.

At approximately 5:00 p.m. the next day, on 12 December 2012, Detective Jonathan Williams and Lieutenant T.J. Goforth arrived at the hospital to speak with defendant about the robbery of Ms. Gaddy. The police asked Nurse Jan Kinsella, defendant’s attending nurse at the time, if they could speak with defendant, which she allowed. The police officers interviewed defendant in his hospital room for approximately one and a half hours and did not inform defendant of his *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). During the interview, defendant confessed to the robbery, though he denied using a gun.

On or about 4 February 2013, a grand jury indicted defendant for robbery with a dangerous weapon. See N.C. Gen. Stat. § 14-87 (2011). On or about 30 June 2014, defendant moved to suppress the statements he made during the police interview on the grounds that he was subjected to a custodial interrogation without having been given *Miranda* warnings, and that his confession was involuntary. The trial court denied defendant’s motion to suppress and admitted an audio recording of the interview at trial. The trial court later memorialized its findings of fact

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and conclusions of law in a written order. On 2 July 2014, the jury found defendant guilty of robbery with a dangerous weapon. The trial court sentenced defendant to 60 to 84 months' imprisonment and ordered that defendant pay \$50 in restitution. Defendant gave notice of appeal in open court.

II. Motion to Suppress

[1] Defendant argues that the trial court erred in denying his motion to suppress because (1) he was "in custody" for purposes of *Miranda* and did not receive the *Miranda* warnings; and (2) his confession was involuntary.

A. Standard of Review

The standard of review in determining whether a trial court properly denied a motion to suppress is whether the trial court's findings of fact are supported by the evidence and whether its conclusions of law are, in turn, supported by those findings of fact. The trial court's findings are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. The determination of whether a defendant's statements are voluntary and admissible is a question of law and is fully reviewable on appeal.

State v. Cortes-Serrano, 195 N.C. App. 644, 654-55, 673 S.E.2d 756, 762-63 (citations and quotation marks omitted), *disc. review denied*, 363 N.C. 376, 679 S.E.2d 138 (2009). "Additionally, the trial court's determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law, which is fully reviewable on appeal." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001).

B. Findings of Fact

Defendant's brief recounts much of the evidence from the hearing on the motion to suppress and notes some findings that the trial court could have made but did not. But our standard of review as to the findings of fact does not allow us to substitute our judgment for that of the trial court; the trial court determines the weight and credibility of the evidence. And this order includes full and detailed findings of fact, so we need not speculate about the basis for the trial court's ruling. Defendant ultimately challenges only small portions of three of the trial court's Findings of Fact 2, 6, and 13 as unsupported or at least partially unsupported by the evidence.

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Finding of Fact 2 states as follows:

That on December 11th, 2012, at approximately 3:50 p.m., Magistrate Sherry Crowder, a Union County Magistrate, issued a custody order for the involuntary commitment of [defendant], and directed the Union County Sheriff's Department to deliver [defendant] to a facility for examination and treatment. That the paper writing introduced into evidence showed that the magistrate found that the defendant was mentally ill and dangerous to himself or others; and the Sheriff's Department was directed to serve such paper writing on the defendant and transport the defendant.

Defendant argues that Finding of Fact 2 was "partially unsupported by the evidence, as the court found that the involuntary commitment order directed the Union County *Sheriff's Department* to deliver [defendant] to a facility [for] treatment." (Emphasis added.) Defendant is correct that the involuntary commitment order, issued in Union County, directs "*any law enforcement officer*" to "take [defendant] into custody within 24 hours after this order is signed and transport [defendant] directly to a 24-hour facility designated by the State for the custody and treatment of involuntary clients and present [defendant] for custody, examination and treatment pending a district court hearing." (Emphasis added and portion of original in all caps.) The evidence also showed that a law enforcement officer from the Union County Sheriff's Office executed this order. The exact wording of Finding of Fact 2 is not strictly supported by the record, but defendant has not demonstrated how the wording of the finding is prejudicial to him, and the substance of the facts is supported by the record. This argument is without merit.

Defendant also argues that Finding of Fact 13, "that nurses were in and out of the room during the interview and that [defendant] 'was never isolated without the ability to contact others,' was unsupported by the evidence." (Quoting Finding of Fact 13.) Finding of Fact 13 in its entirety is as follows:

The defendant was interviewed by Detective Williams of the Monroe Police Department and Detective T.J. Goforth at approximately five p.m. on December the 12th. They spoke with the defendant for approximately one and [a] half hours. No Miranda Rights were given to the defendant. On at least three occasions, however, the defendant was told that, "there were no arrest warrants

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with the officers,” and that they were not here to “lock you up.” Indeed the defendant was not arrested and there were no warrants present at the time they spoke with the defendant. It is clear from the conversation that the officers had with the defendant that they knew that he was hospitalized as a result of an overdose, whether accidental or intentional, and had been involuntarily committed, and would be going for further evaluation and treatment. But although the defendant’s words seem to be muttered, especially initially, they were appropriate responses to the statements or questions from the officers. The defendant answered the questions or statements coherently and appropriately. Throughout the conversation the defendant never asked the officers to leave or to stop talking. There was actually a sitter watching the interview, and nurses were in and out. The defendant was never isolated without the ability to contact others. The tone was conversational between the officers and the defendant, although the officers would confront the defendant when they believed that he was being less than truthful. The officers did not tell the defendant he was being taped. There is no indication that there had been any previous relationship between the defendant and the officers. The nurse was not an agent of the state [or] government. The defendant was not arrested and no warrant issued at the time. The defendant was unable to leave the hospital. He was not actually at a police station and was not told that he could not stop the conversation or request that the officers leave. He was never threatened, voices were never raised. The only promises made were such that the officers would tell the [district attorney] about his cooperation, and that he would be in a superior position to others if he told, before others did, as to the facts of the circumstances of the incident at Wal-Mart.

(Emphasis added.)

As noted above, only the underlined portion of this finding is challenged by defendant as unsupported by the evidence. Defendant’s argument relies heavily upon the hospital records and notations of times that nurses recorded activities in defendant’s room, stressing periods of time when a nurse was not physically present in the room. Yet we also note that defendant has not challenged Finding of Fact 8, which states:

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During the defendant's stay in the hospital and before he spoke with Monroe Police Department, he visited with representatives of DayMark, who apparently was the provider for his inpatient or outpatient follow-up from the hospital. He also had others around, specifically his mother, at times during his time in the hospital.

The trial court's characterization of the nurses as being "in and out" of the room is fully supported by the medical records, Nurse Kinsella's testimony, and the transcript of the audio recording of the police interview. The trial court did not need to prepare a detailed log of every moment that each person who visited or treated defendant was in the room. There is no indication in the evidence that defendant was ever isolated or prevented from contacting others, and Finding of Fact 8, which is unchallenged, also addresses his contact with others. This argument is also without merit.

Defendant also challenges Finding of Fact 6, specifically that defendant was "normal." Defendant asserts that the trial court found that he was normal simply because "he scored a 15 on the Glasgow Coma Scale, as the scale does not assess a patient's psychiatric or mental state. An alert and conscious patient who says, 'I want to walk now to London, England,' scores 15 on the Glasgow Coma Scale." (Citation omitted.) Defendant's argument takes the word "normal" entirely out of context. In context, the relevant portion of Finding of Fact 6 addresses Nurse Kinsella's testimony and states that

according to her review, a Glasgow-Coma Scale was administered when the defendant had arrived at the [emergency room], which is a quick and objective way to determine a patient's physical and mental state. It includes such criteria as the ability of keeping eyes open, whether oriented and can converse, obey commands, vocalize pain. That the defendant registered a fifteen on the Glasgow-Coma Scale, (even on admission) and that is termed "normal".

This finding is fully supported by the evidence, and it is not, as defendant implies, a finding that defendant's mental state upon his admission to the emergency room after a suicide attempt and involuntary commitment was entirely "normal." The trial court was addressing defendant's state of consciousness upon arrival at the emergency room, and in other findings the trial court addresses defendant's mental and emotional state, both upon arrival and after treatment, in detail. Defendant does not challenge those findings as unsupported by the evidence.

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The trial court's findings of fact which were not challenged on appeal are binding on this court on appeal, and the challenged findings were supported by the record, so all of the trial court's findings of fact are binding on appeal. *See State v. Phillips*, 151 N.C. App. 185, 190-91, 565 S.E.2d 697, 701 (2002); *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983).

C. Custody

i. Automatic Custody

[2] Defendant's argument suggests that a defendant who has been involuntarily committed in the hospital is automatically "in custody" for purposes of *Miranda* warnings. The briefs from both defendant and the State focus on cases which have addressed interrogations in hospital settings where a defendant was voluntarily seeking medical care, while defendant here was in the hospital due to involuntary commitment. The dissent also distinguishes the cases dealing with hospitalized defendants because they deal with persons voluntarily in the hospital for treatment and would require the trial court to apply a new and different analysis to the questioning of an involuntarily committed person. We agree that involuntary commitment is different from a voluntary hospitalization, as there is no doubt that involuntary commitment places a person in custody and his freedom of movement may be restricted by law enforcement officers. But we believe that cases dealing with incarcerated defendants who have been questioned regarding other crimes unrelated to their current imprisonment are instructive on this issue, and our courts have simply not considered the fact that the defendant is incarcerated as determinative. Since involuntary commitment is arguably less restrictive than incarceration, and certainly not more restrictive, we do not adopt a more restrictive rule for involuntary commitment than for incarceration.

In determining whether defendant was "in custody" for purposes of *Miranda*, this situation is closely analogous to cases which address interviews of a prisoner who has been incarcerated for another crime, when law enforcement officers attempt to speak with him about another entirely separate crime. In *State v. Fisher*, this Court held that an inmate is not "automatically in custody for the purposes of *Miranda*[,] " and our Supreme Court affirmed this ruling *per curiam*. 158 N.C. App. 133, 145, 580 S.E.2d 405, 415 (2003), *aff'd per curiam*, 358 N.C. 215, 593 S.E.2d 583 (2004). There, we noted:

It is well established that *Miranda* warnings are required only when a defendant is subjected to custodial

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interrogation. Because the determination of whether a defendant was in custody is a question of law, it is fully reviewable here.

A person is in custody, for purposes of *Miranda*, when he is taken into custody or otherwise deprived of his freedom of action in any significant way, and an inmate who is subject to a custodial interrogation is entitled to *Miranda* warnings. An inmate, however, is not, because of his incarceration, automatically in custody for the purposes of *Miranda*; rather, whether an inmate is in custody must be determined by considering his freedom to depart from the place of his interrogation.

Factors which bear on the determination of whether an inmate is in custody for purposes of *Miranda* include: (1) whether the inmate was free to refuse to go to the place of the interrogation; (2) whether the inmate was told that participation in the interrogation was voluntary and that he was free to leave at any time; (3) whether the inmate was physically restrained from leaving the place of interrogation; and (4) whether the inmate was free to refuse to answer questions.

Id., 580 S.E.2d 415 (citations, quotation marks, and brackets omitted).

This Court has followed this rule in *State v. Briggs*, 137 N.C. App. 125, 129, 526 S.E.2d 678, 680-81 (2000), and *State v. Wright*, 184 N.C. App. 464, 470-71, 646 S.E.2d 625, 629 (2007), *cert. denied*, 362 N.C. 372, 662 S.E.2d 393 (2008). In addition, the Fourth Circuit Court of Appeals agrees:

[*Mathis v. United States*, 391 U.S. 1, 20 L. Ed. 2d 381 (1968),] clearly holds that the fact that a defendant is imprisoned on an unrelated matter does not necessarily remove the necessity for *Miranda* warnings. Nothing in that opinion, however, suggests that an inmate is automatically “in custody” and therefore entitled to *Miranda* warnings, merely by virtue of his prisoner status. . . .

We also decline to read *Mathis* as compelling the use of *Miranda* warnings prior to all prisoner interrogations and hold that a prison inmate is not automatically always in “custody” within the meaning of *Miranda*. [The

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defendant's] view of the *Mathis* decision would seriously disrupt prison administration by requiring, as a prudential measure, formal warnings prior to many of the myriad informal conversations between inmates and prison guards which may touch on past or future criminal activity and which may yield potentially incriminating statements useful at trial. As the Ninth Circuit pointed out, this approach would "torture [*Miranda*] to the illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart." [*Cervantes v. Walker*, 589 F.2d 424, 427 (9th Cir. 1978).] Such a result would be directly at odds with established constitutional doctrine that while persons in government-imposed confinement retain various rights secured by the Bill of Rights, they retain them in forms qualified by the exigencies of prison administration and the special governmental interests that result. See *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (qualified sixth amendment rights of inmates in prison disciplinary proceedings); *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (qualified fifth amendment liberty interest of pre-trial detainee); *Hudson v. Palmer*, [468 U.S. 517], 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) (qualified fourth amendment right of inmates).

. . . .

Prisoner interrogation simply does not lend itself easily to analysis under the traditional formulations of the *Miranda* rule. A rational inmate will always accurately perceive that his ultimate freedom of movement is absolutely restrained and that he is never at liberty to leave an interview conducted by prison or other government officials. Evaluation of prisoner interrogations in traditional freedom-to-depart terms would be tantamount to a *per se* finding of "custody," a result we refuse to read into the *Mathis* decision.

United States v. Conley, 779 F.2d 970, 972-73 (4th Cir. 1985), *cert. denied*, 479 U.S. 830, 93 L. Ed. 2d 61 (1986) (third alteration in original).

A person who has been involuntarily committed is certainly a "person[]" in government-imposed confinement[,] just as an incarcerated defendant, and the exigencies of the administration of hospitals and

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inpatient facilities which treat patients with psychiatric conditions are quite similar to those of prisons. *See id.* at 973. For example, if every involuntarily committed person held in an emergency room, hospital, or other mental health treatment facility is automatically “in custody” for purposes of *Miranda*, a law enforcement officer who simply needs to ask a patient for information about an altercation or theft which had occurred in the facility would have to first notify the person of his *Miranda* rights, regardless of the other circumstances of the interview. Such a result is “directly at odds with established constitutional doctrine that while persons in government-imposed confinement retain various rights secured by the Bill of Rights, they retain them in forms qualified by the exigencies of prison administration and the special governmental interests that result.” *See id.* For these reasons, we hold that defendant was not automatically “in custody” for purposes of *Miranda* based simply upon his involuntary commitment and instead we consider the circumstances of defendant’s statements in the same manner as courts have considered interviews of incarcerated defendants.

ii. Totality of the Circumstances

[3] In light of the above discussion, we must address whether the trial court’s findings of fact support its conclusion of law that, based on the totality of the circumstances, defendant was not “in custody” for purposes of *Miranda*. Generally, “the appropriate inquiry in determining whether a defendant is ‘in custody’ for purposes of *Miranda* is, based on the *totality of the circumstances*, whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828 (emphasis added and quotation marks omitted). In the context of a hospitalized defendant, this Court examines “(1) whether the defendant was free to go at his pleasure; (2) whether the defendant was coherent in thought and speech, and not under the influence of drugs or alcohol; and (3) whether officers intended to arrest the defendant.” *State v. Allen*, 200 N.C. App. 709, 714, 684 S.E.2d 526, 530 (2009). “This Court has also made a distinction between questioning that is accusatory and that which is investigatory.” *Id.*, 684 S.E.2d at 530. In *Allen*, this Court held that the defendant was not “in custody” and noted that “[a]ny restraint in movement [the] defendant may have experienced at the hospital was due to his medical treatment and not the actions of the police officers.” *Id.* at 715, 684 S.E.2d at 531.

In *United States v. Jamison*, the Fourth Circuit Court of Appeals also stressed this distinction:

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Analysis of whether [the defendant] was in custody . . . depends on whether a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter[.] In dissecting the perceptions of such a reasonable person, however, we must be careful to separate the restrictions on his freedom arising from police interrogation and those incident to his background circumstances. That is, to the extent [the defendant] felt constrained by his injuries, the medical exigencies they created (e.g., the donning of a hospital gown and the insertion of an I.V. line), or the routine police investigation they initiated, such limitations on his freedom should not factor into our reasonable-person analysis. It is this careful differentiation between police-imposed restraint and circumstantial restraint that leads us to conclude that [the defendant] was not in custody[.]

U.S. v. Jamison, 509 F.3d 623, 629 (4th Cir. 2007) (citation, quotation marks, and brackets omitted).

In the context of a prison inmate, this Court examines “(1) whether the inmate was free to refuse to go to the place of the interrogation; (2) whether the inmate was told that participation in the interrogation was voluntary and that he was free to leave at any time; (3) whether the inmate was physically restrained from leaving the place of interrogation; and (4) whether the inmate was free to refuse to answer questions.” *Fisher*, 158 N.C. App. at 145, 580 S.E.2d at 415 (quotation marks omitted). In *Conley*, the Fourth Circuit Court of Appeals, in determining whether a prison inmate was “in custody,” examined the “circumstances of the interrogation to determine whether the inmate was subject to *more than the usual restraint* on a prisoner’s liberty to depart.” *Conley*, 779 F.2d at 973 (emphasis added).

In addressing the issue of custody, we apply an objective test:

Throughout the years, the United States Supreme Court has stressed that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. Unless they are communicated or otherwise manifested to the person being questioned, an officer’s evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or interview, and thus

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cannot affect the *Miranda* custody inquiry. Nor can an officer's knowledge or beliefs bear upon the custody issue unless they are conveyed, by word or deed, to the individual being questioned. A policeman's unarticulated plan has no bearing on the question whether a suspect was in custody at a particular time; *the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.*

Buchanan, 353 N.C. at 341-42, 543 S.E.2d at 829 (emphasis added and citations and quotation marks omitted).

Here, the trial court made Finding of Fact 13, as quoted above. During the interview, the police officers told defendant that he was not being arrested and in fact did not arrest him. The officers never told defendant that he could not stop the conversation or that he could not request that they leave, and the officers never threatened defendant or raised their voices. Defendant was "never isolated without the ability to contact others[.]" a sitter watched the interview, and nurses were "in and out" during the interview. Given that the factors in *Allen* or *Fisher* do not squarely apply to the context of an involuntarily committed defendant, we focus on "how a reasonable man in [defendant's] position would have understood his situation." See *Buchanan*, 353 N.C. at 341-42, 543 S.E.2d at 829. While the dissent is correct that defendant was not free to leave the hospital, "we must be careful to separate the restrictions on his freedom arising from police interrogation and those incident to his background circumstances." See *Jamison*, 509 F.3d at 629. In other words, we must analyze how a reasonable person, in defendant's position, would have perceived the purpose of the restriction on his movement, whether it be for police interrogation or for medical treatment.

On 11 December 2012, the night before the police approached defendant, defendant "tried to leave the room, but was escorted back by security." Given the fact that defendant's attempt to escape took place *before* the police interview, coupled with the attendant circumstances of the interview, as discussed above, we hold that a reasonable person in defendant's position would understand that the restriction on his movement was due to his involuntary commitment to receive medical treatment, not police interrogation. See *Allen*, 200 N.C. App. at 715, 684 S.E.2d at 531 (holding that the defendant was not "in custody" and noting that "[a]ny restraint in movement [the] defendant may have experienced at the hospital was due to his medical treatment and not the actions of the police officers"). Additionally, the test in *Conley* accords with this result, as defendant was not subject to "more than the usual restraint[.]" See *Conley*, 779 F.2d at 973.

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The dissent correctly cites N.C. Gen. Stat. § 122C-205(a), for the proposition that if an involuntarily committed patient of a 24-hour facility escapes, the responsible professional shall immediately notify law enforcement. *See* N.C. Gen. Stat. § 122C-205(a) (2011). But a prison inmate who attempts to escape prison would also be met with police resistance, and yet as discussed above, numerous courts have held that a prison inmate is not automatically “in custody” for purposes of *Miranda*. We hold that the *purpose* behind a defendant’s restraint is much more relevant than the force that can potentially be summoned to thwart a breach of that restraint. In light of *Buchanan*, *Allen*, *Conley*, and *Jamison*, we agree with the trial court that defendant was not “in custody” for purposes of *Miranda*. The trial court properly considered all of the factors to determine if defendant was in custody and did not err in its conclusion of law that based on the totality of the circumstances, defendant was not in custody at the time he was interviewed.

D. Voluntariness

[4] Defendant next challenges the trial court’s conclusion of law that his statements during the police interview were voluntary. Under the United States Constitution, the question is whether the totality of the circumstances demonstrates that the statement was “the product of an essentially free and unconstrained choice by its maker[.]” *Culombe v. Connecticut*, 367 U.S. 568, 602, 6 L. Ed. 2d 1037, 1057 (1961); *see also State v. Bordeaux*, 207 N.C. App. 645, 647, 701 S.E.2d 272, 274 (2010). In considering whether a statement was voluntary, the court must assess “the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” *Schneekloth v. Bustamonte*, 412 U.S. 218, 226, 36 L. Ed. 2d 854, 862 (1973). We consider the following factors:

whether defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

Cortes-Serrano, 195 N.C. App. at 655, 673 S.E.2d at 763. “Admonitions by officers to a suspect to tell the truth, standing alone, do not render a confession inadmissible. . . . [To be improper, an] inducement of hope must promise relief from the criminal charge to which the confession

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relates.” *State v. McCullers*, 341 N.C. 19, 27, 460 S.E.2d 163, 168 (1995). In *State v. Smith*, a police officer testified that he told the defendant during an interrogation: “I couldn’t tell him what would happened [sic], but it will be better for him when he came to court that he would tell—that we would tell the [district attorney] and the judge that he told the truth about it.” 328 N.C. 99, 115, 400 S.E.2d 712, 720-21 (1991) (first alteration in original and brackets omitted). Our Supreme Court held that this statement did not constitute an improper promise and that the defendant’s confession was voluntary. *Id.* at 115, 118, 400 S.E.2d 721-22.

As relevant to defendant’s argument regarding voluntariness, the trial court found as follows:

9. That Nurse [Kinsella] checked the defendant for fall risk, that he was alert; he was not confused, he was oriented, he had a quick “get up and go”, and he could respond quickly to moving out of the bed, and had no medications to make him confused at the time that she saw him.

10. That he was actually discharged from the care of the emergency room at 21:00 hours on 12-12. That he had to be medically stable for such to occur. That he actually clothed himself to leave before he actually left.

11. That when the nurse went off duty, she noted that the defendant’s vital signs were within normal limits, his behavior was calm, he had proper emotional support; she had gone over the coping skills with him, and they were effective. She had discussed his concerns and suicide precautions were still in place. Nurse [Kinsella] had been on duty approximately two hours when two detectives arrived from the Monroe Police Department. They checked with her before they went to the defendant’s room, and she told them that he was alert, oriented, and they were welcome to talk with him. She did not ask the defendant if he wished to speak with them, and did not tell the officers why the defendant was there, although it is clear from the conversation that they were aware that he was actually involuntarily committed at that time.

....

13. The defendant was interviewed by Detective Williams of the Monroe Police Department and Detective

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T.J. Goforth at approximately five p.m. on December the 12th. They spoke with the defendant for approximately one and [a] half hours. No Miranda Rights were given to the defendant. On at least three occasions, however, the defendant was told that, “there were no arrest warrants with the officers,” and that they were not here to “lock you up.” Indeed the defendant was not arrested and there were no warrants present at the time they spoke with the defendant. It is clear from the conversation that the officers had with the defendant that they knew that he was hospitalized as a result of an overdose, whether accidental or intentional, and had been involuntarily committed, and would be going for further evaluation and treatment. But although the defendant’s words seem to be muttered, especially initially, they were appropriate responses to the statements or questions from the officers. The defendant answered the questions or statements coherently and appropriately. Throughout the conversation the defendant never asked the officers to leave or to stop talking. There was actually a sitter watching the interview, and nurses were in and out. The defendant was never isolated without the ability to contact others. The tone was conversational between the officers and the defendant, although the officers would confront the defendant when they believed that he was being less than truthful. The officers did not tell the defendant he was being taped. There is no indication that there had been any previous relationship between the defendant and the officers. The nurse was not an agent of the state [or] government. The defendant was not arrested and no warrant issued at the time. The defendant was unable to leave the hospital. He was not actually at a police station and was not told that he could not stop the conversation or request that the officers leave. He was never threatened, voices were never raised. The only promises made were such that the officers would tell the [district attorney] about his cooperation, and that he would be in a superior position to others if he told, before others did, as to the facts of the circumstances of the incident at Wal-Mart.

14. At the time of the interview the defendant had had no drugs administered by the hospital in more than fourteen hours. The Court has had a chance to review

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the witnesses and listen to the tape, and finds the defendant to be at all times coherent and understanding of the questions, and appropriately responsive in his answers. There appears nothing from the Court listening to the tape that indicates the defendant was under the influence of any medication, and certainly not under the influence of medications that would cause him to be incapable of understanding the context or words that were coming to him and issued by him. The defendant was coherent in thought and speech and not under the influence of drugs or alcohol at the time the statement was made.

The trial court concluded: “Based on the totality of the circumstances, the Court finds the defendant made a knowing, voluntary, and understanding statement to the officers[.]”

The trial court’s findings of fact addressed the obvious concerns raised by the evidence in this case. Defendant had been involuntarily committed and had attempted a drug overdose. The trial court’s extensive findings of fact, only a portion of which are quoted above, demonstrate that the court carefully considered all of the circumstances and defendant’s mental and emotional state. In addition, there was an audio recording of the interview, which the trial court reviewed and was able to hear both the officers’ questions and defendant’s responses and demeanor. A trial court, and this Court, should exercise a high degree of care to ensure that the rights of a person in defendant’s condition, who has been involuntarily committed and may suffer from an impairing mental or emotional condition, are protected. But the trial court did exactly that in this case.

[5] Defendant also contends that his confession was not voluntary because the police officers made threats, promises, and accusations of lying. But we are bound by the findings the trial court actually made, as they are either unchallenged or supported by the evidence. *See Phillips*, 151 N.C. App. at 190-91, 565 S.E.2d at 701; *Jackson*, 308 N.C. at 581, 304 S.E.2d at 152. The trial court found that “the officers would confront the defendant when they believed that he was being less than truthful.” The trial court also found that the police officers never threatened defendant and promised only that they “would tell the [district attorney] about his cooperation, and that he would be in a superior position to others if he told, before others did, as to the facts of the circumstances of the incident at Wal-Mart.” The police officers’ exhortations that defendant tell the truth did not render defendant’s confession involuntary. *See McCullers*, 341 N.C. at 27, 460 S.E.2d at 168. Additionally, the police officers’ promise

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that they would tell the district attorney about defendant's cooperation and that he would be in a "superior position to others" was not improper and did not vitiate the voluntariness of defendant's confession. *See id.*, 460 S.E.2d at 168; *Smith*, 328 N.C. at 115, 118, 400 S.E.2d at 721-22; *State v. Richardson*, 316 N.C. 594, 603-04, 342 S.E.2d 823, 830-31 (1986) (holding that a detective's statement to the defendant that "the district attorney usually responds favorably when a defendant cooperates" did not render the defendant's confession involuntary).

Defendant's reliance on *State v. Pruitt*, where our Supreme Court held that the defendant's confession was involuntary, is misplaced. *See* 286 N.C. 442, 458, 212 S.E.2d 92, 102-03 (1975). There,

the interrogation of defendant by three police officers took place in a police-dominated atmosphere. Against this background the officers repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was "lying" and that they did not want to "fool around." Under these circumstances one can infer that the language used by the officers tended to provoke fright. This language was then tempered by statements that the officers considered defendant the type of person "that such a thing would prey heavily upon" and that he would be "relieved to get it off his chest." This somewhat flattering language was capped by the statement that "it would simply be harder on him if he didn't go ahead and cooperate." Certainly the latter statement would imply a suggestion of hope that things would be better for defendant if he would cooperate, *i.e.*, confess.

Id., 212 S.E.2d at 102. In contrast, here, the "tone was conversational between the officers and the defendant, although the officers would confront the defendant when they believed that he was being less than truthful." Accordingly, we distinguish *Pruitt*.

Defendant's reliance on *State v. Flood*, where this Court held that a police officer made an improper promise, is similarly misplaced. *See* ___ N.C. App. ___, ___, 765 S.E.2d 65, 72 (2014), *disc. review denied*, ___ N.C. ___, 768 S.E.2d 854 (2015). There,

[d]uring the interview, Agent Oaks suggested she would work with and help Defendant if he confessed and that she "would recommend that defendant get treatment" instead of jail time. She also asserted that Detective Schwab "can

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ask for, you know, leniency, give you this, do this. He can ask the District Attorney's Office for certain things. It's totally up to them what they do with that but they're going to look for recommendations." Agent Oaks further suggested to Defendant that

if you admit to what happened here Detective Schwab is going to probably talk to the District Attorney and say, "hey, this is my recommendation. Hey, this guy was honest with us. This guy has done everything we've asked him to do. What can we do?" and talk about it.

At one point, Agent Oaks asked Defendant directly: "Do you want my help?" Agent Oaks also threatened that any possibility of help from her or Detective Schwab would cease after their conversation with Defendant ended, once even after Defendant asked to speak to his mother on the phone.

Id. at ___, 765 S.E.2d at 72 (brackets and ellipses omitted). In contrast, here, the police officers never threatened defendant and promised only that they "would tell the [district attorney] about his cooperation, and that he would be in a superior position to others if he told, before others did, as to the facts of the circumstances of the incident at Wal-Mart." Accordingly, we also distinguish *Flood* and hold that the trial court's findings of fact support its conclusion of law that defendant's confession was voluntary.¹

III. Restitution

[6] Defendant's last argument is that the trial court erred in ordering defendant to pay \$50 in restitution because Ms. Gaddy did not testify regarding the value of her identity card or medications, which defendant had stolen and had not been returned to her. The State agrees with defendant but argues that the appropriate remedy is to remand the case to the trial court for further consideration.

1. We also note that this Court in *Flood* held that the defendant's confession was voluntary despite its conclusion that Agent Oaks made an improper promise. *Id.* at ___, 765 S.E.2d at 74.

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A. Standard of Review

Although defendant failed to object to this issue, we hold that this issue is preserved for appellate review. *See* N.C. Gen. Stat. § 15A-1446(d) (18) (2013); *State v. Mumford*, 364 N.C. 394, 402-03, 699 S.E.2d 911, 917 (2010). “[W]e review *de novo* whether the restitution order was supported by evidence adduced at trial or at sentencing.” *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (quotation marks omitted), *disc. review denied*, 365 N.C. 351, 717 S.E.2d 743 (2011).

B. Analysis

[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing. . . .

Prior case law reveals two general approaches: (1) when there is *no* evidence, documentary or testimonial, to support the award, the award will be vacated, and (2) when there is specific testimony or documentation to support the award, the award will not be disturbed.

State v. Moore, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011). In *Moore*, our Supreme Court articulated a third approach for cases that fall in the middle ground. *Id.* at 285-86, 715 S.E.2d at 849-50. The Court held that “some evidence” supported an award of restitution but that the evidence was not specific enough to support the amount of the award. *Id.* at 286, 715 S.E.2d at 849. The Court remanded the case to the trial court for a new hearing to determine the appropriate amount of restitution. *Id.*, 715 S.E.2d at 849-50. Because there is some evidence to support an award of restitution but the evidence is not specific enough to support the amount of the award, we vacate the restitution order and remand for a new hearing to determine the appropriate amount of restitution. *See id.*, 715 S.E.2d at 849-50.

IV. Conclusion

For the reasons noted above, we hold that the trial court committed no error during the guilt-innocence phase, vacate the restitution order, and remand the case for a new hearing to determine the appropriate amount of restitution.

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Judge McCULLOUGH concurs.

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Judge INMAN dissents.

INMAN, Judge, dissenting.

I must respectfully dissent to the majority's decision that defendant's statement to police was noncustodial because, in my view, the circumstances of a person who has been involuntarily committed require inquiry and analysis beyond that performed by the trial court here.

The issue of whether and in what circumstances police questioning of an involuntarily committed person is custodial is one of first impression in North Carolina. While I agree with the majority that the nature of involuntary commitment does not render police questioning custodial *per se*, the analysis employed by North Carolina's appellate courts in other settings does not address the circumstances of a person who has been placed in custody involuntarily, who has not been charged with any crime, and whose mental condition merits inpatient treatment. It is incumbent upon trial courts in such cases to apply the factors identified by this Court and the North Carolina Supreme Court in other settings and to consider additional factors that are not at issue in other settings and have not previously been addressed by these courts. The additional factors include whether the involuntarily committed person expressly consented to the police interview and whether the person was told he was free to exit the interview area or to ask the officers to leave his presence.

I acknowledge that the trial court's findings of fact with regard to a motion to suppress are conclusive on appeal if supported by any competent evidence, and I agree that defendant has not managed to refute the few findings he challenged based on this standard of review. I disagree, however, with the majority's review of the trial court's determination of whether defendant was in custody when he was questioned, a conclusion of law fully reviewable on appeal. In my view, the trial court erred by applying a legal analysis inconsistent with this Court's precedent in other settings and by failing to weigh other factors necessary to determine whether police questioning of an involuntarily committed person was custodial.

The facts here – many of them found by the trial court – demonstrate the shortcomings in the analysis and conclusion that defendant was not in custody when questioned. Defendant was confronted without warning by two police detectives in the room where he was confined against his will. Neither the detectives nor any medical provider asked

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defendant to consent to an interview. The detectives did not introduce themselves to defendant at the beginning of the interview. Detective Williams simply began questioning defendant about his condition and the circumstances leading to his hospitalization. It appears from the evidence that defendant had no place to retreat to if he wished to avoid questioning, although the trial court made no finding in this regard. It is also unclear whether defendant was free to leave his bed during police questioning; at the end of the interview Detective Goforth offered to swap out an old tray of food from defendant's bedside with a tray elsewhere in the room, "and put the fresh one where you can reach it." The trial court made no finding in this regard.

The circumstances of an involuntarily committed person are not the same as those of a typical hospital patient. In the hospital cases cited by the majority, the defendant was in a medical facility on his own volition, not legally restrained in any way. *See, e.g., State v. Allen*, 200 N.C. App. 709, 715, 684 S.E.2d 526, 531 (2009) (the defendant was not in custody where his restraint of movement was due to medical treatment for a cut); *United States v. Jamison*, 509 F.3d 623, 633 (4th Cir. 2007) ("Absent police-imposed restraint, there is no custody.").

I also disagree with the majority that cases addressing questioning of prison and jail inmates are so closely analogous as to obviate the need for additional inquiry where the person subject to questioning has been involuntarily committed. Unlike prison and jail inmates, who necessarily have been advised of their *Miranda* rights in the course of their prior arrests, and who often have had the benefit of counsel in the course of their criminal cases, involuntarily committed patients may have had no prior occasion to be so advised or even to think about their rights if approached by police.

Involuntary commitment, as set out in our General Statutes, is a physical detention executed by government actors against the will of an individual. The General Assembly unequivocally describes involuntary commitment as the taking of a person into "custody." *See* N.C. Gen. Stat. § 122C-252 (2013) (describing facilities to be utilized for "the custody and treatment of involuntary clients"); N.C. Gen. Stat. § 122C-261 (2013) (specifying that the purpose of an involuntary commitment order is "to take the respondent into custody for examination by a physician or eligible psychologist"). Indeed, the order by which the Union County magistrate committed defendant was titled "Custody Order."

The Custody Order served on defendant in this case specified that, after taking defendant into custody, the law enforcement officer was

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required to inform him that he “[was] not under arrest and has not committed a crime, but is being transported to receive treatment and for his or her own safety and that of others.” The required disclaimer belies the similarity between a formal arrest and the taking of an individual into custody for the purposes of involuntary commitment, a comparison this Court has recognized before. In *In re Zollicoffer*, we reasoned that:

[T]he requirements for a custody order under N.C. Gen. Stat. § 122C-261 are analogous to those where a criminal suspect is subject to loss of liberty through the issuance of a warrant for arrest. In both instances a magistrate or other approved official must find probable cause (though under N.C. Gen. Stat. § 122C-261 the synonymous term reasonable grounds is used) supporting the issuance of the order or warrant. In both cases the magistrate has the power to deprive a person of his liberty pending a more thorough and demanding determination of the evidence against him.

165 N.C. App. 462, 466, 598 S.E.2d 696, 699 (2004); *see also In re Moore*, ___ N.C. App. ___, 758 S.E.2d 33, 36 (2014) (“We have drawn [a comparison between involuntary commitment and arrest] because a custody order deprives a person of their liberty and therefore is analogous to a criminal proceeding, like the issuance of an arrest warrant, where a defendant is deprived of his liberty.”).

The General Assembly also has recognized that both a formal arrest and involuntary commitment feature substantial loss of liberty, because indigent persons subject to either are constitutionally entitled to appointed counsel. *See* N.C. Gen. Stat. § 7A-451(a)(1),(6) (2013); *see also McBride v. McBride*, 334 N.C. 124, 126, 431 S.E.2d 14, 16 (1993) (“[I]n determining whether due process requires the appointment of counsel for an indigent litigant in a particular proceeding, a court must first focus on the potential curtailment of the indigent’s personal liberty[.]”).

Many of the findings entered by the trial court in this case reflect the similarity between a formal arrest and an involuntary commitment custody order. The trial court noted that Custody Order directed “any law enforcement officer” to take defendant into custody and transport him to a 24-hour health facility. When defendant tried to leave the hospital on the night of 11 December, he was escorted back to his room by a uniformed security officer. The trial court found as an uncontested fact that “[defendant] was unable to leave the hospital.” Any 24-hour facility

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that accepts involuntarily committed clients is required to immediately notify the appropriate law enforcement agency if any such patient leaves the premises, and that law enforcement agency is in turn required to take the client into custody and remit him to the 24-hour facility from which he “escaped.” See N.C. Gen. Stat. § 122C-205(a) (2013).

Assuming *arguendo* that the cases involving police questioning of inmates, relied upon by the majority, were sufficient to apply in this case, they do not support the trial court’s conclusion in this case. This Court in *State v. Fisher* held that “whether an inmate is in custody must be determined by considering his freedom to depart from the place of his interrogation.” 158 N.C. App. 133, 145, 580 S.E.2d 405, 415 (2003) *aff’d*, 358 N.C. 215, 593 S.E.2d 583 (2004). In contrast, defendant was not free to leave his hospital room.

Fisher’s further holding, which is quoted by the majority and bears repeating, requires the trial court to consider the following specific factors: “(1) whether the [involuntarily committed person] was free to refuse to go to the place of the interrogation; (2) whether the [person] was told that participation in the interrogation was voluntary and that he was free to leave at any time; (3) whether the [person] was physically restrained from leaving the place of interrogation; and (4) whether the [person] was free to refuse to answer questions.” *Id.* (citations and quotation marks omitted). The first two factors, applied to the trial court’s findings in this case, suggest that defendant was in custody: he was not free to refuse to go to the place of the interrogation and he was not told that his participation was voluntary or that he was free to leave. The trial court’s findings do not reflect consideration of the third and fourth factors.

Although the trial court found that defendant “was not told that he could not stop the conversation or request that the officers leave,” the double negative reveals an attenuated approach to the facts and misstates the second factor provided in *Fisher*. It appears undisputed that the police detectives did not tell defendant that he *could* stop the conversation or that he *could* ask the officers to leave.

After entering defendant’s room and asking about his health condition, detectives first asked defendant about thefts from lockers at his workplace, unrelated to the charges and convictions on appeal here. After defendant denied any involvement, the detectives told him that they were being “lenient” by coming to him without an arrest warrant and that “unless you tell us the truth, then we have to do what we have to do. . . . Because we already know. It’s just that we want to hear it from

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you.” After demonstrating to defendant that he could not avoid culpability by his denials because of their superior knowledge, police detectives then questioned defendant about the robbery of Ms. Gaddy underlying the charges and convictions at issue in this appeal. Detective Goforth repeated her forecast of the consequences without his cooperation: “But the thing is is that, like I said, I mean, that man right there [Detective Williams] needs a warrant. He’s already got everything he needs. It’s a done deal.” The nature of the police detectives’ statements to defendant, no matter how softly spoken or conversational in tone, and notwithstanding their assurances that he would not be arrested there on the spot, would seem to suggest to any reasonable person that police already had enough information to bring charges but were giving him a chance to cooperate in hopes of mitigating his exposure. In my view, a reasonable person in defendant’s position presented with this information from two police officers at his bedside would hardly consider the conversation an informal one. The trial court’s findings of fact did not address these circumstances.

Unlike the defendant in *Fisher*, defendant expressed no consent to speak with police officers and in fact had no warning that they were coming to question him. The officers simply asked the nurse monitoring defendant for permission to enter the room, which she granted without seeking defendant’s consent. While the issue has not previously been addressed in North Carolina, courts in other jurisdictions considering police questioning involuntarily committed patients have noted such factors as central to the custody analysis. *Compare United States v. Hallford*, No. 13–0335(RJL), 2015 WL 2128680, at *3 (D.D.C. May 6, 2015) (where defendant, who was questioned in his hospital gown, was not asked if he would submit to an interview and was never told he could refuse to answer questions or suspend the interview at any time, “any reasonable person would have believed that he was not free to leave or terminate the interview”) with *State v. Rogers*, 848 N.W.2d 257, 263-64 (N.D. 2014) (“The medical staff did not permit the detectives to speak with Rogers until the staff had his permission. Hospital staff also selected the room where the interview was conducted [outside of the defendant’s hospital room].”).

Nor were the circumstances of defendant’s statements to police analogous to the statements at issue in *Fisher* and decisions following its holding. The defendant in *Fisher* was not sought out by police; he asked to leave his prison cell and met with a guard to confess he had committed a murder years earlier because “he realized he was getting away with murder and it started eating him up inside[.]” 158 N.C. App.

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at 138, 580 S.E.2d at 410 (quotation marks and brackets omitted). The defendant in *State v. Briggs* was exiting an interview room when he stopped at the open door, closed the door, returned to sit with the officer and confessed to a crime. 137 N.C. App. 125, 127, 526 S.E.2d 678, 679 (2000). The defendant in *State v. Wright* unexpectedly told officers that he had participated in a fatal shooting, even though one officer had expressly told defendant that the purpose of their meeting was not to interrogate him, was only to advise him of the status of the case, and that “‘if I do ask a question, do not answer.’” 184 N.C. App. 464, 471, 646 S.E.2d 625, 630 (2007).

Defendant's circumstances in this case – like those of most involuntarily committed mental patients – also differed from the prison environment cited by the majority, *supra*, in which federal courts have reasoned that requiring *Miranda* warnings in all prisoner interrogations “would seriously disrupt prison administration by requiring, as a prudential measure, formal warnings prior to many of the myriad informal conversations between inmates and prison guards.” *United States v. Conley*, 779 F.2d 970, 973 (4th Cir. 1985). A mental patient's constitutional rights should not be “qualified by the exigencies of prison administration and the special governmental interests that result.” *Id.*

The trial court made no finding regarding whether there was a formal arrest or restraint on defendant's freedom of movement of the degree associated with a formal arrest. Nor did the trial court make a finding regarding whether a reasonable person in defendant's circumstances would not have felt free to terminate the interview or to ask the officers to leave his room.

The fact noted by the majority that defendant was involuntarily committed based on actions bearing no relation to the criminal activity that officers questioned him about did not, in my view, diminish his constitutional rights with regard to interrogation. Such an approach would leave involuntarily committed patients vulnerable to visits from law enforcement officers seeking information they would be less likely to obtain in another setting. Courts must not place such risk on a population which by definition is comprised of people suspected of not being able to care for themselves.

It is important to note that the trial court may not have been presented with the case law cited or the legal analysis included in this dissent. The extensive findings of fact reflect that the trial court indeed exercised a high degree of care in its decision. Nonetheless, in my view the decision was in error.

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In light of the additional factors which I believe must be weighed – whether defendant expressly consented to speak with police and whether defendant was told that he could ask officers to leave his presence – along with other factors previously delineated by this Court as necessary to determining whether a statement is custodial, I would reverse the trial court’s order denying defendant’s motion to suppress and remand this case for reconsideration of the motion and the entry of findings and conclusions based upon all pertinent factors. Because one factor to be considered in determining whether a statement was voluntary is whether defendant was in custody when questioned, the trial court’s conclusion regarding custody also could require it to reconsider the issue of whether defendant’s statement was voluntary.

STATE OF NORTH CAROLINA
v.
ERIC DOUGLAS HICKS

No. COA15-491

Filed 20 October 2015

1. Search and Seizure—seizure—items for manufacture of methamphetamine—destruction without court order—good faith of officers

The trial court did not abuse its discretion by denying defendant’s motion for discovery sanctions after the State destroyed evidence seized from his home without an order authorizing destruction. The seized evidence—items used for the manufacture of methamphetamine—was destroyed under the officers’ good faith belief that a destruction order had been entered.

2. Evidence—business record—database of pseudoephedrine purchases—foundation laid

In defendant’s trial for charges related to the manufacture of methamphetamine, the trial court did not err by admitting a law enforcement officer’s testimony regarding defendant’s alleged pseudoephedrine purchases and an exhibit showing a report from the NPLEX database. The officer’s testimony as to his familiarity with the NPLEX database provided a sufficient foundation for admission of the evidence as a business record. Even assuming admission of this evidence was erroneous, any error would have been harmless because the State presented ample other evidence of defendant’s guilt.

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3. Criminal Law—rejection of plea agreement—motion to continue—waiver of right

In defendant's trial for charges related to the manufacture of methamphetamine, the trial court did not err by denying defendant's motion to continue after rejecting his plea agreement. Defendant waived his right to a continuance pursuant to N.C.G.S. § 15A-1023(b) by (1) expressly consenting to being arraigned and proceeding to trial after the court rejected his plea and (2) failing to assert his right to continuance until jeopardy attached, during the second week of trial. He failed to assert his right in "apt time."

Appeal by defendant from judgment entered 19 August 2014 by Judge Gary M. Gavenus in Avery County Superior Court. Heard in the Court of Appeals 8 October 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph E. Herrin, for the State.

Charlotte Gail Blake for defendant-appellant.

TYSON, Judge.

Eric Douglas Hicks ("Defendant") appeals from judgment entered after a jury convicted him of manufacturing methamphetamine and maintaining a dwelling for the purpose of keeping methamphetamine. We find no error in Defendant's conviction or in the judgment entered thereon.

I. Factual Background

A. State's Evidence

In the fall of 2012, school resource officer Timothy Winters ("Officer Winters") received information from several students, who reported Jennifer McCoury ("McCoury") was making methamphetamine and smoking marijuana with her high-school-aged son. Officer Winters shared this information with Avery County Sheriff's Deputy Casey Lee ("Officer Lee"). Officers verified the tip by conducting a "meth check," which showed McCoury had made multiple purchases of Sudafed, which contains pseudoephedrine, the precursor chemical to methamphetamine.

Officer Lee and others went to McCoury's home to "[c]heck on the safety" of her children on 12 October 2012. No one was present at the residence when officers arrived. Officer Lee testified "[t]here were

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signs of a meth lab” outside McCoury’s home. Officer Lee and others subsequently went to Defendant’s residence to locate McCoury and her children. The officers knew Defendant was the father of McCoury’s daughter, who was six or seven years old at the time.

Officers announced themselves and knocked on Defendant’s door for approximately fifteen minutes. No one answered. Officer Lee walked around the house to the side door and noticed in plain view a trash can with two plastic bottles “sticking up, [with] a drilled hole in the top of one of them” in plain view. Officer Lee testified he “believed those bottles to be used to manufacture meth[,]” based on his training and experience. He also observed “a white granular substance” was present inside the bottles and stated the substance “[was] consistent with meth manufacture.”

Defendant eventually answered the door and allowed the officers to walk through his home to look for his daughter. Defendant also gave his consent for the officers to search his house and property. The officers did not find anything illegal during this initial search. Officer Lee inquired about the two plastic bottles he had observed outside. Defendant “denied any knowledge” about them. Defendant was arrested and transported to jail.

Officer Lee contacted Detective Frank Catalano (“Detective Catalano”) and requested a search warrant for Defendant’s residence the following day. Detective Catalano’s search warrant application sought authorization to destroy any hazardous materials, if found, after the materials were “documented, photographed, and labeled samples obtained for analysis.” This request was based on Detective Catalano’s sworn search warrant application, which stated:

The Affiant knows that some or all of these chemicals and substances pose a significant health and safety hazard due to their explosive, flammable, carcinogenic, or otherwise toxic nature. Additionally, the affiant knows that the handling of hazardous clandestine laboratory materials without proper expertise, supervision, and facilities has caused, in the past, explosions[,] fires, and other events that have resulted in injuries and severe health problems.

The trial judge authorized the search warrant later that day. Despite Detective Catalano’s request for authorization to destroy hazardous materials within the application, the warrant did not contain a destruction order, nor was a destruction order subsequently entered.

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The search warrant was executed the same day it was issued. The following items were seized from Defendant's residence: (1) five bottles with a white substance; (2) two bottles with liquid and a white substance; (3) an ice compress; (4) an empty pack of lithium batteries; (5) a Methadone bottle; (6) an allergy medicine pack (commonly referred to as a "blister pack;" and, (7) a cell phone.

Officer Lee testified, based on his training and experience, plastic bottles, such as the ones found on Defendant's property, are commonly used in a method of methamphetamine manufacture known as the "one pot" method. Officer Lee stated a second plastic bottle is used in the "one pot" method, as the hydrochloric gas, or HCL, generator. A white residue is left behind after an HCL generator is used. Officer Lee testified the white residue he observed in the plastic bottles found on Defendant's property was consistent with the typical white residue left behind after an HCL generator is used to manufacture methamphetamine.

Officer Lee testified he searched for Defendant's name on the National Precursor Log Exchange ("NPLEx") database after he left Defendant's residence. NPLEx is a "federal public registry" used to track an individual's pseudoephedrine purchases. He explained pseudoephedrine is "the main ingredient of methamphetamine." NPLEx was established "to make sure that people don't buy more [pseudoephedrine] than their allowed limits every month."

Officer Lee printed out the log of Defendant's pseudoephedrine purchases from the NPLEx website. The report was offered and admitted into evidence as a business record, over Defendant's hearsay objection. The report indicated Defendant had purchased pseudoephedrine six times at various locations in North Carolina and Tennessee between January and September 2012.

Chip Hughes ("Agent Hughes"), State Bureau of Investigation ("SBI") clandestine laboratory unit site safety officer, arrived on the scene to process the purported methamphetamine lab discovered at Defendant's residence. Agent Hughes testified to the dangers of placing hazardous items seized from a methamphetamine lab into evidence storage, stating:

[E]ven though the bottle itself is no[t] producing gas at that time, if something were to spill on it in the evidence vault, or decay it may still produce gas even though it is in a Ziploc bag or paper bag . . . and the gas will leak or build up in those things and expose people to gas or in a case of flammables if they become hazardous, they could ignite.

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He further stated the destruction of hazardous materials seized from methamphetamine labs is “a common practice across the state because . . . local agencies don’t have the facilities or equipment to . . . adequately store these [items] and protect themselves or others.”

Mike Piwowar (“Mr. Piwowar”), a forensic scientist with the North Carolina State Crime Lab, was called to Defendant’s home after the search warrant was executed to prepare an inventory of possible items used in manufacturing methamphetamine and to take samples back to the lab for analysis. Mr. Piwowar testified the residue in the two plastic bottles recovered from Defendant’s trash can both tested positive for an acidic pH. This pH was consistent with residue found inside an HCL generator used to manufacture methamphetamine.

Mr. Piwowar also testified “the bottoms of the [five other] bottles were missing which indicates there was a very strong acid in there that burned the bottoms off.” Mr. Piwowar explained this finding was consistent with usage in a methamphetamine lab, because the chemicals used in the methamphetamine manufacturing process are corrosive. Mr. Piwowar stated the other items seized from Defendant’s residence were also consistent with items commonly used in manufacturing methamphetamine.

Agent Hughes prepared the items seized, with the exception of the cell phone, for transport and destruction after the bottles were tested for acidic content and subsequent neutralization. On 11 March 2013, a grand jury indicted Defendant for manufacturing methamphetamine, maintaining a dwelling used to keep controlled substances, and possession of an immediate precursor used to manufacture methamphetamine.

B. Defendant’s Pre-Trial Motions

A month after the seizure, Defendant filed a motion on 14 November 2012 for preservation of evidence seized. The trial court granted Defendant’s motion in open court on 29 November 2012 and entered its order on 6 December 2012.

Defendant also filed a motion for sanctions against the State for destruction of evidence on 12 June 2014, in connection with the items seized pursuant to the search warrant. Defendant alleged his Due Process rights were violated because the State “apparently destroyed the evidence seized without offering Defendant any opportunity to view or test the items,” and despite the fact that he had obtained an order to preserve the evidence seized from destruction.

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The trial court made the following relevant findings of fact:

11. Investigator Catalano drafted an application for a search warrant for the defendant's residence based upon the information provided to him by Deputy Lee and in such application also requested a destruction order for any hazardous materials.

....

13. Judge Ginn authorized the search warrant

....

16. That despite the request for a destruction order contained within the search warrant application[,] a destruction order was not entered by the Honorable C. Phillip Ginn on October 13, 2012[,] and no subsequent destruction order was ever entered.

17. That with the exception of the cell phone, the destruction process was initiated pursuant to the belief that such a destruction order was actually entered by Judge Ginn on October 13, 2012.

18. That the court is unable based upon all of the evidence presented by both the State and the Defendant to determine the date upon which the items were destroyed.

....

22. The SBI agents and the officers of the Avery County Sheriff's Department had a good faith belief that the items were to be destroyed and did not act in bad faith when they initiated that destruction process.

23. The Defendant filed a Motion for Order Requiring Preservation of Evidence Seized . . . on or about November 14, 2012.

24. That this Motion was filed some 30 days after the destruction of the evidence seized had been initiated by the SBI.

....

27. That the filed order was served upon the State by letter dated December 10, 2012, the actual date of service

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being unknown by the court[,] but the court notes that an envelope admitted into evidence in this case indicates a postmark date of December 21, 2012.

28. HCL generators are not regularly preserved.

29. The only forensic testing done on the bottles seized was to determine whether the contents were acidic. No further testing could have determined what the generators were used for, unless tubing was located therein. There was no tubing found herein.

30. That the parties agree and the court finds that the items seized were destroyed at an unknown date prior to December 17, 2012.

31. That the substances contained in the seven bottles seized represented by their nature significant health and safety hazards in that they are acidic, potentially carcinogenic[,] and potentially toxic.

. . . .

34. There is no evidence that the seized items were in the possession or control of the State on November 29, 2012[,] the date of the purported preservation order or any date subsequent thereto, and the court finds that these items were not in the possession or control of the State on that date.

Based on the foregoing, the trial court concluded the SBI “had a good faith belief that the items were to be destroyed and did not act in bad faith when they initiated that destruction process.” The trial court denied Defendant’s motion for sanctions.

C. Defendant’s Plea Agreement and Motion to Continue

Defendant’s case came on for trial before a jury on 11 August 2014. On 12 August 2014, the State and counsel for Defendant presented their proposed plea agreement to the trial judge. The plea agreement provided for Defendant to enter an *Alford* plea to possession of a methamphetamine precursor and receive a suspended sentence within the presumptive range. The State would dismiss the charges of manufacturing methamphetamine, maintaining a dwelling for controlled substances, and resisting a public officer.

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The trial judge began to review the plea transcript with Defendant and asked the attorneys to approach the bench. After an unrecorded bench conference, Defendant told the trial judge he was “not comfortable changing the plea.” The trial judge instructed the State to arraign Defendant on all the other charges. The following dialogue occurred between the trial judge, the State, and counsel for Defendant ensued:

MR. RUPP: Mr. Hedrick, how does your client . . . plead in 12 CRS 050584, Count 1, Manufacturing Methamphetamine. And Count 3, maintaining a dwelling, or place or vehicle for keeping controlled substances.

MR. HEDRICK: Pleads not guilty to those charges.

MR. RUPP: Does he agree to proceed with the bill of information that we have just submitted to the court?

MR. HEDRICK: On those charges?

MR. RUPP: Yes sir.

MR. HEDRICK: We signed that correct?

THE COURT: Yes.

MR. HEDRICK: Yes.

MR. RUPP: Does he waive any sort of notice or requirements and agree to proceed today to trial?

MR. HEDRICK: My question would be what about the remaining charges?

MR. RUPP: The only charges that are on the information are the manufacturing methamphetamine, the possession of methamphetamine precursor and the maintaining a dwelling.

MR. HEDRICK: My understanding you didn't arraign him on all those to my understanding. [sic]

THE COURT: As far as Count 2, Possession of methamphetamine precursor, how does he plead?

MR. HEDRICK: Pleads not guilty.

THE COURT: The resisting is being dismissed?

MR. RUPP: The resisting is not on the information.

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THE COURT: It is on the indictment.

MR. RUPP: I will dismiss the resisting.

THE COURT: All right, go ahead and bring in the jury.

On 18 August 2012, after the State had presented its case for two and one-half days, counsel for Defendant moved for a continuance in order to present the plea transcript and agreement to another court. The trial court denied Defendant's motion, stating "[w]e are too far along." The trial court entered an order on Defendant's motion to continue, in which it made the following findings of fact:

3. That during the plea discussions, neither the State nor counsel for the defendant advised the Court that the plea was an *Alford* plea.

4. That when the [c]ourt was presented the plea transcript in open court, the court discovered that the plea was an *Alford* plea and immediately advised the parties that the court would not accept the *Alford* plea.

5. That the State and the Defendant were given an opportunity to modify the plea arrangement.

6. That thereafter, after discussing the matter with the defendant, counsel for the defendant advised the court that the defendant would not enter a plea of Guilty, whereupon the defendant was arraigned and entered pleas of Not Guilty to all three charges.

7. That upon the rejection of the *Alford* plea by the court, the defendant by and through counsel did not move to continue the case and specifically did not move to continue the case pursuant to the provisions of N.C.G.S. [§] 15A-1023(b).

8. Thereafter jury selection began and a jury of twelve and two alternates was empaneled on August 13, 2014, almost 24 hours after the plea was rejected by the court.

9. That at no time during jury selection and at no time prior to the jury being empaneled did the defendant move to continue the case and specifically did not move to continue the case pursuant to the provisions of N.C.G.S. [§] 15A-1023(b).

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10. Evidence was offered by the State from Wednesday, August 13 through Friday August 15, 2014 and at no time during this period did the defendant move to continue this matter and specifically did not move to continue the case pursuant to the provisions of N.C.G.S. [§] 15A-1023(b).

The trial court concluded Defendant “by his silence from the time of the rejection of the plea through jury selection and through approximately 2 ½ days of trial has voluntarily waived his right to a continuance as provided in 15A-1023(b).”

The trial court dismissed the charge of possession of an immediate precursor chemical at the close of all the evidence. The jury returned a verdict finding Defendant guilty of manufacturing methamphetamine and maintaining a dwelling used to keep controlled substances.

The trial court consolidated the convictions and sentenced Defendant to a term of 83 to 112 months imprisonment.

Defendant gave timely notice of appeal to this Court.

II. Issues

Defendant argues the trial court erred by: (1) denying his motion for discovery sanctions; (2) admitting Officer Lee’s testimony regarding information he had received from a search on the NPLEx database regarding Defendant’s alleged purchases of pseudoephedrine; and, (3) denying his motion to continue after the trial court rejected his plea agreement.

III. Analysis

A. Motion for Sanctions

[1] Defendant argues the trial court erred by denying his motion for discovery sanctions after the State destroyed evidence seized from Defendant’s home, without an order authorizing destruction, and despite a court order that the seized evidence be preserved.

1. Standard of Review

“A trial court’s imposition of discovery sanctions is within the court’s sound discretion and will not be reversed absent a showing of abuse of discretion.” *State v. Shedd*, 117 N.C. App. 122, 124, 450 S.E.2d 13, 14 (1994) (citation omitted). “An abuse of discretion occurs when the trial court’s ruling is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Moore*, 152 N.C. App. 156, 161, 566 S.E.2d 713, 716 (2002) (citations and internal quotation marks omitted).

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2. Analysis

Defendant filed a motion for an order requiring preservation of evidence seized from his home upon execution of the search warrant. Defendant contends he sought to preserve the items seized in order to have the opportunity to review the items and for his own witnesses to perform testing.

The Supreme Court of the United States held “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” *Arizona v. Youngblood*, 488 U.S. 51, 58, 102 L. Ed. 2d 281, 289 (1988).

In its order denying Defendant’s motion for sanctions, the trial court found “the destruction process was initiated pursuant to the belief that such a destruction order was actually entered by Judge Ginn on October 13, 2012.” The trial court also noted Defendant’s motion for an order requiring the preservation of evidence seized “was filed some 30 days after the destruction of the evidence seized had been initiated by the SBI” and “HCL generators are not regularly preserved.”

The record and trial testimony contain ample evidence to support the trial court’s conclusion that law enforcement “had a good faith belief that the items were to be destroyed and did not act in bad faith when they initiated that destruction process.” Defendant has failed to carry his burden to show the trial court abused its discretion in denying his motion for sanctions. This argument is overruled.

B. Officer Lee’s Testimony Regarding the NPLEx Database

[2] Defendant argues the trial court erred by admitting Officer Lee’s testimony regarding Defendant’s alleged pseudoephedrine purchases and State’s Exhibit 9. Defendant asserts the State’s Exhibit 9 report was not properly authenticated and was inadmissible hearsay.

1. Standard of Review

This Court reviews a trial court’s ruling on the admission of evidence over a party’s hearsay objection *de novo*. *State v. Miller*, 197 N.C. App. 78, 87-88, 676 S.E.2d 546, 552, *disc. review denied*, 363 N.C. 586, 683 S.E.2d 216 (2009). “A trial court’s determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law.” *State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011) (citation omitted), *disc. review denied*, ___ N.C. ___, 722 S.E.2d 607 (2012).

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“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) (citations and internal quotation marks omitted).

2. Analysis

The North Carolina Rules of Evidence defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801(c) (2013). Hearsay is generally inadmissible at trial, unless a recognized exception to the hearsay rule applies. N.C. Gen. Stat. § 8C-1, Rule 802 (2013).

“The erroneous admission of hearsay testimony is not always so prejudicial as to require a new trial, and the burden is on the defendant to show prejudice.” *State v. Allen*, 127 N.C. App. 182, 186, 488 S.E.2d 294, 297 (1997) (citations omitted); *see* N.C. Gen. Stat. § 15A-1443(a) (2013). Prejudicial errors occur when there is a reasonable possibility that a different result would have been reached, had the error not been committed. *Allen*, 127 N.C. App. at 186, 488 S.E.2d at 297.

N.C. Gen. Stat. § 8C-1, Rule 803(6) establishes an exception to the general exclusion of hearsay for business records. A business record includes:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (2013).

Our Supreme Court held business records stored on computers are admissible if:

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(1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.

State v. Springer, 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973). “There is no requirement that the records be authenticated by the person who made them.” *Crawley*, 217 N.C. App. at 516, 719 S.E.2d at 637-38 (citation omitted). “The authenticity of such records may be established by circumstantial evidence.” *Id.* at 516, 719 S.E.2d at 637 (citation omitted).

Defendant argues the State failed to lay a proper foundation for admission of the report from the NPLeX database under the business record exception to the hearsay rule. Defendant contends the State was required to present testimony from someone associated with the NPLeX database, or the company responsible for maintaining the database, regarding the methods used to collect, maintain and review the data in the NPLeX database to ensure its accuracy. We disagree.

Officer Lee testified about his knowledge of, and familiarity with, the NPLeX database. He explained: “[Pharmacy employees] are required to long [sic] into the system, CVS for example they scan your ID [and] it goes straight into the system the information does. And then the electronic signature is also put straight into the system.”

Officer Lee testified he and other law enforcement officers regularly consult the NPLeX database to look at pseudoephedrine purchases when investigating individuals suspected of manufacturing methamphetamine. During *voir dire*, Officer Lee explained he had attended training sessions on using the NPLeX website. He stated he was unaware of any means or process by which he or any other individual with access to the NPLeX database website could manipulate the electronic data.

Officer Lee thoroughly demonstrated his understanding of the NPLeX database, the method by which the data was gathered, transmitted, and stored, and the underlying basis for the report admitted into evidence. Officer Lee’s testimony provided a sufficient foundation for the admission of the computer report from the NPLeX database as a business record. See *State v. Sneed*, 210 N.C. App. 622, 630-31, 709 S.E.2d 455, 461 (2011) (holding detective who routinely used the NCIC database in his regular course of business was sufficiently qualified

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to lay necessary foundation for admission of NCIC information as a business record).

Presuming the report from the NPLeX database were not admissible under the business record exception to the hearsay rule, admission of the report was harmless error. The State introduced other ample evidence of guilt against Defendant at trial. Defendant's charge of possession of a precursor to methamphetamine, for which the information contained in the report would have been most damaging, was dismissed by the trial court at the close of all the evidence. Defendant has failed to carry his burden to show a different outcome would have resulted had the report not been admitted into evidence. This argument is overruled.

C. Motion to Continue

[3] Defendant argues the trial court erred by denying his motion to continue after rejecting his plea agreement. We disagree.

1. Standard of Review

“An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*.” *Armstrong v. N.C. State Bd. of Dental Exam'rs*, 129 N.C. App. 153, 156, 499 S.E.2d 462, 466 (1998) (citations omitted). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Williams*, 362 N.C. at 632-33, 669 S.E.2d at 294 (citations and quotation marks omitted).

“Denial of a motion for a continuance, regardless of its nature, is, nevertheless, grounds for a new trial only upon a showing by defendant that the denial was erroneous and that his case was prejudiced thereby.” *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981).

2. Analysis

Defendant argues he is entitled to a new trial because the trial court denied his motion to continue after it rejected his plea agreement, in violation of his absolute right to a continuance under N.C. Gen. Stat. § 15A-1023(b). We disagree.

N.C. Gen. Stat. § 15A-1023(b) provides:

Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly. If the judge rejects the arrangement, he must

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so inform the parties, refuse to accept the defendant's plea of guilty or no contest, and advise the defendant personally that neither the State nor the defendant is bound by the rejected arrangement. The judge must advise the parties of the reasons he rejected the arrangement and afford them an opportunity to modify the arrangement accordingly. *Upon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court.*

N.C. Gen. Stat. § 15A-1023(b) (2013) (emphasis supplied).

This statute gives a defendant an absolute right “to a continuance until the next session of court” if and after the trial court rejects the proposed plea agreement. *Id.*; see *State v. Tyndall*, 55 N.C. App. 57, 62-63, 284 S.E.2d 575, 578 (1981) (“By adding the fourth sentence of G.S. 15A-1023(b), the legislature has clearly granted to the defendant such an absolute right upon rejection of a proposed plea agreement at arraignment.”). This Court held the trial court commits prejudicial error and the defendant is entitled to a new trial where the trial court erroneously denies a motion to continue after rejecting the plea agreement. *Id.*

Our appellate courts have long recognized “it is a general rule that a defendant may waive the benefit of statutory or constitutional provisions by express consent, *failure to assert it in apt time*, or by conduct inconsistent with a purpose to insist upon it.” *State v. Gaiten*, 277 N.C. 236, 239, 176 S.E.2d 778, 781 (1970) (citations omitted) (emphasis supplied).

Here, Defendant and the State agreed Defendant would enter an *Alford* plea to possessing a precursor chemical and receive a suspended sentence within the presumptive range and be placed on probation. In exchange, the State would dismiss the charges of manufacturing methamphetamine and maintaining a dwelling for controlled substances.

The parties informed the trial court they had agreed to a plea arrangement, prior to jury selection. The trial judge discovered the plea agreement contained allowance for an *Alford* plea upon reviewing the plea transcript in open court. The trial judge advised the parties he would not accept the *Alford* plea and afforded the State and Defendant the opportunity to modify the plea agreement. See N.C. Gen. Stat. § 15A-1023(b). Counsel for Defendant advised the trial court Defendant “[was] not comfortable changing the plea.” Defendant failed to move for a continuance.

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The trial court advised the State to arraign Defendant on the charges. Defendant pled not guilty and expressly consented to proceed to trial that day. Jury selection began, and Defendant did not move to continue the case prior to the jury being empaneled. The State offered evidence for two and one-half days, and Defendant's trial recessed for the weekend. At no point up to or during this time did Defendant move for a continuance.

The following Monday morning, as the parties entered the second week of trial, counsel for Defendant moved for a continuance pursuant to N.C. Gen. Stat. § 15A-1023(b). The trial court denied Defendant's motion, and the trial resumed.

Defendant's assertion that he had an absolute right to a continuance is a correct interpretation of N.C. Gen. Stat. § 15A-1023(b). The record and trial testimony clearly indicate Defendant voluntarily waived this right by: (1) expressly consenting to being arraigned and proceeding to trial after the trial court rejected the plea agreement; and (2) failing to assert the statutory right until jeopardy attached, during the second week of trial, and after the State presented evidence for two and one-half days. Defendant waived his right to a continuance by his "failure to assert it in apt time." *Gaiten*, 277 N.C. at 239, 176 S.E.2d at 781. This argument is overruled.

IV. Conclusion

The trial court determined law enforcement had a good faith belief the evidence seized was supposed to be destroyed. Defendant has failed to carry his burden to show the trial court abused its discretion in denying his motion for discovery sanctions.

Officer Lee testified concerning his knowledge of and familiarity with the NPLeX database. He stated he regularly used the NPLeX database to assist with investigations into methamphetamine manufacturing. The State provided a sufficient foundation to admit the NPLeX database report. The trial court did not err in admitting into evidence the report under the business record exception to the hearsay rule. Defendant has failed to carry his burden to show how admission of the report, if error, would have prejudiced him.

Defendant had an absolute statutory right to a continuance after the trial court rejected his plea agreement. Defendant waived this right by failing to assert it in a timely manner and expressly consenting to proceed to trial the same day the trial court rejected the plea agreement and jeopardy attached.

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Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in Defendant's conviction nor the judgment entered thereon.

NO ERROR.

Judges McCULLOUGH and DIETZ concur.

STATE OF NORTH CAROLINA

v.

RANDOLPH JOYNER

No. COA14-1289

Filed 20 October 2015

1. Appeal and Error—failure to object—failure to assert plain error

On appeal from defendant's conviction for felony larceny, the Court of Appeals did not review the merits of defendant's argument concerning the admission of some of his prior convictions for impeachment purposes. Even though defendant objected to the State's forecast of the Rule 609(b) evidence, he did not object when the evidence was actually introduced before the jury. Defendant lost his remaining opportunity for appellate review by failing to argue in his appellate brief that the trial court's alleged error amounted to plain error.

2. Evidence—impeachment—conclusory findings—probative value apparent from record

Defendant failed to preserve for appellate review his argument that the trial court erred by admitting some of his prior convictions for impeachment purposes in his trial for felony larceny. The Court of Appeals concluded that, even assuming defendant had preserved the issue, defendant's argument would not prevail. Even though the trial court made conclusory findings on the challenged evidence, the probative value of the evidence was apparent from the record.

Appeal by defendant from judgment entered 23 July 2014 by Judge Phyllis Gorham in Sampson County Superior Court. Heard in the Court of Appeals 3 June 2015.

STATE v. JOYNER

[243 N.C. App. 644 (2015)]

Attorney General Roy Cooper, by Special Deputy Attorney General Jason S. Thomas, for the State.

Mary McCullers Reece, for defendant.

CALABRIA, Judge.

Background

Randolph Joyner (“defendant”) appeals from judgment entered upon a jury verdict finding him guilty of felony larceny and his subsequent admission to attaining the status of an habitual felon. We find no error.

George Monk (“Monk”), the owner of eighteen acres located on Taylor Lane in Clinton, NC (the “property”), used his property to store old trucks, farm equipment, spare parts, and other miscellaneous items. Monk also allowed Brady Waters (“Waters”) to store roughly one hundred and fifty old lawnmowers and a 1979 Ford Carrier pickup truck (“Ford Carrier”) on the property.

On or about 18 April 2012, Monk received word that an on-going theft might be occurring at the property. In response, Monk called Waters and asked him to check out the situation. When Waters arrived, he saw defendant driving out of Taylor Lane with three passengers in a Ford Expedition (“Expedition”). Since his Ford Carrier was being towed by the Expedition, Waters drove up behind defendant and the others near a stop sign. Defendant exited the Expedition, prompting Waters to ask him if he needed “some help or anything?” to which defendant responded, “No. No I got it.” Waters followed defendant.

At some point, Waters found that the Expedition had been stopped by a highway patrolman because the Ford Carrier’s wheels were creating sparks on the road. Waters stopped and notified the patrolman that he was the owner of the Ford Carrier. The patrolman was joined almost immediately by two sheriffs’ deputies who were looking for Waters’ Ford Carrier in reference to a larceny in progress. Consequently, defendant and his passengers were transported to the Sampson County Sheriff’s Office for questioning.

Subsequent investigation revealed that over the course of two days, defendant and others transported four loads of machinery and equipment from the property to a salvage yard. In addition to the theft of Waters’ Ford Carrier, all of his lawn mowers had been removed from

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the property. Many of the stolen items owned by Monk—which included diesel engines, dump truck components, an oil pan, and a tar sprayer—were sold as scrap metal. On 22 January 2014, defendant was indicted for felony larceny, felony possession of stolen property, and attaining the status of an habitual felon. His trial began in July 2014 before the Honorable Phyllis Gorham in Sampson County Criminal Superior Court. At trial, Monk testified that he saw defendant on the property a week or two before the thefts occurred. Defendant claimed to be looking for a dog, and he left without incident when Monk informed him that he did not “need to be down [t]here.”

Before defendant testified in his own defense, the trial court held a *voir dire* hearing to determine, *inter alia*, whether the State could impeach defendant with five prior convictions, all of which were more than ten years old. As demonstrated by the following exchange, the trial court ruled that defendant could be cross-examined on the convictions at issue and defendant objected to the ruling:

THE COURT: All right. Well, they do go to his credibility. It's the age of them I'm concerned about because the most recent would be 14 years ago.

[PROSECUTOR]: And the State would not mention anything that does not go to his exact credibility. And he does have other stuff like DWI, public consumption. I'm not asking to get those items in, but the numerous convictions that he has for forgery, uttering, and obtaining property by false pretenses is fair game. I'm not even asking to get the misdemeanor larceny in, but the other items that actually go to his credibility, if he takes the stand, that's what I'm going for, Your Honor.

THE COURT: I think they do go to his credibility, so I'm going to allow him to be cross-examined on those convictions. They do go to his credibility.

[DEFENSE COUNSEL]: And, Your Honor, we would object to that ruling for the record. We believe it would be more prejudicial than probative for him to be cross-examined on those.

THE COURT: All right. So noted.

While testifying, defendant denied knowing the items taken from the property were stolen. According to defendant, his nephew (“Ray”)

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asked him to haul some junk for two individuals, Thomas Lamb (“Lamb”) and Marcette Hines (“Hines”), both of whom lived near the property on Taylor Lane. Defendant agreed to help. On 17 April 2012, defendant drove a truck to the property and waited for the others to load it with the “junk.” He then drove the truck to a salvage yard, where Ray received payment for the load’s scrap metal value. The group returned the next day and made more “runs” to the salvage yard. Defendant admitted to driving the truck during three of the four occasions on which the junk was sold at the salvage yard; however, he denied ever setting foot on the property before 17 April 2012. On cross-examination, defendant was impeached with five prior convictions, but his trial counsel did not object when the State introduced the evidence.

After the jury returned a verdict finding defendant guilty of felony larceny and felony possession of stolen property, he pled guilty to the habitual felon charge. The trial court then arrested judgment on the possession of stolen property charge, and sentenced defendant to a minimum of 52 and a maximum of 82 months in the custody of the North Carolina Division of Adult Correction. Defendant appeals.

Analysis

[1] Defendant argues that the trial court erred in allowing the State to cross-examine him on his previous convictions for uttering a forged instrument, forgery, and obtaining property by false pretenses without conducting the mandatory balancing test and entering findings of fact pursuant to Rule 609 of the North Carolina Rules of Evidence. According to defendant, the admission of his prior convictions was error because the trial court “made no findings as to the specific facts and circumstances” that demonstrated the probative value of the evidence outweighed its prejudicial effect. We disagree.

As an initial matter, we note that defendant has no right to raise the Rule 609 issue on appeal. Ordinarily, since balancing “the probative value and prejudicial effect [of prior conviction evidence] necessarily involves some exercise of discretion by the trial court, . . . the . . . court’s ultimate determination will not be upset absent a manifest abuse of that discretion.” *State v. Harris*, 140 N.C. App. 208, 216, 535 S.E.2d 614, 620 (2000) (citations omitted). For us to assess defendant’s challenge, however, he was required to properly preserve the issue for appeal by making a timely objection at trial. *See State v. Thibodeaux*, 352 N.C. 570, 577, 532 S.E.2d 797, 803 (2000); N.C.R. App. P. 10(a)(1) (2015). “To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial.” *State v. Ray*, 364 N.C. 272, 277, 697

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S.E.2d 319, 322 (2010) (internal quotation marks omitted). Here, defendant opposed the admission of all prior conviction evidence during a *voir dire* hearing held before his testimony, but he failed to object to the evidence in the presence of the jury when it was actually offered. Unfortunately for defendant, his objection was insufficient to preserve the issue for appellate review. *Id.* at 277, 697 S.E.2d at 322 (“It is insufficient to object only to the presenting party’s forecast of the evidence. . . . As such, in order to preserve for appellate review a trial court’s decision to admit testimony, ‘objections to [that] testimony must be contemporaneous with the time such testimony is offered into evidence’ and not made only during a hearing out of the jury’s presence prior to the actual introduction of the testimony.” (quoting *Thibodeaux*, 352 N.C. at 581–82, 532 S.E.2d at 806)). And since defendant failed to specifically and distinctly allege plain error in his brief, he waived his right to have this issue reviewed under that standard. *See* N.C.R. App. P. 10(a)(4); *see also State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

[2] Nevertheless, even if we assumed that defendant’s objection at the *voir dire* hearing was sufficient to preserve his challenge to the admitted prior conviction evidence, we would find no error. Rule 609(b) provides that evidence of a prior conviction

is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

N.C. Gen. Stat. § 8C-1, Rule 609(b) (2013). “Rule 609(b) is to be used for purposes of impeachment. The use of this rule is necessarily limited by that focus: it is to reveal not the character of the witness, but his credibility.” *State v. Ross*, 329 N.C. 108, 119, 405 S.E.2d 158, 165 (1991) (emphasis omitted) (citation omitted).

This Court has interpreted Rule 609(b) “to mean that the trial court *must* make findings as to the specific facts and circumstances which demonstrate the probative value [of the evidence] outweighs [its] prejudicial effect. . . . [A] conclusory finding that the evidence would attack [the] defendant’s credibility without prejudicial effect . . . does not satisfy the ‘specific facts and circumstances’ requirement. . . .” *State v. Hensley*, 77 N.C. App. 192, 195, 334 S.E.2d 783, 785 (1985) (emphasis added). This requirement enables the reviewing court to determine

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whether the admission of old conviction evidence was properly allowed. “For the trial court to merely state that the probative value of a prior conviction outweighs its prejudicial effect in the interests of justice is insufficient under Rule 609(b).” *State v. Shelly*, 176 N.C. App. 575, 581, 627 S.E.2d 287, 294 (2006).

“[T]he following considerations [are] factors to be addressed by the trial court when determining if conviction evidence more than ten years old should be admitted: (a) the impeachment value of the prior crime, (b) the remoteness of the prior crime, and (c) the centrality of the defendant’s credibility.” *Id.* at 582–83, 627 S.E.2d at 294 (citing *State v. Holston*, 134 N.C. App. 599, 606, 518 S.E.2d 216, 222 (1999)). In addition, the trial court’s findings “should address (a) whether the old convictions involved crimes of dishonesty, (b) whether the old convictions demonstrated a ‘continuous pattern of behavior,’ and (c) whether the crimes that were the subject of the old convictions were ‘of a different type from that for which defendant was being tried.’ ” *Id.* at 583, 627 S.E.2d at 295 (quoting *Hensley*, 77 N.C. App. at 195, 334 S.E.2d at 785).

Despite the requisite factors espoused in *Shelly* and *Hensley*, a trial court’s failure to “satisfy the ‘specific facts and circumstances’ requirement of Rule 609(b)” does “not [necessarily constitute] reversible error.” *State v. Moul*, 95 N.C. App. 644, 646, 383 S.E.2d 429, 431 (1989). “Where there is no material conflict in the evidence, findings and conclusions are not necessary.” *Id.* Other than making a general objection, defendant offered no evidence and made no attempt to rebut the State’s argument for admitting the prior convictions. Furthermore, our Supreme Court has adopted the principle that a trial court’s failure to make the necessary findings is not error when the record demonstrates the probative value of prior conviction evidence to be obvious. *State v. Artis*, 325 N.C. 278, 307, 384 S.E.2d 470, 486 (1989), *vacated and remanded on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990) (“The trial court’s determination that defendant’s [prior] convictions . . . were admissible was erroneous. Specific facts and circumstances supporting the probative value of this evidence are neither apparent from the record nor recounted by the trial court.”); *State v. Ross*, 329 N.C. 108, 127, 405 S.E.2d 158, 169 (1991) (“Although the trial judge did not specifically set out the facts and circumstances in support of the probative value of the prior conviction, this alone does not make it error. It is only when the facts and circumstances supporting the probative value of the evidence are not ‘apparent from the record’ that its admission is error.”) (Meyer, J. concurring) (quoting *Artis*, 325 N.C. at 307, 384 S.E.2d at 486)). That principle applies here.

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In the instant case, although the trial court's findings were conclusory and would normally be inadequate under Rule 609(b), the record contains facts and circumstances showing the probative value of the evidence. As to the *Shelly* factors, the centrality of defendant's credibility was obvious to all parties—he was on trial for larceny and possession of stolen property, crimes which implicate dishonesty and moral turpitude. Indeed, defendant's trial counsel openly stated that defendant's "knowledge [of whether the property was stolen was] . . . the crux of this case." The prior convictions reflected upon defendant's character and raised doubts about his credibility. Likewise, the impeachment value of the evidence was manifest. In its exchange with the trial court regarding defendant's prior convictions, the State specifically stated that it would not seek to admit evidence of defendant's other convictions for DWI and public consumption. Instead, the State sought to impeach defendant only with prior convictions that went "to his exact credibility." Understandably, in a felony larceny and possession of stolen property trial, the State was keenly interested in using five convictions¹ that involved crimes of dishonesty to impeach defendant on the witness stand. Moreover, although the trial court expressed concerns over the age of defendant's prior convictions—noting that "the most recent would be [fourteen] years ago"—it ultimately found that they had a substantial bearing on defendant's credibility.

As to the *Hensley* factors, we have already established that the prior convictions involved crimes of dishonesty. Further, the five convictions at issue spanned between 1980 and 2000, establishing a continuous pattern of behavior. Finally, the prior convictions were substantially similar to those for which defendant was being tried. Accordingly, the facts and circumstances surrounding the probative value of the evidence were apparent from the record and it was unnecessary for the trial court to make detailed, specific findings on them.

1. We note that the State filed a motion asking this Court to take judicial notice that one of the convictions it used to impeach defendant did not fall within the ambit of Rule 609(b). Apparently, the trial court, the prosecutor, and defense counsel were not aware of this at the time of defendant's trial. Although it did nothing to change our analysis, we granted the motion. Because less than ten years had elapsed since defendant was released from the confinement imposed for the conviction at issue, the prior conviction would have been automatically admissible under N.C. Gen. Stat. § 8C-1, Rule 609(a).

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Conclusion

In sum, because defendant objected to the State's forecast of the Rule 609(b) evidence but did not object when the evidence was actually introduced, he failed to preserve for appellate review the trial court's decision to admit some of his prior convictions for impeachment purposes. Defendant also "lost his remaining opportunity for appellate review when he failed to argue [before this Court] that the trial court's admission of this [evidence] amounted to plain error." *Ray*, 364 N.C. at 277–78, 697 S.E.2d at 322. Even assuming defendant's objection was sufficient to preserve the Rule 609(b) issue on appeal, the trial court did not err by making conclusory findings on the challenged evidence as its probative value was apparent from the record.

NO ERROR.

Judges ELMORE and DILLON concur.

STATE OF NORTH CAROLINA
v.
LESIBA SIMON MATSOAKE

No. COA15-304

Filed 20 October 2015

1. Evidence—confidential spousal communication—husband weeping in presence of wife

In a trial for first-degree rape, the trial court did not err by allowing defendant's ex-wife to testify that she saw him crying while looking at a composite photo of the victim's assailant in a newspaper. The incident was not a confidential spousal communication pursuant to N.C.G.S. § 8-57(c) because no testimony indicated that defendant intended to communicate anything to his then-wife by crying at the sight of the picture.

2. Rape—jury instructions—omission of lesser-included offense—penetration—no conflict in evidence

In a trial for first-degree rape, the trial court did not err by declining to instruct the jury on attempted first-degree rape. The victim's testimony that "I think he had [penetrated] a couple of times but he was choking me so hard that I was losing my breath and I believed

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I was going to die” did not create a conflict in the evidence necessitating the instruction on the lesser-included offense. The State presented substantial evidence of penetration—for example, a nurse’s testimony that the victim reported penetration and testimony that defendant’s semen was recovered from inside of the victim.

Appeal by defendant from judgment entered 20 August 2014 by Judge Wayland J. Sermons in Dare County Superior Court. Heard in the Court of Appeals 22 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General David N. Kirkman, for the State.

M. Alexander Charms for defendant-appellant.

TYSON, Judge.

Lesiba Simon Matsoake (“Defendant”) appeals from a jury verdict finding him guilty of first-degree rape. We find no error.

I. Background

On the evening of 9 June 2003, S.M. (“the victim”) and her boyfriend met with friends at the Port O’ Call Restaurant in Kill Devil Hills, North Carolina. When Port O’ Call closed around 2:00 a.m., Julia Shefcheck (“Shefcheck”), one of the victim’s out-of-town friends, wanted to swim in the ocean. The victim and Shefcheck went onto the beach, which was right across the street from Port O’ Call. Shefcheck removed her clothes and went swimming. The water was a little rough, and the victim decided not to swim, but did remove her pants to wade out into the surf.

While standing in the surf, the victim “felt like [she] was being stared at[.]” She turned and saw a male standing on the beach. The victim was “freaked out” by the man, and told him “[y]ou need to leave, my friends are coming, my friends are coming.” The victim described the individual as a black male, around five foot eleven, and stocky. The man grabbed her, threw her on the ground, and got on top of her. He placed his hands around her neck and forced her to open her knees.

During the course of the victim’s testimony at trial, the following exchange occurred:

[Prosecutor]: Did any other parts of [your assailant’s] body[, besides his hands,] touch you?

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[The victim]: His penis.

[Prosecutor]: Where did his penis touch you?

[The victim]: My vagina.

[Prosecutor]: Do you know whether or not he penetrated your vagina with his penis?

[The victim]: I think he had a couple of times but he was choking me so hard that I was losing my breath and I believed I was going to die.

The victim did not know whether her assailant wore a condom or if he ejaculated. She was also unable to estimate how long her assailant's penis was inside of her. While attempting to fend him off, the victim threw sand in her assailant's eyes. In response, he bit down on two of her fingers on her left hand. After the attack, the assailant ran away down the beach. The victim was taken to the hospital.

The case was assigned to Detective Gene Johnson, Jr. ("Detective Johnson") of the Kill Devil Hills Police Department. Detective Johnson met the victim at Outer Banks Hospital in Nags Head, North Carolina. At the hospital, the victim was examined by Dr. Brian Baxter ("Dr. Baxter") and Marlene Parker ("Parker"), a sexual assault nurse examiner. The examination revealed bruising on the left side of the victim's neck, a bite wound on her left hand, and the presence of semen on her skin in the genital area. An internal pelvic examination revealed a large amount of sand in the victim's vagina, along with punctate erythematous lesions on her vagina and cervix, indicating trauma.

Dr. Baxter took swabs and smears from the victim's cervix and vaginal area. The victim told Dr. Baxter she last had sexual relations one week prior to the attack. Parker asked the victim whether her assailant had penetrated her vagina, and Parker testified the victim indicated he had.

The victim worked with a police sketch artist to develop a composite sketch of her assailant. The sketch was circulated among officers and law enforcement agencies, and eventually appeared in the local newspapers.

North Carolina State Bureau of Investigation Special Agent Amanda Thompson ("Agent Thompson") is a forensic scientist manager over the DNA database section at the State Crime Laboratory. Agent Thompson analyzed the vaginal smears taken from the victim, identified and confirmed the presence of sperm.

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Shortly after the rape occurred, Defendant and his now ex-wife, Ruth Hart (“Hart”), were traveling from their home in Point Harbor, North Carolina, to a doctor’s appointment in Virginia Beach, Virginia. Hart was driving. Defendant was sitting in the passenger seat reading the paper. Over Defendant’s objection, Hart testified: “I heard like water, I heard a tear drop hit the paper and I looked over and [Defendant] was crying.” Hart stated Defendant was looking at the composite sketch of the victim’s assailant as he wept.

Hart knew that around the time of the rape, Defendant would go to bars, including Port O’ Call, roughly three or four nights a week. Defendant frequently went by himself, and would stay out until two, three, or four o’clock in the morning. Hart called Crime Stoppers shortly after observing Defendant crying to ascertain whether police had a suspect in the Kill Devil Hills rape. Hart did not disclose Defendant’s name as someone who might have been involved in the crime. In 2004, Defendant and Hart moved from Point Harbor to Virginia Beach so Hart could pursue career opportunities. Over the years, Hart would call Crime Stoppers from time to time to ask if police had identified a suspect in the rape. Hart and Defendant divorced in April 2012.

In March 2007, nearly four years after the rape occurred, Hart contacted law enforcement. Hart met with Detective Johnson at the North Carolina/Virginia border. Hart relayed her suspicions about her husband’s role in the rape of the victim to Detective Johnson. Hart also told Detective Johnson about a pair of electric hair clippers she had seen Defendant use the morning before. As a result of this conversation, Detective Johnson contacted the Virginia Beach Police Department for assistance on a search warrant to obtain the set of electric hair clippers Hart indicated Defendant used on his head. The search warrant was obtained and executed by the Virginia Beach Police Department. The electric hair clippers were sent to the North Carolina Crime Lab for testing.

The electric hair clippers belonging to Defendant were received and analyzed by Kristin Hughes (“Analyst Hughes”), a North Carolina State Bureau of Investigation forensic DNA analyst. After analyzing the sperm taken from the vaginal swabbing of the victim and a DNA sample recovered from Defendant’s hair clippers, Analyst Hughes concluded “[t]he DNA profile obtained from the sperm fraction of the vaginal swab matched [the] DNA profile from [Defendant’s] hair clippers.”

On 23 June 2008, Defendant was indicted on one count of first-degree rape. At the time of his indictment, Defendant was living in his native country of South Africa. Defendant was extradited to the United States

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in January 2012. Following Defendant's return to the United States, a search warrant for a DNA swab of Defendant's cheek was obtained and executed. This swab was analyzed by Analyst Hughes and compared to the vaginal swabs taken from the victim. The DNA from the sperm fraction of the vaginal swab taken from the victim matched the DNA profile obtained from Defendant.

Defendant's trial began on 18 August 2014. Prior to Hart's testimony, the trial court conducted a *voir dire* of her proposed testimony. When the questions addressed the crying incident, Defendant's counsel stated "[t]his will be an objection, Your Honor, non-verbal communication." The trial court responded "[a]ll right. Go ahead." Hart's proposed testimony continued. After Hart's proposed testimony concluded, the trial court asked Defendant's counsel what objections he had regarding Hart's testimony about when "her husband was crying when he looked at the composite picture." Defendant's counsel argued the crying was a communication and Defendant was making "some sort of tacit admission to some sort of involvement" in the attack which was a "form of nonverbal communication [that] shouldn't be allowed."

The trial court ruled the incident was not covered by the spousal confidential communication. The court reasoned that confidential communication "concerns verbal spoken words which were given in a setting of confidentiality that were prompted by the affection, confidence and loyalty engendered by such relationship" and that "it is completely separate and apart from any other type of action and it is an act, not a communication."

In the course of Hart's testimony in front of the jury, she was asked "[w]hat, if anything, did [she] observe [Defendant] do while holding" the newspaper and looking at the composite sketch of the victim's assailant. At this point, Defendant objected, but did not state any grounds for his objection. Defendant's objection was overruled.

Following the conclusion of the evidence, Defendant objected to the trial court's refusal to give an instruction on attempted rape, which was overruled. The jury returned a verdict finding Defendant guilty of first-degree rape on 21 August 2014. The trial court sentenced Defendant to a minimum of 240 months and a maximum of 297 months in prison. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) failing to exclude the testimony of his former wife, Ruth Hart, about Defendant's reaction

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upon seeing the composite sketch of the victim's assailant as a confidential marital communication; and (2) failing to give an instruction on the lesser-included offense of attempted rape.

III. Marital Communication

A. Standard of Review

Whether a privileged confidential communication between Defendant and Hart occurred is a question of law. *See Medlin v. N.C. Specialty Hosp., LLC*, ___ N.C. App. ___, ___, 756 S.E.2d 812, 820 (2014) (Noting in the context of attorney-client privilege, "the determination of privilege is a question of law[.]"). Questions of law are reviewed *de novo*. *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

B. Analysis

[1] North Carolina's marital communication statute, N.C. Gen. Stat. § 8-57(c), provides: "[n]o husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage." N.C. Gen. Stat. § 8-57(c) (2013). The privilege codified at N.C. Gen. Stat. § 8-57(c) "is an extension of the common-law marital communication privilege that 'allows marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation.'" *State v. Terry*, 207 N.C. App. 311, 314, 699 S.E.2d 671, 674 (2010) (quoting *State v. Freeman*, 302 N.C. 591, 596, 276 S.E.2d 450, 453-54 (1981)).

Our Supreme Court has ruled the ancient privilege codified in N.C. Gen. Stat. § 8-57(c) "is held by both spouses—meaning that either spouse can prevent the other from testifying to a confidential communication." *State v. Rollins*, 363 N.C. 232, 236, 675 S.E.2d 334, 337 (2009) (citation omitted); *see also State v. Britt*, 320 N.C. 705, 709 n.2, 360 S.E.2d 660, 662 n.2 (1987) (citation omitted) ("[W]e have said that a spouse's testimony is . . . incompetent if the substance of the testimony concerns a confidential communication.").

Whether the crying incident recounted by Hart to the jury was protected by the marital communication privilege turns on whether a privileged confidential communication occurred between Defendant and his then-wife. *See Rollins*, 363 N.C. at 236, 675 S.E.2d at 337. Hart did not testify about any statements or conversations between herself and Defendant. Defendant asserts his crying while looking at the composite sketch in the newspaper was a communication between Defendant and Hart, his then-wife.

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“An action may be protected if it is intended to be a communication and is the type of act induced by the marital relationship.” *State v. Holmes*, 330 N.C. 826, 835, 412 S.E.2d 660, 665 (1992) (citations omitted); *see also State v. Fulcher*, 294 N.C. 503, 517, 243 S.E.2d 338, 348 (1978) (noting “an act, such as a gesture, can be a declaration within the meaning of [N.C. Gen. Stat. § 8-57].”).

The State argues Hart’s testimony regarding the crying incident was properly admitted because no spousal communication occurred. The State reasons “[Defendant’s] physical reaction upon seeing the composite picture could hardly be defined as a conscious statement, acknowledgment or gesture to his wife[.]” We agree.

The incident occurred as Hart drove to a doctor’s appointment with Defendant sitting in the passenger seat. Hart did not observe Defendant looking at the composite sketch of the victim’s assailant and weeping until Hart heard a teardrop hit the newspaper. No testimony indicates Defendant intended to communicate anything to Hart by crying at the sight of the composite sketch.

Defendant asserts the crying incident is analogous to an admission by silence. He argues “admissions by silence as well as admissions by words” are covered by the confidential communications privilege. *State v. Wallace*, 162 N.C. 623, 630, 78 S.E. 1, 4 (1913). Defendant did not communicate with his then-wife by crying in the car while looking at the composite sketch of the victim’s assailant. Defendant also did not make an admission to his spouse through that act. Defendant’s act of crying while riding in a vehicle with his then-wife is not protected confidential communication pursuant to N.C. Gen. Stat. § 8-57(c). Defendant’s argument is overruled.

IV. Jury Instruction on Lesser-Included Offense

Defendant argues the trial court erred in failing to instruct the jury on the lesser-included offense of attempted rape. We disagree.

A. Standard of Review

A trial court’s decision not to give a requested lesser-included offense instruction is reviewed *de novo* on appeal. *State v. Gettys*, 219 N.C. App. 93, 100, 724 S.E.2d 579, 585 (2012) (citing *State v. Debiase*, 211 N.C. App. 497, 503-04, 711 S.E.2d 436, 441, *disc. rev. denied*, 365 N.C. 335, 717 S.E.2d 399, 400 (2011)).

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B. Analysis

[2] The trial court “must instruct the jury upon a lesser[-]included offense when there is evidence to support it.” *State v. Brown*, 112 N.C. App. 390, 397, 436 S.E.2d 163, 168 (1993) (citing *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)). However, “when the State’s evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser[-]included offense, it is not error for the trial judge to refuse to instruct [the jury] on the lesser offense.” *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718-19 (1980).

To determine whether the evidence supports the submission of a lesser-included offense, “courts must consider the evidence in the light most favorable to [the] defendant.” *Debiase*, 211 N.C. App at 504, 711 S.E.2d at 441 (citations omitted). “Instructions pertaining to attempted first[-]degree rape as a lesser[-]included offense of first[-]degree rape are warranted when the evidence pertaining to the crucial element of penetration conflicts or when, from the evidence presented, the jury may draw conflicting inferences.” *State v. Johnson*, 317 N.C. 417, 436, 347 S.E.2d 7, 18 (1986) (citation omitted), *superseded by statute on other grounds by* N.C. Gen. Stat. § 8C-1, Rule 404(b), *as recognized in State v. Moore*, 335 N.C. 567, 440 S.E.2d 797 (1994).

In *Johnson*, the victim first testified the defendant had inserted his penis in her vagina on direct examination. 317 N.C. at 436, 347 S.E.2d at 18. On cross-examination, however, the victim indicated the defendant had attempted to achieve penetration but was unsuccessful. *Id.* There was testimony the victim told a physician she “felt pressure but not penetration” and was uncertain whether penetration had occurred. *Id.* On appeal, our Supreme Court concluded this evidence created “a conflict as to whether penetration occurred which should have been resolved by the jury under appropriate instructions.” *Id.*

Here, Defendant contends the trial court should have given an instruction on the lesser-included offense of attempted rape because the evidence regarding penetration was equivocal. Defendant relies on the exchange between the prosecutor and the victim at trial. The prosecutor asked “[d]o you know whether or not [your assailant] penetrated your vagina with his penis” and the victim responded “I think he had a couple of times but he was choking me so hard that I was losing my breath and I believed I was going to die.” Defendant asserts this exchange created a conflict in the evidence necessitating an instruction on the lesser-included offense of attempted rape. We disagree.

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The State presented substantial evidence of penetration: the sexual assault nurse testified the victim told her she was penetrated by Defendant. The victim told the examining doctor at the hospital immediately after the attack that Defendant had penetrated her. Defendant's semen was recovered from inside the victim's vagina and from her skin. When asked by the prosecutor at trial whether anything other than Defendant's hands had touched her, she replied her assailant had touched "[her] vagina" with his penis. Precedents clearly state that evidence of the penetration can be slight: "penetration, however slight, of the female sex organ by the male sex organ" is sufficient to warrant submission for first-degree rape. *State v. Combs*, 226 N.C. App. 87, 90, 739 S.E.2d 584, 586 (2013) (citations omitted).

The victim also testified she was unsure of how long Defendant was inside of her, but did identify the Defendant in court when asked whether she saw "the person that pulled [her] out of the surf that night and. . . penetrated [her] vagina with his penis." In addition, Dr. Baxter testified the victim's pelvic exam revealed sand in her vagina, and trauma to her vagina and cervix. Swabs taken from inside the victim's vagina and from her skin show the presence of Defendant's semen.

We hold the victim's testimony and other competent evidence, viewed in the light most favorable to Defendant, did not create a conflict in the evidence to require an instruction on attempted first-degree rape. The trial court did not err by declining to give Defendant's requested instruction on attempted first-degree rape.

V. Conclusion

The trial court properly admitted Hart's testimony regarding her former husband crying while looking at a composite sketch of the victim's assailant. The incident was not a confidential spousal communication pursuant to N.C. Gen. Stat. § 8-57(c).

The trial court did not err in declining to give an instruction on attempted first-degree rape. Defendant received a fair trial free from the prejudicial errors he preserved and argued.

NO ERROR.

Judges BRYANT and GEER concur.

STATE v. MILLER

[243 N.C. App. 660 (2015)]

STATE OF NORTH CAROLINA

v.

THOMAS SCOTT MILLER, DEFENDANT

No. COA15-295

Filed 20 October 2015

1. Motor Vehicles—impaired driving—unchallenged evidence sufficient

There was a sufficient unchallenged evidence in an impaired driving prosecution to support the trial court's conclusion that there was a reasonable and articulable suspicion for an officer to stop defendant and probable cause for his arrest.

2. Appeal and Error—appealability—guilty plea

Defendant's right of appeal after a guilty plea was limited by statute and not available in this case. There were no grounds for certiorari, and the appeal was dismissed without prejudice to defendant's pursuit of a motion for appropriate relief.

Appeal by defendant from orders entered 13 August 2014 by Judge H. William Constangy in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 September 2015.

Roy Cooper, Attorney General, by Kimberly N. Callahan, Assistant Attorney General, for the State.

Arnold & Smith, PLLC, by Kyle Frost, for defendant-appellant.

ZACHARY, Judge.

Where unchallenged findings of fact supported the trial court's conclusions of law, the trial court did not err in denying defendant's motion to suppress. Where defendant pleaded guilty, defendant does not have a right of appeal from the trial court's denial of his motion to dismiss. Where defendant has not alleged an untimely appeal, an interlocutory appeal, or review of a motion for appropriate relief, this Court may not issue a writ of *certiorari*.

I. Factual and Procedural Background

On 22 June 2011, Officer Anthony Watkins of the Charlotte Mecklenburg Police Department observed Thomas Scott Miller

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[243 N.C. App. 660 (2015)]

(defendant) driving south on Park Road. Officer Watkins witnessed defendant hit the center median with his vehicle, fail to stop at a red light at an intersection, and travel 50 mph in a 35 mph zone. Officer Watkins made a U-turn to pursue defendant. While Officer Watkins was in pursuit of defendant, but before a traffic stop was commenced, defendant neglected to stop at a second red light. After this additional failure to stop, Officer Watkins activated his blue lights and initiated a traffic stop.

Officer Watkins found defendant in the driver's seat, and requested his license and registration. Upon detecting a strong odor of alcohol on defendant's breath, and noticing that defendant had red, glassy eyes, Officer Watkins asked defendant to exit the car and perform a series of field sobriety tests, as well as two roadside preliminary breath tests. Defendant admitted to consuming alcohol. Officer Watkins then arrested defendant for impaired driving.

Defendant telephoned his mother to come and observe the intoxilizer test at the station, but she did not arrive within the requisite period of time and thus could not observe the test. Defendant was placed on \$2,500 secured bond.

Defendant was charged with driving while impaired. On 16 April 2014, defendant moved to suppress all evidence resulting from his arrest, alleging that it was an unconstitutional seizure. That same day, defendant moved to dismiss the charge, contending that he was denied his right to communicate with counsel and friends and to have them observe him. Defendant filed an amended motion to dismiss on 30 July 2014. On 13 August 2014, the trial court denied these motions. On 13 October 2014, defendant pleaded guilty to driving while impaired, and preserved his right to appeal the denial of his motions.

From the denial of his motions, defendant appeals.

II. Motion to Suppress

[1] In his first argument, defendant contends that the trial court erred in denying his motion to suppress all evidence resulting from his arrest. We disagree.

A. Standard of Review

Appellate 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*,

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306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). “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).

B. Analysis

At trial, the State elicited testimony from Officer Watkins concerning the events of the date in question. After direct, cross, and redirect examination of Officer Watkins, the State rested its case. Defendant then moved to suppress the evidence, alleging that the stop was an unlawful seizure without probable cause or reasonable suspicion.

On appeal from the trial court’s order denying defendant’s motion to suppress, defendant contends that the trial court “made numerous Findings of Facts [sic] which were not supported by competent evidence.” Specifically, defendant challenges the trial court’s Findings of Fact numbers 3, 4, 8, 18, and 21. Defendant does not dispute any other of the trial court’s findings. In its order, the trial court made the following Findings of Fact, among others, that are not contested by defendant on appeal:

5. While in pursuit, but before a traffic stop was initiated, the Defendant failed to stop at a red light at Park Road and Seneca Place.

. . .

9. After smelling a strong odor of alcohol, the officer asked the Defendant to exit his vehicle to determine the origin of the odor of alcohol.

10. The officer determined that the odor of alcohol was coming from the Defendant’s breath, and saw that the Defendant had red glassy eyes.

. . .

14. The Defendant exhibited 6 of 6 clues on the Horizontal Gaze Nystagmus Test.

15. During the Walk and Turn test, the Defendant started too soon, stepped offline multiple times and held his arms up away from his body for balance throughout the test.

16. During the One Leg Stand, the Defendant counted improperly, bent his leg, and did not follow the officer’s directions.

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17. That the Defendant admitted to consuming “a beer” prior to driving and was coming from “Bankers,” a local bar.

...

19. The officer formed the opinion that the Defendant was appreciably impaired.

“Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.” *State v. White*, ___ N.C. App. ___, ___, 753 S.E.2d 698, 701 (citations and quotations omitted), *cert. denied, review denied*, 367 N.C. 785, 766 S.E.2d 627 (2014). Accordingly, these findings, unchallenged by defendant on appeal, are binding upon this Court.

Even assuming *arguendo* that there was no evidence to support the challenged findings, we hold that these unchallenged findings are fully sufficient to support the trial court’s conclusion that “[t]here was a reasonable and articulable suspicion to stop the Defendant and probable cause for his arrest.” Our Supreme Court has previously held that where an officer witnessed a defendant’s traffic violation, this personal observation created reasonable suspicion for a traffic stop. *See State v. Styles*, 362 N.C. 412, 417, 665 S.E.2d 438, 441 (2008). We have further held that the testimony of an officer regarding his observations of defendant, and the opinion derived therefrom, is sufficient evidence of defendant’s impairment, provided that the opinion was not based solely on the odor of alcohol. *See State v. Mark*, 154 N.C. App. 341, 346, 571 S.E.2d 867, 871 (2002) *aff’d per curiam*, 357 N.C. 242, 580 S.E.2d 693 (2003). In the instant case, Officer Watkins personally watched defendant drive through a red light, creating reasonable suspicion to support a traffic stop. Upon stopping defendant’s vehicle and administering field sobriety tests, Officer Watkins formed an opinion of defendant’s sobriety, and testified to that effect. These facts were all found by the trial court, and are not challenged on appeal; they support the stop and arrest.

This argument is without merit.

III. Motion to Dismiss

[2] In his second argument, defendant contends that the trial court erred in denying his motion to dismiss. Because defendant pleaded guilty at trial, we are unable to review this argument, and dismiss it without prejudice to defendant’s right to file a motion for appropriate relief with the trial court.

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[243 N.C. App. 660 (2015)]

A. Standard of Review

It is well established that under North Carolina law “a defendant’s right to appeal in a criminal proceeding is purely a creation of state statute. Furthermore, there is no federal constitutional right obligating courts to hear appeals in criminal proceedings.” *State v. Jamerson*, 161 N.C. App. 527, 528, 588 S.E.2d 545, 546 (2003) (quoting *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002)).

Upon a guilty plea, the defendant’s right of appeal is restricted to the following issues:

1. Whether the sentence “is supported by the evidence.” This issue is appealable only if his minimum term of imprisonment does not fall within the presumptive range. N.C. Gen. Stat. § 15A-1444(a1) (2001);
2. Whether the sentence “[r]esults 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.” N.C. Gen. Stat. § 15A-1444(a2)(1) (2001);
3. Whether the sentence “[c]ontains 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.” N.C. Gen. Stat. § 15A-1444(a2)(2) (2001);
4. Whether the sentence “[c]ontains 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)(3) (2001);
5. Whether the trial court improperly denied defendant’s motion to suppress. N.C. Gen. Stat. §§ 15A-979(b)(2001), 15A-1444(e) (2001);
6. Whether the trial court improperly denied defendant’s motion to withdraw his guilty plea. N.C. Gen. Stat. § 15A-1444(e).

Id. at 528-29, 588 S.E.2d at 546-47.

If a defendant has no appeal as of right, a defendant may nevertheless petition this Court for review by writ of *certiorari* pursuant

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to the provisions of N.C. Gen. Stat. § 15A-1444(e). A petition for writ of *certiorari* may be granted where:

(1) defendant lost his right to appeal by failing to take timely action; (2) the appeal is interlocutory; or (3) to review a trial court's denial of a motion for appropriate relief. N.C. R. App. P. 21(a)(1) (2003). In considering appellate Rule 21 and N.C. Gen. Stat. § 15A-1444, this Court has reasoned that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of *certiorari* except as provided in Rule 21. *State v. Nance*, 155 N.C. App. 773, 574 S.E.2d 692 (2003); *Pimental*, 153 N.C. App. at 73-74, 568 S.E.2d at 870; *State v. Dickson*, 151 N.C. App. 136, 564 S.E.2d 640 (2002).

Id. at 529, 588 S.E.2d at 547.

B. Analysis

After the State rested its case, defendant moved to dismiss the charge, alleging that he was denied his constitutional right to communicate with counsel and friends and gather evidence on his behalf by allowing friends or family to observe him and form opinions as to his condition at the time. On appeal, defendant contends that the trial court lacked an evidentiary basis for several of its findings and that the denial of his right to gather evidence resulted in substantial prejudice to him.

In that defendant pleaded guilty, his right of appeal is limited by statute. As defendant's motion to dismiss does not fall within any of the six categories listed in N.C. Gen. Stat. § 15A-1444 and quoted above, defendant does not have an appeal as of right from the trial court's denial of defendant's motion.

Furthermore, there are no grounds for *certiorari* to issue. Because defendant does not allege a lack of timely action, the appeal is not interlocutory, and the appeal does not concern a denial of a motion for appropriate relief, as required by Appellate Rule 21 and N.C. Gen. Stat. § 15A-1444, this Court is unable to issue a writ of *certiorari*. As such, we are unable to hear this argument, and must dismiss it.

Although we dismiss this argument, we do so without prejudice to defendant's pursuit of a motion for appropriate relief, pursuant to N.C. Gen. Stat. § 15A-1411 *et seq.*, before the trial court.

AFFIRMED IN PART, DISMISSED IN PART.

Judges STEPHENS and McCULLOUGH concur.

WELL v. WORLOCK

[243 N.C. App. 666 (2015)]

DEWEY WRIGHT WELL AND PUMP COMPANY, INC., PLAINTIFF
v.
TRAVIS WORLOCK AND WIFE, ASHLEY ROSE WORLOCK, DEFENDANTS

No. COA14-1293

Filed 20 October 2015

Appeal and Error—interlocutory orders and appeals—summary judgment denied—res judicata and collateral estoppel—no final determinations on merits

Where the trial court denied defendants' motion for summary judgment based on *res judicata* and collateral estoppel in a lawsuit for breach of contract and quantum meruit, the Court of Appeals dismissed defendants' interlocutory appeal for lack of appellate jurisdiction. None of plaintiff's claims against any of the parties had been finally determined on the merits, so there was no possibility of a result inconsistent with a prior jury verdict or prior decision on the merits by a judge. An order setting aside a default judgment against another party opened up plaintiff's claims to relitigation; furthermore, the trial court's later determination that it lacked subject matter jurisdiction over that party rendered the default judgment void *ab initio*.

Appeal by defendants from order entered on 16 September 2014 by Judge Hal Harrison in District Court, Watauga County. Heard in the Court of Appeals on 8 April 2015.

Hedrick Kepley, PLLC, by Jeffery M. Hedrick, for plaintiff-appellee.

Deal, Moseley & Smith, LLP, by Bryan P. Martin, for defendant-appellants.

STROUD, Judge.

Travis Worlock and Ashley Rose Worlock ("defendants") appeal from an order denying their motion for summary judgment. They argue that their defenses of *res judicata*, collateral estoppel, judicial estoppel, and election of remedies bar the claims of Dewey Wright Well and Pump Company, Inc. ("plaintiff"). Because we lack appellate jurisdiction, we dismiss this appeal.

WELL v. WORLOCK

[243 N.C. App. 666 (2015)]

I. Background

In October 2010, defendants hired plaintiff to drill a well on their real property in Tennessee; plaintiff drilled a well and billed defendants. Defendants did not pay the bill. On 24 August 2012, plaintiff filed its first lawsuit against defendants and David Taylor¹ for breach of contract and *quantum meruit* and alleged that “[o]n or about 25 October 2010, Defendants, by and through their agent David Taylor, executed a [written] contract with Plaintiff, whereby Plaintiff agreed to drill a well on property of Defendants” and that plaintiff had fully performed but that defendants and Mr. Taylor had failed to pay. Defendants and Mr. Taylor failed to timely answer. On 24 October 2012, plaintiff moved for entry of default and a default judgment against defendants only. *See* N.C. Gen. Stat. § 1A-1, Rule 55 (2011). On 24 October 2012, the Clerk of the Superior Court entered default against defendants and awarded plaintiff a default judgment of \$14,642.85 plus pre-judgment interest, post-judgment interest, court costs, and attorneys’ fees against defendants. On 1 November 2012, plaintiff voluntarily dismissed its claims against Mr. Taylor without prejudice.

On 7 January 2013, defendants moved to set aside the entry of default and the default judgment against them in the first lawsuit pursuant to North Carolina Rule of Civil Procedure 60(b). *See id.* § 1A-1, Rule 60(b) (2013). On or about 14 January 2013, plaintiff objected to defendants’ motion. On 12 August 2013, the trial court allowed defendants’ motion and set aside the entry of default and the default judgment against them.

On 3 September 2013, plaintiff filed a second lawsuit (No. 13 CvD 453) to recover for the drilling of the well, but this lawsuit was only against Mr. Taylor for breach of contract and *quantum meruit*.² Mr. Taylor again failed to answer. On or about 11 October 2013, plaintiff moved for entry of default and a default judgment against Mr. Taylor. On 16 October 2013, the Clerk of the Superior Court entered default against Mr. Taylor. On 24 October 2013, the Clerk of the Superior Court awarded plaintiff a default judgment of \$14,642.85 plus pre-judgment interest, post-judgment interest, court costs, and attorneys’ fees against Mr. Taylor.

1. Mr. Taylor was apparently an acquaintance of defendants. His signature appears as “Agent” of defendants on the contract for the well which was attached to plaintiff’s complaint, although his capacity as an agent is disputed by defendants.

2. Plaintiff had voluntarily dismissed its claims against Mr. Taylor in the first lawsuit, but defendants herein remained as defendants in the first lawsuit.

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On 22 November 2013, defendants answered the complaint in the first lawsuit and alleged that they and plaintiff had orally agreed that plaintiff would drill a well no deeper than three hundred feet but that plaintiff had drilled beyond this depth. According to defendants, they were liable only for \$11,187.00, as this amount reflected the terms of their oral contract. Defendants also alleged:

David Taylor was never authorized in any capacity to act on behalf of Defendants, and Defendants never informed Plaintiff to the contrary. David Taylor, upon information and belief, conveyed no apparent authority to Plaintiff, but was told that somebody must sign a written contract in order for well digging to begin. [Defendants] were never made aware of any written contract and were justifiabl[y] operating under the oral contract with Plaintiff.

On or about 22 November 2013, plaintiff moved to set aside its own default judgment against Mr. Taylor in the second lawsuit pursuant to North Carolina Rule of Civil Procedure 60(b) and moved to consolidate the two actions alleging that “Defendants Worlock are contending that Plaintiff’s Default Judgment against Taylor is a bar to Plaintiff’s rights against [defendants.]” *See id.* On 11 March 2014, the trial court allowed plaintiff’s motion and set aside the 24 October 2013 default judgment against Mr. Taylor.

On 8 May 2014, Mr. Taylor moved to dismiss plaintiff’s action for lack of personal jurisdiction. On 21 May 2014, the trial court entered a consent order to consolidate the two actions. On 23 May 2014, defendants amended their answer to include the defenses of *res judicata*, collateral estoppel, judicial estoppel, and election of remedies. On 14 August 2014, defendants moved for summary judgment. On 8 September 2014, the trial court granted Mr. Taylor’s motion to dismiss, concluding that it lacked personal jurisdiction over Mr. Taylor. On 15 September 2014, defendants amended their motion for summary judgment, and the trial court held a hearing on their motion. On 16 September 2014, the trial court concluded that defendants were not entitled to summary judgment on any of their four named defenses, denied defendants’ motion, and set the case for trial. On 16 September 2014, defendants gave timely notice of appeal from the summary judgment order.

II. Appellate Jurisdiction

We must first address whether we have jurisdiction to review the trial court’s summary judgment order. “The denial of summary judgment

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is not a final judgment, but rather is interlocutory in nature.” *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, 219 N.C. App. 623, 626, 727 S.E.2d 311, 314 (2012). “Generally, there is no right of immediate appeal from interlocutory orders and judgments. However, immediate appeal of an interlocutory order is available where the order deprives the appellant of a substantial right which would be lost without immediate review.” *Whitehurst Inv. Prop’s v. NewBridge Bank*, ___ N.C. App. ___, ___, 764 S.E.2d 487, 489 (2014) (citation and quotation marks omitted).

The appellant bears the burden of demonstrating that the order is appealable despite its interlocutory nature. It is not the duty of this Court to construct arguments for or find support for an appellant’s right to appeal; the appellant must provide sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

... We take a “restrictive” view of the substantial right exception and adopt a case-by-case approach.

Wells Fargo Bank, N.A. v. Corneal, ___ N.C. App. ___, ___, 767 S.E.2d 374, 376 (2014) (citations omitted).

Defendants argue that the order denying their summary judgment motion affects a substantial right because their motion was based on the defenses of *res judicata* and collateral estoppel.

The denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable. This rule is directed at preventing the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff. Thus, the denial of a motion for summary judgment based upon the defense of *res judicata* may involve a substantial right so as to permit immediate appeal *only where a possibility of inconsistent verdicts exists if the case proceeds to trial*.

To demonstrate that a second trial will affect a substantial right, [a defendant] must show not only that one claim has been finally determined and others remain which have not yet been determined, but that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.

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Heritage Operating, 219 N.C. App. at 627-28, 727 S.E.2d at 314-15 (emphasis added and citations, quotation marks, brackets, and footnote omitted).

When a trial court enters an order rejecting the affirmative defenses of res judicata and collateral estoppel, the order can affect a substantial right and may be immediately appealed. Incantation of the two doctrines does not, however, automatically entitle a party to an interlocutory appeal of an order rejecting those two defenses.

This Court has previously limited interlocutory appeals to the situation when the rejection of those defenses gave rise to a risk of two actual trials resulting in two different verdicts. *See, e.g., Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co.*, 135 N.C. App. 159, 167, 519 S.E.2d 540, 546 (1999) (holding that an order denying a motion based on the defense of res judicata gives rise to a “substantial right” only when allowing the case to go forward without an appeal would present the possibility of inconsistent jury verdicts), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000); *Northwestern Fin. Group, Inc. v. County of Gaston*, 110 N.C. App. 531, 536, 430 S.E.2d 689, 692 (holding that the defense of res judicata gives rise to a “substantial right” only when there is a risk of two actual trials resulting in two different verdicts), *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). One panel, however, has held that a “substantial right” was affected when defendants raised defenses of res judicata and collateral estoppel based on a prior federal summary judgment decision rendered on the merits. *See Williams v. City of Jacksonville Police Dep’t*, 165 N.C. App. 587, 589-90, 599 S.E.2d 422, 426 (2004).

Foster v. Crandell, 181 N.C. App. 152, 162-63, 638 S.E.2d 526, 533-34 (citation and quotation marks omitted), *disc. review denied*, 361 N.C. 567, 650 S.E.2d 602 (2007). In *Foster*, this Court dismissed the defendants’ appeal without reconciling *Country Club*, *Northwestern*, and *Williams*, because there was no possibility of a result inconsistent with a prior jury verdict or a prior decision on the merits by a judge. *Id.* at 163-64, 638 S.E.2d at 534-35.

Here, none of plaintiff’s claims against defendants or Mr. Taylor have been finally determined on their merits, because the trial court set

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aside plaintiff's 24 October 2012 default judgment against defendants and plaintiff's 24 October 2013 default judgment against Mr. Taylor. Although the trial court did later make a final determination of plaintiff's claims against Mr. Taylor, this final determination was based on a lack of personal jurisdiction, not on the merits of the underlying claims. Accordingly, we hold that there is no possibility of a result inconsistent with a prior jury verdict or a prior decision on the merits by a judge. *See id.* at 163, 638 S.E.2d at 534; *Heritage Operating*, 219 N.C. App. at 627-28, 727 S.E.2d at 314-15.

Defendants argue that plaintiff is barred from continuing to pursue its action against them by *res judicata*, collateral estoppel, judicial estoppel, and election of remedies, based upon the 24 October 2013 default judgment against Mr. Taylor in the second lawsuit, despite the fact that the judgment was set aside and the trial court later determined that it did not have personal jurisdiction over Mr. Taylor. We disagree.

Under the doctrine of *res judicata* or "claim preclusion," a final judgment on the merits in one action precludes a second suit based on the same cause of action between the parties or their privies. . . . Under the companion doctrine of collateral estoppel, also known as "estoppel by judgment" or "issue preclusion," the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004).

The trial court set aside the default judgment against Mr. Taylor pursuant to Rule 60(b)(6), which provides: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) Any other reason justifying relief from the operation of the judgment." *See* N.C. Gen. Stat. § 1A-1, Rule 60(b). The trial court's order caused the default judgment against Mr. Taylor to no longer be "a final judgment on the merits" and opened up plaintiff's claims against Mr. Taylor to relitigation. *See Biosignia*, 358 N.C. at 15, 591 S.E.2d at 880. Plaintiff's claims against Mr. Taylor were in fact relitigated and then disposed of in the trial court's order granting Mr. Taylor's motion to dismiss for lack

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of personal jurisdiction.³ Additionally, we note that the trial court set aside the default judgment precisely in order to avoid any *res judicata* or collateral estoppel problems, as is evidenced by its findings of fact and conclusions of law, which provide in part:

[Finding of Fact] 6. Defendant Taylor has not satisfied the Judgment, in whole or [in] part.

7. While Defendants Worlock have denied that Defendant Taylor was acting as their agent, they have, in 12 CvD 521, contended that the Default Judgment against Taylor, which is predicated upon agency principles, is a bar to any recovery from them by Plaintiff in 12 CvD 521.

Based upon the foregoing Findings of Fact, the Court concludes as a matter of law that extraordinary circumstances exist and the interests of justice require that the Default Judgment entered herein on 24 October [2013] against Defendant Taylor should be set aside pursuant to Rule 60(b)(6).

(Portion of original in bold and all caps.) We hold that the trial court's order setting aside the default judgment against Mr. Taylor opened up plaintiff's claims against Mr. Taylor, as well as any related issues, to relitigation and that the trial court later disposed of those claims without deciding the merits of any of those claims or issues.

We further hold that the default judgment against Mr. Taylor was void *ab initio* because the trial court later determined that it lacked personal jurisdiction over Mr. Taylor. *See Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 689, 567 S.E.2d 179, 184 (2002) (holding that orders were void *ab initio* for want of personal jurisdiction); *Hamilton v. Johnson*, ___ N.C. App. ___, ___, 747 S.E.2d 158, 164 (2013) (same). Accordingly, there is no possibility of inconsistent verdicts, and defendant has failed to demonstrate how the challenged interlocutory order affects a substantial right. *See Heritage Operating*, 219 N.C. App. at 627-28, 727 S.E.2d at 314-15; *Corneal*, ___ N.C. App. at ___, 767 S.E.2d at 376; *Robinson v. Gardner*, 167 N.C. App. 763, 769, 606 S.E.2d. 449, 453 (“[M]ere avoidance of a trial is not a substantial right entitling an appellant to immediate review.”) (quotation marks and ellipsis omitted), *disc. review denied*, 359 N.C. 322, 611 S.E.2d 417 (2005). Because defendants

3. Neither plaintiff nor defendants appealed from this order and have not challenged on appeal the trial court's determination that it had no personal jurisdiction over Mr. Taylor.

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have failed to meet this burden, we hold that we lack jurisdiction to review this appeal. *See Corneal*, ___ N.C. App. at ___, 767 S.E.2d at 376.

III. Conclusion

Because we lack appellate jurisdiction, we dismiss this appeal.

DISMISSED.

Judges CALABRIA and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 OCTOBER 2015)

BOST v. HELLER No. 15-362	Iredell (14CVS779)	Dismissed
GAO v. JAIN No. 15-136	Union (13CVD633)	Vacated and Remanded
IN RE I.S. & D.S. No. 15-502	Sampson (08JT42) (08JT97)	Affirmed
IN RE D.M.B. No. 15-315	Buncombe (14SPC1210)	Affirmed
IN RE T.W.B. No. 15-348	Ashe (14JA6) (14JA7) (14JA8) (14JA9)	Affirmed
RIOS v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 15-201	Wayne (14OSP05062)	Affirmed
ROBINSON v. CAIN No. 15-181	Henderson (06CVD2004)	Vacated and Remanded
STATE v. ARTIS No. 15-339	Wake (08CRS22984)	Affirmed
STATE v. AUSTIN No. 15-44	Wake (13CRS211442) (13CRS2345)	No Error
STATE v. BARBER No. 15-396	Forsyth (11CRS61384)	Reversed and Remanded
STATE v. BUNSIE No. 15-111	Buncombe (12CRS061197)	No Error
STATE v. CURRY No. 15-410	Union (12CRS55188)	No Error
STATE v. DAMATO No. 15-469	Wake (12CRS227492)	No Error

STATE v. DARBY No. 15-482	Person (13CRS51076) (13CRS51077) (13CRS51092) (13CRS966)	No Error
STATE v. DAVIS No. 15-222	Wake (09CRS213782)	No Error
STATE v. DIXON No. 15-318	New Hanover (14CRS54061)	Affirmed
STATE v. DUNLAP No. 15-372	Moore (14CRS50248)	Affirmed
STATE v. FOWLER No. 15-239	Person (14CRS1743) (14CRS417) (14CRS50266)	No Error
STATE v. HUDGINS No. 15-345	Madison (13CRS392)	No Error
STATE v. LAWING No. 14-1288	Mecklenburg (12CRS246991)	No Error
STATE v. LUKE No. 15-241	New Hanover (13CRS59316)	Affirmed
STATE v. MANGUM No. 15-86	Durham (13CRS54257)	No Error
STATE v. McCLENNY No. 15-306	Tyrrell (14CRS50056)	Dismissed
STATE v. McCLURE No. 15-273	Cabarrus (12CRS54564) (14CRS600)	Affirmed
STATE v. McCLURE No. 15-266	Mecklenburg (13CRS214471-73) (13CRS30542)	No Error
STATE v. McGRAW No. 15-6	Polk (11CRS50162)	No Error
STATE v. MORGAN No. 15-85	Durham (13CRS50538)	No Error
STATE v. NANNEY No. 15-476	Buncombe (13CRS63595) (14CRS51)	No Error

STATE v. SULLIVAN No. 15-343	Guilford (14CRS24198) (14CRS66022)	No Error
STATE v. TEETER No. 15-176	Mecklenburg (11CRS244958) (11CRS244966) (11CRS244969-72) (11CRS246048-52)	No Error
STATE v. TOOMER No. 14-1246	Alamance (11CRS57237) (11CRS57238) (12CRS4785) (12CRS4786) (12CRS50991)	No Error
STATE v. WALKER No. 15-340	Mecklenburg (13CRS223464)	No Error
STATE v. WILSON No. 15-536	Guilford (13CRS76515-16) (13CRS76518) (13CRS76522) (13CRS76524) (13CRS76526) (13CRS76528-29) (13CRS76530) (13CRS76532-33) (13CRS76538)	Dismissed
TATE v. N.C. DEP'T OF PUB. SAFETY No. 14-1274	N.C. Industrial Commission (TA-23162)	Dismissed

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[243 N.C. App. 677 (2015)]

TIMOTHY CLARKE, PERSONAL REPRESENTATIVE OF THE ESTATE
OF ERICA BOHN, PLAINTIFF

v.

ASHRAF GAD BAKHOM MIKHAIL, M.D., JESSICA LYN HARDIN, P.A., AND COASTAL
CAROLINA NEUROPSYCHIATRIC CENTER, P.A., DEFENDANTS

No. COA15-235

Filed 3 November 2015

1. Negligence—instructions—superseding or intervening negligence

The trial court's jury instruction on superseding negligence in a medical malpractice case did not improperly shift the burden of proof to plaintiff to disprove defendants' "affirmative defense." The well-settled principle in North Carolina holds that superseding or intervening negligence is an extension of the element of proximate cause.

2. Medical Malpractice—damages—punitive—titration of medicine—directed verdict against plaintiff

The trial court properly granted a directed verdict on the issue of punitive damages in a medical malpractice action where the issue concerned the medicine and the dosing schedule used to treat plaintiff for chronic mental illness. The physician's assistant who prescribed the medicine sought to reach a therapeutic dose sooner in order to benefit the patient and her deteriorating condition. Experts testified they had successfully dosed the medication, Lamictal, at an increased rate and the manufacturer's recommended dosing schedule was a recommendation only, from which medical providers could deviate.

3. Appeal and Error—preservation of issues—motion in limine—no evidence offered at trial

The issue of whether medical records should have been excluded from a medical malpractice case was not preserved for appellate review where plaintiff filed a motion *in limine* but failed to object when the evidence was offered at trial.

4. Evidence—prior medical records—known to defendants at time of treatment

Even if plaintiff had properly objected to medical records introduced at a medical malpractice trial, the information in the records was known to defendants at the time they treated the patient and was relevant to the issues of both damages and causation.

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5. Evidence—expert witness’s testimony—not improper character evidence

Although plaintiff did not object at trial to medical records on the grounds that they presented improper character evidence, the Court of Appeals determined that the evidence was properly admitted because experts for both parties relied on it to form their own opinions of the case, particularly with regard to the issues of proximate cause and damages. An expert witness’s opinions do not constitute improper character evidence under N.C.G.S. § 8C-1, Rule 404.

6. Medical Malpractice—motion to bifurcate trial—eve of trial

The trial court did not abuse its discretion in a medical malpractice case involving mental health treatment by denying plaintiff’s motion to bifurcate the trial into liability and damages phases. Although plaintiff’s counsel had earlier declined to move for bifurcation in response to the trial court’s inquiries, he changed his strategy after the trial court admitted plaintiff’s prior records. The trial court ruled that it would be improper to bifurcate on the eve of trial.

Appeal by plaintiff from judgment entered 30 May 2014 and order entered 22 September 2014 by Judge Gary E. Trawick in Onslow County Superior Court. Heard in the Court of Appeals 25 August 2015.

Shipman & Wright, LLP, by Gary K. Shipman and W. Cory Reiss, and Childers, Schlueter & Smith, LLC, by C. Andrew Childers, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by John D. Martin, Colleen N. Shea, and Kara O. Gansmann, for defendants-appellants.

TYSON, Judge.

Timothy Clarke (“Plaintiff”), personal representative of the Estate of Erica Bohn, appeals from judgment entered by the trial court after a jury returned a verdict in favor of Ashraf Gad Bakhom Mikhail, M.D., Jessica Lyn Hardin, P.A., and Coastal Carolina Neuropsychiatric Center, P.A. (collectively, “Defendants”). Plaintiff also appeals from order denying his motion for a new trial. We find no prejudicial error.

I. Factual Background

Plaintiff commenced this wrongful death and medical malpractice action against Dr. Ashraf Gad Bakhom Mikhail (“Dr. Mikhail”), Jessica Hardin (“Ms. Hardin”), and Coastal Carolina Neuropsychiatric Center

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(“CCNC”) on 30 September 2011. Plaintiff alleged Ms. Hardin was negligent in prescribing and dosing a drug, Lamictal, to treat Erica Bohn’s (“Ms. Bohn’s”) severe mental illness. Plaintiff filed an amended complaint seeking punitive damages on 3 December 2013.

A. Erica Bohn’s Medical History and Treatment

Ms. Bohn first sought treatment at CCNC, an outpatient psychiatric practice located in Jacksonville, North Carolina, on 26 February 2009. CCNC was the only clinic located in Onslow County with a full-time psychiatric practice in 2009. Prior to receiving treatment at CCNC, Ms. Bohn had been involuntarily committed five times by other healthcare providers between 2006 and 2008. A magistrate and two medical providers all determined Ms. Bohn demonstrated a desire to harm herself or others for each involuntary commitment.

Ms. Bohn was seen and evaluated by Dr. Mikhail, a psychiatrist and owner of CCNC. Ms. Bohn reported a history of diagnosis and treatment for paranoid schizophrenia to Dr. Mikhail. She also reported feelings of sadness, fear, and poor concentration. Dr. Mikhail noted Ms. Bohn displayed depressive symptoms of generalized sadness and poor concentration, and anxiety symptoms of excessive worries, restlessness, muscle tension, specific anxiety, and panic attacks. Dr. Mikhail diagnosed Ms. Bohn with paranoid schizophrenia and generalized anxiety disorder.

Ms. Bohn reported numerous stressors in her life, which affected or resulted from her mental illness. She had been married and divorced twice. Her second husband was abusive. She lost custody of her only son, Eddie, after she held a knife to him and the Department of Social Services (“DSS”) intervened.

Eddie also suffered from severe mental illness, and had been involuntarily committed and admitted to residential mental health programs numerous times beginning at nine years old. Ms. Bohn lived with and cared for her aging and ill parents.

Ms. Bohn possessed an increased risk of suicide attributed to her diagnosis, depressive symptoms, lack of financial resources, lack of friends, and lack of family support. She posed an even higher risk of suicide due to her prior history of hospitalizations.

Ms. Hardin, a physician’s assistant under Dr. Mikhail’s supervision at CCNC, was primarily responsible for Ms. Bohn’s direct treatment thereafter. Ms. Bohn engaged in therapy and medication management at CCNC. She admitted past “suicidal ideations” in her therapy sessions

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at CCNC. Ms. Bohn had failed all typical and atypical antipsychotic medications her previous two psychiatrists had prescribed. Ms. Hardin's treatment objective was to manage Ms. Bohn's fluctuating symptoms, to help keep her out of the hospital, and to prevent her from hurting herself or others.

In April 2010, Ms. Hardin prescribed Lithium as a mood stabilizer for Ms. Bohn's depression and anxiety. Ms. Bohn reported "she was having increased moments that she wanted to cry and felt very sad since having started the [L]ithium" at her 25 May 2010 appointment with Ms. Hardin. Ms. Hardin testified Ms. Bohn initially responded well to the Lithium, but certain medications intended to decrease depression can increase depressive symptoms instead.

Ms. Hardin was aware of Ms. Bohn's chronic mental illness, history of hospitalizations, lack of family support, lack of friends, multiple stressors in her life, and her general increased risk of suicide. Ms. Hardin's goal was to maintain Ms. Bohn's stability and function, and noted Ms. Bohn was "going downhill" at her 25 May 2010 appointment.

Ms. Hardin prescribed Lamictal to Ms. Bohn at this appointment. Ms. Hardin testified she based her decision, in part, on the fact that Ms. Bohn "was sad . . . [and] was already on or had been on antidepressants, which at times were effective and at times were not effective[.]" and "ha[d] initially responded well to the [L]ithium[.]" Ms. Hardin explained "Lamictal is chemically similar to [L]ithium, but has a more favorable side effect profile[.]" Ms. Hardin also testified she

was aware of the literature that supports Lamictal as augmentation for depression and the literature that supports it in regards to its mood-stabilizing properties, and [Ms. Bohn] repeatedly throughout her chart was kind of speckled with that sadness, or the ups and downs or irritability, so I thought the Lamictal was appropriate for her.

Lamictal is a prescription drug and carries a "black box" warning, mandated by the United States Food and Drug Administration ("FDA"). The "black box" warning states Lamictal carries the risk of a severe rash, known as Stevens-Johnson Syndrome ("SJS"), in 0.8 out of every 1,000 adult patients. SJS causes blistering of the skin. The outer layer of a patient's skin, the epidermis, dies and separates from the lower layer, the dermis. SJS causes this rash to occur on less than ten percent of a patient's body.

SJS's rash can develop into toxic epidermal necrolysis ("TEN") if left untreated, which affects at least thirty percent of a patient's skin.

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The skin is the body's largest organ and plays a major role in the body's immune functions. Patients with TEN are at an increased risk for infection, due to the skin not being intact. A patient can die from complications arising from TEN. Large amounts of fluids, electrolytes, and proteins are lost through the open wounds, which further compromises the body's ability to fight infection because of this malnutrition.

The "black box" warning advises that the risk of developing SJS increases if the drug's titration, or dosing schedule, differs from the titration recommended in the package insert. The manufacturer's suggested titration of Lamictal is: 25 milligrams daily for the first two weeks, 50 milligrams daily for weeks three and four, 100 milligrams daily for week five, and 200 milligrams daily for week six and thereafter.

The record from Ms. Bohn's 25 May 2010 CCNC appointment showed Ms. Hardin instructed Ms. Bohn to take 25 milligrams of Lamictal daily for the first week, and increase the dosage to 50 milligrams daily in the second week. Ms. Hardin and other medical experts testified to achieving success in titrating Lamictal at an increased rate and reaching a therapeutic dose.

Ms. Hardin stated she weighed the potential benefits of Lamictal against the potential, but statistically rare, risk of Ms. Bohn developing SJS. Ms. Hardin testified, in her clinical judgment, the increased titration of Lamictal was the best protocol to reach a therapeutic effect more quickly to manage Ms. Bohn's depressive symptoms.

Ms. Hardin noted Ms. Bohn's improvement at her 8 June 2010 appointment, and instructed her to continue taking 50 milligrams daily for the third week. At this visit, Ms. Bohn told Ms. Hardin her elderly father recently had a stroke, which had increased Ms. Bohn's stress level. Ms. Hardin wrote Ms. Bohn another prescription, which increased the dosage of Lamictal to 100 milligrams daily, and instructed Ms. Bohn to start taking 100 milligrams daily starting the fourth week. Ms. Hardin wrote the prescription for the fourth week during this appointment to ease the stress of returning one week later, so that Ms. Bohn could focus on caring for her ailing father.

Ms. Bohn did not contact or see any provider for treatment at CCNC after her 8 June 2010 appointment. She cancelled her subsequent two appointments at CCNC. Ms. Bohn never reported any issue with her medications to CCNC.

On 23 June 2010, Ms. Bohn presented at Onslow Urgent Care with a sore throat, yeast infection, blisters on her lips, and a rash, which had

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been present for two days. Ms. Bohn reported the medications she was currently taking, including Lamictal. Dr. Michael Mosier (“Dr. Mosier”), a burn trauma general surgeon and surgical critical care surgeon at Loyola University Medical Center, located in Chicago, Illinois, testified Ms. Bohn presented at Onslow Urgent Care with all of the “classic,” textbook symptoms of SJS on this day.

Onslow Urgent Care did not diagnose Ms. Bohn with SJS, nor did they advise her to stop taking Lamictal. Onslow Urgent Care diagnosed Ms. Bohn with herpes simplex 2, bacterial conjunctivitis, leukoplakia of her oral mucous membrane, yeast infection, and canker sores.

Ms. Bohn’s condition had drastically changed on 25 June 2010, two days after she was seen at Onslow Urgent Care. Ms. Bohn called for an ambulance, and emergency responders found her lying in a dark room in her home, unable to walk and having difficulty talking or moving. Ms. Bohn was “covered head to toe” with a blistering rash and sloughing skin.

Ms. Bohn was initially transported to the emergency department at Onslow Memorial Hospital for medical treatment. She informed the medical providers that she had recently started taking Lamictal. Ms. Bohn was transported to the burn center at UNC Hospital, located in Chapel Hill, North Carolina, for treatment of TEN. Ms. Bohn’s initial assessment at UNC Hospital showed she had lost the top layer of skin on 57% of her body due to her untreated SJS rash progressing into TEN, leaving her skin raw and blistered.

Ms. Bohn was intubated for mechanical ventilation at UNC Hospital. She remained hospitalized for two months, and died of ventilator-acquired pneumonia on 29 August 2010.

B. Pre-trial Motions and Expert Testimony at Trial

A jury trial began on 21 April 2014 in Onslow County Superior Court. Plaintiff filed various motions *in limine*. Plaintiff’s first motion *in limine* sought to exclude medical records, criminal records, social services files, and other evidence Plaintiff deemed irrelevant and unfairly prejudicial to Ms. Bohn. Plaintiff’s second motion *in limine* sought to exclude character evidence of Ms. Bohn and her son, Edward Clarke. During the hearing, these motions were denied in part and granted in part. The trial court entered a written order on 4 September 2014. The trial court prohibited Defendants from referencing Ms. Bohn’s prior criminal history or her Satanic worship.

At trial, Plaintiff called one expert witness: Dr. Stephen Kramer (“Dr. Kramer”), a forensic psychiatrist who specializes in neuropsychiatry. Dr.

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Kramer agreed that patients diagnosed with paranoid schizophrenia are at an increased risk for suicide. He also agreed that depressive symptoms can be a core feature of paranoid schizophrenia, and Ms. Bohn's records from CCNC and other inpatient hospitals contained numerous references to her reporting depression and sadness.

Dr. Kramer admitted he had also prescribed medications outside the FDA label indications, and “[m]ost medications are prescribed outside of the original indication.” He explained this is a common practice in medicine because “if the available medications haven’t been effective . . . and if it makes any clinical sense, I will consider it even if it’s off label [sic].” Although testifying as Plaintiff’s sole causation expert, Dr. Kramer admitted a TEN expert would be better equipped to give an opinion about whether Ms. Bohn’s SJS and TEN could have been treated or interrupted after its onset.

Psychiatrists Dr. George Corvin (“Dr. Corvin”) and Dr. Rick Weisler (“Dr. Weisler”) testified as experts for Defendants. Both doctors opined Lamictal was an appropriate medication for Ms. Bohn’s condition. Dr. Corvin testified that in his own practice, he had prescribed doses of Lamictal at a faster rate than the manufacturer’s guidelines suggest. Dr. Weisler testified he has prescribed Lamictal to treat bipolar disorder and acute depressive symptoms. Dr. Weisler stated he had experience with patients developing SJS after starting Lamictal. He recalled the rash went away after his patients discontinued the Lamictal.

Dr. Corvin testified the records from Ms. Bohn’s five previous conditions indicated she was “an individual with a very severe illness, a very fragile illness.” He also stated her involuntary hospital admissions placed her at higher risk of suicide than if she had never been admitted. Both Drs. Corvin and Weisler testified Ms. Bohn’s risk of suicide was much higher than her risk of developing SJS or TEN.

Defendants called two causation experts to testify at trial: Dr. Gary Goldenberg (“Dr. Goldenberg”), a board-certified dermatologist, and Dr. Mosier. Drs. Goldenberg and Mosier both testified Ms. Bohn presented with the “classic” SJS rash when she was treated at Onslow Urgent Care on 23 June 2010. Dr. Mosier agreed that Onslow Urgent Care’s failure to diagnose SJS caused it to progress into TEN, thereby causing Ms. Bohn’s condition to worsen to the degree she had to become mechanically ventilated to live, and causing her to ultimately die from pneumonia. Drs. Goldenberg and Mosier stated, in their expert opinion, if Ms. Bohn had been properly diagnosed on the date she sought care at Onslow Urgent Care and had discontinued the Lamictal, more likely than not the rash would have resolved and she would have survived.

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At the close of Plaintiff's case on 8 May 2014, Defendants moved for a directed verdict on the issues of punitive damages and Plaintiff's principal negligence claim. The trial court denied Defendants' motion for a directed verdict on the issue of negligence. On 14 May 2014, the trial court granted Defendants' motion for a directed verdict on Plaintiff's amended claim for punitive damages.

The jury returned a unanimous verdict in favor of Defendants. Plaintiff filed a motion for a new trial on 9 June 2014. The trial court entered an order denying Plaintiff's motion on 22 September 2014.

Plaintiff gave timely notice of appeal to this Court.

II. Issues

Plaintiff argues the trial court erred by: (1) submitting the issue of superseding and intervening negligence to the jury; (2) submitting a jury instruction on superseding and intervening negligence, which was unsupported by the evidence and misstated the law; (3) granting a directed verdict in favor of Defendants on the issue of punitive damages; (4) admitting irrelevant and unfairly prejudicial evidence of Ms. Bohn's character; (5) denying Plaintiff's request to bifurcate; and (6) denying Plaintiff's motion for a new trial.

III. Analysis

A. Superseding and Intervening Negligence

Plaintiff argues the trial court erred by denying his motion for summary judgment and submitting the issue of intervening and superseding negligence to the jury. Plaintiff also contends the instruction the trial court gave to the jury was not supported by the evidence and misstates the law.

1. Standard of Review

Plaintiff states this Court's review of an order *granting* summary judgment is *de novo*. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012). Plaintiff's proposed standard of review is inapplicable to the facts at bar. Denial of a motion for summary judgment is not reviewable on appeal from a final judgment after a trial on the merits of the case. *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). Any improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the evidence and merits by the trier of fact. *Id.*

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A final judgment on the jury's verdict was entered after the jury heard and weighed the evidence, and reached a verdict on the merits in favor of Defendants. Under these facts, the trial court's denial of Plaintiff's partial motion for summary judgment on the issue of intervening negligence is not subject to appellate review. *Id.* (holding "denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits").

This Court reviews and considers jury instructions "in their entirety." *Estate of Hendrickson v. Genesis Health Venture, Inc.*, 151 N.C. App. 139, 150, 565 S.E.2d 254, 262 (citation omitted), *disc. review denied*, 356 N.C. 299, 570 S.E.2d 503 (2002). The "appealing party must show not only that error occurred in the jury instructions but also that such error was likely, in light of the entire charge, to mislead the jury." *Id.* at 151, 565 S.E.2d at 262 (citation omitted). "Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (citation omitted).

2. Analysis

[1] The trial court incorporated the North Carolina Pattern Jury Instructions 102.28 and 102.65, and charged the jury in pertinent part as follows:

In this case, the defendants contend that if one or more of them was negligent, which the defendants deny, then such negligence was not a proximate cause of the plaintiff's injury because it was insulated by the negligence of Onslow Urgent Care. *You will consider this matter only if you have found that one of the defendants was negligent. . . .* If the negligence of Onslow Urgent Care was such as to have broken the causal connection or sequence between the defendants' negligence and the plaintiff's injury, thereby excluding the defendant's [sic] negligence as a proximate cause, the negligence of Onslow Urgent Care would thus become as between the negligence of the defendants and the Onslow Urgent Care as the sole proximate cause of the plaintiff's injury.

. . . .

The burden is not on the defendants to prove that their negligence in any way was insulated by the negligence of Onslow Urgent Care. Rather, the burden is on

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the plaintiff to prove by the greater weight of the evidence that the negligence of the defendants was a proximate cause of the plaintiff's injury.

(emphasis supplied).

Plaintiff argues the trial court erred by instructing the jury the burden was on Plaintiff to disprove the existence of a superseding, or insulating, cause of Ms. Bohn's injury and resulting death. Plaintiff contends this instruction misstates the law by placing the burden on Plaintiff to disprove the affirmative defense of superseding negligence. Plaintiff's argument misconstrues both the doctrine of insulating or superseding negligence and the instructions given to the jury.

As an established element of negligence, the burden rests upon a plaintiff to prove "by the greater weight of the evidence" that a defendant's conduct was the proximate cause of the injuries alleged in an action for negligence. *Wall v. Stout*, 310 N.C. 184, 201, 311 S.E.2d 571, 581 (1984). Long-established North Carolina case law and the Pattern Jury Instructions clearly state "[t]he doctrine of insulating negligence is an elaboration of a phase of proximate cause." *Childers v. Seay*, 270 N.C. 721, 726, 155 S.E.2d 259, 263 (1967); N.C.P.I.—Civil 102.65. The burden of proof does not shift to the defendant when an instruction on superseding negligence is requested. Superseding or insulating negligence is an extension of a plaintiff's burden of proof on proximate cause. *See Childers*, 270 N.C. at 726, 155 S.E.2d at 263; *Barber v. Constien*, 130 N.C. App. 380, 383, 502 S.E.2d 912, 914, *disc. review denied*, 349 N.C. 227, 515 S.E.2d 699 (1998); *see also* N.C.P.I.—Civil 102.65 ("The burden is not on the defendant to prove that *his* negligence, if any, was insulated by the negligence of [another party]. Rather, the burden is on the plaintiff to prove, by the greater weight of the evidence, that the negligence of the defendant was a proximate cause of the plaintiff's [injury].") (emphasis in original); N.C.P.I.—Civil 102.28 n.1 ("Insulating negligence . . . is not a separate issue.").

At oral argument, Plaintiff's counsel asserted the burden shifted to Defendants to prove superseding or insulating negligence because Defendants filed a motion to amend their answer, in which they pled superseding negligence as an affirmative defense. We disagree.

Defendants' amended answer to Plaintiff's complaint, filed 6 November 2013, states in pertinent part as follows:

If Defendants were negligent, which is specifically denied, Defendants' negligence is not a proximate cause

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of Plaintiff's injuries or damages. The superseding and intervening negligence of Onslow Urgent Care and its physicians and healthcare providers was a proximate cause of Plaintiff's injuries and damages in that Onslow Urgent Care failed to recognize, diagnose, and treat the symptoms of Plaintiff's alleged reaction to Lamictal. It was unforeseeable that Onslow Urgent Care would negligently fail to diagnose and treat Plaintiff when she presented at Onslow Urgent Care with known symptoms of a Lamictal reaction and reported to Onslow Urgent Care that she was taking Lamictal. But for Onslow Urgent Care's negligence, Plaintiff would not have contracted TEN and would not have suffered the injuries and death she suffered. Accordingly, Defendants hereby specifically plead the doctrine of insulating and intervening negligence in bar of Plaintiff's claims.

During oral argument, counsel for Defendants stated he asserted insulating and intervening negligence to request and obtain the specific jury instruction. *See* N.C.P.I.—Civil 102.65.

Defendants' superseding negligence averments were asserted beneath the heading "Sixth Defense." However, the text of the averments comports with the well-settled principle in North Carolina, which holds superseding or intervening negligence is an extension of the element of proximate cause. The burden of proof to show proximate cause remained with Plaintiff. *Muteff v. Invacare Corp.*, 218 N.C. App. 558, 565, 721 S.E.2d 379, 384 (2012) (holding contributory negligence is an affirmative defense, for which the burden lies with the defendant asserting it, but "superseding or insulating negligence[] is an elaboration of a phase of proximate cause[]").

The trial court's instruction to the jury did not require Plaintiff to *disprove* superseding or intervening negligence by Onslow Urgent Care. The trial court's jury instruction properly informed the jury of the following: (1) Plaintiff carries the burden "to prove by the greater weight of the evidence" that Defendants' negligence was a proximate cause of Ms. Bohn's injury and death; (2) Defendants did *not* carry the burden of proving their negligence, if any, was insulated by Onslow Urgent Care's negligence; and, (3) the issue of superseding negligence was to be addressed only if the jury first found Defendants were negligent in the course of Ms. Bohn's medical treatment.

The trial court's jury instruction on superseding negligence did not improperly shift the burden of proof to Plaintiff to disprove Defendants'

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“affirmative defense.” Insulating or superseding negligence is “an elaboration of a phase of proximate cause.” *Childers*, 270 N.C. at 726, 155 S.E.2d at 263. The burden of proof remained with Plaintiff to prove Defendants’ negligence, if any, was a proximate cause of Ms. Bohn’s injury and death. The trial court’s jury instruction did not improperly shift the burden of proof or misstate the law. This argument is overruled.

B. Punitive Damages

[2] Plaintiff argues the trial court erred by granting Defendants’ motion for a directed verdict on the issue of punitive damages.

1. Standard of Review

This Court reviews a directed verdict to determine whether the non-moving party presented “sufficient evidence to sustain a jury verdict in [his] favor, or to present a question for the jury.” *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991) (citations omitted).

To determine the sufficiency of the evidence, “all of the evidence which supports the non-movant’s claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant’s favor.” *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

“A directed verdict is improper unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish.” *Sheppard v. Zep Mfg. Co.*, 114 N.C. App. 25, 30, 441 S.E.2d 161, 164 (1994) (citation and quotation marks omitted).

A jury instruction on punitive damages is warranted “when more than a *scintilla* of evidence exists from which the jury could find that defendant’s tortious conduct was accompanied by a reckless disregard for plaintiff’s rights.” *Ellison v. Gambill Oil Co., Inc.*, 186 N.C. App. 167, 180, 650 S.E.2d 819, 827 (2007) (citations and internal quotation marks omitted), *aff’d per curiam and disc. review improvidently allowed*, 363 N.C. 364, 677 S.E.2d 452 (2009).

2. Analysis

“Punitive damages may be awarded, in an appropriate case . . . to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts.” N.C. Gen. Stat. § 1D-1 (2013); *see Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004).

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Recovery of punitive damages requires a claimant to prove by clear and convincing evidence that the defendant is liable for compensatory damages, and the presence of one of the following aggravating factors: (1) fraud; (2) malice; or (3) willful or wanton conduct. N.C. Gen. Stat. § 1D-15 (2013). Our General Assembly has statutorily defined “willful or wanton conduct” as “the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm.” N.C. Gen. Stat. § 1D-5(7) (2013). Willful or wanton conduct requires more than a showing of gross negligence. *Id.*

Plaintiff argues he presented sufficient evidence to raise a genuine issue of whether Defendants acted with conscious and intentional disregard for Ms. Bohn’s safety. Plaintiff asserts the evidence, taken as true and viewed in the light most favorable to him, supports an award of punitive damages. We disagree.

In the medical context, a medical provider acts willfully and wantonly when she knowingly, consciously, and deliberately places a patient at risk of harm by acting contrary to known protocols and procedures. *Chambliss v. Health Sciences Found., Inc.*, 176 N.C. App. 388, 393-94, 626 S.E.2d 791, 795, *petition for disc. review withdrawn*, 360 N.C. 532, 633 S.E.2d 677 (2006).

Plaintiff argues Ms. Hardin’s titration or dosage of Lamictal at a higher rate than recommended by the manufacturer’s guidelines constituted evidence of a “reckless indifference” for Ms. Bohn’s safety and warranted the submission of punitive damages to the jury. All expert witnesses testified that the manufacturer’s guidelines for a particular titration are recommendations and do not establish the standard of care, or a breach thereof. Plaintiff failed to present any evidence, outside of this assertion, that Ms. Hardin’s prescribing and titration of Lamictal was “willful or wanton,” as required by N.C. Gen. Stat. § 1D-15.

The evidence presented showed Ms. Hardin used her clinical judgment to weigh the risks and benefits of prescribing and titrating Lamictal to Ms. Bohn. Ms. Bohn consistently reported depressive symptoms while being treated at CCNC. The medical expert testimony showed the prescribing and increased titration of Lamictal was appropriate for Ms. Bohn, in light of her symptoms, her history of failing other drugs, and her increased risk of suicide.

Ms. Hardin testified, and medical expert testimony confirmed, her decision to prescribe Lamictal at an increased titration was based on Ms. Bohn’s conditions and medical history, and Ms. Hardin’s clinical

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judgment, training, and experience. Ms. Hardin sought to reach a therapeutic dose sooner in order to benefit Ms. Bohn and her deteriorating condition. Experts in this case testified they had successfully titrated Lamictal at an increased rate.

The evidence also showed the label indicated any increased risk of rash with an increased titration was unproven. Ms. Hardin stated she believed the probability Ms. Bohn would develop a rash from Lamictal was much lower than Ms. Bohn's risk of suicide. Ms. Hardin testified she also knew from clinical experience that any rare rash would resolve by discontinuing the Lamictal. This experience was consistent with every testifying medical expert's experience with Lamictal.

Contrary to Plaintiff's argument, the manufacturer's recommended titration schedule does not constitute a "policy or protocol," which Ms. Hardin could have violated. The manufacturer's recommended titration schedule is a recommendation only, from which medical providers can and do deviate. Plaintiff did not present any evidence Ms. Hardin's decision violated CCNC's policies or procedures, or breached any established standard of care. *See Chambliss*, 176 N.C. App. at 393, 626 S.E.2d at 794-95 (holding evidence defendant was aware of, but did not follow, safety protocols and procedures was sufficient evidence to submit issue of punitive damages to the jury). The trial court properly granted a directed verdict on the issue of punitive damages. Plaintiff's argument is overruled.

C. Admission of Medical and Other Records

Plaintiff argues the trial court erroneously admitted into evidence the following: (1) Ms. Bohn's medical records; (2) certain Social Security and DSS records; and (3) Eddie's medical records (collectively, "prior records"). Plaintiff contends these records should not have been admitted because they were: (1) irrelevant to the issues of breach, standard of care, and causation; (2) unfairly prejudicial; and (3) not available to Defendants at the time Lamictal was prescribed.

1. Standard of Review

"Whether evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010) (citation omitted). Whether to admit or exclude evidence under Rule 403 of the Rules of Evidence is a decision which rests within the trial court's discretion. *State v. Peterson*, 361 N.C. 587, 602, 652 S.E.2d 216, 227 (2007) (citation omitted), *cert. denied*, 552 U.S. 1271, 170 L. Ed. 2d. 377 (2008). "[T]he

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trial court's ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (citation and internal quotation marks omitted), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001); see also *State v. Young*, __ N.C. __, __, 775 S.E.2d 291, 306 (2015) ("Thus, the ultimate issue . . . is whether the trial court's decision to allow the admission of the challenged evidence was so arbitrary that it could not have resulted from the making of a reasoned decision.")

2. Analysis

(a) Preservation for Appellate Review

[3] "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); see also *State v. Jamison*, __ N.C. App. __, __, 758 S.E.2d 666, 671 (2014).

Our appellate courts have consistently held "[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the [party] fails to object to that evidence at the time it is offered at trial." *State v. Bonnett*, 348 N.C. 417, 437, 502 S.E.2d 563, 576 (1998) (citation and quotation marks omitted), *cert. denied*, 525 U.S. 1124, 12 L. Ed. 2d 907 (1999); see also *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999); *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845, *cert. denied*, 516 U.S. 884, 133 L. E. 2d 153 (1995); *T & T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49, *disc. review denied*, 346 N.C. 185 486 S.E.2d 219 (1997). Plaintiff filed a motion *in limine* to exclude Ms. Bohn's medical records from admission into evidence at trial. Plaintiff failed to object when this evidence was offered at trial. Plaintiff has failed to properly preserve this issue for appellate review.

(b) Relevancy

[4] Presuming Plaintiff properly preserved this issue for appellate review, Ms. Bohn's medical records were relevant to the issues of damages and causation. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013). Relevant evidence may be excluded under Rule 403 "if its probative value is substantially

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outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]” N.C. Gen. Stat. § 8C-1, Rule 403 (2013).

Communications and records of confidential medical or mental health matters may be relevant and admissible when a party’s claims place a person’s medical or mental health condition in issue. *See Spangler v. Olchowski*, 187 N.C. App. 684, 691, 654 S.E.2d 507, 512-13 (2007) (holding confidential substance abuse treatment matters were relevant to patient’s claims against a physician in a medical malpractice suit in which she alleged pain and emotional distress following gastric bypass surgery).

Here, the information contained in the prior records was relevant to both the issues of damages and causation. This information *was* known to Defendants at the time they treated Ms. Bohn at CCNC. Ms. Bohn reported her medical history, symptoms, and “stressors” to both Dr. Mikhail during her initial intake at CCNC, and to Ms. Hardin during their subsequent appointments.

The prior records illustrated a complete picture of Ms. Bohn’s mental health for the jury. The prior records showed Ms. Bohn’s mental health affected her ability to work, attend school, and care for her mentally ill son and elderly parents. *See* N.C. Gen. Stat. § 28A-18-2(c) (2013) (“All evidence which reasonably tends to establish any of the elements of damages . . . or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.”); *Hales v. Thompson*, 111 N.C. App. 350, 358, 432 S.E.2d 388, 393 (1993) (holding mother’s testimony about decedent son’s leukemia and the effect it had on their relationship was relevant, as it had the tendency to prove the extent of damages in wrongful death by motor vehicle action). Even if Plaintiff had properly objected when this evidence was presented at trial, Plaintiff has failed to show these records were not relevant concerning causation and damages, or that the trial court’s admission was “manifestly unsupported by reason.” *Hyde*, 352 N.C. at 55, 530 S.E.2d at 293. Plaintiff’s argument is overruled.

(c) Character Evidence

[5] Rule 404(a) provides: “Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]” N.C. Gen. Stat. § 8C-1, Rule 404(a) (2013).

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Plaintiff argues for the first time on appeal that the prior records were admitted as improper propensity or character evidence. Plaintiff did not assert Rules 403, 404, 405, or 608 as the basis for his objection to the admission of this evidence at trial. The North Carolina Rules of Appellate Procedure provide: “In order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . objection . . . stating the specific grounds for the ruling the party desired[.]” N.C.R. App. P. 10(a)(1).

Notwithstanding Plaintiff’s failure to object to the admission of this evidence as “character evidence,” this evidence was properly admitted because experts for both parties relied on it to form their own opinions of the case, particularly with regard to the issues of proximate cause and damages. Ms. Bohn’s prior records and Eddie’s medical records were not admitted for any purposes to show “character evidence.” See N.C. Gen. Stat. § 8C-1, Rule 703 (2013); *State v. Golphin*, 352 N.C. 364, 467-68, 533 S.E.2d 168, 235 (2000) (holding report expert relied upon to support his conclusions relating to co-defendant’s character and upbringing, his relationship with his parents, his prior experience with police, his demeanor, and influence defendant had over him was admissible), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

An expert witness’s opinions do not constitute improper character evidence under Rule 404. A party may present its own theory of the case by offering an expert. See *State v. Moss*, 139 N.C. App. 106, 111-12, 532 S.E.2d 588, 593 (2000) (concluding two experts’ opinions were properly admitted and did not constitute evidence of bad character).

(d) Prejudice

As a general proposition, appellate decisions holding that a trial court erroneously failed to sustain an objection lodged pursuant to N.C. [Gen. Stat.] § 8C-1, Rule 403, tend to rest on determinations that the admission of the evidence in question served little or no purpose other than to inflame the passions of the jury. . . . For that reason, one of the ultimate questions . . . is whether the evidence in question had *any* significant probative value or, alternatively, whether the *sole effect* of the challenged evidence was to unfairly prejudice the [party] in the eyes of the jury.

Young, ___ N.C. at ___, 775 S.E.2d at 306-07 (emphasis supplied).

The admission of the prior records did not prejudice Plaintiff. As stated *supra*, most of the information contained in these records was

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known to Defendants through Ms. Bohn's initial intake interview and ongoing reports while being treated at CCNC. The trial court conducted a lengthy *voir dire* hearing to determine what Ms. Hardin had been told, reviewed, and knew while she was treating Ms. Bohn. Experts also used the prior records as a basis for their opinions on causation.

Plaintiff has failed to carry his burden to show how the admission of this evidence was likely to lead the jury to draw negative inferences about Ms. Bohn or to confuse the issues. No evidence shows the trial court's review process or decision to admit the prior records into evidence was "manifestly unsupported by reason." *Hyde*, 352 N.C. at 55, 530 S.E.2d at 293. This argument is overruled.

D. Plaintiff's Motion to Bifurcate

[6] Plaintiff argues the trial court erred by denying his motion to bifurcate the trial into liability and damages phases. We disagree.

1. Standard of Review

"The severance of issues for separate trials is in the trial court's discretion, and its decision will not be reviewed absent an abuse of discretion[.]" *Ashley v. Delp*, 59 N.C. App. 608, 610, 297 S.E.2d 905, 908, *disc. review denied*, 308 N.C. 190, 302 S.E.2d 242 (1982). A motion to bifurcate may be denied "for good cause shown." N.C. Gen. Stat. § 1A-1, Rule 42(b)(3) (2013).

This Court is not called upon to determine whether the facts of this case support a showing of good cause; instead, we are asked to review the trial court's reasoning to determine whether its finding of good cause in this specific case was manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision.

Atkins v. Mortenson, 183 N.C. App. 625, 628, 644 S.E.2d 625, 628 (2007) (citation and internal quotation marks omitted).

2. Analysis

N.C. Gen. Stat. § 1A-1, Rule 42(b) provides: "Upon a motion of any party in an action in tort . . . the court shall order separate trials for the issue of liability and the issue of damages, unless the court for good cause shown orders a single trial." N.C. Gen. Stat. § 1A-1, Rule 42(b)(3).

Plaintiff argues because the admission of Ms. Bohn's and her son's prior records was not relevant to the liability issues and was prejudicial

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against Plaintiff, the trial court should have granted his motion to bifurcate the trial. Our review confirms these records were both relevant and that the trial court did not abuse its discretion in determining that the records were not unfairly prejudicial to Plaintiff.

The trial court inquired of counsel about bifurcation on the first day of hearing pre-trial matters. Counsel for Plaintiff stated he had not filed a motion to bifurcate. The trial court raised the possibility of bifurcation on two other occasions. Each time, Plaintiff's counsel did not move for bifurcation.

During oral argument, Plaintiff's counsel stated his change in trial strategy and motion to bifurcate the trial were made in direct response to the trial court's decision to admit Ms. Bohn's prior medical and DSS records into evidence. The trial court denied Plaintiff's motion and ruled it would be improper to bifurcate on the eve of trial, after the parties' trial strategy, schedule of subpoenas, and the order of witnesses were dependent on the case proceeding as a consolidated trial.

Plaintiff has failed to carry his burden to show the trial court's "finding of good cause in this specific case was manifestly unsupported by reason . . . or so arbitrary that it could not have been the result of a reasoned decision." *Atkins*, 183 N.C. at 628, 644 S.E.2d at 628. This argument is overruled.

E. Plaintiff's Motion for a New Trial

Plaintiff argues he should be granted a new trial due to the numerous errors, which occurred at trial. Plaintiff is not entitled to a new trial on any issue properly preserved and asserted, for the reasons discussed *supra*.

IV. Conclusion

The denial of Plaintiff's motion for summary judgment is not reviewable on appeal. The trial court did not improperly shift the burden onto Plaintiff in its jury instruction on superseding and intervening negligence.

Plaintiff failed to present any evidence tending to show Ms. Hardin's decision to prescribe Lamictal was willful or wanton to warrant submission of punitive damages to the jury. The trial court properly granted Defendants' motion for a directed verdict on the issue of punitive damages.

Plaintiff waived appellate review of the denial of his motion *in limine*, because he failed to object when the prior records were proffered at trial. Ms. Bohn's and her son's prior medical and DSS records

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were relevant to the issues of causation and damages. Evidence shows Defendants were made aware of Ms. Bohn's medical and mental health history. Medical experts properly relied on these records in forming their opinions. At the pre-trial hearing, the trial court reviewed and exercised its discretion to rule on which information to allow and to exclude.

Plaintiff did not object to the introduction of these records on the basis that they were improper character evidence, and failed to preserve this argument on appeal. Plaintiff failed to carry his burden to show these records were unfairly prejudicial, or that the trial court did not abuse its discretion in admitting the prior records into evidence.

Plaintiff failed to carry his burden to show the trial court's decision to deny his motion to bifurcate was "manifestly unsupported by reason."

The trial court did not abuse its discretion in denying Plaintiff's motion for a new trial. Plaintiff received a fair trial, free from prejudicial errors he preserved and argued.

NO ERROR.

Judges BRYANT and GEER concur.

MARY J.S. COLLINS, PLAINTIFF
v.
RANDY RAY COLLINS, DEFENDANT

No. COA15-481

Filed 3 November 2015

1. Appeal and Error—alimony order—trial recordings unavailable—no issue raised as to sufficiency of findings of fact—briefs and record sufficient for review

Where recordings of the trial court proceedings became unavailable due to the long delay between the proceedings and the entry of the alimony order, the parties' briefs and the record were sufficient to allow the Court of Appeals to review defendant's appeal. The issues raised in defendant's appeal pertained to questions of law and whether the trial court's findings of fact supported its conclusions of law, not the sufficiency of the findings.

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2. Divorce—post-separation support—determination of dependent and supporting spouse—comparison of incomes and expenses

On appeal from the trial court's orders awarding post-separation support, alimony, an alimony arrearage, and attorney fees in favor of plaintiff, the Court of Appeals rejected defendant's argument that the trial court erred by determining that defendant was a supporting spouse and plaintiff was a dependent spouse entitled to post-separation support. The order, which focused on the parties' comparative incomes and current expenses, sufficiently addressed the parties' accustomed standard of living established during the marriage.

3. Divorce—alimony—insufficient findings of fact—no findings on dependent spouse's current income

The trial court erred in its order awarding alimony to plaintiff by failing to make any findings of fact on plaintiff's current income from which the court could determine whether plaintiff was a dependent spouse. The trial court's order required defendant to pay alimony based on plaintiff's income five to seven years prior to entry of the order. The order was reversed and remanded.

4. Divorce—alimony—alimony for savings

The trial court abused its discretion in its order awarding alimony to plaintiff by ordering defendant to pay plaintiff an extra \$1,241 per month so that she could "have an opportunity at some savings." An alimony award to allow a party to accumulate savings is improper. The order was reversed and remanded.

5. Divorce—alimony—parity of income—no consideration of statutory requirements

The trial court erred in its order awarding alimony to plaintiff by basing the alimony award on a desire for parity of income rather than the statutory requirements of N.C.G.S. § 50-16.3A. The trial court's findings of fact were limited to the parties' incomes and expenses in the various years preceding the hearing. The trial court was ordered on remand to consider evidence of the factors set forth in the statute.

6. Divorce—alimony—extended duration—no explanation in court's order

The trial court erred in its order awarding alimony to plaintiff by making the award permanent without providing any reason for the extended duration or manner of payment of the award. The order was reversed and remanded.

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7. Divorce—alimony—alimony arrearage and attorney fees—reversed based on reversal of alimony order

On appeal from the trial court's orders awarding post-separation support, alimony, an alimony arrearage, and attorney fees in favor of plaintiff, the Court of Appeals reversed the trial court's rulings on alimony arrearage and attorney fees because those rulings were predicated on the trial court's erroneous alimony order that the Court of Appeals reversed and remanded.

Appeal by defendant from orders entered 6 October 2014, 20 October 2014 and 31 December 2014 by Judge James K. Roberson in Alamance County District Court. Heard in the Court of Appeals 8 October 2015.

Walker & Bullard, P.A., by Daniel S. Bullard, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson and K. Edward Greene, for defendant-appellant.

TYSON, Judge.

Randy Ray Collins ("Defendant") appeals from the trial court's orders awarding post-separation support, alimony, an alimony arrearage, and attorney fees in favor of Mary J.S. Collins ("Plaintiff"). We affirm the order on post-separation support. We reverse and remand the orders on alimony, alimony arrearage, and attorney fees.

I. Background

Plaintiff and Defendant married in 1987 and separated on 6 March 2010. Two children were born of the marriage. On 11 October 2010, Plaintiff filed a complaint for post-separation support, alimony, and equitable distribution.

The trial court heard Plaintiff's claim for post-separation support on 25 January 2011 and entered an order on 6 October 2011. The court concluded Plaintiff was a dependent spouse, Defendant was a supporting spouse, and awarded Plaintiff post-separation support in the amount of \$2,800.00 per month for thirty months, or until the order was terminated or modified.

The trial court heard Plaintiff's equitable distribution claim in June, July and August 2012 and entered an order on equitable distribution over a year later on 10 September 2013. The court found Plaintiff was entitled to a distributive award in the amount of \$119,463.62, and Defendant was

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entitled to a distributive award of \$62,725.93. Included in the property awarded to Defendant was his interest and personal liability in various real estate companies.

The trial court heard Plaintiff's claim for alimony in August and September 2012. Over two years later, on 20 October 2014, the court entered orders awarding alimony to Plaintiff and setting the amount of alimony arrearage Defendant owed. Defendant was ordered to pay alimony to Plaintiff in the amount of \$4,175.00 per month until the death of either party, or until Plaintiff remarries or cohabitates.

On 31 December 2014, the trial court entered an order allowing Plaintiff to recover her attorney fees of \$8,000.00 from Defendant. Defendant appeals from the trial court's orders awarding post-separation support, alimony, alimony arrearage, and attorney fees.

II. Issues

Defendant argues the trial court erred by: (1) determining Defendant is a supporting spouse and Plaintiff is a dependent spouse entitled to post-separation support; (2) ordering Defendant to pay alimony without determining Plaintiff's income and entering findings of fact, which do not support the conclusions of law to hold Plaintiff is entitled to alimony; (3) determining the amount of Defendant's alimony obligation to Plaintiff; (4) making the alimony award permanent, without providing any reason for the extended duration or manner of payment of the award; and, (5) awarding alimony arrearages and attorney fees.

III. Standard of Review

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether . . . competent evidence . . . support[s] the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004) (citation omitted). If the court's findings of fact are supported by competent evidence, they are conclusive on appeal, even if there is contrary evidence. *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994).

Whether a spouse is entitled to an award of alimony or post-separation support is a question of law. *Rickert v. Rickert*, 282 N.C. 373, 379, 193 S.E.2d 79, 82 (1972). This Court reviews questions of law *de novo*. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004). "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 Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

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The trial court's determination of the amount of alimony is reviewed for an abuse of discretion. *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982). The trial court's decision constitutes an abuse of discretion where it "is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision[.]" *Frost v. Mazda Motor of Am. Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000) (citations and internal quotation marks omitted).

IV. Missing Portions of Transcript

[1] One result of the two-year delay in length of time, which elapsed between the hearing and entry of the alimony order, is the recordings of the court proceedings became unavailable. Defendant's counsel was only able to procure recordings of the 13 August, 14 August and 20 August 2012 proceedings. These transcripts contain only Plaintiff's evidence.

The issues Defendant has raised on appeal pertain to questions of law and whether the trial court's findings of fact support the conclusions, and not the sufficiency of the findings of fact. The parties' briefs and the record before us are sufficient to permit review of Defendant's issues on appeal. These facts show yet another consequence in long delays between dates of hearings and entry of orders.

V. Entitlement to Post-Separation Support

[2] Defendant argues the trial court erred in determining Defendant is a supporting spouse and Plaintiff is a dependent spouse entitled to post-separation support. We disagree.

An award of post-separation support is governed by N.C. Gen. Stat. § 50-16.2A:

(b) In ordering postseparation support, the court shall base its award on the financial needs of the parties, *considering the parties' accustomed standard of living*, the present employment income and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party's respective legal obligations to support any other persons.

(c) Except when subsection (d) of this section applies, a dependent spouse is entitled to an award of postseparation support if, based on consideration of the factors specified in subsection (b) of this section, the court finds that

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the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay.

N.C. Gen. Stat. § 50-162.2A(b) (2013) (emphasis supplied). Subsection (d) of the statute pertains to marital misconduct. N.C. Gen. Stat. § 50-162.2A(d) (2013).

A dependent spouse is defined as one “who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.” N.C. Gen. Stat. § 50-16.1A(2) (2013). “Actually substantially dependent requires that the party seeking alimony would be actually unable to maintain the accustomed standard of living [established before separation] from his or her own means.” *Hunt v. Hunt*, 112 N.C. App. 722, 726, 436 S.E.2d 856, 859 (1993) (citation and internal quotation marks omitted). A spouse is “substantially in need of maintenance” if the dependent spouse will be unable to meet future needs even if current needs are met. *Id.* at 181-82, 261 S.E.2d at 855. The legal principles, which govern alimony awards, “are equally applicable to awards of post-separation support.” *Crocker v. Crocker*, 190 N.C. App. 165, 168, 660 S.E.2d 212, 214 (2008).

An objective determination of the parties’ “accustomed standard of living” is central to the trial court’s determination on alimony and post-separation support. *Id.* at 169, 660 S.E.2d at 214. Our Supreme Court has explained the phrase “accustomed standard of living of the parties,”

contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent that it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed.

Williams v. Williams, 299 N.C. 174, 181, 261 S.E.2d 849, 855 (1980).

The trial court heard Plaintiff’s claim for post-separation support on 25 January 2011, less than a year after the parties separated. The order was not entered until 6 October 2011. The court found Defendant’s gross income in 2010 was approximately \$156,000.00. His net income was \$95,869.00, which equals \$7,989.00 per month, but the court found this figure is “lower than actual because it does not consider deductions and exemptions.” The court found Defendant earned a gross income of

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\$147,069.00 in 2009 and a gross income of \$115,000.00 in 2007. The court did not make any findings of Defendant's income in 2008.

The court found Plaintiff earned a net monthly income of approximately \$1,900.00 per month from employment at a retirement center and a restaurant in 2010. The court determined “[t]hat under the circumstances existing at the date of separation, the Defendant was a supporting spouse and the Plaintiff was a dependent spouse. This is also currently the case.”

The court found:

9. The Plaintiff's current reasonabl[e] monthly needs to live in the lifestyle to which she had become accustomed leading up to the date of separation is approximately \$4,000.00 per month. The Defendant's current monthly needs are approximately \$4,300.00 per month, not including his payments toward the college education of the parties' emancipated daughter.

The court awarded post-separation support to Plaintiff in the amount of \$2,800.00 per month for a period of thirty months, effective November 2010, the month following the filing of her claim for post-separation support.

Defendant argues the order awarding post-separation support is reversible because it fails to: (1) find the parties' accustomed standard of living as a family unit during the marriage; and, (2) reflect how the court determined Plaintiff's living expenses, as measured against the accustomed standard of living. Defendant asserts the trial court focused entirely on the parties' comparative incomes and current expenses, without regard for the economic needs of the parties as a family unit during the marriage.

N.C. Gen. Stat. § 1A-1, Rule 52(a) requires in all non-jury trials, the trial court specially find “those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached.” *Quick*, 305 N.C. at 451, 290 S.E.2d at 657. The trial court found that Plaintiff required \$4,000.00 per month to continue the lifestyle to which she had become accustomed during marriage. The trial court made no specific findings regarding the parties' marital standard of living, such as their necessary and discretionary expenditures, the type of home they lived in, or the types of activities or vacations shared.

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In *Adams v. Adams*, this Court held the trial court sufficiently addressed the parties' standard of living, when the order contained findings of the supporting spouse's "monthly gross income and his reasonable living expenses, coupled with the findings as to [the dependent spouse's] monthly income and her expenses during the last year of the marriage." 92 N.C. App. 274, 279-80, 374 S.E.2d 450, 453 (1988), *superseded on other grounds by statute as stated in Brannock v. Brannock*, 135 N.C. App. 635, 523 S.E.2d 110 (1999), *disc. review denied*, 351 N.C. 351, 543 S.E.2d 123 (2000). This Court also held, "[t]he statute does not require a specifically articulated finding on the subject [of accustomed standard of living]." *Id.* at 280, 374 S.E.2d at 453 (citing *Beaman v. Beaman*, 77 N.C. App. 717, 721-22, 336 S.E. 2d 129, 131-32 (1985) (holding the trial court's failure to make a categorical finding about the parties' accustomed standard of living was not fatal to the validity of the judgment)).

The trial court's order on post-separation support sufficiently addresses the issue of the parties' accustomed standard of living established during the marriage. This argument is overruled.

VI. Alimony Award

A. Plaintiff's Current Income

[3] Defendant argues the trial court erred in awarding alimony to Plaintiff. He asserts the findings of fact do not include any determination of Plaintiff's current income from which the court could make a determination of whether Plaintiff is a dependent spouse. We agree.

N.C. Gen. Stat. § 50-16.3A governs awards of alimony. The statute provides, in pertinent part:

The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section.

N.C. Gen. Stat. § 50-16.3A(a) (2013).

"Alimony is ordinarily determined by a party's *actual* income, from all sources, *at the time of the order.*" *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) (second emphasis supplied and citation omitted); *see also Rhew v. Felton*, 178 N.C. App. 475, 484-85, 631 S.E.2d 859, 866 (2006) ("A supporting spouse's ability to pay an alimony award is generally determined by the supporting spouse's income at

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the time of the award.”) The burden rests on the party seeking alimony to show the accustomed standard of living and the lack of the means to maintain that standard. *Williams*, 299 N.C. at 181, 261 S.E.2d at 855.

The court heard Plaintiff’s claim for alimony on five dates in August and September 2012, but did not enter the order until two years later on 17 October 2014. In the alimony award, the court made findings of fact of both parties’ individual gross and net incomes for the years 2007, 2008, and 2009. The court also made findings to the parties’ combined joint adjusted gross income and annual net income for 2007, 2008, and 2009. For the years 2007 through 2009, Plaintiff earned an average net income of \$16,387.00. Defendant earned an average net income of \$99,547.00 for those years.

In 2010, the year of separation, the court found Plaintiff earned a gross income of \$28,530.00, and Defendant earned a gross income of \$151,610.00. In 2011, Plaintiff earned a gross income of \$27,909.00 and Defendant earned a gross income of \$197,878.00. The court further found that, beginning in 2012, Defendant received a base salary of \$156,000.00. The court made no findings with regard to Plaintiff’s 2012 income.

The court determined Plaintiff’s “reasonable expenses necessary to maintain the standard of living acquired prior to the date of separation are approximately \$4,300.00 per month, before accounting for savings that the parties could have accumulated if Defendant had not overreached and tied up the parties’ liquidated funds into his various real estate investments.” The court’s determination of Plaintiff’s expenses was based upon Plaintiff’s financial affidavit, which is dated 10 June 2012. The court determined Defendant’s personal expenses to be \$3,250.00 per month.

The court determined the amount of alimony Defendant was to pay Plaintiff, as follows:

33. Plaintiff’s monthly net income from 2007 through 2009 was \$1,366.00. Plaintiff has a shortfall of \$2,934.00 needed to meet her reasonable monthly expenses to allow her to maintain the standard of living she maintained prior to [the] date of separation. Again, this does not include the savings that would have been part of the standard of living of the parties had husband not made the real estate investments he made and used marital funds for those. Considering all the factors involved and the need for a gross income sufficient to provide wife with net funds to meet her shortfall and have an opportunity at some

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savings, the Court sets alimony in the amount of \$4,175.00 per month.

The trial court engaged in various comparisons of the parties' incomes for a number of years dating back to 2007. The court based its determination that Plaintiff had a shortfall of income to expenses by comparing her average net income between 2007 and 2009 with the expenses she was incurring in 2012, three to five years later. The court failed to account for and factor Plaintiff's income received in 2010 and 2011, which was substantially higher than her income in 2007, 2008 and 2009. The court also failed to make any findings regarding Plaintiff's income for 2012.

The order was entered over two years later in 2014 and requires Defendant to pay alimony to Plaintiff calculated based upon Plaintiff's income from *five to seven years prior* to entry of the order. *Kowalick*, 129 N.C. App. at 787, 501 S.E.2d at 675. The trial court's conclusion that Plaintiff is a dependent spouse is not supported by the findings of fact that *at the time of the order* Plaintiff lacked sufficient *actual* and *current* income to maintain her standard of living established during the marriage. *Id.* The trial court's order is reversed and remanded.

B. Savings Component of Alimony Award

[4] Defendant argues the trial court abused its discretion by ordering Defendant to pay Plaintiff an additional \$1,241.00 per month in alimony so that she could "have an opportunity at some savings." We agree.

With regard to the court's consideration of savings as a component of an alimony award, this Court has held:

Although we agree that the trial court can properly consider the parties' custom of making regular additions to savings plans *as a part of their standard of living* in determining the amount and duration of an alimony award, we conclude the trial court erred in this case when it excluded amounts paid into savings accounts by the parties from their respective incomes. If such an exclusion were allowed, a spouse could reduce his or her support obligation to the other by merely increasing his or her deductions for savings plans. Likewise, a spouse might increase an alimony award by deferring a portion of his or her income to a savings account. *Further, our case law establishes that the purpose of alimony is not to allow a party to accumulate savings.*

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Glass v. Glass, 131 N.C. App. 784, 789-90, 509 S.E.2d 236, 239-40 (1998) (citing *Sgueros v. Sgueros*, 252 N.C. 408, 114 S.E.2d 79 (1960) (emphasis supplied). See *Roberts v. Roberts*, 30 N.C. App. 242, 226 S.E.2d 400 (1976).

Defendant argues the additional \$1,241.00 of the court's alimony award is not based on the parties' custom of making regular additions to savings plans as a part of their standard of living, but is based on the fact that the parties *did not* save this money during their marriage. The court found:

31. Defendant used marital funds to finance his real estate investments during the marriage. This is money the parties could have regularly accumulated in a savings account, which accumulation could have been a part of the parties' standard of living. Plaintiff was at least tangentially aware of most of Defendant's investments of this sort, but Defendant seriously obligated and encumbered the parties' regular monthly cash flow, and savings, by overreaching in his investments. Defendant was allocated these investment properties in equitable distribution, along with any financial obligations. Each payment Defendant makes toward the investment properties has the potential of creating equity for his own use.

The court further found that Plaintiff's monthly shortfall of \$2,934.00 "does not include the savings that *would have* been part of the standard of living of the parties had husband not made the real estate investments he made and used marital funds for those." (Emphasis supplied). The order specifically added \$1,241.00 per month to the alimony award to allow Plaintiff to accumulate savings. This additional allowance is contrary to our well-established precedents, which hold the purpose of alimony is not to allow a party to accumulate savings. See, e.g., *Glass*, 131 N.C. App. at 789-90, 509 S.E.2d at 239-40.

The court made the following finding of fact:

25. The Court does consider that the accumulation of usable savings on a regular monthly basis is a valid component to this couple's standard of living and should be considered as a reasonable expense necessary to maintain the standard of living at the date of separation.

The court made no findings regarding the amount of money the parties contributed to their savings on a monthly basis to support this award.

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Furthermore, the court failed to factor in the savings as a monthly expense of Plaintiff in calculating her reasonable monthly expenses. Instead, the court *sua sponte* added a lump sum figure to the alimony award *after* balancing Plaintiff's income and expenses and specifically stated the \$1,241.00 was to allow Plaintiff to accumulate savings. Almost thirty percent of the alimony award was specifically added for Plaintiff's savings. An alimony award to allow a party to accumulate savings is improper. *Id.* at 790, 509 S.E.2d at 240.

If on remand the trial court concludes Plaintiff is a dependent spouse and Defendant is a supporting spouse, the court may consider the issue of a savings component to the alimony award only if the parties' had a habit of regularly contributing money to savings during their marriage. This consideration may only be made in determining the parties' accustomed standard of living during the marriage, and must be factored as an expense when calculating Plaintiff's monthly expenses to determine her monthly shortfall. *Id.* The trial court also wholly failed to make any findings concerning the overall decline in the economy or of the values of the investment property interest since 2007, prior to castigating Defendant for making these investments. No findings show if or how Plaintiff may have benefitted from these investments during the marriage. This portion of the order is reversed and remanded.

C. Statutory Requirements of N.C. Gen. Stat. § 50-16.3A

[5] Defendant argues the trial court erred by basing its alimony award on a desire for "parity of income" and not the statutory requirements of N.C. Gen. Stat. § 50-16.3A. We agree.

The term "alimony" is defined as "an order for payment of the support and maintenance of a spouse or former spouse[.]" N.C. Gen. Stat. 50-16.1A(1). In determining the amount of alimony, the trial court "shall consider all relevant factors," including the sixteen (16) factors set forth in N.C. Gen. Stat. § 50-16.3A(b). *See Rhew v. Rhew*, 138 N.C. App. 467, 470, 531 S.E.2d 471, 473 (2000) ("The trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the factors . . . for a determination of an alimony award.") (citation omitted). "In the absence of such findings, appellate courts cannot appropriately determine whether the order of the trial court is adequately supported by competent evidence, and therefore such an order must be vacated and the case remanded for necessary findings." *Id.* (citation omitted).

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The factors set forth in N.C. Gen. Stat. § 50-16.3A are as follows:

- (1) The marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation;
- (2) The relative earnings and earning capacities of the spouses;
- (3) The ages and the physical, mental, and emotional conditions of the spouses;
- (4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
- (5) The duration of the marriage;
- (6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
- (7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
- (8) The standard of living of the spouses established during the marriage;
- (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
- (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
- (11) The property brought to the marriage by either spouse;
- (12) The contribution of a spouse as homemaker;
- (13) The relative needs of the spouses;

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(14) The federal, State, and local tax ramifications of the alimony award;

(15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.

(16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

N.C. Gen. Stat. § 50-16.3A (2013).

Here, the trial court's findings of fact were limited to the parties' incomes and expenses in the various years preceding the hearing. On remand, the court shall consider all competent evidence of all the factors set forth in N.C. Gen. Stat. §50-16.3A and make sufficient findings of fact on each relevant factor to support its conclusions. *See Hunt*, 112 N.C. App. at 728, 436 S.E.2d at 860 (reversing alimony award where trial court made findings only as to parties' earnings, and "there were no findings to the parties' estates, earning capacities, conditions, or accustomed standard of living and the record contains no indication that these factors were considered by the trial court.") This portion of the trial court's order is vacated and remanded.

D. Permanent Duration

[6] Defendant argues the trial court erred by making the alimony award permanent without providing any reason for the extended duration or manner of payment of the award. We agree.

The court ordered Defendant's payment of alimony "shall continue until the death of either party, the remarriage of the Plaintiff, or the cohabitation of the Plaintiff, whichever event shall first occur." N.C. Gen. Stat. § 50-16.3A(c) (2013) provides, "[t]he court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment."

This Court has held a failure to set forth reasons for the duration of the alimony award is reversible error and requires remand. *Squires v. Squires*, 178 N.C. App. 251, 263-64, 631 S.E.2d 156, 163 (2006) (rejecting the dependent spouse's argument that the court's findings of a thirty-eight year marriage and the fact that she had no income supported a permanent award); *Crocker*, 190 N.C. App. at 172, 660 S.E.2d at 217 (reversal required where trial court failed to state any reason for amount

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of alimony, its duration or manner of payment); *see also Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421-22, 588 S.E.2d 517, 522-23 (2003); *Williamson v. Williamson*, 140 N.C. App. 362, 364-365, 536 S.E.2d 337, 339 (2000). The trial court erred in ordering the alimony award to be permanent without making findings of fact to support its conclusion as required by the statute and our precedents.

VII. Orders Allowing Arrearages and Attorney Fees

[7] By separate order also entered 20 October 2014, also over two years after the conclusion of the hearing, the trial court set an alimony “arrearage.” The court determined Defendant owed an alimony arrearage of \$40,675.00. This arrearage was calculated based upon the improper calculations in the alimony order, which we reverse and remand. Upon reversal of the underlying alimony order for errors, the order setting the arrearage must also be reversed.

Likewise, the trial court’s 31 December 2014 order awarding attorney fees is predicated upon the determination Plaintiff is a dependent spouse entitled to an award of alimony. N.C. Gen. Stat. § 50-16.4 (2013). Reversal of the determination of the trial court’s order awarding alimony also necessitates a reversal and remand of the award of attorney fees. The trial court’s ruling on arrearages and attorney fees is reversed.

VIII. Conclusion

The trial court did not err in determining Plaintiff is a dependent spouse and Defendant is a supporting spouse in deciding Plaintiff’s entitlement to post-separation support. The order sufficiently addresses the parties’ accustomed standard of living established during the marriage. *Adams*, 92 N.C. App. at 279-80, 374 S.E.2d at 453.

The trial court’s order awarding alimony fails to consider all the statutory factors and to make findings of fact as are set forth in N.C. Gen. Stat. § 50-16.3A.

The trial court’s conclusion that Plaintiff is a dependent spouse and Defendant is a supporting spouse is erroneous, where it is based upon Plaintiff’s income from 2007 through 2009 and her expenses from 2012 in an order entered more than two years later in 2014.

The trial court erred in ordering the alimony award to be permanent without making sufficient findings of fact to support its conclusions.

The trial court erred in adding a lump sum of \$1,241.00 monthly to the alimony award as “savings” for Plaintiff rather than factoring the

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amount of money the parties contributed to savings each month into the calculation of Plaintiff's expenses.

We affirm the order on post-separation support, and reverse and vacate the order awarding Plaintiff alimony and attorney fees, and remand this matter to the trial court for a new hearing on alimony and timely entry of an order containing all the statutorily required findings of fact consistent with this decision and prior precedents.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Judges McCULLOUGH and DIETZ concur.

THE RESIDENCES AT BILTMORE CONDOMINIUM OWNERS'
ASSOCIATION, INC., PLAINTIFF

v.

POWER DEVELOPMENT, LLC AND MOUNTAIN MORTGAGE, INC., DEFENDANTS

No. COA14-1222

Filed 3 November 2015

Real Property—condominiums—concierge area—utilities—not common areas—not units

The trial court properly granted summary judgment in favor of plaintiff-homeowner's association's ownership of a disputed concierge area inside the building and electrical, plumbing, and telephone utilities. While the North Carolina Condominium Act permits the declaration creating a condominium to provide special declarant rights, those rights do not include the right to retain ownership of property that is located within a building and not designated as a unit.

Appeal by defendants from order entered 15 May 2014 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 21 April 2015.

Long, Parker, Warren, Anderson & Payne, P.A., by Ronald K. Payne, and Dunnuck Law Firm, PLLC, by Erin Dunnuck, for plaintiff-appellee.

David R. Payne, P.A. by David R. Payne, for defendant-appellant Power Development, LLC.

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Asheville Law Group, by Michael G. Wimer and Jake A. Snider, for defendant-appellant Mountain Mortgage, Inc.

DAVIS, Judge.

Plaintiff The Residences at Biltmore Condominium Owners' Association, Inc. ("the Association") filed this action seeking a declaratory judgment that various disputed areas within The Residences at Biltmore Condominium ("the Biltmore Condominium") were common elements of the Biltmore Condominium as opposed to properties retained by Power Development, LLC ("Power Development") in its capacity as the declarant. Power Development and Mountain Mortgage, Inc. ("Mountain Mortgage") (collectively "Defendants") appeal from the trial court's order granting summary judgment in favor of the Association. After careful review, we affirm.

Factual Background

In 2005, Power Development purchased a 6.6 acre tract of real property on Biltmore Avenue in Asheville, North Carolina for the purpose of developing the Biltmore Condominium. On 12 December 2006, Power Development recorded the Declaration of Condominium for The Residences at Biltmore Condominium ("the Declaration") in the Buncombe County Registry in Book 4330, Page 1427 pursuant to N.C. Gen. Stat. § 47C-2-101 of the North Carolina Condominium Act. The Declaration included plat maps illustrating the plans for the Biltmore Condominium and showing the approximately 5.7 acres of the property that Power Development "desire[d] to submit . . . to the terms and provisions of the North Carolina Condominium Act." The Declaration addressed the rights and responsibilities of the Association, which was organized in November of 2006 through the filing of articles of incorporation with the North Carolina Secretary of State.

The Declaration also set forth the definitions of various terms that were contained therein. One such term was "condominium," which the Declaration stated "shall mean and refer to The Residences at Biltmore Condominium as established by the submission of the Property, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions, to the terms of the North Carolina Condominium Act by this Declaration."

The Declaration also defined the term "'Declarant Retained Property' or 'Retained by Developer'" as

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property or other areas which will be retained by Declarant which are reflected on Exhibit “A” or the Plans attached hereto and which are not a part of the Common Elements or Units associated with this condominium and which are, in fact, held in ownership by Declarant. These areas must be built by the Developer but the Developer will keep these properties and may convey the same to the Association but is not required to convey the same.

The plat maps illustrating the Biltmore Condominium plans showed various shaded areas that were labeled “D.R.P.” with a note explaining that D.R.P. was an acronym for “Declarant Retained Property.” Some of the areas labeled “D.R.P.” were inside condominium buildings where residential units were located. The Declaration stated that the Condominium was intended to be a “concierge condominium,” meaning one that “has resources in place (i.e., on-staff concierge) to accommodate the *al [sic] carte* needs (identified within a concierge menu and individually billed per service requested) of the owner, guest, renter or other occupier of any one unit within the condominium.”

On 28 September 2007, Power Development executed and recorded a commercial deed of trust in favor of The Bankers Bank, N.A. to secure a loan of \$15,580,000.00. The deed of trust encumbered “Tract B,” 2.074 acres of the condominium property that encompassed both the remaining units Power Development owned and the areas at issue in the present litigation.

Power Development defaulted on its loan, and foreclosure proceedings were initiated by the substitute trustee, Raintree Realty and Construction, Inc. While the foreclosure sale was pending, Power Development executed a document entitled “Supplemental Declaration of Condominium for The Residences at Biltmore Condominium” (“the Supplemental Declaration”), which was recorded in the Buncombe County Registry in Book 4854, Page 698. The Supplemental Declaration stated, in pertinent part, that (1) “when Power Development, LLC recorded the Declaration, the Declarant labeled certain portions of the common elements in the Condominium Plans attached to the Declaration as ‘Declarant Retained Property’”; (2) these common elements labeled Declarant Retained Property are “critical for the operation of the hotel condominium known as The Residences at Biltmore Condominium and the individual unit owners’ use and enjoyment” as they include electrical, plumbing, and telephone utilities; (3) “it was always the Declarant’s intention that the property labeled as Declarant Retained Property . . . be a portion of the unit owners’ common elements”; and (4) the

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original Declaration was “hereby amended for the purpose of clarifying that all of the properties labeled as Declarant Retained Property in the Condominium Plans attached to the Declaration are Residential common elements. As explained in Article III of the Declaration, each residential Unit Owner shall be the owner of an undivided interest as tenant in common of the Residential Common Elements.” No vote was held for the unit owners to approve this Supplemental Declaration.¹

On 31 January 2011, Pios Grande Power Development, L.P. (“Pios Grande”) purchased Tract B in a foreclosure sale, and the trustee’s deed was recorded in the Buncombe County Registry in Book 4858, Page 1173. Pios Grande subsequently conveyed its interest in Tract B by special warranty deed to Serrus Residences at Biltmore, LLC (“Serrus”) on 2 November 2012.

Several months earlier, on 20 June 2012, a document entitled “Agreement to Transfer Declarant Retained Property & Rights” (“the Agreement”) was recorded in the Buncombe County Registry in Book 4992, Page 620. The Agreement was dated 7 April 2009 and stated that — contrary to the above-quoted language in the Supplemental Declaration — Power Development had retained the rights to “various common elements of the project known as The Residences at Biltmore” because these rights were not included in the commercial deed of trust securing its outstanding loan. The Agreement then explained that in consideration for an additional loan from Mountain Mortgage, Power Development was transferring to Mountain Mortgage the rights it retained in

[a]ny and all properties or other rights which were specifically and clearly retained by POWER by virtue of that certain declaration of condominium for The Residences at Biltmore dated 12/12/2006 and recorded in Deed Book 4330 at Pages 1427-1523; including all developer retained or declarant retained properties as identified on those certain plats and within the intention of the subject declarations and all amendments thereto[.]

The Agreement further stated that the properties retained by Power Development as the declarant were “clearly intended to entail . . .

1. Power Development argues on appeal that the Supplemental Declaration was a legal nullity because (1) it sought to amend the original Declaration; (2) as a result, it required the approval of 67% of the Biltmore Condominium’s unit owners; and (3) no vote was held. However, for the reasons discussed below, we do not reach the issue of whether the Supplemental Declaration should be given legal effect.

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telephone boards, electrical boards, all communication boards as well as any other boards or areas needed to service the entire condominium. For example, all storage closets etc.”

The same day the Agreement was recorded, Mountain Mortgage executed a licensing agreement granting a company called Biltmore Management, LLC (“Biltmore Management”) “an exclusive license to use those rights and properties therein defined by [the Agreement]” that would terminate at the option of Mountain Mortgage if Biltmore Management ceased to be the manager of the Biltmore Condominium or its rental program. Following Serrus’ acquisition of the Biltmore Condominium, however, the Association engaged a separate company, Southern Resort Group, LLC (“Southern Resort”), to act as the management company for the Biltmore Condominium. In an addendum to the Association Management Agreement, it stated that Southern Resort was intended to be the exclusive management entity for the Biltmore Condominium.

On 16 September 2013, the Association filed the present action in Buncombe County Superior Court seeking a declaratory judgment. The Association’s complaint alleged, in part, that the “recording of the document captioned Agreement to Transfer Declarant Retained Property and Rights creates a cloud on the title of the Association members’ common elements” and sought a declaration that (1) “the members of the Plaintiff Association are the owners of the common elements that were labeled ‘declarant retained property’ or ‘retained by Developer’ in the Declaration . . . free and clear of any claims of Mountain Mortgage, Inc.”; and (2) the Agreement is “null and void and of no effect on the title of the property interests of the members of Plaintiff Association.” Power Development and Mountain Mortgage filed answers to the complaint on 7 November 2013 and 15 November 2013, respectively.

On 25 February 2014, the Association filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. On 15 May 2014, the trial court granted summary judgment in the Association’s favor, ruling that (1) “all areas, which had been marked as ‘Declarant Retained Property’ or ‘Declarant Retained Areas’ in the plans attached to the Declaration of Condominium for the Residences at Biltmore Condominium recorded in Book 4330 at Page 1427 of the Buncombe County Registry are common elements and therefore owned by the individual members of the Plaintiff Association in their respective percentages”; and (2) the Association members’ ownership of these areas was “free and clear of any claims of Defendant Mountain Mortgage,

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Inc. and Defendant Power Development, LLC.” Defendants gave timely notice of appeal.

Analysis

The entry of summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.R. Civ. P. 56(c). An order granting summary judgment is reviewed *de novo* on appeal. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

The Association argues that summary judgment was properly granted in its favor for the following reasons: (1) no authority existed under the North Carolina Condominium Act (“the Act”) for Power Development — as the declarant — to retain ownership of the areas designated in the Declaration as “declarant retained property”; (2) even assuming *arguendo* that a declarant could retain such ownership interests within a condominium in this manner, the areas within the Biltmore Condominium over which Power Development purported to reserve ownership were not indicated in the Declaration and attached plats with the specificity required under the Act; (3) Power Development’s alleged transfer of its ownership rights to the retained property to Mountain Mortgage did not comport with the Act’s provisions concerning the transfer of declarant rights; and (4) the Supplemental Declaration clarifying that the areas at issue were actually common elements (rather than declarant retained property) was recorded in the Buncombe County Registry prior to the recording of the Agreement purporting to transfer ownership of those same areas to Mountain Mortgage. Because we believe that the Association’s first argument is dispositive of this appeal, we need not address the alternative grounds advanced by the Association for affirming the trial court’s entry of summary judgment in its favor.

The Association contends the Act expressly provides that separately owned units and common elements are the two exclusive types of property comprising a condominium. It then asserts that because the areas that were labeled “declarant retained property” in the Declaration and attached plans were not designated as units, they must — by default — be legally classified as common elements in order for the Biltmore Condominium to be consistent with the Act.

Power Development, conversely, argues that the Act does not prohibit “a developer from retaining property or spaces within the

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physical boundaries of the Condominium” and that this is precisely what it did here.² It therefore asserts that these areas (designated by shading on the plat maps) were excluded in their entirety from the Biltmore Condominium and, in turn, from the requirements of the Act. Thus, according to Power Development, by virtue of the designated shading on the plat map and the inclusion in the Declaration of a definition for the term “declarant retained property” that expressly encompassed the disputed areas, the following propositions are true: (1) the areas at issue were neither individual units nor common elements; (2) Power Development — rather than the individual unit owners — retained ownership of these areas; and (3) by means of the Agreement, Power Development transferred ownership of these areas to Mountain Mortgage.

All of the parties agree that Power Development sought to — and, in fact, did — create a condominium by recording a declaration that subjected the property comprising the Biltmore Condominium to the terms and provisions of Chapter 47C of the North Carolina General Statutes. Thus, there is no disagreement among the parties as to the fact that the Act controls the resolution of this case.

The Act, codified in Chapter 47C of the North Carolina General Statutes, defines a condominium as

real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

N.C. Gen. Stat. § 47C-1-103(7) (2005).

“A condominium is created pursuant to this Act only by recording a declaration.” N.C. Gen. Stat. § 47C-2-101 cmt. 1 (2005). N.C. Gen. Stat. § 47C-2-105 sets out the required contents of the declaration, stating that it must contain “[a] legally sufficient description of the real estate included in the condominium” as well as “[a] description of any development rights and other special declarant rights reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those

2. Power Development asserts that its ability to retain ownership of these areas was derived entirely from its reservation of these properties in the Declaration and unconnected to its former status as a unit owner (which ended when it defaulted on its loan and the units it had owned were then foreclosed upon).

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rights must be exercised[.]” N.C. Gen. Stat. § 47C-2-105 (3), (8) (2005); *see also In re Williamson Village Condos.*, 187 N.C. App. 553, 556-57, 653 S.E.2d 900, 902 (2007) (noting that the Act “lists more than a dozen specific items that must be included in the declaration,” including a description of the property and any special declarant rights), *aff’d per curiam*, 362 N.C. 671, 669 S.E.2d 310 (2008).

The fatal flaw with Power Development’s position as to the legal classification of the areas at issue is that its interpretation is inconsistent with the terms of the Act. The defining feature of a condominium is that it is comprised of two — *and only two* — types of property: (1) units (defined as the “physical portion[s] of the condominium designated for separate ownership or occupancy, the boundaries of which are described [in the declaration]”); and (2) common elements (meaning “all portions of [the] condominium other than the units”). N.C. Gen. Stat. § 47C-1-103(25), (4).

Power Development correctly notes that the Act permits a declaration to define terms contained therein in a manner that varies from the statutory definitions contained in the Act. *See* N.C. Gen. Stat. § 47C-1-103 (explaining that definitions of terms provided in this subsection apply to Chapter 47C and to declarations and bylaws “unless specifically provided otherwise or the context otherwise requires”). However, variations in defined terms cannot serve to alter the fundamental nature of a condominium pursuant to the Act. *See* N.C. Gen. Stat. § 47C-1-104 cmt. 3 (2005) (“All definitions used in the declaration and bylaws may be varied in the declaration, but not in interpretation of the Act.”).

Power Development chose to create a condominium under the Act consisting of the property that ultimately formed the Biltmore Condominium. In so doing, it surrendered the right to maintain ownership of certain areas within the condominium property in a manner that was unauthorized under the Act.

Thus, Power Development cannot simultaneously maintain, on the one hand, that the Act applies to the Biltmore Condominium while, on the other hand, contend that, as the declarant, it reserved ownership of areas within the condominium buildings that would otherwise constitute common elements pursuant to the unambiguous language of the Act. *See* N.C. Gen. Stat. § 47C-1-103 cmt. 5 (“[I]f a declarant sold units in a building but retained title to the common areas, granting easements over them to unit owners, no condominium would be created. Such projects have many of the attributes of condominiums, but they are not covered by this Act.”).

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It is true that, as noted above, the Act does recognize the concept of declarant retained rights, thereby permitting declarants to reserve certain rights with regard to a condominium project by expressly reserving such rights in the declaration. N.C. Gen. Stat. § 47C-2-105(8). For this reason, Power Development's alternative argument is that even assuming that the disputed areas were, in fact, part of the Biltmore Condominium, Power Development nevertheless retained ownership of them as a special declarant right that was permitted under N.C. Gen. Stat. § 47C-1-103(23). However, the right to ownership of the disputed areas that Power Development contends it reserved here far exceeds the scope of those special declarant rights permissible under the Act.

The Act defines "special declarant rights" as

rights reserved for the benefit of the declarant to complete improvements indicated on plats and plans filed with the declaration (G.S. 47C-2-109); to exercise any development right (G.S. 47C-2-110); to maintain sales offices, management offices, signs advertising the condominium, and models (G.S. 47C-2-115); to use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium (G.S. 47C-2-116); to make the condominium part of a larger condominium (G.S. 47C-2-121); or to appoint or remove any officer of the association or any executive board member during any period of declarant control (G.S. 47C-3-103(d)).

N.C. Gen. Stat. § 47C-1-103(23). In order to properly reserve such rights, a declarant must specifically state in the declaration the rights it wishes to retain "together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised." N.C. Gen. Stat. § 47C-2-105(8).

While acknowledging as a general proposition that the Act permits a declaration to provide for special declarant rights, the Association argues that the special declarant rights recognized in the Act do not include the right to retain ownership of property that is "located within a building in a North Carolina Condominium Project" and not designated as a unit. We agree. Although the official comment to N.C. Gen. Stat. § 47C-1-103 states that the above-quoted list of declarant rights enumerated in subpart (23) of N.C. Gen. Stat. § 47C-1-103 is not exhaustive, *see* N.C. Gen. Stat. § 47C-1-103 cmt. 13 ("The list [of special declarant rights], while short, encompasses *virtually* every significant right which a declarant

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might seek in the course of creating or expanding a condominium.” (emphasis added)), a holding that the range of special declarant rights permitted by the Act is broad enough to encompass a declarant’s right to retain ownership of areas located within a condominium building yet not designated as a unit would be inconsistent with the essential nature of a condominium under the Act.

In reaching this conclusion, we are once again guided by the fundamental and defining features of a condominium: (1) that it is comprised of common elements and units; and (2) that unit owners, in addition to their separate ownership of their individual units, own an undivided interest in *all condominium property that has not been designated as a unit*. See N.C. Gen. Stat. § 47C-1-103 (4) (explaining that all portions of a condominium that are not units are common elements); *id.* cmt. 5 (explaining that if a declarant retained title to the common elements, the project would not legally constitute a condominium).

In urging this Court to accept its broad concept of special declarant rights, Power Development notes that a portion of the disputed areas is being used for management offices — a use the Act expressly recognizes as one that may be reserved by the declarant as a special declarant right. The specific statutory provision to which Power Development refers is N.C. Gen. Stat. § 47C-2-115, which provides as follows:

A declarant may maintain sales offices, management offices, and models in units or on common elements in the condominium only if the declaration so provides and specifies the rights of a declarant with regard to the number, size, location, and relocation thereof. *Any sales office, management office, or model not designated a unit by the declaration is a common element*, and if a declarant ceases to be a unit owner, he ceases to have any rights with regard thereto unless it is removed promptly from the condominium in accordance with a right to remove reserved in the declaration. . . .

N.C. Gen. Stat. § 47C-2-115 (2005) (emphasis added).

Thus, pursuant to this statutory provision, a declarant desiring to maintain management or leasing offices may reserve the right to keep such offices on site, either in the units it owns or on common elements (for so long as the declarant remains a unit owner). However, this statute does not authorize a declarant to maintain offices on property that is *neither* a unit *nor* a common element. Instead, the statute expressly

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states that such an office is a common element in cases where it was not designated a unit in the declaration.

Thus, N.C. Gen. Stat. § 47C-2-115 does not permit a declarant that avails itself of the right to maintain offices on common elements to *own* these portions of the common elements. Rather, the right reserved under N.C. Gen. Stat. § 47C-2-115 is merely that of *use* of the property. *Ownership* of the portion of the common elements on which a management office is maintained — like ownership of all common elements — is vested in the unit owners jointly.

The invalidity of Power Development’s argument is further demonstrated by the fact that the areas labeled “Declarant Retained Property” in the Declaration and attached plans not only contain management offices but also house utility boards, power breakers, water systems, fire alarm and sprinkler systems, and emergency lighting systems that service various common elements and units within the condominium. Neither law nor logic supports the proposition that a declarant is permitted to reserve ownership of areas containing such critical safety equipment, thereby retaining the legal right to exclude unit owners and their condominium association from access thereto.

Nor are we persuaded by Power Development’s assertion that the resolution of this appeal is affected by the fact that the Biltmore Condominium was created as a “concierge condominium” rather than a traditional condominium. The Act does not distinguish between a condominium that offers concierge services and one that does not. Rather, the Act sets out the fundamental requirements for *all* condominium complexes within the scope of Chapter 47C.

Power Development has not directed this Court to any caselaw from North Carolina or from any other jurisdiction that (like North Carolina) has adopted the Uniform Condominium Act (“UCA”) that provides support for its position. Rather, the primary case upon which Power Development attempts to rely does not actually address the issue before us. In *MetroClub Condo. Ass’n v. 201-59 N. Eighth Street Assocs., L.P.*, 2012 PA Super 122, 47 A.3d 137, *appeal denied*, 618 Pa. 689, 57 A.3d 71 (2012), the condominium’s declaration authorized the declarant, so long as it owned any units within the condominium, to reserve for itself the power to allocate unassigned parking spaces (which were limited common elements of the condominium) to certain units as it saw fit. *Id.* at 140. The condominium association argued that the declarant, which still owned 17 of the condominium’s 130 residential units at the time of the litigation, was no longer entitled to control and allocate these

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unassigned parking spaces because the declarant control period had ended. *Id.* at 142-43.

The Superior Court of Pennsylvania disagreed, holding that the declarant's reservation of the right to maintain control over these unallocated parking spaces while it remained a unit owner did not conflict with the provisions of the UCA. *Id.* at 147. In so holding, the court explained that (1) the provisions of the declaration addressing control of the unassigned parking spaces complied with the UCA's requirements concerning the designation of limited common elements and the method of allocating the use of such common elements to certain units; (2) as a unit owner itself, the declarant continued to "pay its proportionate share of common expenses" related to the maintenance of these limited common elements; and (3) the declarant's use of these limited common elements, as articulated in the declaration, was consistent with the UCA because, by definition, "although limited common elements are owned in common, their use is reserved for fewer than all." *Id.* at 147-49.

The court in *MetroClub* did not hold that the declarant in that case had reserved *ownership* over the areas at issue (as Power Development is arguing here), noting instead that these common areas continued to be owned by the unit owners jointly. Thus, we do not believe that *MetroClub* provides any support for Power Development's position in the present case. Indeed, Power Development's reliance on *MetroClub* demonstrates its failure to recognize the crucial distinction between a declarant's reservation of the right to *use* portions of common elements (as was upheld in *MetroClub*) as opposed to a declarant's reservation of the right to retain *ownership* of such areas (for which Power Development has offered no legal authorization).

Because we reject Power Development's arguments regarding its ability to retain ownership of the disputed areas as inconsistent with the Act, we conclude that the trial court properly granted summary judgment in favor of the Association. We therefore need not address the Association's alternative grounds for upholding the trial court's order.

Conclusion

For the reasons stated above, we affirm the trial court's 15 May 2014 order granting summary judgment in favor of the Association.

AFFIRMED.

Judges BRYANT and INMAN concur.

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[243 N.C. App. 723 (2015)]

STATE OF NORTH CAROLINA

v.

JUDY HARDISON

No. COA15-150

Filed 3 November 2015

Accomplices and Accessories—acting in concert—not present or nearby—accessible by telephone

The trial court should have granted defendant's motion to dismiss charges of contaminating a public water system by acting in concert where defendant was not present or nearby when her accomplice damaged the water lines. Defendant, whose company repaired water lines for Pamlico County, was accessible if needed by telephone and was later at the scene to repair the water lines, but one cannot be actively or constructively present for acting in concert simply by being available by telephone.

Appeal by defendant from judgment entered 30 April 2014 by Judge Kenneth F. Crow in Craven County Superior Court. Heard in the Court of Appeals 27 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Torrey D. Dixon, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender John F. Carella, for the defendant-appellant.

DIETZ, Judge.

Defendant Judy Hardison owns a business that repairs water lines in Pamlico County. In November 2012, a family friend of Hardison mistakenly broke a public water line after driving over it with a heavy truck and then joked with Hardison about "creating a job for her." This gave Hardison an idea: she began paying the same man to break other water lines in the county so that Hardison could repair them at the county's expense.

Law enforcement discovered the scheme and convinced the man working with Hardison to wear a wire. After recording incriminating conversations between the two, the State arrested Hardison and charged her with six counts of contaminating a public water system and one count of obtaining property by false pretenses.

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At trial, the State relied solely on the theory of acting in concert to convict Hardison on all counts. During the trial and after the jury convicted her, Hardison moved to dismiss, arguing that the theory of acting in concert requires the defendant to be actually or constructively present during the commission of the crime. Here, it is undisputed that Hardison was not present when the water lines were damaged, although she planned the crimes and was available by telephone if needed.

We agree with Hardison that the evidence does not support acting-in-concert liability with respect to her convictions for contaminating a public water system.¹ Under this Court's precedent, Hardison was not physically close enough to aid or encourage the commission of the crimes and therefore was not actually or constructively present—a necessary element of acting-in-concert liability. To be sure, the evidence in this record easily would have supported Hardison's conviction as an accessory before the fact. But the jury was not instructed on that theory of criminal liability, nor was Hardison charged with other related offenses, such as conspiracy, that apply to those who help plan a criminal act. Because the State relied entirely on a flawed theory of acting in concert, we must reverse Hardison's convictions.

Facts and Procedural History

Defendant Judy Hardison owns Triple H Construction Company. Triple H contracted with Pamlico County to repair water lines, install taps, and do routine water line maintenance throughout the county.

In November 2012, Rodney Brame accidentally cracked a water line in Pamlico County while turning around a large truck. Triple H responded to a call from the county and repaired the cracked water line. Brame knew Hardison and her family, and jokingly apologized to Hardison for “creating a job for her.”

The following week, Hardison contacted Brame and offered to pay him \$400 in exchange for cracking another water line in Pamlico County. Over the next month, Brame intentionally broke a number of other water lines so that Hardison could repair those lines and be paid by the county. Hardison identified the lines that Brame was to break and, on at least one occasion, Hardison or someone working on her behalf placed a flag at the location of a water line to assist Brame in locating it. Hardison was never present when Brame broke the water lines, but Brame had

1. The trial court arrested judgment on her conviction of obtaining property by false pretenses.

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Hardison's phone number and occasionally called Hardison to "let her know" after he broke a line.

Law enforcement ultimately discovered that Brame was intentionally damaging the water lines. Brame began assisting law enforcement by recording a phone call with Hardison and meeting her while wearing a wire. When Brame called Hardison, he said, "I was trying to figure out where I might need to go," to which Hardison responded, "Okay. I can't talk right now." Hardison then agreed to meet Brame the next day. During their in-person meeting, Brame asked Hardison if she could give him money and if she could "get my ass out of jail if they put me in jail." Hardison declined to give him money and stated that she would not be able to bail him out of jail because that might make her look guilty.

Law enforcement later arrested Hardison. The State indicted Hardison in seven separate indictments on six counts of contaminating a public water system and one count of obtaining property by false pretenses. The indictments charged that Hardison willfully damaged portions of public water lines, conduct which falls within the statutory definition of contaminating a public water system. At trial, the State proceeded on a theory that Hardison acted in concert with Brame in damaging the water lines. The trial court instructed the jury on the theory of acting in concert, but not on other similar theories of liability, such as accessory before the fact.

During trial and after the verdict, Hardison moved to dismiss the charges on the ground that the State failed to prove she was either actually or constructively present at the crime—a necessary element of the acting-in-concert theory of criminal liability. The trial court denied Hardison's motions to dismiss and the jury returned a verdict of guilty on all counts. At sentencing, the trial court arrested judgment on the conviction of obtaining property by false pretenses and on one of the counts of contaminating a public water system and sentenced Hardison on the remaining counts. Hardison timely appealed.

Analysis

Hardison argues that the trial court erred by denying her requests to dismiss all charges. Specifically, Hardison argues that for each charge against her the State relied entirely on the theory that Hardison acted in concert with Brame but failed to prove that Hardison was actually or constructively present during the commission of the crimes. For the reasons discussed below, we agree.

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In reviewing a motion to dismiss based on the sufficiency of the evidence, the scope of the court's review is to determine whether there is substantial evidence of each element of the charged offense. *See State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The evidence must be considered in the light most favorable to the State as the State is entitled to every reasonable inference that might be drawn therefrom. *Id.*

Here, Hardison argues there was insufficient evidence to convict her under an acting-in-concert theory of criminal liability. "Acting in concert means that the defendant is present at the scene of the crime and acts together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Wade*, 213 N.C. App. 481, 487, 714 S.E.2d 451, 456 (2011). To act in concert, a defendant's presence at the scene of the crime may be actual or constructive. *See State v. Gaines*, 345 N.C. 647, 675-76, 483 S.E.2d 396, 413 (1997). "A person is constructively present during the commission of a crime if he is close enough to provide assistance if needed and to encourage the actual execution of the crime." *Id.*

It is undisputed that Hardison was not actually present, nor was she nearby, at the time Brame damaged the water lines. The State nevertheless argues that it proved Hardison was constructively present because she planned the crimes, was accessible if needed by telephone, and later was at the scene of the crime to repair the broken water lines. We disagree.

First, we reject the State's argument that Hardison acted in concert with Brame because she planned the crimes and provided guidance on how Brame could later damage the water lines. One who plans and organizes a crime before the fact is typically charged as a principal under a theory such as accessory before the fact, which is an entirely different theory of liability than acting in concert. *See State v. Woods*, 307 N.C. 213, 218, 297 S.E.2d 574, 577 (1982). Unlike an accessory before the fact, who need not be present during the crime's commission, one who acts in concert must be "close enough to provide assistance if needed and to encourage the actual execution of the crime." *Gaines*, 345 N.C. at 675-76, 483 S.E.2d at 413. Thus, the fact that Hardison planned the crime before the fact is irrelevant to the acting-in-concert analysis; what matters is Hardison's presence and conduct during the commission of the crime itself.

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We likewise reject the State's argument that "by being accessible by telephone Hardison was as close as she needed to be to further aid and encourage the particular crime of contaminating a public water system." This Court previously has held that one cannot be actually or constructively present for purposes of proving acting in concert simply by being available by telephone. *State v. Zamora-Ramos*, 190 N.C. App. 420, 425-26, 660 S.E.2d 151, 155 (2008); *State v. Buie*, 26 N.C. App. 151-53, 215 S.E.2d 403 (1975). We are bound by that precedent whether we agree with it or not. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989). If the State believes that accessibility by telephone should be sufficient to prove a defendant acted in concert, it must raise that issue with our Supreme Court. *See id.*

Finally, the State argues that Hardison was present during the repairs of the damaged water lines and that the crime was still ongoing at that point because, during the repairs, the water system could have been exposed to further damage or contamination. But the record does not support this theory. The State did not present any evidence indicating that the repair process further contaminated or damaged the water line. Moreover, the offense of contaminating a public water system is a specific intent crime, meaning the State also would need to show that Hardison *intended* to further damage or contaminate the system during the repairs. *See* N.C. Gen. Stat. § 14-159.1(a)(2). But even the State's own theory of the case depended on evidence that Hardison wanted to repair, not damage, the system once she arrived on the scene. After all, Hardison's scheme depended on successfully repairing the damage so she could charge Pamlico County for doing so.

In sum, we are constrained to reverse Hardison's convictions. The State did not charge Hardison with conspiracy to commit those crimes, nor did it seek an instruction for accessory before the fact. The State's sole theory of criminal liability in this case turned on proving that Hardison acted in concert with Brame to damage the water lines. But the undisputed evidence at trial established that Hardison was not present, either actually or constructively, at the time Brame committed the crime. Accordingly, the trial court should have granted Hardison's motion to dismiss. Because we reverse Hardison's convictions for contaminating a public water system for these reasons, we need not address her remaining arguments challenging those convictions.

We note that the trial court arrested judgment on the charge of obtaining property by false pretenses. This Court recently held that "in the absence of some indication that the trial court's decision to arrest

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judgment stemmed from double jeopardy-related concerns, the effect of the decision to arrest judgment is to vacate the underlying conviction and preclude subsequent appellate review.” See *State v. Pendergraft*, ___ N.C. App. ___, 767 S.E.2d 674, 684 (2014) *aff’d without precedential value*, ___ N.C. ___, ___ S.E.2d ___ (2015). Accordingly, we do not review the merits of Hardison’s arguments concerning her conviction for obtaining property by false pretenses, which the trial court effectively vacated by arresting judgment.

Conclusion

The trial court’s judgment of conviction on all counts is reversed.

REVERSED.

Judges HUNTER, JR. and DILLON concur.

STATE OF NORTH CAROLINA

v.

RODERICK DEAN HARRIS, DEFENDANT

No. COA15-214

Filed 3 November 2015

1. Appeal and Error—preservation of issues—plain error—evidentiary and instructional errors

Issues involving instructional and evidentiary errors that defendant failed to preserve at trial were reviewed for plain error.

2. Sexual Offenses—first-degree sexual offense—lesser-included offense of sexual offense with a child by an adult—jury instructions

A conviction for a lesser-included offense, first-degree sexual offense, N.C.G.S. § 14-27.4(a)(1), was vacated and remanded for resentencing where defendant was indicted for that offense but the jury was instructed on sexual offense with a child, adult offender, N.C.G.S. § 14-27.4A(d). The difference between the two statutes concerns the defendant’s age, and this case cannot be distinguished from *State v. Hicks*, 239 N.C. App. 396 (2015) (“In essence, the trial court submitted to the jury the additional element that the State was not required to prove: that defendant was at least 18, an adult, at the time he committed the offense.”).

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3. Evidence—sexual abuse of a child—testimony of guidance counselor

The testimony of a school guidance counselor was admitted without plain error where defendant contended that the testimony implied that the Department of Social Services had substantiated the victim's claim. Even assuming the testimony was improper, the jury probably would not have reached a different verdict, in light of defendant's incriminating statements and the evidence corroborating the victim's allegations.

4. Evidence—sexual abuse of a child—testimony of therapist

There was no plain error in the admission of the testimony of a therapist specializing in children who have been sexually abused where defendant contended that a portion of her testimony constituted impermissible vouching for the victim's credibility. Defendant did not point to any part of the testimony where the witness opined that the abuse had occurred or that defendant was the abuser. The testimony concerned the treatment the therapist used; the victim's symptoms, which were consistent with trauma; and the purpose and process of writing a trauma narrative, which laid the foundation for the State to introduce the victim's narrative. The mere fact that the testimony supported the victim's credibility does not render it inadmissible.

5. Evidence—sexual abuse of a child—actions following medical evaluation

There was no plain error in a prosecution for sexual abuse of a child in the admission of testimony from a witness from SAFEchild Advocacy Center, which provides medical evaluations for children who may be victims of child abuse or neglect. The witness never asserted that the victim had been abused or explicitly commented on her credibility. The challenged portion of the testimony was nothing more than what the witness did at the conclusion of her examination and was within the permissible range of expert testimony in child sexual abuse cases.

Appeal by defendant from Judgment and Orders entered 13 August 2014 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 24 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

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[243 N.C. App. 728 (2015)]

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant.

ELMORE, Judge.

Roderick Dean Harris (defendant) appeals from a judgment of conviction for sexual offense with a child in violation of N.C. Gen. Stat. § 14-27.4A(a), and from accompanying orders requiring him to register as a sex offender and enroll in satellite-based monitoring (SBM) for life. On appeal, defendant principally argues that the trial court committed plain error by instructing the jury on section 14-27.4A(a) because he was indicted for violating a separate statute, section 14-27.4(a)(1). Therefore, defendant claims, the judgment of his conviction for section 14-27.4A(a) was improperly entered against him. Because we are bound by this Court's decision in *State v. Hicks*, ____, N.C. App. ____, 768 S.E.2d 373 (Feb. 17, 2015) (No. COA14-57), we vacate the judgment and remand for entry of judgment and resentencing on the charge of first-degree sexual offense in violation of section 14-27.4(a)(1). We find no other error.

I. Background

This case arises out of defendant's alleged sexual abuse of his stepdaughter, Kathy.¹ After Kathy's parents separated, defendant became romantically involved with Kathy's mother. He moved in with the family and married Kathy's mother several years later. The family moved around frequently, and Kathy's mother and defendant fought, separated, and reconciled a number of times.

Defendant began sexually abusing Kathy just after her tenth birthday. The first instance of sexual misconduct occurred when the family lived in Raleigh. Defendant came into Kathy's room and "wrestled" with her while they were alone. As Kathy was lying on her bed, defendant got on top of her and touched her vaginal area outside of her clothes, toying with her using his finger. The touching occurred multiple times while they lived there. On later occasions, defendant touched Kathy under her shorts but outside of her underwear.

When the family moved into a larger house in Louisburg, Kathy had her own room and the sexual misconduct happened more often. On more than one occasion, defendant touched Kathy under her underwear, putting his finger inside her vagina, and also touched her breasts. The

1. Kathy is a pseudonym used to protect the identity of the minor.

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touching continued after the family moved to Knightdale. When Kathy was in seventh grade, defendant continued to touch her vaginal area and her breasts but did not put his finger inside her vagina.

In October 2012, Kathy reported defendant's misconduct to Jan Gibson, a school guidance counselor. Gibson, in turn, filed a report with Child Protective Services (CPS). Kim Franklin, an investigator with CPS, was assigned to the case and interviewed Kathy. Kathy was also interviewed and examined by Holly Warner at the SAFEchild Advocacy Center, a nonprofit organization that provides medical evaluations for children who are suspected to be victims of child abuse or neglect.

Following the examination at SAFEchild, Kathy was treated by Alison Burke, a therapist who specializes in working with children who have been sexually abused. Burke performed an assessment and used trauma-focused cognitive behavioral therapy (TFCBT) to help treat Kathy. During treatment, Kathy talked about the sexual misconduct, how she felt, and wrote a "trauma narrative" describing what had happened.

The first of three warrants for defendant's arrest was issued on 30 October 2012 in Wake County. Defendant was interviewed by Kim Franklin and Knightdale Police that same day. The Wake County Grand Jury returned two separate bills of indictment: one on 26 November 2012, charging defendant with one count of sexual offense with a child and two counts of indecent liberties with a child; and another on 25 February 2013, charging defendant with one count of first-degree sexual offense and one count of indecent liberties with a child. On 30 September 2013, the Franklin County Grand Jury also returned a bill of indictment against defendant, charging him with first-degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1).²

The case out of Franklin County was then transferred to Wake County by agreement, and the three cases were joined and tried before a jury on 11 August 2014 in Wake County Superior Court. The court dismissed the two sex offense charges from Wake County at the close of

2. The caption on the left side of the indictment lists "14-27.4(a)(1)" as the "Offense in Violation," and on the right side the indictment reads, "INDICTMENT FIRST DEGREE STATUTORY SEXUAL OFFENSE (FEMALE OR MALE CHILD UNDER 13) (1116)." The text in the body of the indictment alleges the following:

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 the defendant named above unlawfully, willfully and feloniously did engage in a sex offense with [Kathy], a child under the age of 13 years.

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the evidence. The only remaining charges left to be submitted to the jury, therefore, were the sex offense arising out of Franklin County and the three indecent liberty offenses. The jury found defendant guilty of one count of sexual offense with a child in violation of section 14-27.4A(a) and two counts of indecent liberties with a child. The court arrested judgment on the third count of indecent liberties with a child.

Based on his prior record level IV, defendant was sentenced to a minimum of 365 and a maximum of 447 months for his conviction under section 14-27.4A(a). The two indecent liberties offenses were consolidated for sentencing, and the court sentenced defendant to a minimum of 24 and maximum of 29 months, set to begin at the expiration of the first sentence. The court also ordered defendant to register as a sex offender and enroll in SBM for life upon release from imprisonment.

Defendant gave oral notice of appeal in open court. He also filed a petition for writ of *certiorari* to this Court, since the sex offender registration and SBM are civil in nature and thus require written notice of appeal. N.C.R. App. P. 3(a) (2013); *Hicks*, ___ N.C. App. at ___, 768 S.E.2d at 375–76; *State v. White*, 162 N.C. App. 183, 190–98, 590 S.E.2d 448, 453–58 (2004). In our discretion, we allow defendant’s petition and review the merits of his appeal.

II. Analysis

A. Standard of Review

[1] We note at the outset that defendant failed to preserve at trial any of the issues he raises on appeal. *See* N.C.R. App. P. 10(a)(1) (2013) (“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.”).

Nevertheless, defendant contends that the alleged instructional and evidentiary errors committed by the trial court amount to plain error. *See* N.C.R. App. P. 10(a)(4) (“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.”); *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (“[P]lain error review in North Carolina is normally limited to instructional and evidentiary error.”) (citing *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39–40 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003)).

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We review for plain error those issues now before us on appeal.

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. 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.” *See id.* (citations and quotation marks omitted); *see also Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (stating “that absent the error the jury probably would have reached a different verdict” and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error). Moreover, because plain error is to be “applied cautiously and only in the exceptional case,” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, the error will often be one that “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *McCaskill*, 676 F.2d at 1002).

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334.

B. The Indictment and Charge to the Jury

[2] First, defendant argues that his conviction of sexual offense with a child and accompanying sentence was improperly entered against him. Specifically, defendant contends that the trial court committed plain error by instructing the jury on “sexual offense with a child; adult offender” in violation of N.C. Gen. Stat. § 14-27.4A(a) where the indictment charged defendant pursuant to N.C. Gen. Stat. § 14-27.4(a)(1), “first-degree sexual offense.”

“A valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony and have the jury determine his guilt or innocence, ‘and to give authority to the court to render a valid judgment.’” *State v. Moses*, 154 N.C. App. 332, 334, 572 S.E.2d 223, 226 (2002) (quoting *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968)). An indictment or other criminal pleading must contain the following:

A plain and concise factual statement in each count which, without allegations of an evidentiary nature, assert facts supporting every element of a criminal offense and the defendant’s commission thereof with sufficient precision

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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) (2013). “A defendant may not be lawfully convicted of an offense which is not charged in an indictment; if a defendant is found guilty of an offense for which he has not been charged, judgment thereon is properly arrested.” *Moses*, 154 N.C. App. at 334, 572 S.E.2d at 226.

N.C. Gen. Stat. § 14-27.4(a)(1) (2013), titled, “First-degree sexual offense,” provides in pertinent part as follows:

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

(1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim;

....

N.C. Gen. Stat. § 14-27.4A(a) (2013), titled, “Sexual offense with a child; adult offender,” provides in pertinent part as follows:

(a) A person is guilty of sexual offense with a child if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years.

N.C. Gen. Stat. § 14-27.4(a)(1) is a lesser included offense of section 14-27.4A(a). N.C. Gen. Stat. § 14-27.4A(d) (2013). Both statutes require the State to prove that the defendant engaged in a sexual act with a victim who was a child under the age of thirteen. The difference between the two statutes concerns the defendant’s age: section 14-27.4(a)(1) requires the State to prove that the defendant was at least twelve years old and at least four years older than the victim, whereas section 14-27.4A(a) requires the State to prove that the defendant was at least eighteen years old. *See Hicks*, ___ N.C. App. at ___, 768 S.E.2d at 379 (explaining the difference between section 14-27.4(a)(1) and section 14-27.4A(a)); *see also id.* at ___, 768 S.E.2d at 381 (urging the North Carolina General Assembly “to consider reorganizing, renaming, and renumbering the various sexual offenses to make them more easily distinguishable from one another”); 2015 N.C. Sess. Laws 2015-181 (H.B. 383). In addition, while each offense is punishable as a Class B1 felony, a conviction under § 14-27.4A(a) carries an active punishment of no less than 300 months’ imprisonment. N.C. Gen. Stat. §§ 14-27.4(b), 14-27.4A(b) (2013).

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In support of his argument, defendant relies almost exclusively on this Court's decision in *State v. Hicks*. In *Hicks*, the defendant was indicted for violating N.C. Gen. Stat. § 14-27.4(a)(1). *Hicks* ___ N.C. App. at ___, 768 S.E.2d at 379. The trial court, however, instructed the jury on section 14-27.4A(a), the crime for which the defendant was ultimately convicted. *Id.* at ___, ___, 768 S.E.2d at 374, 379. This Court explained, "In essence, the trial court submitted to the jury an additional element that the State was not required to prove: that defendant was at least 18, an adult, at the time he committed the offense." *Id.* at ___, 768 S.E.2d at 379. Because the indictment did not allege that the defendant was at least eighteen years old, an essential element of section 14-27.4A(a), this Court vacated the judgment and remanded for sentencing and entry of judgment of conviction of section 14-27.4(a)(1), the lesser-included offense. *Id.* at ___, 768 S.E.2d at 379–81 (citing *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986); *State v. Bullock*, 154 N.C. App. 234, 245, 574 S.E.2d 17, 24 (2002)); see also *State v. Jones*, 317 N.C. 487, 495, 346 S.E.2d 657, 661 (1986) (vacating judgment of conviction for first-degree rape and remanding for entry of judgment of conviction for second-degree rape and resentencing because "[i]n finding the defendant guilty of first-degree rape, the jury necessarily found the existence of all the necessary elements of second-degree rape, a lesser-included offense"); *State v. Miller*, 137 N.C. App. 450, 458–59, 528 S.E.2d 626, 631 (2000) ("[O]ur Supreme Court has held it to be a basic violation of due process, amounting to plain error, where a jury is instructed as to an offense which is not charged in the bill of indictment." (citation omitted)).

Despite the State's position to the contrary, we are unable to distinguish the present case from *Hicks*. We are bound by *Hicks* and apply it here.³ *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 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

3. While it may be implicit in the decision, *Hicks* does not explicitly address whether the text of the short-form indictment is sufficient in law under N.C. Gen. Stat. § 15-144.2(b) (2013) to sustain a conviction under either section 14-27.4A(a) or section 14-27.4(a)(1). We do note, however, that our Supreme Court has previously alluded to this issue. See *State v. Jones*, 317 N.C. 487, 492, 346 S.E.2d 657, 660 (1986) ("[W]hether the fundamental concerns expressed in *Sills* are protected when the caption of a short-form indictment specifies an offense less serious than the maximum offense supported by the indictment and the defendant is nevertheless ultimately convicted of the maximum offense is a question not heretofore addressed by this Court.").

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court.”). Accordingly, the judgment entered on defendant’s conviction under section 14-27.4A(a) is vacated. We remand for entry of judgment of conviction for the lesser-included offense, section 14-27.4(a)(1), and appropriate resentencing.

C. The School Counselor’s Testimony

[3] Second, defendant argues that the trial court committed plain error by allowing Jan Gibson’s testimony which, according to defendant, implied that DSS had substantiated Kathy’s claim that defendant sexually abused her.

“[A] witness may not vouch for the credibility of a victim.” *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009) (citations omitted), *aff’d per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010); *see also* N.C. Gen. Stat. § 8C-1, Rules 608(a), 701–03 (2013). In *Giddens*, this Court concluded that it was plain error for a DSS investigator to testify that DSS had “substantiated” the defendant as the perpetrator and believed the abuse did occur based on the evidence DSS had gathered where, absent the testimony, “the jury would have been left with only the children’s testimony and the evidence corroborating their testimony.” *Giddens*, 199 N.C. App. at 119–23, 681 S.E.2d at 507–09; *see also State v. Couser*, 163 N.C. App. 727, 731, 594 S.E.2d 420, 423 (2004) (“Thus, the central issue to be decided by the jury was the credibility of the victim.”). In contrast, even where testimony that sexual abuse had occurred was improperly admitted, we have found that the error did not rise to plain error where the evidence against the defendant amounted to something more than just the victim’s testimony and corroborating evidence. *State v. Sprouse*, 217 N.C. App. 230, 242, 719 S.E.2d 234, 243 (2011) (finding no plain error because “[u]nlike *Giddens*, absent the challenged testimony, the present case involved more evidence of guilt against the defendant than simply the testimony of the child victim and the corroborating witnesses”); *State v. Stancil*, 146 N.C. App. 234, 240, 552 S.E.2d 212, 216 (2001) (finding no plain error where the jury had before it evidence of victim’s symptoms and two experts’ conclusions that victim’s actions and statements were consistent with abuse), *modified and aff’d*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002).

In the present case, even assuming *arguendo* that Gibson’s testimony was improper, our review of the record on appeal leads us to conclude that it was not received in plain error. Gibson testified on direct examination that she reported Kathy’s allegations to DSS, as mandated by law. Gibson then testified as follows:

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Q. Have you had occasion in the past to make reports to the Department of Social Services?

A. Many times.

Q. And to your knowledge, are they required to follow up on all the calls that are made?

A. They are not. They decide at the intake unit if that is a substantiated report, if they can substantiate it or not; and if they do, then they follow up on it.

Q. And with respect at least to the allegations of stepfather and child, did you believe that someone would follow up with [Kathy]?

A. Yes, they told me they would.

Q. Okay.

A. And I received a letter to that effect.

....

Q. Okay. And you said at some point later, you found out that CPS had investigated the case?

A. Yes, they sent me a letter saying that—

MR. KELLY: Objection.

Q. Let me make sure.

THE COURT: Sustained. Go ahead.

Q. They followed up with you that they had done an investigation?

A. Yes, I received a letter saying—

MR. KELLY: Objection.

THE COURT: Sustained.

Although Gibson is not employed by DSS and did not testify directly as to the conclusion reached by DSS investigators, defendant insists that we apply *Giddens* to these facts. Unlike *Giddens*, however, where the sole issue to be decided was the victims' credibility, here the evidence against defendant did not solely consist of Kathy's allegations and corroborative testimony. The jury heard audio from defendant's interview with DSS and Knightdale Police, in which he admitted that he had been

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touching Kathy and that “it turned corrupt.” In the same interview, defendant told a Knightdale police detective that he had become “aroused by the stimulation.” Defendant also said, “We played a lot. You know, and . . . I just don’t know how it could turn like this—how I could turn like this.” Furthermore, the jury heard audio from a phone call made by defendant to his wife, Kathy’s mother, from jail. As he was crying, defendant told her that he was sorry for what he had done and he would “accept the consequences.”

In light of defendant’s incriminating statements and the evidence corroborating Kathy’s allegations, we conclude that Gibson’s testimony was not received in plain error. Even if we accept the premise that Gibson’s testimony was erroneous, defendant has failed to show that, absent the error, the jury probably would have reached a different verdict.

D. Expert Testimony From Child’s Therapist

[4] Third, defendant argues that the trial court committed plain error by admitting Allison Burke’s testimony regarding Kathy’s placement in TFCBT and the therapy process in general. Defendant claims that this portion of Burke’s testimony constituted impermissible vouching for Kathy’s credibility.

“Expert opinion testimony is not admissible to establish the credibility of the victim as a witness.” *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (2002) (citing *State v. Kim*, 318 N.C. 614, 350 S.E.2d 347 (1986)), *aff’d per curiam*, 356 N.C. 428, 571 S.E.2d 584 (2002). “In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has in fact occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim’s credibility.” *State v. Stancil*, 355 N.C. 266, 266–67, 559 S.E.2d 788, 789 (2002) (citations omitted). “However, those cases in which the disputed testimony concerns the credibility of a witness’s accusation of a defendant must be distinguished from cases in which the expert’s testimony relates to a diagnosis based on the expert’s examination of the witness.” *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988). “[A]n expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.” *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789 (citations omitted); *see also State v. Hall*, 330 N.C. 808, 821, 412 S.E.2d 883, 890 (1992) (concluding that evidence of PTSD should not be admitted substantively to prove that a rape has in fact occurred, but allowing such evidence for certain corroborative

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purposes). “The fact that this evidence may support the credibility of the victim does not alone render it inadmissible.” *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 367 (1987).

Defendant maintains that Burke’s testimony amounted to an expert opinion that Kathy was credible and that defendant was guilty as charged, but fails to point to any portion of Burke’s testimony where she opined that Kathy was sexually abused by defendant or stated that sexual abuse did in fact occur. Burke explained how TFCBT is used to help treat victims in cases of sexual abuse and described therapeutic techniques that she employs in her treatment. She testified that Kathy had symptoms consistent with trauma, and explained the purpose and process of writing a “trauma narrative.” Her explanation laid the foundation for the State to introduce Kathy’s “trauma narrative,” which included Kathy’s written statement about what happened to her. The narrative itself was introduced solely for the purpose of corroborating Kathy’s testimony. The mere fact that Burke’s testimony supports Kathy’s credibility does not render it inadmissible. Accordingly, we find no error—and certainly no plain error—in the trial court’s receipt of Burke’s testimony.

E. Expert Testimony From Nurse Practitioner

[5] Finally, defendant argues that the trial court committed plain error by permitting Holly Warner to testify that she recommended Kathy for therapy despite finding no physical evidence of abuse, and that she referred to Kathy’s mother as the “non-offending” caregiver. Warner’s testimony, defendant argues, “impermissibly bolstered Kathy’s credibility and constituted opinion evidence as to guilt.”

Defendant relies principally on *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012), in support of his argument. In *Towe*, an expert testified at trial that “approximately 70 to 75 percent of children who have been sexually abused have no abnormal findings, meaning that the exams are either completely normal or [sic] very non-specific findings, such as redness.” *Id.* at 60, 732 S.E.2d at 566. The expert went on to testify that she would place the victim in that category of children who had been sexually abused but showed no physical symptoms of abuse. *Id.* Our Supreme Court concluded that the expert’s testimony was received in plain error:

In the absence of physical evidence of sexual abuse in this case, the only bases for [the expert’s] conclusory assertion that the victim had been sexually abused were the victim’s history as relayed to [the expert] by the victim’s mother and the victim’s statements to [the social worker]

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that were observed by [the expert]—evidence that, standing alone, is insufficient to support an expert opinion that a child was sexually abused.

Id. at 62, 732 S.E.2d at 568.

The facts in *Towe* are easily distinguishable from those in the present case. Most notably, while Warner testified that she recommended Kathy be referred for therapy, Warner never asserted that Kathy had been sexually abused or explicitly commented on Kathy's credibility. Rather, the challenged portion of Warner's testimony was nothing more than a recitation of facts as to what she did at the conclusion of her examination and was within "the permissible range of expert testimony in child sexual abuse cases." *Towe*, 366 N.C. at 64, 732 S.E.2d at 569. In addition, Warner explained that the Center uses the term "non-offending caregiver" in reference to the person with whom the child will be going home, and that "any parent or caregiver who is suspected of being an offending caregiver is not allowed in the center." Warner never testified that defendant was an "offending caregiver" and even if she had, her testimony makes clear that the term does not mean that defendant is guilty. Accordingly, we find no error or plain error in the trial court's admission of Warner's testimony.

III. Conclusion

In accordance with *Hicks*, ___ N.C. App. at ___, 768 S.E.2d at 379–81, we vacate the judgment of defendant's conviction for sexual offense with a child in violation of N.C. Gen. Stat. § 14-27.4A(a). The case is remanded for entry of judgment of conviction for first-degree sexual offense in violation of section 14-27.4(a)(1) and for appropriate resentencing.

NO ERROR in part; VACATED AND REMANDED in part; NEW SENTENCING.

Chief Judge McGEE and Judge DAVIS concur.

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STATE OF NORTH CAROLINA

v.

TARRENCE SHAKIL HAZEL

No. COA15-243

Filed 3 November 2015

Criminal Law—jury question—referral to written instructions

The trial court did not abuse its discretion in a prosecution for felony murder and armed robbery where the trial court correctly instructed the jury on the offenses, properly responded to a jury question by instructing the jury to reread the written instructions previously given to them, and gave the jury separate verdict sheets for each count that allowed them to select “not guilty” for each offense.

Appeal by defendant from judgments entered 1 August 2014 by Judge James Gregory Bell in Columbus County Superior Court. Heard in the Court of Appeals 8 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Dahr Joseph Tanoury, for the State.

Paul F. Herzog for defendant-appellant.

BRYANT, Judge.

Tarrence Shakil Hazel (“defendant”) appeals from judgments entered upon jury verdicts finding him guilty of robbery with a firearm and first-degree murder under the felony murder rule. We uphold the verdict of the jury and find no error in the judgment of the trial court.

On 13 April 2012, Marquice Antone shot and killed his uncle by marriage, Keith Gachette, inside Gachette’s Columbus County home. Defendant and Kenneth Williams were also present during the shooting. Kenneth Williams testified for the State pursuant to a plea bargain, wherein he pled guilty to accessory after the fact to murder. Williams testified that he, Antone, and defendant had planned to break into the Gachette home and steal Gachette’s guns and jewelry on 12 April 2013, provided no one was home. Gachette was a gun collector who owned a number of rifles and handguns. Defendant, who was eighteen years old and had a car, drove Antone and Williams, who were each sixteen years

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old, to the Gachette home, where they were all admitted by Gachette. After this visit, Williams testified that the group then went to Williams's home and talked. According to Williams, Antone asked defendant if they could "go back over there tomorrow and try again" to break in and steal Gachette's guns. Williams and defendant agreed.

On 13 April 2013, Williams and Antone walked to defendant's house to get a ride to the Gachette residence. According to Williams, Antone told them that if Gachette was at home, Antone would simply ask his uncle for money, even though the real purpose of the visit was to "get guns." When the group arrived at the Gachette residence, all three were admitted by Gachette, and they all took seats at the dining room table. After about fifteen minutes of conversation, Williams heard Antone ask Gachette if he had any gun oil, at which point Williams looked up to see Antone pull out a gun and fire it. The shot hit Gachette's computer, which was in the living room. Gachette ordered the group to leave. Antone fired again, shooting Gachette in the head, then walked over and fired at Gachette a third time. Antone ordered Williams and defendant to come to him as he stood over Gachette's body, then told them to take the guns. Williams took two rifles from the gun rack and put them in the trunk of defendant's car.

Defendant also took a gun handed to him by Antone while Antone took additional guns from a gun rack in the house. According to Williams, when defendant left the house, he was carrying a pink bag, later determined to contain jewelry, in addition to a handgun. Antone came outside with a rifle and a handgun. The group left the scene in defendant's car and drove toward Bolton.

After arriving in Bolton, they went to a park. According to Williams, Antone had defendant call an individual named Jamal. Antone wanted to know if Jamal could hold the stolen property for them. Jamal apparently refused. After this phone call, Williams testified defendant drove off in his car by himself, leaving Williams and Antone in the park. Defendant returned about ten minutes later and said that he could not find anybody "to hold the guns."

Defendant testified that during this ten-minute interval he drove to Brianna Webb's house. While he was talking to Webb, she saw the pink pouch in the back seat of defendant's car. When she asked to have it, defendant let her take it. Defendant then returned to the park where Antone and Williams were waiting. Defendant testified that he told Williams and Antone that "this stuff [the guns] has to come out of my car."

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They all got back into defendant's car and drove off, ending up on a dirt road near Lake Waccamaw. They attempted to hide the guns under an abandoned house but were interrupted by an approaching car. They left that location, heading toward the town of Hallsboro, still in possession of one rifle and some handguns. Antone asked Williams if he wanted the handguns, but Williams declined. Antone said he was going to throw the guns out the window, but Williams did not know if he actually did so.

The three went to Williams's home, where Antone asked Williams for a duffel bag. Antone hid the remaining rifle inside the duffel bag and left Williams's home, having friends pick him up. Defendant then left as well.

Defendant was indicted on charges of first-degree murder and robbery with a dangerous weapon on 9 May 2012, and arrested shortly thereafter. Defendant was tried during a late July 2014 term of court in Columbus County, the Honorable James Gregory Bell, judge presiding.

At trial, once the jurors began deliberations, they requested a written copy of the trial court's instructions. The trial court provided the jury with written instructions on "all the substantive charges." Later that day, the jury sent a note containing the following question: "To clarify . . . can this defendant be found guilty of the robbery charge and then found not guilty of the murder charge?" Defense counsel indicated that the question should be answered "yes," and the prosecutor thought it should be answered "no." After the parties were given an opportunity to research the issue, and after the trial court had conducted independent legal research as well, the trial court indicated it would tell the jury to read the instructions and would not answer the question yes or no. Defense counsel responded:

[Defense counsel]: I'm not denying the Court has the discretion to do that, I'm not suggesting that you must answer the question, but I think that is a matter the Appellate Courts of North Carolina have clearly said is within your discretion. But technically the answer is yes.

. . .

THE COURT: All right. . . I'm not going to answer yes or no, I am going to give you the written copies of the instructions, they can go back and read the instructions. Anybody want to say anything about that?

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The following day, the jurors, using separate verdict sheets, convicted defendant of robbery with a firearm and first-degree murder based on the felony murder rule. Defendant appeals.

On appeal, defendant raises only one issue: whether the trial court committed prejudicial error in failing to answer “yes” or “no” to the following question from the jury: “Can this defendant be found guilty of the robbery charge and then found not guilty of the murder charge?” We conclude the trial court acted within its discretion.

This Court recognizes that “the trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court’s instructions.” *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986). Thus, whether to give additional instructions to the jury is within the trial court’s discretion:

- (a) After the jury retires for deliberation, the judge *may* give appropriate additional instructions to:
 - (1) Respond to an inquiry of the jury made in open court; or
 - (2) Correct or withdraw an error;
 - (3) Clarify an ambiguous instruction; or
 - (4) Instruct the jury on a point of law which should have been covered in the original instructions.
- (b) At any time the judge gives additional instructions, he may also give or repeat other instructions to avoid giving undue prominence to the additional instructions.
- (c) Before the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard.

N.C. Gen. Stat. § 15A-1234 (2013) (emphasis added). “[T]he trial court is not required to repeat instructions which have been previously given absent an error in the charge.” *State v. Moore*, 339 N.C. 456, 464, 451 S.E.2d 232, 236 (1994).

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Defendant argues that the trial court's response to the jury's question should either have been (1) a "yes" response, as requested by defendant, or (2) at least a response instructing the jury to consider each charge against defendant separately. Either of these responses, defendant argues, would have properly conveyed to the jury that its finding on the robbery charge did not automatically dictate the verdict on the murder charge. Defendant nonetheless conceded at trial that the trial court's choice of response was "a matter that the Appellate Courts of North Carolina have clearly said is within [the trial court's] discretion." Thus, the trial court's response instructing the jury to reread the instructions, without answering the specific question, was well within its discretion.

Defendant cites *State v. Bromfield*, 332 N.C. 24, 418 S.E.2d 491 (1992), in support of his contention that the trial court erred. In *Bromfield*, the jury asked the trial court a question almost identical to the one asked in defendant's trial: " 'If [defendant is] found guilty of robbery with a dangerous weapon, must [the jury] automatically find him guilty of felony murder?' " *Id.* at 332 N.C. at 45, 418 S.E.2d at 503. After soliciting comment from both defense counsel and the prosecutor, the trial court clarified the instruction, stating that the jury was "to consider each case separately on its own merits You're to consider each count in each case separately, independently." *Id.* at 46, 418 S.E.2d at 503. The North Carolina Supreme Court held that the trial court's choice to repeat the instructions substantially in accordance with defense counsel's suggestion "was carefully designed to prevent confusion by the jury." *Id.*

Here, it is undisputed that the trial court correctly instructed the jury on the separate offenses of robbery with a firearm and first-degree murder in perpetration of a felony. Additionally, like the trial court in *Bromfield*, the trial court in the instant case solicited comment and advice from defense counsel and the prosecutor with regard to an appropriate response to the jury's question. In its discretion, the trial court then decided that it would instruct the jurors to reread their written copies of the instructions previously given and that the court would not answer "yes" or "no" to the jury's question.

While the trial court here did not clarify the instructions by telling the jury to "treat each count separately," as the trial judge did in *Bromfield*, failure to do so in the instant case could not be error where the trial court has discretion in its response to the jury's request. See *Prevette*, 317 N.C. at 164, 345 S.E.2d at 169. Further, the jury was handed separate and distinct verdict sheets with which they were to enter individual verdicts of either guilty or not guilty as to each charge. Therefore,

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the trial court's action in response to the jury's question was well within its discretion and proper as a matter of law. *See id.*

Defendant's argument is overruled where: (1) it is undisputed that the trial court correctly instructed the jury on the separate offenses of robbery with a firearm and first-degree murder in perpetration of a felony; (2) the court properly responded to the jury's question by instructing the jury to reread the written instructions previously given to them; and (3) the jury was given separate verdict sheets for each count that allowed them to select "not guilty" for each offense. Accordingly, defendant's trial was free from error.

NO ERROR.

Judges TYSON and INMAN concur.

STATE OF NORTH CAROLINA

v.

DONNA HELMS LEDBETTER

No. COA15-414

Filed 3 November 2015

1. Appeal and Error—right to appeal after guilty plea—no motion to suppress

Defendant had no statutory right to appeal the trial court's denial of her motion to dismiss after a guilty plea to a misdemeanor (driving while impaired) was entered. Defendant did not file a motion to suppress and has no right of appeal after denial of her motion to dismiss and entry of a plea of guilty.

2. Appeal and Error—writ of certiorari on appeal—outside of Appellate Rules authority

Defendant's appeal from a guilty plea to driving while impaired was dismissed where she contended that the Court of Appeals had the authority to issue a writ of certiorari. Defendant's petition did not invoke any of the three grounds set forth in Appellate Rule 21 to enable the Court of Appeals to issue the writ under that rule, and defendant did not demonstrate the 'exceptional circumstances' necessary to invoke Rule 2 and suspend the requirements of Rule 21 to review the merits of her argument by certiorari.

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Appeal by defendant from judgment entered 27 October 2014 by Judge Jeffrey P. Hunt in Rowan County Superior Court. Heard in the Court of Appeals 8 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Ashleigh P. Dunston, for the State.

Meghan A. Jones, for defendant-appellant.

TYSON, Judge.

Donna Helms Ledbetter (“Defendant”) appeals from judgment entered after she pleaded guilty to driving while impaired. Defendant does not have a statutory right to appeal the issue she raised. Rule 21 of the North Carolina Rules of Appellate Procedure does not set forth the grounds Defendant asserts to issue the requested writ. We decline to suspend the Rules of Appellate Procedure to exercise our jurisdiction under N.C. Gen. Stat. § 1444(e) to issue the writ. We deny Defendant’s petition for writ of certiorari and dismiss the appeal.

I. Background

Around 7:30 p.m. on 1 January 2013, Rowan County Sheriff’s Deputy Daniel Myers (“Deputy Myers”) was called to the Enochville Food Center in Kannapolis, North Carolina. Upon arrival, Deputy Myers observed Defendant seated behind the wheel of the car, “slumped over,” and apparently unconscious. The keys were in the ignition. Deputy Myers knocked on the window and instructed Defendant to exit the vehicle. Deputy Myers never observed Defendant drive the vehicle.

Deputy Myers conducted three separate field sobriety tests on Defendant: (1) the Horizontal Gaze Nystagmus test (HGN test); (2) the one-leg stand test; and (3) the walk-and-turn test. During the HGN test, Deputy Myers had to remind Defendant to keep her head still several times. The HGN test revealed five out of six indicators for impairment. During the one-leg stand test, Deputy Myers had to twice tell Defendant to not start before being told to do so, and to keep her hands by her side.

During the walk-and-turn test, Defendant lost her balance a couple of times, used her arms to balance repeatedly, and missed the heel-toe twice. Defendant made a 560-degree turn, rather than a 360-degree turn, and proceeded to walk backwards towards Deputy Myers. Deputy Myers administered an Alco-Sensor portable breath test to Defendant, which registered a negative reading for alcohol.

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Defendant admitted she had taken Xanax and Oxymorphone about an hour prior to her encounter with Deputy Myers. Based upon his interactions with Defendant, Deputy Myers concluded Defendant was appreciably impaired and placed her under arrest for driving while impaired.

Defendant was transported to the Rowan Regional Medical Center for a blood test. Following the blood test, Defendant was transported to the Rowan County Magistrate's Office, where she appeared before Magistrate Todd Wyrick ("Magistrate Wyrick"). After speaking with Deputy Myers, Magistrate Wyrick found probable cause to believe Defendant was a danger to herself or others.

The detention order contains a findings of fact section, where the magistrate enters why Defendant posed a danger to herself or others. Magistrate Wyrick simply typed "BLOOD TEST" in this section. Magistrate Wyrick found probable cause to detain Defendant as an impaired driver.

The detention order required Defendant remain in custody for a 12-hour period or until released into the custody of a sober adult. Magistrate Wyrick failed to instruct Defendant to fill out an "implied consent offense notice" form ("Form AOC-271"), which advises a defendant of her right to have "other persons appear at the jail to observe [her] condition."

After her appearance before Magistrate Wyrick, Defendant was transported to the Rowan County Jail. Defendant used a phone at the jail to call several friends and acquaintances and asked them to come to the jail to allow her to be released into their custody. Defendant was released into the custody of Kenneth Paxton at 12:24 a.m. on 2 January 2013.

Defendant filed a motion to dismiss the charges on 23 December 2013. She argued the State violated N.C. Gen. Stat. § 20-38.4 and *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988), when Magistrate Wyrick: (1) failed to provide sufficient findings of fact to show Defendant was a danger to herself and others; and (2) failed to provide Defendant a copy of Form AOC-271 advising of her right to have witnesses observe her demeanor at the jail. The trial court denied Defendant's motion on 20 October 2014.

Following the court's denial of her motion, Defendant entered a plea of guilty. The plea arrangement states "[Defendant] expressly retains the right to appeal the Court's denial of her motion to dismiss/suppress her Driving While Impaired charge in this case and her plea of guilty is conditioned based on her right to appeal that decision[.]" Defendant appeals.

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II. Issue

Defendant asserts the trial court erred in denying her motion to dismiss. She argues a substantial violation occurred during the crucial period in which she could have gathered witnesses on her behalf and she was deprived of her statutory and constitutional rights of access to witnesses.

III. Right to Appeal

[1] The State filed a motion to dismiss Defendant’s appeal. It argues Defendant has no statutory right to appeal the trial court’s denial of her motion to dismiss when a plea of guilty has been entered. We agree.

A defendant’s right to appeal in a criminal proceeding in North Carolina “is purely a creation of state statute.” *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. rev. denied*, 356 N.C. 442, 573 S.E.2d 163 (2002) (citations omitted); N.C. Gen. Stat. § 15A-1444 (2013). Absent express statutory authority, a criminal defendant does not have a state right to appeal from a judgment entered upon her conviction under N.C. Gen. Stat. § 15A-1444. *Id.*; *see also State v. Ahern*, 307 N.C. 584, 605, 300 S.E.2d 689, 702 (1989) (quoting N.C. Gen. Stat. § 15A-1444(e)) (noting that except as provided in N.C. Gen. Stat. §§ 15A-1444 and 15A-979, a defendant has no right of appeal from the entry of a guilty plea). No federal constitutional right obligates state courts to hear appeals in criminal proceedings. *E.g., Abney v. United States*, 431 U.S. 651, 656, 52 L. Ed. 2d 651, 657 (1977).

A. N.C. Gen. Stat. §§ 15A-1444 and 15A-979(b)

The circumstances under which a defendant may appeal a guilty plea and conviction are found in N.C. Gen. Stat. §§ 15A-1444 and 15A-979(b). A defendant who has pleaded guilty to a misdemeanor, as here, is entitled to appeal as a matter of right 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

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the defendant's class of offense and prior record or conviction level.

N.C. Gen. Stat. § 15A-1444(a2) (2013).

Defendant attempts to appeal as a matter of right from an order denying her motion to dismiss prior to her guilty plea. This issue is not listed as one of the grounds for appeal of right set forth in N.C. Gen. Stat. § 15A-1444. Defendant contends that an appeal of right is proper pursuant to N.C. Gen. Stat. § 15A-979(b), which provides:

An order finally denying a *motion to suppress* evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.

N.C. Gen. Stat. § 15A-979(b) (2013) (emphasis supplied). We disagree.

In this case, Defendant filed a "MOTION TO DISMISS DWI CHARGE." In her motion to dismiss, Defendant stated "pursuant to N.C. Gen. Stat. § 15A-954, [Defendant] moves the Court for an Order dismissing" the charge of DWI.

While the trial court's order denying Defendant's motion was styled "order on motion to suppress Defendant's DWI Charge," and Defendant's transcript of plea purported to reserve a right to appeal the Court's denial of her "motion to dismiss/suppress," a review of the record and the transcripts of Defendant's motion hearing and plea hearing reveals the only motion filed by Defendant was the motion to dismiss. Defendant's motion specifically cited N.C. Gen. Stat. § 15A-954, North Carolina's motion to dismiss statute. Defendant did not file a motion to suppress and has no right of appeal after denial of her motion to dismiss and entering a plea of guilty. N.C. Gen. Stat. §§ 15A-1444 and 15A-979(b).

The facts of this case are substantially similar to the circumstances presented in *State v. Rinehart*, 195 N.C. App 774, 673 S.E.2d 769 (2009). In *Rinehart*, the defendant made two pre-trial motions to dismiss. 195 N.C. App at 775, 673 S.E.2d at 770. Both were denied. *Id.* Following the denial of the motions to dismiss, the defendant entered a plea of guilty, while reserving the right to appeal the denial of his motions to dismiss. *Id.* On appeal, the defendant argued the trial court erred in denying his motions to dismiss. *Id.*

Our Court held the defendant did not have a right to appeal from a denial of his motions to dismiss after his plea of guilty was entered. *See id.* at 776, 673 S.E.2d at 770-71; *see also id.* at 776 n.1, 673 S.E.2d at

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771 n.1. The holding in *Rinehart* was later characterized, in relevant part, as follows:

The defendant in *Rinehart* appealed only from motions to dismiss; he did not additionally attempt to appeal from any order for which an appeal of right existed. Since the *Rinehart* defendant did not attempt to appeal from any order for which an appeal of right existed, his appeal was appropriately dismissed.

State v. White, 213 N.C. App. 181, 185-86, 711 S.E.2d 862, 865 (2011).

B. *State v. Chavez* and *State v. Labinski*

Our Court has long held a defendant is limited to a right to appeal from a judgment entered following a guilty plea as prescribed in N.C. Gen. Stat. §§ 15A-1444 and 15A-979(b). *See, e.g., State v. Carter*, 167 N.C. App. 582, 584, 605 S.E.2d 676, 678 (2004); *State v. Jeffery*, 167 N.C. App. 575, 578, 605 S.E.2d 672, 674 (2004); *State v. Jamerson*, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47 (2003).

Defendant argues the State's motion to dismiss her appeal should be denied. She cites two cases in which this Court reviewed the trial court's denial of a defendant's motion to dismiss based on a *Knoll* violation following a plea of guilty. *See State v. Chavez*, ___ N.C. App. ___, 767 S.E.2d 581 (2014); *State v. Labinski*, 188 N.C. App. 120, 654 S.E.2d 740 (2008). The Court in both the *Chavez* and *Labinski* cases reached the merits of the respective defendant's appeals without any discussion of, or citation to, N.C. Gen. Stat. §§ 15A-1444, 15A-979(b), or our precedents in *Carter*, *Jeffery*, or *Jamerson*.

We are bound by the decisions of our Supreme Court and by prior decisions of another panel of our Court addressing the same question, unless overturned by an intervening decision from a higher court. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Where apparent inconsistency exists between precedents of this Court, the oldest controlling case prevails. *State v. Harris*, ___ N.C. App. ___, ___, 776 S.E.2d 554, 556 (2015).

We are required to follow longstanding precedents, which hold a defendant's right to appeal from a judgment following a plea of guilty is limited to the grounds enumerated in N.C. Gen. Stat. §§ 15A-1444 and 15A-979(b). *Carter*, 167 N.C. App. at 584, 605 S.E.2d at 678; *Jeffery*, 167 N.C. App. at 578, 605 S.E.2d at 674; *Jamerson*, 161 N.C. App. at 528-29, 588 S.E.2d at 546-47. Under these facts, Defendant does not have a statutory

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right to appeal from the trial court's denial of her motion to dismiss followed by a plea of guilty. Defendant's appeal is dismissed.

IV. Writ of Certiorari

[2] Defendant petitioned this Court for a writ of certiorari to review the trial court's denial of her motion to dismiss. Defendant contends this Court has authority to issue the writ of certiorari pursuant to N.C. R. App. P. 21 and N.C. Gen. Stat. § 15A-1444(e). The Rules of Appellate Procedure do not allow us to issue the requested writ under these facts. We decline to invoke Appellate Rule 2 to suspend Appellate Rule 21 to exercise our discretion pursuant to N.C. Gen. Stat. § 15A-1444(e) to grant the writ.

Although N.C. Gen. Stat. § 15A-1444(e) states a defendant who pleads guilty to a criminal offense "may petition the appellate division for review by writ of certiorari," this Court's authority to issue writs of certiorari is circumscribed by the North Carolina Rules of Appellate Procedure. Appellate Rule 21(a)(1) limits the Court's ability to grant petitions for writ of certiorari to the following situations: (1) "when the right to prosecute an appeal has been lost by failure to take timely action;" (2) "when no right of appeal from an interlocutory order exists;" or (3) to "review pursuant to [N.C. Gen. Stat.] § 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) (2015); *see State v. Stubbs*, ___ N.C. ___, ___, 770 S.E.2d 74, 76 (2015) (noting a writ of certiorari is appropriate to review the State's appeal of a trial court's grant of the defendant's motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1422(c)(3)). Here, Defendant's petition under N.C. Gen. Stat. § 15A-1444(e) does not invoke any of the three grounds set forth in Appellate Rule 21 to enable this Court to issue the writ under this rule. N.C. R. App. P. 21(a)(1).

"In considering [A]ppellate Rule 21 and N.C. Gen. Stat. § 15A-1444, this Court has reasoned that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of certiorari except as provided in [Appellate] Rule 21." *State v. Smith*, 193 N.C. App. 739, 742, 668 S.E.2d 612, 614 (2008); *see also State v. Nance*, 155 N.C. App. 773, 774, 574 S.E.2d 692, 693 (2003); *Pimental*, 153 N.C. App. at 73-74, 568 S.E.2d at 870; *State v. Dickson*, 151 N.C. App. 136, 137-38, 564 S.E.2d 640, 640-41 (2002).

These holdings are rooted in precedents from our Supreme Court. *See State v. Bennett*, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983) (noting because rules of practice and procedure are "promulgated

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by the Supreme Court pursuant to its exclusive authority under the Constitution of North Carolina, Article IV, Section 13(2),” where a statute is in conflict with an appellate rule, “the statute must fail.”); *see also State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (striking down Rule of Evidence 103(a)(2) “to the extent it conflicts with Rule of Appellate Procedure 10(b)(1)”).

A. Suspension of Rule 21(a)(1)

Precedents from our Supreme Court and this Court issued a writ of certiorari in circumstances not set forth by Appellate Rule 21(a)(1). *See Ahearn*, 307 N.C. at 605, 300 S.E.2d at 702; *State v. Bolinger*, 320 N.C. 596, 601-02, 359 S.E.2d 459, 462 (1987); *State v. O’Neal*, 116 N.C. App. 390, 394-95, 448 S.E.2d 306, 310, *disc. rev. denied*, 338 N.C. 522, 452 S.E.2d 821 (1994); *see also State v. Demaio*, 216 N.C. App. 558, 563-64, 716 S.E.2d 863, 866-67 (2011); *State v. Blount*, 209 N.C. App. 340, 345, 703 S.E.2d 921, 925 (2011); *State v. Keller*, 198 N.C. App. 639, 641-42, 680 S.E.2d 212, 213-14 (2009); *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006); *State v. Carter*, 167 N.C. App. 582, 585, 605 S.E.2d 676, 678 (2004); *State v. Rhodes*, 163 N.C. App. 191, 193-94, 592 S.E.2d 731, 732-33 (2004).

In *Ahearn*, the defendant pleaded guilty to felonious child abuse and voluntary manslaughter and filed an appeal. *Ahearn*, 307 N.C. at 601, 300 S.E.2d at 699. Ahearn argued no factual basis was shown to support his plea of guilty to felonious child abuse. *Id.* at 605, 300 S.E.2d at 702.

Our Supreme Court cited N.C. Gen. Stat. § 15A-1444(e), and recognized a defendant who has pleaded guilty has no right of appeal, except as provided in N.C. Gen. Stat. §§ 15A-1444 and 15A-979. *Id.* Defendant’s argument was not a ground enumerated in either N.C. Gen. Stat. §§ 15A-1444 or 15A-979. *Id.* The Court reasoned “if we are to consider this assignment of error, we must treat it as a petition for writ of certiorari, which we do.” *Id.*

The Court then reviewed the merits of the defendant’s argument through a writ of certiorari. *Id.* at 605-07, 300 S.E.2d at 702-03. The Supreme Court in *Ahearn* did not cite nor discuss Appellate Rule 21. *See id.* at 593-608, 300 S.E.2d at 695-704.

In *Bolinger*, the defendant contended the trial judge violated N.C. Gen. Stat. § 15A-1022 by accepting his guilty plea. *Bolinger*, 320 N.C. at 601, 359 S.E.2d at 462. Our Supreme Court held “defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea.” *Id.* The Court further held

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that “[d]efendant may obtain appellate review of this issue only upon grant of a writ of certiorari.” *Id.* Defendant Bolinger failed to petition the Court for a writ of certiorari, and the Court nonetheless elected to review the merits of the defendant’s argument. *Id.* at 601-02, 359 S.E.2d at 462.

Our Supreme Court did not cite nor address Appellate Rule 21 in either *Ahern* or *Bolinger*. The Court stated: “Neither party to this appeal appears to have recognized the limited bases for appellate review of judgments entered upon pleas of guilty. For this reason we nevertheless choose to review the merits of defendant’s contention.” *Id.* In cases which precede *Bolinger*, our Supreme Court has specifically stated where a conflict exists between the General Statutes and the Appellate Rules, the Appellate Rules control. *Bennett*, 308 N.C. at 535, 302 S.E.2d at 790; *State v. Elam*, 302 N.C. 157, 160-61, 273 S.E.2d 661, 664 (1981).

In *O’Neal*, defendant pleaded guilty to second-degree murder and received a life sentence. *O’Neal*, 116 N.C. App. at 391, 448 S.E.2d at 308. Defendant argued, *inter alia*, the trial court erred in denying his pretrial motion for further mental evaluation. *Id.* at 394, 448 S.E.2d at 310. This Court in *O’Neal* stated: “[g]enerally, a defendant who has entered a plea of guilty to a felony is not entitled to appellate review as a matter of right.” *Id.* at 394-95, 448 S.E.2d at 310 (citing *Ahearn*, 307 N.C. at 605, 300 S.E.2d at 702; N.C. Gen. Stat. § 15A-1444).

After recognizing defendant did not have a right to appeal the issue he argued, the Court stated defendant “may petition the appellate division for review by writ of certiorari.” *Id.* at 395, 448 S.E.2d at 310 (quoting N.C. Gen. Stat. § 15A-1444(e)). The Court stated:

[I]n the present case where defendant pled guilty, we may not consider this assignment of error unless we treat his appeal as a writ of certiorari with respect to this assignment of error. Given the life sentence imposed upon defendant, we elect to treat the appeal as a petition for a writ of certiorari.

Id. This Court issued the writ of certiorari and reviewed the merits of the defendant’s appeal. *Id.* As in *Ahearn* and *Bolinger*, this Court in *O’Neal* did not cite nor discuss Appellate Rule 21. *Id.* at 391-96, 488 S.E.2d at 308-11.

N.C. Gen. Stat. § 15A-1444(e) clearly grants jurisdiction to the appellate courts to issue writs of certiorari to review the merits of defendant’s argument, when no right of appeal exists following a plea of guilty

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pursuant to N.C. Gen. Stat. §§ 15A-1444(a1)-(a2). We recognize an apparent tension when comparing N.C. Gen. Stat. § 15A-1444(e), which grants appellate courts' jurisdiction to issue writs of certiorari, and Appellate Rule 21, which limits this Court's ability to grant such writs under the three specific grounds, none of which are applicable here. N.C. R. App. P. 21.

In neither *Ahearn* nor *Bolinger* did our Supreme Court cite to or address the requirements of Appellate Rule 21. In cases where this Court has issued the writ of certiorari to review issues surrounding guilty pleas under N.C. Gen. Stat. § 15A-1444(e), this Court also did not cite nor analyze the three grounds to issue the writ set forth in Appellate Rule 21 to determine whether they applied to the facts of the case. *See e.g., O'Neal*, 116 N.C. App. at 395, 448 S.E.2d at 310.

Other panels of this Court allowed certiorari by citing *Bolinger* and reached the merits of the defendants' arguments pursuant to N.C. Gen. Stat. § 15A-1444(e) for grounds not set forth in N.C. Gen. Stat. § 15A-1444(a) or Appellate Rule 21. *See, e.g., Rhodes*, 163 N.C. App. at 193, 592 S.E.2d at 732-33 (holding this Court could issue the writ of certiorari to review the defendant's challenge to the trial court's procedures employed in accepting his guilty plea); *Demaio*, 216 N.C. App. at 563-64, 716 S.E.2d at 866-67 (holding this Court could issue the writ of certiorari to review the defendant's argument that his plea was not the product of informed choice); *see also Keller*, 198 N.C. App. at 641, 680 S.E.2d at 213; *Carter*, 167 N.C. App. at 585, 605 S.E.2d at 678.

B. Appellate Rule 2

Although the aforementioned cases do not cite nor discuss Appellate Rule 2, Rule 2 gives this Court the authority to suspend the limits of the Rules of Appellate Procedure:

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2. The Appellate Rules may be suspended as long as such suspension does not enlarge the jurisdiction of the Court. N.C. R. App. P. 1(c) (noting the Rules of Appellate Procedure "shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as

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that is established by law”); *see also* *Bailey v. North Carolina*, 353 N.C. 142, 157, 540 S.E.2d 313, 323 (2000) (citations omitted) (noting “suspension of the appellate rules under Rule 2 is not permitted for jurisdictional concerns”).

The plain language of Appellate Rule 2 “grants this Court the discretion to suspend appellate rules either ‘upon application of a party’ or ‘upon its own initiative.’” *Bailey*, 353 N.C. at 157, 540 S.E.2d at 323. Appellate Rule 2 “relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances.” *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999). This Court’s discretionary exercise to invoke Rule 2 is “intended to be limited to occasions in which a ‘fundamental purpose’ of the appellate rules is at stake, which will necessarily be ‘rare occasions.’” *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (citations omitted).

On the record before us, Defendant has not demonstrated, and we do not find, the exceptional circumstances necessary to invoke Appellate Rule 2. We decline to suspend Appellate Rule 21(a)(1) pursuant to Appellate Rule 2 to exercise our discretionary review of Defendant’s petition for writ of certiorari pursuant to N.C. Gen. Stat. § 15A-1444(e).

We are bound by decisions of the Supreme Court of North Carolina. *See Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985) (holding the Court of Appeals has a “responsibility to follow” decisions of the Supreme Court, “until otherwise ordered” by our Supreme Court). Likewise, a subsequent panel of this Court has no authority to overrule a previous panel on the same issue. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. We must follow our Supreme Court’s holdings in *Bennett* and *Oglesby* that the appellate rules promulgated by our Supreme Court under constitutional authority prevail over conflicting general statutes, *Bennett*, 308 N.C. at 535, 302 S.E.2d at 790; *Oglesby*, 361 N.C. at 554, 648 S.E.2d at 821, and this Court’s oldest precedent ruling on the issue. *E.g.*, *Smith*, 193 N.C. App. at 742, 668 S.E.2d at 614; *Nance*, 155 N.C. App. at 774, 574 S.E.2d at 693; *Pimental*, 153 N.C. App. at 73-74, 568 S.E.2d at 870; *Dickson*, 151 N.C. App. at 137-38, 564 S.E.2d at 640-41.

On the record before us, Defendant has not demonstrated, and we do not find, the ‘exceptional circumstances’ necessary to invoke Rule 2 and suspend the requirements of Rule 21 to review the merits of Defendant’s argument by certiorari.

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V. Conclusion

Under these facts, Defendant does not have a statutory right to appeal from the trial court's denial of her motion to dismiss prior to her plea of guilty. Defendant's petition to issue a writ of certiorari does not assert grounds which are included in or permitted by Appellate Rule 21(a)(1). In the exercise of our discretion, we decline to invoke Appellate Rule 2 to suspend the requirements of the appellate rules to grant the writ of certiorari pursuant to N.C. Gen. Stat. § 15A-1444(e) to review Defendant's argument. Defendant's petition is denied. Defendant's appeal is dismissed.

DENIED AND DISMISSED.

Judges McCULLOUGH and DIETZ concur.

STATE OF NORTH CAROLINA

v.

MARTY ALLAN LEWIS, DEFENDANT

No. COA15-408

Filed 3 November 2015

1. Evidence—pills—analysis of one—visual examination of the rest

The trial court did not err in a prosecution for trafficking in opioids by denying defendant's request to instruct the jury on lesser-included conspiracy charges where the State's expert analyzed one of twenty pills and visually examined the remaining nineteen. It was not necessary to test every tablet, and the State's analyst satisfied the State's evidentiary burden by visually confirming that the remaining pills were similar.

2. Courts—sessions—recess from Friday to Tuesday

The trial court had jurisdiction to enter judgment where the trial began on a Monday, the State rested on the following Friday, the trial court recessed until the following Tuesday, and defendant was convicted and sentenced on Wednesday. Defendant had advance notice of the recess and was given ample opportunity to object.

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[243 N.C. App. 757 (2015)]

Appeal by defendant from judgment entered 1 October 2014 by Judge Thomas H. Lock in Columbus County Superior Court. Heard in the Court of Appeals 6 October 2015.

Roy Cooper, Attorney General, by Zachary Padget, Associate Attorney General, for the State.

Staples Hughes, Appellate Defender, by Nicholas C. Woomer-Deters, Assistant Appellate Defender, for defendant-appellant.

ZACHARY, Judge.

Where the analysis of one pill, and visual comparison of the others, constituted sufficient evidence of their contents, the trial court did not err in declining to instruct the jury on lesser included conspiracy charges. Where the trial court substantially complied with N.C. Gen. Stat. § 15-167, it properly extended the court session and had jurisdiction to enter judgment upon defendant.

I. Factual and Procedural Background

In late 2011, Tamika Packer approached Marty Allan Lewis (defendant), Chief of Police of Fair Bluff, North Carolina, and asked him if he could get her twenty pain pills. Defendant received \$160 from Packer and contacted James Scott, a drug dealer, from whom he purchased the pills. Defendant then delivered them to Packer. Defendant was involved in multiple such transactions.

On 8 May 2012, Packer was confronted by SBI agents Adrienne Harvey and Kellie Farrell, who claimed to know everything about defendant and the pills. Through Packer, the agents set up a controlled purchase. Packer met with defendant and gave him money. Later that afternoon, they met again and defendant gave Packer twenty pills. Investigators arrested defendant and Scott and executed search warrants of their persons at the Fair Bluff police station and of defendant's and Scott's residences.

On 9 May 2012, defendant was indicted for conspiracy to traffic an opiate derivative and/or compound, conspiracy to traffic cocaine, sale and delivery of a Schedule II substance, possession with intent to sell and deliver a Schedule II substance, and possession of cocaine. Prior to trial, the State dismissed the conspiracy to traffic cocaine charge.

On 1 October 2014, the jury found defendant guilty of conspiracy to traffic 14 grams or more but less than 28 grams of opiates, sale or

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delivery of oxycodone, and possession with intent to sell or deliver oxycodone, and not guilty of possession of cocaine. The trial court arrested judgment on the convictions for sale or delivery of oxycodone and possession with intent to sell or deliver oxycodone. The trial court sentenced defendant to an active term of 90-117 months of imprisonment.

Defendant entered oral notice of appeal.

II. Lesser Included Charges

[1] In his first argument, defendant contends that the trial court erred in denying his request to instruct the jury on all lesser included conspiracy charges. We disagree.

A. Standard of Review

It is well established that “[arguments] challenging the trial court’s decisions regarding jury instructions are reviewed *de novo* by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). “The prime purpose of a court’s charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence.” *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). “[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial.” *Id.*

B. Analysis

Defendant was found guilty of, among other charges, conspiracy to traffic 14 grams or more but less than 28 grams of opiates. Police seized twenty pills during the controlled purchase from defendant, weighing 17.63 grams total. The State’s expert analyzed one of these pills, and determined that it contained oxycodone, a Schedule II opium derivative, with a net weight of 0.88 grams. The expert visually examined the remaining nineteen pills, with a net weight of 16.75 grams, and found them to have “the same similar size, shape and form as well as the same imprint on each of them.” In short, the expert visually determined that the remaining nineteen pills were consistent with the one that was tested.

At trial, defense counsel requested instructions on all lesser included conspiracy to traffic charges, alleging that the visual examination was insufficient to establish precisely how much opium derivative was present in the seized pills. The trial court denied this request. On appeal, defendant contends that because the evidence did not clearly establish the amount of opium derivative present in the pills, the jury was entitled to instructions on all lesser included conspiracy charges.

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Our courts have consistently held that a trial court is not required to instruct the jury on all lesser included charges when the evidence clearly demonstrates that defendant committed the crime charged. See *State v. Summit*, 301 N.C. 591, 596, 273 S.E.2d 425, 427, cert. denied, 451 U.S. 970, 68 L.Ed.2d 349 (1981); *State v. Myers*, 61 N.C. App. 554, 556, 301 S.E.2d 401, 403 (1983) cert. denied, 311 N.C. 767, 321 S.E.2d 153 (1984). In the instant case, defendant does not challenge the evidence supporting the fact that he was trafficking in opium derivative; rather, defendant challenges the sufficiency of the expert's analysis as to precisely how much opium derivative was present.

We find that the facts of this case parallel those of *State v. Wilhelm*, 59 N.C. App. 298, 296 S.E.2d 664 (1982). In *Wilhelm*, the defendant was convicted of trafficking in methaqualone. On appeal, defendant challenged the trial court's decision to allow evidence that the defendant possessed more than five thousand tablets of methaqualone, when the State's analyst tested only three of the pills. *Id.* at 303, 326 S.E.2d at 667. We upheld the lower court's decision, holding that "[w]hen a random sample from a quantity of tablets or capsules identical in appearance is analyzed and found to contain contraband, the entire quantity may be introduced as the contraband." *Id.*

Our Supreme Court has since held that, in trafficking cases, "[a] chemical analysis of each individual tablet is not necessary. . . . A chemical analysis is required in this context, but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration." *State v. Ward*, 364 N.C. 133, 148, 694 S.E.2d 738, 747 (2010).

In *Wilhelm*, this Court held that testing three out of five thousand tablets – a sample size approximately 0.06% of the whole – was sufficient to establish the chemical composition of the entire batch. In the instant case, one of the twenty – 5%, by comparison – was tested. In accordance with the precedent established in *Wilhelm* and *Ward*, we conclude that it was not necessary to test every tablet, and that, upon establishing the chemical composition of a sufficient sample, and visually confirming that the remaining pills were similar, the State's analyst satisfied the evidentiary burden upon the State to determine the quantity of opium derivative in the pills. As such, the evidence was sufficient to support the charge of conspiracy to traffic 14 grams or more but less than 28 grams of opiates, and the trial court did not err in declining to instruct on lesser included conspiracy charges.

This argument is overruled.

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III. Failure to Extend Session

[2] In his second argument, defendant contends that the trial court lacked jurisdiction to enter judgment because the court failed to properly extend its session to the following week. We disagree.

A. Standard of Review

“This Court also reviews challenges to the jurisdiction of the trial court under a *de novo* standard.” *State v. Wainwright*, ___ N.C. App. ___, ___, 770 S.E.2d 99, 102 (2015) (citing *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010)).

B. Analysis

This trial began on a Monday. After the State rested on the following Friday, the trial court announced that it would be in recess until the following Tuesday. Court resumed on Tuesday, and defendant was convicted and sentenced the following Wednesday.

Defendant contends, however, that N.C. Gen. Stat. § 15-167 only permits the trial court to extend a felony trial from one session of court to a succeeding Sunday or Monday. N.C. Gen. Stat. § 15-167 provides that, if it appears that a trial will not be complete by the end of Friday afternoon, the trial judge “may recess court on Friday or Saturday . . . to such time on the succeeding Sunday or Monday as, in his discretion, he deems wise.” N.C. Gen. Stat. § 15-167 (2013). The statute further provides that, when the trial court extends the session, the judge “shall cause an order to such effect to be entered in the minutes, which order may be entered at such time as the judge directs, either before or after he has extended the session.” *Id.*

In *State v. Hunt*, 198 N.C. App. 488, 680 S.E.2d 720 (2009), the defendant appealed from a conviction, asserting that the trial court failed to enter the requisite formal written order extending the session. In that case, the trial judge advised the parties that he doubted the matter would be resolved by Friday and that he might have to extend the session. On Friday, the trial judge verbally announced that the court would be in recess until Monday morning. *Id.* at 494, 680 S.E.2d at 724. On appeal, we held that, given that “the trial court repeatedly announced that it was recessing court, with no objection by Defendant[,]” the argument lacked merit, and “the [lower] court sufficiently complied with N.C. Gen. Stat. § 15-167.” *Id.* at 495, 680 S.E.2d at 724-25. Similarly, in *State v. Locklear*, we held that, despite not strictly complying with the statute, the trial court’s numerous announcements in open court about extending the

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session, without objection from defendant, sufficiently complied with N.C. Gen. Stat. § 15-167. *State v. Locklear*, 174 N.C. App. 547, 551, 621 S.E.2d 254, 257 (2005).

In the instant case, prior to the beginning of trial, the trial judge informed the jury that he would be recessing trial on Monday due to a prior obligation. Defendant did not object to this announcement. Prior to dismissing the jurors after the Friday afternoon session, the trial judge again informed them, in the presence of defendant and defense counsel, that court would be in recess until Tuesday, due to his Monday obligation. Again, defendant offered no objection. When the court reconvened on Tuesday, defendant again raised no objection.

As did the defendants in *Hunt* and *Locklear*, defendant had advance notice of the recess and was given ample opportunity to object. We find this case analogous to *Hunt* and *Locklear*, and hold that the trial court in the instant case sufficiently complied with N.C. Gen. Stat. § 15-167 and properly extended the court session. As such, the trial court had jurisdiction to enter judgment upon defendant.

This argument is without merit.

NO ERROR.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA
v.
JAMES CORNELIUS McNEILL

No. COA15-94

Filed 3 November 2015

1. Homicide—first-degree felony murder—felony larceny—sufficiency of evidence

On appeal from defendant's conviction for first-degree felony murder, the Court of Appeals held that the trial court did not err by denying defendant's motion to dismiss the charge and instructing the jury on felony murder. There was sufficient evidence to show that the glass bottle found at the crime scene was a deadly weapon, that the alleged larceny was committed with the use of the glass

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bottle, and that the killing occurred in the perpetration of the felonious larceny. The State presented evidence that defendant's DNA was present on the broken glass bottle found at the crime scene and that the victim died from blunt force injuries to his head. A jury could reasonably infer that the bottle was used to incapacitate the victim, facilitating defendant's larceny of the victim's vehicle—and that these events formed one continuous transaction.

2. Homicide—closing arguments—reference to prior conviction—“cold” person

On appeal from defendant's conviction for first-degree felony murder, the Court of Appeals held that the trial court did not err when it did not intervene *ex mero motu* during the prosecutor's closing arguments. The prosecutor's single reference to defendant's prior conviction, which had already been presented in the evidence with a limiting instruction, and suggestion that defendant was a “cold” person were not grossly improper.

3. Criminal Law—first-degree felony murder conviction—underlying felony—failure to arrest judgment

On appeal from defendant's conviction for first-degree felony murder, the Court of Appeals held that the trial court erred by failing to arrest judgment on the underlying felony. The Court of Appeals accordingly arrested judgment on defendant's felony larceny conviction.

Appeal by defendant from judgment entered 24 February 2014 by Judge Douglas B. Sasser in Cumberland County Superior Court. Heard in the Court of Appeals 13 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Peter A. Regulski, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

McCULLOUGH, Judge.

Defendant James Cornelius McNeill appeals from judgment entered upon his conviction for first degree felony murder. For the reasons stated herein, we hold no error.

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I. Background

On 25 April 2011 defendant was indicted for first degree murder in violation of N.C. Gen. Stat. § 14-17, common law robbery in violation of N.C. Gen. Stat. § 14-87.1, and felony larceny in violation of N.C. Gen. Stat. §§ 14-72(a) and 14-70.

Defendant's trial commenced at the 10 February 2014 criminal session of Cumberland County Superior Court, the Honorable Douglas B. Sasser, presiding. The State's evidence tended to show the following: Robert Farmer testified that he met Jeremy Dixon in early 2009. Farmer lived in Raleigh and Dixon lived in Fayetteville. After learning that Dixon was a homosexual, Farmer testified that he "took him under my wing" and because Farmer was older than Dixon, and "a little bit more experienced in the lifestyle, I was the mother-figure as far as in the gay community with him." They both worked in the nursing field and would call each other often. Farmer testified that he would visit with Dixon in Fayetteville "[a]lmost every weekend."

On 30 July 2010, a Friday, Farmer headed to Fayetteville to visit Dixon. He had a key to Dixon's apartment and Dixon told Farmer that "if he wasn't home when I got there, you know, just to go on in and make myself at home, like he always did, and he would be there when he got off of work." When he arrived at Dixon's apartment that night, Farmer let himself in and testified that he did not notice anything unusual about Dixon's apartment. The next morning, on Saturday, Farmer saw Dixon around 8:00 a.m. They talked and spent some time together until the afternoon. Dixon attended a party with his church that afternoon. Farmer testified that he returned to Raleigh.

Farmer spoke with Dixon to let him know that he was going to come back to Fayetteville that Saturday night, 31 July 2010. Dixon told Farmer to "call him back when I got to Fayetteville, because he had company, and he would unlock the door for me." Farmer arrived somewhere between 11:00 p.m. and midnight with a guest at Dixon's apartment. When Farmer arrived, Dixon came to his bedroom door, stuck his head out and told Farmer "he wanted to make sure that it was me coming in; and, I told him yeah, and okay, well, you know make yourself comfortable or whatever, and he went back in." That night, Farmer slept in the living room of Dixon's apartment with his guest. During the night, Farmer could hear noises – "sexual in nature" – coming from Dixon's bedroom made by a male voice.

The next morning at 5:00 a.m., 1 August 2010, Farmer left Dixon's apartment to attend a funeral in Roanoke Rapids. Farmer's guest also left

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Dixon's apartment at that time. On the evening of 1 August 2010, after the funeral, Farmer spoke with Dixon over the phone. Dixon informed Farmer that "he was at a store with the friend that he had at the house." Dixon also stated that "the other guy was in the store" and that he was "frightened."

On 2 August 2010, Farmer tried to call Dixon several times throughout the day, beginning at 7:00 a.m. but did not get an answer. Once Farmer got off of work at 5:00 p.m., he drove to Fayetteville and went straight to Dixon's apartment. He did not see Dixon's vehicle, a 2006 black Chevy Cobalt with rear tinted windows and Maryland license plates. Farmer drove around town and spoke to several individuals, searching for Dixon. He learned that Dixon was scheduled to work, but had failed to appear.

Officer Aubry Raymond of the Fayetteville Police Department testified that on Wednesday, 3 August 2010, she was dispatched to the Summertime Apartments in reference to a well-being check. Farmer informed Officer Raymond that he had not been able to make contact with Dixon since Sunday. Officer Raymond approached the door to Dixon's apartment, cracked it open, and saw Dixon lying dead on the living room floor.

At the scene, police found blood splatter on the walls, a bloody comforter, a bloody inflatable mattress, and part of a broken glass bottle on the living room floor. Zachary Kallenbach, a forensic scientist supervisor in the DNA section of the North Carolina State Crime Lab, testified regarding the broken glass bottle found shattered on the floor of Dixon's living room. The partial DNA profile obtained from a swabbing of the top of the broken bottle matched the DNA profile obtained from defendant and did not match the DNA profile of Dixon. A white tank top was found on the floor of Dixon's living room within a foot away from Dixon's body. An analysis of the neck area of the tank top revealed a mixture of DNA, the predominant profile matching defendant. A white hooded sweatshirt was also found lying across Dixon's body. The sweatshirt had blood on the cuffs and on the sleeve. Kallenbach testified that the DNA profile obtained from the neck area of the hooded sweatshirt was consistent with a mixture and neither defendant nor Dixon could be excluded as a contributor. A DNA analysis of the sleeves, chest, and inside, bottom of the sweatshirt matched Dixon and did not match defendant.

Brittany McLaughlin, a forensic technician with the Fayetteville Police Department, testified that she collected 17 latent fingerprints from Dixon's apartment. Trudy Wood, a latent examiner with the

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Fayetteville Police Department, testified that she reviewed the 17 latent prints collected by McLaughlin. Two latent fingerprints, collected from the exterior door surface of a fuse box located on Dixon's bedroom wall and collected from the exterior surface of a drinking glass in Dixon's kitchen, matched defendant.

Jonathan Privette, a forensic pathologist that was employed at the Office of the Chief Medical Examiner in Chapel Hill, North Carolina in 2010, testified that he performed an autopsy of Dixon on 4 August 2010. Privette testified that in his opinion, the cause of death for Dixon was blunt-force injuries to his head. Privette testified that Dixon had injuries to his lips, face, eyes, head, and neck. Dixon had lacerations on his head and suffered from a subdural hemorrhage and swelling of the brain, but his skull was not fractured. Privette testified that Dixon's injuries were consistent with being beaten to death with feet or hands. In reference to the lacerations Dixon suffered on his skull, Privette testified that "[a] bottle could cause those injuries."

Jacqueline Samuel testified that in August and September of 2010, she met and dated defendant in Lumberton, North Carolina. They lived together at her apartment in Lumberton for approximately two months. During the time they lived together, defendant had injuries on his chest and back. The injuries "had glass in them [demonstrating]. They was deep. He should have had stitches." Samuel believed the injuries, which continued to bleed, were "a couple weeks" old. Defendant "kept picking at them." Samuel also observed fresh scars on the knuckles of defendant's hands. When asked whether defendant indicated why he had left Fayetteville, Samuel testified that defendant said because he "like [sic] to beat a man to death."

Samuel further testified that during their time together, defendant used a black, 4-door vehicle with Maryland license plates. The rear windows of the vehicle were tinted and it had a spare tire on it. Defendant would not allow anyone else to drive the vehicle. When Samuel's landlord requested the registration and insurance of the vehicle, defendant was unable to provide it. Defendant continuously moved the location of where he parked the vehicle and Samuel testified to hearing defendant inquire about obtaining tags for the vehicle, as well as the location of a salvage yard to dispose of the vehicle. Dixon's vehicle, which was valued in excess of \$9,000, was never recovered.

Defendant was arrested in Lumberton, North Carolina. In his possession was a wallet and cell phone at the time of arrest. Defendant's wallet contained a piece of paper with Dixon's mother's name written

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on it, the name of her bank, and her checking account number. Dixon's mother identified the writing on the paper as Dixon's handwriting.

Defendant testified on his own behalf. Defendant testified that he met Dixon on 1 August 2010 at a convenience store. Defendant was buying some cigars and as he was leaving, a man behind him "said he wanted to holler at me." The man, who defendant identified as named "Black," was purchasing a 40 ounce bottle of beer and asked defendant if had any marijuana for sale. Continuing their conversation outside of the store, defendant told Black that he had "a little bit" and that he was "going to get some more." Black was interested in trying the marijuana before he purchased any from defendant. Black told defendant that he was riding with his cousin, Dixon, and defendant testified that Dixon was driving a black vehicle. Defendant rode with Dixon and Black and arrived at Dixon's apartment.

Defendant testified that before he sat on Dixon's sofa, he remembered moving an object out of the way before he sat down and stated that it could have possibly been the hooded sweatshirt. Defendant finished rolling a blunt in the living room of Dixon's apartment while Dixon and Black stepped into Dixon's bedroom to talk. When they came out of the bedroom, Black asked defendant if he wanted something to drink and brought defendant a drinking glass. Defendant poured himself some beer and testified that he touched the top of the beer bottle.

Defendant lit a blunt and started smoking marijuana. He passed it to Black, who also smoked the blunt. Black was "talking about how good it was. He said he got to have some" and stated that he wanted to purchase an ounce from defendant. While defendant and Black smoked in the living room, Dixon was watching television. Defendant got up to use Dixon's bathroom. As he was exiting the bathroom, he tripped, stumbled, and in order to break his fall, grabbed onto the wall. Defendant testified that he could have touched the fuse box with his hand during his attempt to break his fall. Defendant returned to the living room and discussed how he would go to get the ounce of marijuana. Black stated that defendant could use Dixon's car if he would "come straight back." Defendant agreed to this and "gave [Black his] word." Black and Dixon went into the bedroom for a couple of minutes to talk. Black returned and said "it was a go." Dixon handed Black \$120 and Black gave the money to defendant. Defendant testified that at that point, "as [Dixon and Black] were coming out, you know, the vibe I picked up . . . it was like a homosexual – just two – it was touching, you know; and, when they went back and sat down, they was sitting close up on each other." Dixon gave defendant the keys to his car and defendant left, telling Dixon and

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Black that it would take him five to ten minutes. Defendant testified that although he initially planned to return to Dixon's apartment, he changed his mind upon realizing that Black and Dixon were homosexuals and decided not to return with Dixon's vehicle.

Defendant headed to Lumberton because he "had a probation violation, number one; and, I had planned on turning myself in on the probation violation." He met with Samuel in Lumberton a couple of days later. Defendant admitted that he knew he had a probation violation and a warrant out for his arrest based on a fight that he was involved in – "around July 15, I remember I got in a fight." Defendant planned on finishing out the summer with Samuel and then turning himself in to serve a six to eight month sentence. On cross-examination, defendant admitted to a prior conviction for assault with a deadly weapon which occurred on 15 July 2010. The name of the victim in that fight was Dwayne Anderson and the fight occurred at a boardinghouse. Defendant testified that Anderson pulled a gun on him and they wrestled, throwing furniture at each other. Defendant admitted that he hit Anderson with a box-cutter, resulting in serious injury.

Defendant testified that two weeks after having Dixon's vehicle in his possession, he noticed the piece of paper with Dixon's mother's checking account information. He put it in his pocket because he knew the vehicle "might have been reported – probably – reported to the cops stolen." Defendant then parked Dixon's vehicle and abandoned it with the keys inside.

At the close of all the evidence, defendant moved to dismiss the charge of common law robbery and the trial court granted his motion. On 24 February 2014, a jury found defendant guilty of first degree murder under the felony murder rule as to felony larceny with the use of a deadly weapon. Defendant was sentenced to a term of life imprisonment without parole. Defendant appeals.

II. Discussion

On appeal, defendant argues that the trial court erred by (A) denying his motion to dismiss the charge of first degree felony murder and by instructing the jury on felony murder based on insufficiency of the evidence; (B) allowing the prosecutor to make an improper closing argument; and (C) by failing to arrest judgment on the larceny conviction.

A. Motion to Dismiss

[1] Defendant contends that the State failed to present sufficient evidence on the charge of first degree felony murder with felony larceny as

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the underlying predicate felony. Specifically, defendant argues that: (1) there was insufficient evidence to show that the glass bottle found at the crime scene constituted a “deadly weapon”; (2) that the alleged larceny was committed with the “use” of the glass bottle; and (3) that the killing occurred “in the perpetration” of the felonious larceny.

“A motion to dismiss for insufficiency of the evidence is properly denied if substantial evidence exists to show: (1) each essential element of the offense charged; and (2) that defendant is the perpetrator of such offense.” *State v. Fuller*, 166 N.C. App. 548, 554, 603 S.E.2d 569, 574 (2004). While assessing a defendant’s motion to dismiss for insufficiency of the evidence, “[t]he trial court’s function is to test whether a reasonable inference of the defendant’s guilt of the crime charged may be drawn from the evidence. The evidence is to be considered in the light most favorable to the State.” *Id.* (internal citations and quotation marks omitted). “[T]he State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal[.]” *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). This court reviews the trial court’s denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

First degree felony murder is a murder “committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon[.]” N.C. Gen. Stat. § 14-17(a) (2013). To find a defendant guilty of larceny, the State must prove that the defendant “(1) took the property of another; (2) carried it away; (3) without the owner’s consent, and (4) with the intent to deprive the owner of the property permanently.” *State v. Reeves*, 62 N.C. App. 219, 223, 302 S.E.2d 658, 660 (1983); *See* N.C. Gen. Stat. § 14-72 (2013). To convict a defendant of felonious larceny, the State must prove an additional element demonstrating that the value of the stolen property is more than \$1,000.00. N.C.G.S. § 14-72(a).

First, we address defendant’s assertion that the State failed to demonstrate that the beer bottle found at the crime scene was used as a “deadly weapon” within the meaning of N.C. Gen. Stat. § 14-17. Defendant argues that evidence that the bottle “could” have caused Dixon’s injuries amounted to speculation or conjecture and was not substantial. Defendant’s arguments are without merit.

“A dangerous or deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great

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bodily harm.” *State v. Flaughner*, 214 N.C. App. 370, 387, 713 S.E.2d 576, 589 (2011). There is no “mechanical definition” for “[t]he distinction between a weapon which is deadly or dangerous per se and one which may or may not be deadly or dangerous depending upon the circumstances[.]” *State v. Torain*, 316 N.C. 111, 121, 340 S.E.2d 465, 471 (1986). “Only where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, its allegedly deadly character is one of fact to be determined by the jury.” *Flaughner*, 214 N.C. at 387, 713 S.E.2d at 589 (citation and quotation marks omitted).

In the present case, Zachary Kallenbach, a forensic scientist at the North Carolina State Crime Lab, testified that defendant’s DNA profile matched the DNA obtained from the top of a broken bottle found at the scene of the crime. Jonathan Privette, a forensic pathologist who performed the autopsy on Dixon’s body, testified that Dixon died as a result of blunt force injuries to his head. Dixon suffered semicircular lacerations, which are tears to the tissue or skin caused by a blunt object striking the surface of the skin, on his skull and head. Dixon also suffered from a subdural hemorrhage, as well as swelling of the brain. The following exchange occurred between the State and Privette:

Q. Injuries that you noted and showed the jury of the lacerations around the top of Mr. Dixon’s skull, were those consistent with the injuries that could have been caused by a bottle breaking – or, a broken bottle striking the back of the head of Mr. Dixon?

A. A bottle could cause those injuries.

Our Courts have established that “a substantial evidence inquiry examines the sufficiency of the evidence presented *but not its weight*, which is a matter for the jury.” *State v. Hunt*, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (emphasis in original). Therefore, the weight of Privette’s testimony and whether the bottle was likely to produce death or great bodily harm was a question for the jury. Taking the evidence in the light most favorable to the State, we hold that the State presented sufficient evidence that the broken beer bottle found at the scene of the crime constituted a deadly weapon.

Next, defendant argues that the State failed to provide sufficient evidence that defendant “used” the broken bottle during the commission of the felonious larceny. Defendant concedes that the State does not need to prove that the deadly weapon was used to effectuate the underlying felony, but argues that the State “must prove, at a minimum, that the

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accused was in possession of a deadly weapon at the time the felony was committed.”

N.C. Gen. Stat. § 14-17 (2013) provides that the murder is “committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed murder in the first degree[.]” (emphasis added). In order to satisfy the “use” language of the felony murder statute, the defendant must either possess the deadly weapon in the commission of the underlying predicate felony or use that weapon to effectuate the felonious act. *See State v. Fields*, 315 N.C. 191, 199, 337 S.E.2d 518, 523 (1985) (holding that mere possession of a deadly weapon is sufficient to constitute “use” of that weapon “even if the weapon is not *physically* used to actually commit the felony”).

Defendant relies primarily on *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), for his contention. In *Pakulski*, the unarmed defendants broke into a doctor’s office with the intent to commit robbery. *Id.* at 566, 356 S.E.2d at 322. After being confronted by a security guard, one of the defendants stole the security guard’s gun, which he then used to shoot and kill the security guard. *Id.* After killing the victim, the defendants proceeded to rob both the doctor’s office and the victim, taking money, keys and other belongings from the deceased. *Id.* In *Pakulski*, the North Carolina Supreme Court held that while there was sufficient evidence to warrant an instruction allowing the jury to find that murder was committed in the course of an armed robbery, there was insufficient evidence presented that felonious breaking and entering could serve as the underlying felony for a felony murder charge based on the fact that the State “failed to prove possession of a deadly weapon at the time of the felonious breaking or entering.” *Id.* at 573, 356 S.E.2d at 326.

In *Pakulski*, the State conceded that defendants did not use a deadly weapon to accomplish the breaking and entering of the doctor’s office and there was no evidence that the defendants possessed a deadly weapon at the time of breaking and entering. *Id.* However, in the case *sub judice*, the evidence when viewed in the light most favorable to the State, tends to show that incapacitating Dixon with the deadly weapon – the broken bottle – was a prerequisite to the larceny of Dixon’s vehicle. During trial, the State presented evidence of Dixon’s blood found on a broken piece of glass found inside the apartment and splattered across a wall beside Dixon’s dead body. The State presented evidence of defendant’s DNA found on the neck of the bottle and an autopsy of the victim showing circular lacerations on Dixon’s skull. During trial, Privette testified that

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a glass bottle could have caused the lacerations found on Dixon's head and skull. In his own testimony, defendant admitted to both possessing the glass bottle while inside Dixon's apartment and also driving away with Dixon's vehicle. Based on the foregoing evidence, a jury could reasonably infer that the bottle was used to incapacitate the victim, which facilitated defendant's larceny of Dixon's vehicle. It would be a reasonable inference from the evidence in this case that defendant "used" the glass bottle in the same manner and for the same purpose as the defendants in *Pakulski* used the security guard's gun to facilitate the taking of the victim's property and commission of armed robbery.

Lastly, defendant contends that the State failed to present sufficient evidence that the killing was committed "in the perpetration" of the larceny. Defendant contends that there was only a speculation that the theft of Dixon's vehicle and Dixon's murder occurred during a single transaction. We disagree.

"A killing is committed in the perpetration or attempted perpetration for the purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death so that the homicide is part of [a] series of incidents which form one continuous transaction." *State v. Carroll*, 356 N.C. 526, 534, 573 S.E.2d 899, 905 (2002). Whether defendant's intent to steal Dixon's car was formulated before or after the killing is inconsequential, so long as the sequence of events constituted a single transaction. *See Fields*, 315 N.C. at 203, 337 S.E.2d at 525 ("[I]t makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use or threat of force can be perceived by the jury as constituting a single transaction."); *See also State v. Handy*, 331 N.C. 515, 529, 419 S.E.2d 545, 552 (1992) ("Neither the commission of armed robbery . . . nor the commission of felony murder based on armed robbery depends upon whether the intention to commit the taking of the victim's property was formed before or after the killing.") (internal citations omitted).

Here, defendant relies primarily on *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). In *Powell*, the defendant killed the victim during the perpetration of first degree rape and subsequently stole the victim's television and car. *Id.* at 96-97, 261 S.E.2d 116. The *Powell* Court upheld the defendant's conviction of first degree felony murder on the basis of first degree rape. However, the *Powell* Court found that the State was unable to establish a necessary element of robbery with a dangerous weapon – "that the defendant took the objects from the victim's presence by use of a dangerous weapon" – because the victim had already died before the

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defendant took the objects. *Id.* at 102, 261 S.E.2d at 119. As a result, the Court reversed the trial court's denial of the motion to dismiss the charge of robbery with a dangerous weapon. *Id.*

As the State points out, the victim's presence, while required under the State's armed robbery statute pursuant to N.C. Gen. Stat. § 14-87, is not an element of larceny. In *Powell*, the State failed to provide sufficient evidence of the victim's presence during the felonious robbery, making it inoperative as the underlying predicate felony. Because presence of the victim is not required under the larceny statute, the holding in *Powell* with respect to the victim's presence is irrelevant to the present case. In so much as *Powell* is relevant to the case before us, however, it weighs against defendant's argument. The *Powell* Court indicated that the evidence in that case tended to show that the defendant was guilty of larceny, rather than robbery, because the former does not require the presence of the victim. *See Powell*, 299 N.C. at 102, 261 S.E.2d at 119 (stating that "while possession by defendant of the television and automobile belonging to [the victim] gave the inference that defendant took them, and therefore committed the crime of *larceny*, there is no substantial evidence giving rise to the reasonable inference that the defendant took the objects from the victim's presence by use of a dangerous weapon").

Rather, the circumstances of the present case is similar to those found in *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333 (1976), *death sentence vacated*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976). In *Bush*, the defendant stole a car and crashed it into a ditch. Two people offered to obtain help for the defendant but he refused their offers. *Id.* at 173, 221 S.E.2d at 342. The defendant did not attempt to find a telephone, nor did he attempt to use an outside pay telephone that he passed. *Id.* Soon thereafter, the defendant entered into a nearby house. Once inside the house, he killed the occupant and stole the victim's car keys from his pants pocket. *Id.* at 163-64, 221 S.E.2d at 335. As the defendant prepared to leave in the victim's car, the victim's wife arrived at the house. The defendant followed her into the house, took money from her, cut the telephone line, and tied her into a chair. The defendant also took a rifle and some ammunition before he drove away in the victim's vehicle. *Id.* at 164, 221 S.E.2d at 336. On appeal, the defendant argued that the trial court erred by submitting the charge of first degree felony murder because the defendant did not intend to commit robbery until *after* he had killed the deceased victim. *Id.* at 173, 221 S.E.2d at 342. The *Bush* Court reviewed the evidence in the light most favorable to the State and concluded that defendant's actions were guided and controlled by an "intent to steal and rob" and that the defendant killed the victim while "in the perpetration" of a robbery. *Id.* at 174, 221 S.E.2d at 342.

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Here, the evidence pertinent to this issue, viewed in the light most favorable to the State, establishes that a jury could reasonably infer that Dixon's murder and larceny of Dixon's vehicle comprised a series of incidents, forming one continuous transaction. When defendant first encountered Dixon, he did not have a car and rode with Dixon to his apartment. Within a 24 hour period, defendant killed Dixon. Thereafter, defendant drove off with Dixon's vehicle and did not return it because he needed to leave Fayetteville to avoid an outstanding warrant for his arrest. Samuel testified that during August and September 2010, defendant had access to a vehicle matching the description of Dixon's vehicle. Samuel further testified that defendant sought alternate tags and registration for the vehicle. Contrary to defendant's position that the State failed to prove that there was no break in the chain of events between the murder and larceny, defendant's actions from the day he met Dixon to at least several weeks after Dixon's murder demonstrate that they were guided and controlled by an intent to deprive Dixon of his vehicle permanently. We hold that the evidence was sufficient to permit a jury to find that defendant murdered Dixon in the perpetration of felony larceny. Accordingly, the trial court did not err by denying defendant's motion to dismiss the first degree felony murder charge and instructing the jury on first degree felony murder.

B. Closing Arguments

[2] In his next argument on appeal, defendant asserts that the prosecutor's closing arguments were grossly improper and that the trial court erred by failing to intervene. Defendant did not object during closing arguments. Defendant now argues that it was grossly improper for the prosecutor to "ask[] the jury to believe that, because [defendant] assaulted Dwayne Anderson after being asked to leave, he must have been asked to leave by Jeremy Dixon." Defendant also challenges the prosecutor's characterization of defendant as a "cold person."

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*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending

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attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Storm, __ N.C. App. __, __, 743 S.E.2d 713, 718 (2013) (citation omitted). Grossly improper closing arguments may include “statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others.” *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002).

During closing arguments, the prosecutor stated the following:

According to the defendant’s testimony and according to State’s Exhibit 142, which you saw this morning, on July the 15th, 2010, a man named Dwayne Anderson told the defendant you’ve got to leave, and he got beaten with a computer or slashed with a box cutter, 20 stiches and 7 staples, as a result. Two weeks later – or two weeks and a day later, on August the 1st, 2010, Jeremy Dixon tells the defendant, okay, it’s time to go; you got to leave; and, Jeremy Dixon is dead. Prompt medical care, according to the examiner, would probably have saved his life; but no, the defendant was too busy making off with his stuff. Who does something like that? One cold person.

After the prosecutor’s closing argument, the trial court issued a limiting instruction to the jury, stating the following:

Evidence has been received concerning prior criminal convictions and/or criminal acts not related to the charges the defendant is currently on trial for. You may consider this evidence for one purpose only. If, considering the nature of the crimes, you believe that this bears on the defendant’s truthfulness, then you may consider it and all other facts and circumstances bearing upon the defendant’s truthfulness in deciding whether you will believe the defendant’s testimony at this trial. A prior conviction is not evidence of the defendant’s guilt in this case. You may not convict the defendant on the present charges because of something the defendant may have done in the past.

It is well established that “[a] prosecutor must be allowed wide latitude in the argument of hotly contested cases and may argue all the facts in evidence and any reasonable inferences that can be drawn therefrom.” *State v. Alford*, 339 N.C. 562, 571, 453 S.E.2d 512, 516 (1995). “On appeal, particular prosecutorial arguments are not viewed in an isolated

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vacuum. [Rather, f]air consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred.” *State v. Moseley*, 338 N.C. 1, 50, 449 S.E.2d 412, 442 (1994) (citations omitted).

Here, the prosecutor was arguing facts already in evidence. Defendant had testified that he fled Fayetteville based on an outstanding warrant for his arrest stemming from the 15 July 2010 assault and testified to the circumstances surrounding that event. In addition, the trial court’s limiting instruction directed the jury to consider defendant’s prior convictions for impeachment purposes only and that a prior conviction could not be considered as evidence of defendant’s guilt in the present case. After thoughtful review of the record, and considering that the prosecutor only made this argument once, we are unable to hold that the prosecutor’s reference to the 15 July 2010 incident and suggesting that defendant is a “cold person” were so grossly improper that it interfered with defendant’s right to a fair trial or the sanctity of the proceedings. The trial court did not err by failing to intervene *ex mero motu*.

C. Arresting Judgment

[3] In his last argument on appeal, defendant contends that upon his conviction of first degree murder on a theory of felony murder, the trial court erred by failing to arrest judgment on the underlying felony. We agree. Accordingly, judgment is arrested on defendant’s conviction of felony larceny. *See State v. Wilson*, 345 N.C. 119, 122, 478 S.E.2d 507, 510 (1996) (stating that “when the sole theory of first-degree murder is the felony murder rule, a defendant cannot be sentenced on the underlying felony in addition to the sentence for first-degree murder”).

III. Conclusion

The trial court did not err by denying defendant’s motion to dismiss the charge of first degree felony murder, instructing the jury on the charge of first degree felony murder, or by failing to intervene *ex mero motu* during the prosecutor’s closing arguments. However, we arrest judgment on defendant’s felony larceny conviction.

NO ERROR AS TO THE CONVICTION OF FIRST DEGREE MURDER; JUDGMENT ARRESTED AS TO THE CONVICTION OF FELONY LARCENY.

Judges STROUD and INMAN concur.

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STATE OF NORTH CAROLINA

v.

ARCHIMEDE N. NKIAM, DEFENDANT

No. COA14-1164

Filed 3 November 2015

Constitutional Law—effective assistance of counsel—guilty plea—deportation consequences

A green card holder and permanent resident of the U.S. received ineffective assistance of counsel in entering a guilty plea to aiding and abetting common law robbery and conspiracy to commit common law robbery where his counsel informed him only that his plea could (not would) result in deportation. When deportation is unclear or uncertain, counsel need only advise the client of the risk, but that is not sufficient when the deportation consequences of defendant's guilty plea to aggravated felonies are truly clear. Moreover, defendant presented sufficient evidence to support a finding that rejection of the plea offer would have been a rational choice, taking into account defendant's fear of deportation, and the trial court's denial of defendant's Motion for Appropriate Relief was reversed for a determination of whether defendant had proven prejudice.

Appeal by defendant from order entered 26 November 2013 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 4 March 2015.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Robert H. Hale, Jr. & Associates, Attorneys at Law, P.C., by Daniel M. Blau, for defendant-appellant.

GEER, Judge.

Defendant Archimede N. Nkiam, an alien who had obtained permanent legal resident status in the United States, appeals from an order denying his motion for appropriate relief ("MAR") that, asserted a claim of ineffective assistance of counsel ("IAC") with respect to his guilty plea to two crimes that led to the initiation of deportation proceedings. On appeal, defendant argues that the trial court should have granted his MAR based on *Padilla v. Kentucky*, 559 U.S. 356, 176 L. Ed. 2d 284, 130

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S. Ct. 1473 (2010), which established that incorrect advice regarding the immigration consequences of a guilty plea may constitute IAC. We hold that the advice provided by defendant's counsel in connection with his plea did not comply with *Padilla*. Because the trial court did not specifically address the prejudice prong of defendant's IAC claim, we reverse the trial court's order denying defendant's MAR and remand for a determination whether defendant was prejudiced by the IAC and such further proceedings as are necessary.

Facts

Defendant was born on 5 January 1990 in the Democratic Republic of Congo ("DRC"). Defendant moved to the United States and settled in Raleigh with his family when he was about 11 years old. Defendant was admitted for an indefinite period as a returning asylee, and he later became a permanent resident of the United States after obtaining a green card.

On 24 February 2012, defendant was arrested in connection with an armed robbery of Jocqui Brown. On 16 April 2012, defendant was charged with having used a knife or pistol to commit armed robbery of Mr. Brown's personal property having a value of \$50.00, including a cell phone and a ball cap. Defendant was also charged with conspiring with Terrence Mitchell and Leslie Martine to rob Mr. Brown. Attorney Deonte Thomas, a Wake County public defender, was assigned to represent defendant on the charges, and defendant met with Mr. Thomas several times about his case.

At a hearing on 7 January 2013, defendant appeared in Wake County Superior Court before Judge G. Wayne Abernathy to accept a plea offer that allowed him to plead guilty to aiding and abetting common law robbery, a Class G felony, and conspiracy to commit common law robbery, a Class H felony. After conducting a colloquy with defendant, Judge Abernathy accepted defendant's plea and sentenced him to two consecutive suspended sentences. For the aiding and abetting charge, defendant received a sentence of 13 to 25 months imprisonment, which was suspended and defendant was placed on 24 months of supervised probation. For the conspiracy charge, defendant was placed on an additional 24 months of supervised probation after suspension of a sentence of six to 17 months imprisonment.

Following defendant's guilty plea, the federal government initiated deportation proceedings against defendant. In January 2013, defendant was detained by immigration officials and transported to an immigration holding facility in Atlanta.

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On 3 April 2013, defendant filed an MAR asserting IAC that the trial court denied without a hearing on 1 May 2013. This Court granted defendant's petition for writ of certiorari, reversed the trial court's order, and remanded for an evidentiary hearing. On 15 November 2013, the trial court held an evidentiary hearing at which Mr. Thomas, defendant, defendant's father, and an immigration law expert, Hans Linnartz, testified. Following the hearing, the trial court entered an order making the following pertinent findings of fact.

The trial court found that, following his arrest, defendant received "at a minimum" the following information regarding the immigration consequences of his guilty plea:

- a. Defendant was informed by his attorney prior to accepting the plea that there was at least a possibility it could result in his deportation from the United States;
- b. Defendant reviewed and answered question #8 on the Transcript of Plea form with his attorney, indicating that he was a permanent U.S. resident born in Congo, and that he understood his plea of guilty could therefore result in deportation from the country;
- c. Judge Abernathy informed Defendant that his guilty plea "would make him subject to deportation," and his attorney responded by confirming that it could result in his deportation.
- d. Defendant's attorney stated during the colloquy that he hoped the Defendant would not actually be deported, but also stated "we told him we can't do anything with that."
- e. Judge Abernathy directly cautioned the Defendant that: i) his guilty plea could result in deportation; ii) the judge had no control over that in state court; and, iii) he could not make Defendant any promises about what would happen with his potential deportation.
- f. During the colloquy, Defendant was asked three different times whether he understood that his plea could have immigration consequences, and each time the Defendant answered that he understood.

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The trial court then further found that defendant testified that if he had “been advised of the high likelihood that he would be deported as a result of his negotiated plea, he would not have accepted it.” However, the trial court also found that “[i]n reviewing the overall reasonableness of Defendant’s decision to accept the original plea agreement,” there was a “sound factual basis for th[e] plea,” including (1) anticipated testimony from the victim, Mr. Brown, identifying defendant, Mr. Mitchell, and Mr. Martine as being involved in the robbery, as well as their car, the weapons used, and the stolen property found in defendant’s and his accomplices’ possession; (2) evidence that officers apprehended defendant and the other two men 30 minutes after Mr. Brown reported the crime; and (3) Mr. Mitchell’s agreement in exchange for a plea to testify that defendant was driving when the robbery was committed although Mr. Mitchell denied any weapons were used.

The trial court found that had defendant proceeded to trial on the robbery with a dangerous weapon charge, he could have been sentenced to 51 to 74 months in prison and would be subject to the same immigration consequences he now faces. On the other hand, the trial court acknowledged that defendant and his father both testified as to their fears of political and ethnic persecution if defendant were to return to DRC.

The trial court then determined that, given its review of defendant’s testimony, the relevant immigration statutes, and Mr. Linnartz’ testimony,

- a. Defendant’s conviction constituted an “aggravated felony” under 8 USC § 1101, since it carried a potential prison sentence of at least twelve months.
- b. Defendant therefore became “removable” and subject to deportation by accepting the plea, pursuant to 8 USC § 1227, and he is not eligible for Asylum or Cancellation of Removal relief. 8 USC § 1229b; 8 USC § 1158.
- c. However, several other avenues of relief from deportation were (and in some cases still are) possible for Defendant, such as:
 - i. Withholding of Removal (8 USC § 1231);
 - ii. Appeal of a denial of Withholding to the Immigration Board of Appeals or the 11th Circuit Court of Appeals (8 CFE § 1003; 8 USC § 1252);

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- iii. Convention Against Torture (“CAT”) Relief (8 CFR § 208.16);
- iv. Stay of Removal on discretionary grounds (8 CFR § 241.6).

Although these avenues were extremely difficult to achieve, according to Mr. Linnartz, defendant and his father had testified to the threat of political persecution in the Congo, and the trial court found defendant “therefore had a reasonable basis for asserting such a claim for relief.”

Based on these findings of fact, the trial court concluded that for trial counsel to satisfy his responsibility to advise his client regarding the immigration consequences of a plea, *Padilla*’s “final holding” was that counsel need only “ ‘inform her client whether his plea carries a **risk** of deportation.’ ” (Quoting *Padilla*, 559 U.S. at 374, 176 L. Ed. 2d at 299, 130 S. Ct. at 1486). The trial court further concluded that “Defendant’s assertion that he should have been advised he ‘would’ be deported rather than ‘could’ be deported is asking for a higher standard than the United States Supreme Court has set.”

The trial court then distinguished *Padilla* on the grounds that counsel for the defendant in *Padilla* “incorrectly ‘provided him with false assurance that his conviction would not result in his deportation[,]’ ” (quoting *Padilla*, 559 U.S. at 368, 176 L. Ed. 2d at 295, 130 S. Ct. at 1483), whereas in this case, “Defendant was correctly advised that he could be deported, and that advice was confirmed on multiple occasions throughout the colloquy.” Further, the trial court noted that *Padilla* recognized that “when the law is not ‘succinct and straightforward,’ the defendant’s attorney ‘need do no more than advise a noncitizen client that pending criminal charges may carry a risk of immigration consequences.’ ” (Quoting *Padilla*, 559 U.S. at 369, 176 L. Ed. 2d at 296, 130 S. Ct. at 1483). He concluded that the law was not clear because “Defendant was still eligible for various forms of relief from deportation[.]” Therefore, the standard set out in *Padilla* “was satisfied in the present case” when defendant’s attorney advised defendant that he “ ‘could’ be deported.” The trial court consequently denied defendant’s MAR. Defendant timely appealed to this Court.

Discussion

Defendant’s sole argument on appeal is that the trial court erred in denying his MAR because the trial court misapplied the standard for determining IAC under *Padilla*. This Court has explained,

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“When considering rulings on motions for appropriate relief, we review the trial court’s order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.” *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) However, “[i]f the issues raised by Defendant’s challenge to [the trial court’s] decision to deny his motion for appropriate relief are primarily legal rather than factual in nature, we will essentially use a *de novo* standard of review in evaluating Defendant’s challenges to [the court’s] order.” *State v. Jackson*, [220] N.C. App. [1], [8], 727 S.E.2d 322, 329 (2012)[.]

State v. Marino, ___ N.C. App. ___, ___, 747 S.E.2d 633, 640 (2013), *app. dismissed and disc. review denied*, 367 N.C. 500, 757 S.E.2d 907, *cert. denied*, ___ U.S. ___, 188 L. Ed. 2d 914, 134 S. Ct. 1900 (2014).

To prevail on an IAC claim,

“[F]irst, 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.*”

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984)).

This case is the first in which our appellate courts have been called upon to interpret and apply *Padilla*’s holding. In *Padilla*, 559 U.S. at 359, 176 L. Ed. 2d at 289-90, 130 S. Ct. at 1477, the defendant, who was not a United States citizen, pled guilty to transporting a large amount of marijuana, and, as a result, he was deportable under 8 U.S.C. § 1227(a)(2)(B)(i) (2014). 8 U.S.C. § 1227(a)(2)(B)(i) provides that any alien “convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation . . . relating to a controlled substance . . . , other than a single offense involving possession for one’s own use of 30 grams or less of

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marijuana, is deportable” if the offense is committed after entry into the United States.

After discovering that his pleas made him deportable, the defendant filed a postconviction IAC proceeding in Kentucky state court seeking to withdraw his guilty pleas. *Padilla*, 559 U.S. at 359, 176 L. Ed. 2d at 290, 130 S. Ct. at 1478. In support of his IAC claim, the defendant alleged that his plea counsel failed to advise him of the immigration consequences of his plea and, further, told him that he did not have to worry about his immigration status since he had lived in the United States for such a long period of time. *Id.* The defendant alleged that he relied on his counsel’s erroneous advice when pleading guilty and that he would have insisted on going to trial had he received correct advice from his attorney. *Id.*

After the defendant was denied relief in the Kentucky Supreme Court, the United States Supreme Court granted certiorari to address whether, under the Sixth Amendment right to effective assistance of counsel, defense counsel had “an obligation to advise [a client] that [an] offense to which he was pleading guilty *would result in his removal from this country.*” *Id.* at 360, 176 L. Ed. 2d at 290, 130 S. Ct. at 1478 (emphasis added). In describing the context of its opinion, the *Padilla* majority noted that “[w]hile once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation . . . deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.” *Id.* (internal citation omitted). Consequently, “[u]nder contemporary law, if a noncitizen has committed a removable offense . . . , his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General [under 8 U.S.C. § 1229b (2002)] to cancel removal[.]” *Id.* at 363-64, 176 L. Ed. 2d at 292, 130 S. Ct. at 1480.

The *Padilla* majority acknowledged that, given the change in deportation law, “ ‘[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence[.]’ ” and “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.” *Id.* at 367, 368, 176 L. Ed. 2d at 294, 295, 130 S. Ct. at 1482, 1483 (quoting *INS v. St. Cyr*, 533 U.S. 289, 322, 150 L. Ed. 2d 347, 376, 121 S. Ct. 2271, 2291 (2001)).

The *Padilla* majority, therefore, held that “counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation

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on families living lawfully in this country demand no less.” *Id.* at 374, 176 L. Ed. 2d at 299, 130 S. Ct. at 1486. In rejecting the argument that the duty to provide correct advice only applies when an attorney chooses to advise her client on immigration consequences, the majority observed: “It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so ‘clearly satisfies the first prong of the *Strickland* analysis.’” *Id.* at 371, 176 L. Ed. 2d at 297, 130 S. Ct. at 1484 (quoting *Hill v. Lockhart*, 474 U.S. 52, 62, 88 L. Ed. 2d 203, 212, 106 S. Ct. 366, 372 (1985) (White, J., concurring in judgment)).

Indeed, the majority noted that “were a defendant’s lawyer to know that a particular offense would result in the client’s deportation and that, upon deportation, the client and his family might well be killed due to circumstances in the client’s home country, any decent attorney would inform the client of the consequences of his plea. We think the same result should follow when the stakes are not life and death but merely ‘banishment or exile[.]’” *Id.* at 370 n.11, 176 L. Ed. 2d at 297 n.11, 130 S. Ct. at 1484 n.11 (internal citation omitted) (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 391, 92 L. Ed. 2d 17, 19, 68 S. Ct. 10, 12 (1947)).

The *Padilla* majority recognized the tension between the harshness of deportation and the fact that “[i]mmigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges . . . may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain.” *Id.* at 369, 176 L. Ed. 2d at 295-96, 130 S. Ct. at 1483.

Given this tension, the majority set out the following Sixth Amendment duty that an attorney owes to a noncitizen defendant:

The duty of the private practitioner in [unclear or uncertain] cases is . . . limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice ALITO [in his concurring opinion]), a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences. *But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.*

Id., 176 L. Ed. 2d at 296, 130 S. Ct. at 1483 (emphasis added) (internal footnote omitted).

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In *Padilla*, whether the defendant was subject to mandatory deportation was “truly clear,” and his appeal was “not a hard case in which to find deficiency[.]” *Id.* at 368, 369, 176 L. Ed. 2d at 295, 296, 130 S. Ct. at 1483. The terms of the relevant immigration statute, 8 U.S.C. § 1227(a)(2)(B)(i), “[were] succinct, clear, and explicit in defining the removal consequence for [the defendant’s] conviction. . . . [The defendant’s] counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. . . . The consequences of [the defendant’s] plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.” *Padilla*, 559 U.S. at 368-69, 176 L. Ed. 2d at 295, 130 S. Ct. at 1483.

The *Padilla* majority, therefore, agreed with the defendant that, in his case, “constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.” *Id.* at 360, 176 L. Ed. 2d at 290, 130 S. Ct. at 1478. The Supreme Court, however, remanded the case for the Kentucky courts to determine whether the defendant was prejudiced by his trial counsel’s incorrect advice. *Id.* at 374-75, 176 L. Ed. 2d at 299, 130 S. Ct. at 1487.

In this case, the State asserts that *Padilla* still requires no more than that “counsel must inform her client whether his plea carries a *risk* of deportation.” *Id.* at 374, 176 L. Ed. 2d at 299, 130 S. Ct. at 1486 (emphasis added). However, a complete reading of the *Padilla* majority opinion indicates that the quotation the State relies upon represents a defense attorney’s *minimum* duty to the client. The Supreme Court established a bifurcated duty: when the consequence of deportation is unclear or uncertain, counsel need only advise the client of the risk of deportation, but when the consequence of deportation is truly clear, counsel must advise the client in more certain terms. *Id.* at 369, 176 L. Ed. 2d at 296, 130 S. Ct. at 1483. To read *Padilla* otherwise would disregard the majority opinion’s emphasis on counsel’s duty, when “the deportation consequence is truly clear,” to give “correct advice.” *Id.* The majority opinion recognized that “[i]t is quintessentially the duty of counsel to provide her client with *available advice* about an issue like deportation[.]” *Id.* at 371, 176 L. Ed. 2d at 297, 130 S. Ct. at 1484 (emphasis added).

Moreover, Justice Alito’s opinion concurring in the result confirms our interpretation of the majority opinion. Justice Alito warned, “the Court’s opinion would not just require defense counsel to warn the

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client of a general *risk* of removal; it would also require counsel in at least some cases, to specify what the removal *consequences* of a conviction would be.” *Id.* at 377, 176 L. Ed. 2d at 301, 130 S. Ct. at 1488. In Justice Alito’s view, the majority’s approach was “problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex.” *Id.* Therefore, Justice Alito would have held, “an alien defendant’s Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.” *Id.* at 388, 176 L. Ed. 2d at 307, 130 S. Ct. at 1494.

We hold that *Padilla* mandates that when the consequence of deportation is truly clear, it is not sufficient for the attorney to advise the client only that there is a risk of deportation. The State, however, alternatively contends that *Padilla*’s holding should be limited to the facts of that case and, therefore, apply only when a noncitizen defendant pleads guilty to a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i), involving crimes relating to controlled substances. The State further argues that *Padilla*’s holding should never apply to convictions for “aggravated felon[ies],” identified as deportable offenses under 8 U.S.C. § 1227(a)(2)(A)(iii), because the deportation consequences for an aggravated felony, as defined in 8 U.S.C. § 1101(a)(43) (2014), can never be “truly clear.”

In support of its argument that deportation can never be a truly clear consequence when a defendant pleads guilty to an aggravated offense, the State cites no authority other than Justice Alito’s opinion concurring in the result, which noted that whether an alien is convicted of an aggravated felony is not always easy to determine. *See Padilla*, 559 U.S. at 378, 176 L. Ed. 2d at 302, 130 S. Ct. at 1489 (“Defense counsel who consults a guidebook on whether a particular crime is an ‘aggravated felony’ will often find that the answer is not ‘easily ascertained.’”). However, nothing in the majority opinion limits its holding to crimes relating to controlled substances or suggests that the deportation consequence of convictions under other subsections of 8 U.S.C. § 1227 cannot also be truly clear. Instead, the majority agreed only that immigration law is not succinct and straightforward “in *many of the scenarios* posited by Justice ALITO[.]” *Padilla*, 559 U.S. at 369, 176 L. Ed. 2d at 296, 130 S. Ct. at 1483 (emphasis added).

However, numerous other courts considering guilty pleas to aggravated felonies have concluded that the immigration consequences of such pleas can be truly clear. *See, e.g., United States v. Bonilla*, 637

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F.3d 980, 984 (9th Cir. 2011) (holding, with respect to defendant who pled guilty to aggravated felony, that “[a] criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty”); *Hernandez v. State*, 124 So. 3d 757, 762 (Fla. 2012) (per curiam) (holding as to guilty plea to aggravated felony that “counsel was deficient under *Padilla* for failing to advise [the defendant] that his plea subjected him to presumptively mandatory deportation”); *Encarnacion v. State*, 295 Ga. 660, 663, 763 S.E.2d 463, 466 (2014) (holding with respect to guilty plea to aggravated felony that “[i]t is not enough to say ‘maybe’ when the correct advice is ‘almost certainly will’ lead to deportation”); *Chacon v. State*, 409 S.W.3d 529, 537 (Mo. Ct. App. 2013) (holding with respect to aggravated felony that “when the deportation consequence is clear, as it was in *Padilla* and as it is here, defense counsel has an equally clear duty to give correct advice”); *State v. Kostyuchenko*, 8 N.E.3d 353, 357 (Ohio Ct. App. 2014) (per curiam) (holding as to aggravated felony plea that counsel “had a duty under *Padilla* to ascertain from the immigration statutes, and to accurately advise him, that his conviction mandated his deportation”); *State v. Sandoval*, 171 Wash. 2d 163, 172, 249 P.3d 1015, 1020 (2011) (en banc) (holding that defense counsel violated *Padilla* in connection with aggravated felony plea).

We hold that *Padilla* is not limited to its facts and that the deportation consequences resulting from a guilty plea to an aggravated felony may, depending on the particular offense, be truly clear within the meaning of *Padilla*. Defendant asserts that, in this case, (1) the offenses of aiding and abetting common law robbery and conspiracy to commit common law robbery were aggravated felonies, and (2) the deportation consequences of defendant’s guilty plea were truly clear. Therefore, according to defendant, mere advice that his guilty plea gave rise to a risk of deportation was not adequate under *Padilla*.

The State does not seriously dispute that defendant’s offenses amount to aggravated felonies. 8 U.S.C. § 1101(a)(43)(G) defines “aggravated felony” to include “a theft offense . . . or burglary offense for which the term of imprisonment [is] at least one year[.]” Additionally, 8 U.S.C. § 1101(a)(43)(U) provides that “an attempt or conspiracy to commit an offense described in this paragraph” is an “aggravated felony.” The offense of aiding and abetting common law robbery is plainly one of theft under 8 U.S.C. § 1101(a)(43)(G), and the conspiracy to commit common law robbery under 8 U.S.C. § 1101(a)(43)(U) is plainly a conspiracy to commit an offense under 8 U.S.C. § 1101(a)(43)(G). See John Rubin and Sejal Zota, *Immigration Consequences of a Criminal*

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Conviction in North Carolina 100 (2008) (stating that common law robbery is aggravated felony because it is theft offense under 8 U.S.C. § 1101(a)(43)(G)). Defendant was also sentenced for a term of more than a year; the fact that the court suspended his sentences is immaterial. See 8 U.S.C. § 1101(a)(48)(B) (“Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”).

Moreover, the relevant provisions of the United States Code plainly indicate that defendant’s deportation upon entering his guilty plea was “presumptively mandatory.” See *Padilla*, 559 U.S. at 369, 176 L. Ed. 2d at 295, 296, 130 S. Ct. at 1483 (finding deportation consequences “truly clear” when “[t]he consequences of *Padilla*’s plea could easily be determined from reading the removal statute”).

When other courts have found deportation consequences unclear for particular guilty pleas, they have pointed to the need for trial counsel to look beyond the plain language of the United States Code in order to reach a conclusion regarding the deportation consequences for the defendant. See, e.g., *United States v. Chan Ho Shin*, 891 F. Supp. 2d 849, 856 (N.D. Ohio 2012) (“Given the divergent views among the few circuits that had addressed the issue, and the silence of the others, this Court cannot hold that the relevant immigration statute was . . . ‘truly clear’ at the time of [the defendant’s] plea.”); *State v. Ortiz-Mondragon*, 358 Wis. 2d 423, 433, 856 N.W.2d 339, 344 (Wis. App. 2014) (“If an attorney must search federal court and unfamiliar administrative board decisions from around the country to identify a category of elements that together constitute crimes of moral turpitude, and then determine whether a charged crime fits that category, then the law is not ‘succinct, clear, and explicit.’” (quoting *Padilla*, 559 U.S. at 368, 176 L. Ed. 2d at 295, 130 S. Ct. at 1483)), *aff’d*, 364 Wis. 2d 1, 866 N.W.2d 717 (Wis. 2015). In this case, however, there was no need for counsel to do anything but read the statute.

Rather than argue that it was unclear whether defendant was subject to presumptive mandatory deportation, the State contends that the deportation consequences for defendant were not truly clear because of the availability of other “various forms of relief from deportation,” as referenced in the trial court’s order. These forms of relief include Withholding of Removal, 8 U.S.C. § 1231(b)(3) (2014) (prohibiting government from deporting alien if alien’s life or freedom would be threatened because of race, religion, nationality, membership in particular social group, or political opinion; denial may be appealed); Convention

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Against Torture, 8 C.F.R. §§ 208.16-18 (2014) (deferring deportation under the United States Convention Against Torture if alien can demonstrate he would be tortured if returned home); Stay of Removal, 8 C.F.R. § 241.6 (2014) (allowing application to local immigration director for discretionary stay of removal).

According to the uncontradicted testimony of defendant's immigration law expert Mr. Linnartz, these avenues of relief from deportation were "in the realm of mathematical possibility," but such relief was a "remote possibility" at the time defendant entered his guilty plea. With respect to Withholding of Removal and the Convention Against Torture, Mr. Linnartz testified that this type of relief was rarely granted, did not confer lawful legal status, and the deferral of deportation would be lifted as soon as the threat to the defendant abated. With respect to the Stay of Removal, Mr. Linnartz explained that such relief was only temporary -- such as in the event of a medical emergency -- and was almost never granted to an alien being deported due to a criminal conviction. Mr. Linnartz emphasized that (1) none of the forms of relief would eliminate the deportation order, (2) a defendant could end up spending his life in a detention facility, (3) a defendant could be deported to a third country if there was a fear of persecution, and (4) lawful status would never be conferred.

The State has cited no authority supporting its contention that the possible availability of these forms of rare relief render defendant's deportation consequences unclear. In *Padilla*, the majority opinion noted the potential availability to the defendant of an avenue of relief from a deportation order: 8 U.S.C. § 1229b, which grants the Attorney General discretionary authority to cancel an alien's removal. 559 U.S. at 363-64, 176 L. Ed. 2d at 292, 130 S. Ct. at 1480. The majority explained that a noncitizen's "removal is practically inevitable but for the possible exercise" of this discretion, but still concluded that the defendant's removal was a "presumptively mandatory" consequence and that "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[.]" *Id.* at 364, 368, 369, 176 L. Ed. 2d at 292, 295, 130 S. Ct. at 1480, 1483. In short, *Padilla* focused on whether the defendant's conviction made him deportable under 8 U.S.C. § 1227 and not on the availability of possible avenues of relief. If, as the *Padilla* Court necessarily concluded, the availability of discretionary relief under 8 U.S.C. § 1229b did not render the deportation consequences unclear, we cannot conclude that the unlikely avenues of relief that the trial court relied upon are sufficient to support a conclusion that the deportation consequences for defendant were not "truly clear."

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Moreover, we believe that *Padilla*'s holding would be substantially undermined by the State's contention, if accepted, that the theoretical availability of relief that does not eliminate the deportation order and grant lawful status renders the law unclear. One or more of the avenues of relief relied upon by the trial court would theoretically be available to most defendants. We note that other courts have rejected the State's approach, and the State has cited no authority supporting it. *See Encarnacion*, 295 Ga. at 663, 763 S.E.2d at 466 (recognizing that counsel's advice of possibility of deportation for aggravated felony conviction pleas was incorrect despite fact that "some noncitizens convicted of an aggravated felony might avoid removal" because "those circumstances are exceptionally rare"); *Enyong v. State*, 369 S.W.3d 593, 600 (Tex. App. 2012) (concluding defendant's deportation consequence for pleading guilty to aggravated felony truly clear despite State's reference to internal United States Immigration and Customs Enforcement memo encouraging its employees to use prosecutorial discretion in enforcing immigration laws), *judgment vacated on other grounds*, 397 S.W.2d 208 (Tex. Crim. App. 2013) (per curiam).

Consequently, we hold that the deportation consequences of defendant's guilty plea were truly clear in this case. Trial counsel was required, therefore, under *Padilla*, "to give correct advice" and not just advise defendant that his "pending criminal charges may carry a risk of adverse immigration consequences." 559 U.S. at 369, 176 L. Ed. 2d at 296, 130 S. Ct. at 1483.

The trial court's findings establish only that defendant's trial counsel informed him that he could be deported, that the trial court had no control over deportation, that his plea could have immigration consequences, and that his attorney hoped that defendant would not actually be deported. While the State points to the attorney's testimony that he told defendant "you're not a legal citizen[and] it's going to result in deportation," Mr. Thomas clarified, when asked about the accuracy of that statement, that he actually advised defendant that he "could possibly be subject to deportation." Indeed, Mr. Thomas gave defendant a false assurance when he told Judge Abernathy: "We told [defendant] we can't do anything with [deportation], and I'm hoping that my past experience doing this kind of things [sic] – the Congo is not one of the places they're apt to send you back to."¹

1. Mr. Thomas also testified that he told defendant he did not practice immigration law and that he offered to put defendant in touch with an immigration attorney if defendant ran into any trouble *after* pleading guilty. This advice would have erroneously suggested that defendant still could have done something to avoid deportation after pleading guilty.

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The trial court's findings and the evidence, therefore, show that defendant was only advised of the risk of deportation. This advice was not sufficient under *Padilla* because it did not adequately advise defendant of the likelihood of deportation. *See, e.g., Hernandez v. State*, 61 So. 3d 1144, 1151 (Fla. Dist. Ct. App. 2011) ("It is now the law in this and every other state that constitutionally competent counsel must advise a noncitizen/defendant that certain pleas and judgments *will*, not 'may,' subject the defendant to deportation."), *aff'd per curiam*, 124 So. 3d 757 (Fla. 2012); *Encarnacion*, 295 Ga. at 663, 763 S.E.2d at 466 ("It is not enough to say 'maybe' when the correct advice is 'almost certainly will.' " (quoting *Hernandez*, 61 So. 3d at 1151)).

We need not determine precisely what advice Mr. Thomas should have given defendant because, here, there can be no question that Mr. Thomas' advice fell short of what *Padilla* required. Defendant has, therefore, shown that he received ineffective assistance of counsel.

Turning to the question whether defendant was prejudiced by the inadequate advice, the State contends that any prejudice defendant might have suffered as a result of misadvice by Mr. Thomas was cured by the plea colloquy conducted by Judge Abernathy prior to defendant's entering his plea. In *Missouri v. Frye*, ___ U.S. ___, ___, 182 L. Ed. 2d 379, 389, 132 S. Ct. 1399, 1406-07 (2012) (emphasis added), the Supreme Court explained:

At the plea entry proceedings the trial court and all counsel have the opportunity to establish on the record that the defendant understands . . . the advantages and disadvantages of accepting [the plea deal.] . . . [N]evertheless, there may be instances when claims of ineffective assistance can arise after the conviction is entered. Still, the State, and the trial court itself, have . . . a substantial opportunity to guard against this contingency by establishing at the plea entry proceeding that the defendant has been given proper advice or, *if the advice received appears to have been inadequate, to remedy that deficiency before the plea is accepted and the conviction entered.*

At the plea hearing in this case, Judge Abernathy announced that defendant's "guilty plea 'would make him subject to deportation[.]'" However, this isolated statement, when read in the context of the entire colloquy, cannot reasonably be read as advising defendant that his plea would certainly result in deportation. Immediately following this statement, Mr. Thomas interjected that defendant's plea "possibly could"

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make him subject to deportation. Then, the trial court asked defendant whether he understood that “there’s a possibility, because you’re not a U.S. citizen, upon your plea of guilty you could be deported from this country or denied readmission[,]” to which defendant replied that he did. Thus, the advice in the colloquy, which merely advised defendant of the risk of deportation, was incorrect and inadequate and did not cure any possible prejudice. *See Enyong*, 369 S.W.3d at 603 (“[I]t would seem illogical to . . . require effective counsel to provide specific advice regarding ‘clear’ or ‘virtually certain’ immigration consequences, but then . . . hold that a defendant is not prejudiced by counsel’s failure to provide this constitutionally required advice simply when a trial court . . . provides a boilerplate warning concerning general immigration consequences. If such general admonishments precluded a finding of prejudice, the . . . holding in *Padilla* would be stripped of much of its force.”).

The question remains whether defendant has adequately demonstrated prejudice. In the plea context, “[t]he . . . ‘prejudice[.]’ requirement[] . . . focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” *Hill*, 474 U.S. at 59, 88 L. Ed. 2d at 210, 106 S. Ct. at 370. Thus, “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.* The Supreme Court in *Padilla* emphasized, that in applying *Hill*, “to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” 559 U.S. at 372, 176 L. Ed. 2d at 297, 130 S. Ct. at 1485.

In *Padilla*, upon remand, the Kentucky Court of Appeals addressed whether the defendant had been prejudiced by the incorrect advice he received from his trial counsel. *Padilla v. Commonwealth*, 381 S.W.3d 322, 328 (Ky. Ct. App. 2012) (“*Padilla II*”). In doing so, the Kentucky Court of Appeals held that a defendant need not show “that an acquittal at trial was likely.” *Id.* The court in *Padilla II* explained:

A reasonable probability [that a defendant, if advised adequately, would have decided to reject the plea offer] exists if the defendant convinces the court “that a decision to reject the plea bargain would have been rational under the circumstances.” *Padilla*, [559 U.S. at 372, 176 L. Ed. 2d at 297,] 130 S. Ct. at 1485. This standard of proof is “somewhat lower” than the common “preponderance of the evidence” standard. *Strickland*, 466 U.S. at 694, [80 L. Ed. 2d at 698,] 104 S. Ct. at 2068.

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. . . .

The [trial] court must determine whether the defendant's rejection of the plea offer would have been a rational choice, even if not the best choice. *Necessarily, the court must consider the importance a particular defendant places upon preserving his or her right to remain in the country.* A noncitizen defendant with significant ties to this country may rationally be willing to take the risk of a trial while the same decision by one who has resided in the United States for a relatively brief period of time or has no family or employment in this country may be irrational.

Id. at 328-29 (emphasis added) (internal footnote omitted).

Other jurisdictions addressing the question of prejudice in light of *Padilla* have adopted a similar approach to that taken in *Padilla II*. *See, e.g., Hernandez v. United States*, 778 F.3d 1230, 1234 (11th Cir. 2015) (holding defendant alleged sufficient facts to support finding of prejudice from ineffective assistance of counsel in connection with guilty plea when defendant alleged that "he would not have pleaded guilty if a plea would have 'automatically remove[d] him from his family and from a Country he ha[s] called home all [of] his adult life' "); *United States v. Urias-Marrufo*, 744 F.3d 361, 368 (5th Cir. 2014) (finding prima facie evidence of prejudice for purposes of IAC claim when defendant swore in statement that had she known she was pleading guilty to deportable offense, she would not have pled guilty); *United States v. Orocio*, 645 F.3d 630, 643, 645 (3rd Cir. 2011) (rejecting contention that defendant must show acquittal at trial likely and finding prejudice when, "if made aware of the dire immigration consequences of the proposed guilty plea, [defendant] could have reasonably chosen to go to trial even though he faced a drug distribution charge constituting an aggravated felony"), *abrogated on other grounds by Chaidez v. United States*, ___ U.S. ___, 185 L. Ed. 2d 149, 133 S. Ct. 1103 (2013); *Bonilla*, 637 F.3d at 984 (finding district court abused its discretion when it unreasonably denied defendant's motion to withdraw his plea where "entering a plea would mean that after he served his sentence, [the defendant] would almost certainly be deported and separated from his wife and children"); *Commonwealth v. DeJesus*, 468 Mass. 174, 184, 9 N.E.3d 789, 797 (2014) ("If an assessment of the apparent benefits of a plea offer is made, it must be conducted in light of the recognition that a noncitizen defendant confronts a very different calculus than that confronting a United States citizen.");

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State v. Tejeiro, 345 P.3d 1074, 1084 (N.M. Ct. App. 2014) (“Defendant is not required to demonstrate that he would have obtained a better result at trial than he received from his plea. He need only demonstrate a reasonable probability that he would have rejected the plea as offered had he known of its immigration consequences.” (internal citation omitted)), *cert. denied*, 2015 N.M. LEXIS 128 (N.M. 2015); *Kostyuchenko*, 8 N.E.3d at 358 (finding evidence supporting prejudice where prior to plea negotiations defendant was unconcerned with deportation, yet, had defendant known plea would have resulted in deportation, defendant would have insisted on going to trial or seeking to negotiate plea that preserved eligibility for relief from deportation); *Enyong*, 369 S.W.3d at 603 (finding evidence of prejudice for noncitizen defendant where “appellant stated that he would not have pleaded guilty to the offenses if his trial counsel had advised him of the immigration consequences of his pleas”); *Sandoval*, 171 Wash. 2d at 176, 249 P.3d at 1022 (finding prejudice notwithstanding sentencing benefit of plea “[g]iven the severity of the deportation consequence”); *Ortega-Araiza v. State*, 331 P.3d 1189, 1194 (Wyo. 2014) (“It would . . . be entirely reasonable for [the defendant] to reject the plea and insist on going to trial (or seek a different plea agreement with lesser deportation consequence) as he was facing deportation whether he was convicted pursuant to a plea agreement or as a result of trial. Better to gamble on an acquittal at trial, than the assured conviction and deportation resulting from a guilty plea.”).

Some courts discussing prejudice based on insufficient advice under *Padilla* have, however, focused on whether there was a likelihood of acquittal at trial. *E.g.*, *Clarke v. United States*, 703 F.3d 1098, 1101 (7th Cir. 2013) (no possible prejudice where defendant faced almost certain conviction of aggravated felony at trial); *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012) (finding no possible prejudice in light of overwhelming evidence of defendant’s guilt for aggravated felony and noting that defendant cannot show prejudice on appeal “merely by telling [the Court] now that she would have gone to trial then if she had gotten different advice”); *Matos v. United States*, 907 F. Supp. 2d 378, 382 (S.D.N.Y. 2012) (holding that “[t]he overwhelming evidence of guilt forecloses any reasonable probability that [the defendant] would have proceeded to trial rather than accept the Government’s [plea] offer” where defendant’s insistence on appeal that he would have rejected plea bargain was deemed “self-serving”); *Mendoza v. United States*, 774 F. Supp. 2d 791, 800 (E.D. Va. 2011) (finding no possible prejudice in light of overwhelming evidence of defendant’s guilt of deportable offenses and sentencing benefits defendant received from pleading guilty).

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While the United States Supreme Court in *Hill* stated that “[i]n many guilty plea cases . . . the determination whether the error ‘prejudiced’ the defendant . . . will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial,” 474 U.S. at 59, 88 L. Ed. 2d at 210, 106 S. Ct. at 370, “[t]he Supreme Court has ‘never required an affirmative demonstration of likely acquittal at such a trial as the *sine qua non* of prejudice.’” *Padilla II*, 381 S.W.3d at 328-29 (quoting *Orocio*, 645 F.3d at 643). We believe cases focusing on the likelihood of acquittal rather than considering the importance a defendant places on avoiding deportation ignore the primary focus of *Padilla*, which was in large part the recognition that the likelihood of deportation may often be a much more important circumstance for a defendant to consider than confinement in prison for any length of time. 559 U.S. at 365, 368, 176 L. Ed. 2d at 293, 295, 130 S. Ct. at 1481, 1483. Thus, the consequence of deportation may, in certain cases, weigh more heavily in a defendant’s risk-benefit calculus on whether he should proceed to trial. For this reason, *Padilla II*’s analysis is persuasive, and we hold that a defendant makes an adequate showing of prejudice by showing that rejection of the plea offer would have been a rational choice, even if not the best choice, when taking into account the importance the defendant places upon preserving his right to remain in this country.

In this case, because the trial court concluded that defendant had failed to show that his attorney inadequately advised him, the court never addressed the prejudice prong of defendant’s IAC claim. The trial court held that defendant’s decision to accept the plea was reasonable, but did not consider whether rejection of the plea would be a reasonable choice given the immigration consequences. We hold that defendant presented sufficient evidence to support a finding that rejection of the plea offer would have been a rational choice for defendant, taking into account defendant’s fear of deportation. Even if the evidence against defendant may have made conviction for a deportable offense likely at trial, the evidence would permit a finding that, had Mr. Thomas provided correct advice, it would have been a rational course of action for defendant to forego the plea offered to him for the chance of acquittal at trial or even just to delay deportation. “Moreover, had the immigration consequences of [defendant’s] plea been factored into the plea bargaining process, trial counsel may have obtained a plea agreement that would not have the consequence of mandatory deportation.” *Padilla II*, 381 S.W.3d at 330.² We therefore remand so that the trial court may address, in

2. We note that our own case law, consistent with other jurisdictions, forbids a finding of prejudice upon “[a] mere allegation by the defendant that he would have insisted on

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the first instance, whether defendant was prejudiced by his trial counsel's inadequate advice regarding the immigration consequences of his guilty plea.

Conclusion

We hold that the trial court's findings of fact establish under *Padilla* that defendant received ineffective assistance of counsel in connection with his decision whether to enter into a guilty plea. We, therefore, reverse the trial court's denial of defendant's MAR and remand for a determination whether defendant has proven the prejudice prong of his IAC claim. In the event the trial court determines that defendant has adequately shown prejudice, the trial court must set aside defendant's conviction and allow defendant to withdraw his guilty plea. *State v. Moser*, 20 Neb. App. 209, 225, 822 N.W.2d 424, 436 (2012).

REVERSED AND REMANDED.

Judges ELMORE and INMAN concur.

going to trial[.]” *State v. Goforth*, 130 N.C. App. 603, 605, 503 S.E.2d 676, 678 (1998) (quoting *Barker v. United States*, 7 F.3d 629, 633 (7th Cir. 1993)). The evidence here, however, far surpasses such an allegation and affirmatively establishes circumstances demonstrating that if defendant had been properly informed of the consequences of his plea, his priority would have been avoiding deportation.

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THOMAS JEFFERSON CLASSICAL ACADEMY CHARTER SCHOOL, PIEDMONT
COMMUNITY CHARTER SCHOOL, AND LINCOLN CHARTER SCHOOL, PLAINTIFFS

v.

CLEVELAND COUNTY BOARD OF EDUCATION, D/B/A CLEVELAND
COUNTY SCHOOLS, DEFENDANT

No. COA15-464

Filed 3 November 2015

**1. Schools and Education—charter schools—underfunding—
unrestricted funds—tuition/fees**

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that funds labeled "Tuition/Fees" were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were used for CCS's general operating expenses and general K-12 population supported the trial court's findings and conclusion on this issue.

**2. Schools and Education—charter schools—underfunding—
unrestricted funds—indirect costs**

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that funds labeled "indirect costs" were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds received from federal grants for indirect costs were spent in the normal operations of the school district supported the trial court's findings and conclusion on this issue.

**3. Schools and Education—charter schools—underfunding—
unrestricted funds—Medicaid reimbursement**

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that Medicaid

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reimbursement funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the federal government did not designate or restrict the funds for a specific purpose and that CCS used the funds to provide services for students with IEPs in the general K-12 population supported the trial court's findings and conclusion on this issue.

4. Schools and Education—charter schools—underfunding—unrestricted funds—E-Rate

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that E-Rate (a federal program that reimburses the school system for a percentage of what it pays for telecommunications and Internet access) funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the federal government did not designate or restrict the funds for a specific purpose and that the funds were used for Internet and telecommunications services for all K-12 CCS students and staff supported the trial court's findings and conclusion on this issue.

5. Schools and Education—charter schools—underfunding—unrestricted funds—Juvenile Crime Prevention Council

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that Juvenile Crime Prevention Council funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were used for life skills counselors who were available to the entire K-12 population supported the trial court's findings and conclusion on this issue.

6. Schools and Education—charter schools—underfunding—unrestricted funds—Dropout Prevention Grant

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that funds designated as the

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Dropout Prevention Grant were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were intended to benefit the entire K-12 population and that CCS exercised discretion over how to spend the funds supported the trial court's findings and conclusion on this issue.

7. Schools and Education—charter schools—underfunding—unrestricted funds—Reserved Officers' Training Corps

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that Reserved Officers' Training Corps (ROTC) funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were used to reimburse ROTC instructors' salaries paid from CCS's current expense fund and that the federal government did not restrict the funds to a specific purpose supported the trial court's findings and conclusion on this issue.

8. Schools and Education—charter schools—underfunding—unrestricted funds—WorkForce Investment Act

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that WorkForce Investment Act funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were not restricted and were used to pay two employees at the Job Link Center and to pay the students who participated in the program supported the trial court's findings and conclusion on this issue.

9. Schools and Education—charter schools—underfunding—unrestricted funds—Gear Up Grant

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that Gear Up Grant

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funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were not restricted and were spent on programs available to the general K-12 population of CCS supported the trial court's findings and conclusion on this issue.

Judge BRYANT concurs in part and dissents in part by separate opinion.

Appeal by defendant from judgment entered 29 January 2015 by Judge Jesse B. Caldwell, III in Cleveland County Superior Court. Heard in the Court of Appeals 8 October 2015.

Robinson Bradshaw & Hinson, P.A., by Richard A. Vinroot, Matthew F. Tilley and Amanda R. Pickens, for plaintiffs-appellees.

Tharrington Smith, L.L.P., by Deborah R. Stagner, for defendant-appellant.

Christine T. Scheef and Allison B. Schafer, for amicus curiae North Carolina School Boards Association.

TYSON, Judge.

Defendant Cleveland County Board of Education, d/b/a Cleveland County Schools ("CCS" or "Defendant"), appeals from judgment entered in favor of Thomas Jefferson Classical Academy Charter School, Piedmont Charter School, and Lincoln Charter School (collectively, "the charter schools" or "Plaintiffs") in the amount of \$54,527.80. The trial court concluded CCS had underfunded Plaintiffs during the 2009-10 fiscal year. We affirm.

I. Factual and Procedural Background

This case returns to this Court after prior remand to the trial court by a divided panel of this Court. *See Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. Of Educ. (Thomas Jefferson II)*, __ N.C. __, 763 S.E.2d 288 (2014).

Plaintiffs commenced this action on 9 January 2012 by filing a complaint, in which they alleged CCS had underfunded the charter schools for fiscal year 2009-10. Plaintiffs asserted CCS failed to pay them the statutorily required per-pupil amount of all money contained in the local

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current expense fund. Plaintiffs alleged CCS owed them approximately \$102,480.00

Plaintiffs asserted CCS wrongfully transferred approximately \$4.9 million from the local current expense fund into a “special revenue fund” known as Fund 8. Monies in the local current expense fund must be shared with charter schools, while monies in a special revenue fund are not required to be shared with the charter schools.

Plaintiffs sought a declaratory judgment that CCS was statutorily required to allocate the funds in accordance with N.C. Gen. Stat. § 115C-238.29H (2009), and demanded recovery in the amount of \$102,480.00 and attorneys’ fees. CCS timely served an answer, and denied the transfer of funds to the special revenue fund violated any relevant statutory provisions.

A non-jury trial was held on 9 October 2012. On 21 February 2013, the trial court entered a final judgment in favor of Plaintiffs and awarded the charter schools \$57,836.00. Plaintiffs were also awarded attorneys’ fees by separate order. CCS appealed both orders.

In an opinion issued 2 September 2014, this Court reversed the trial court’s order awarding attorneys’ fees to Plaintiffs. This Court held “the determination of whether funds that accrued to the local school administrative unit were ‘restricted’ is a conclusion of law rather than a finding of fact.” *Thomas Jefferson II*, __ N.C. at __, 763 S.E.2d at 293.

This Court remanded the case to the trial court for “a revised judgment with appropriate findings of fact and conclusions of law as to the funds at issue.” *Id.* at __, 763 S.E.2d at 295. This Court instructed the trial court that “[r]elevant findings of fact would concern the origin, purpose, and ultimate use of the funds, not their designation as ‘restricted.’” *Id.* at __, 763 S.E.2d at 293.

The hearing after remand was held on 21 November 2014. The trial court entered a final judgment on 29 January 2015 in favor of the charter schools and awarded them \$54,527.80, which represented their “per-pupil share of those moneys CCS had included in its Special Revenue Fund that were not, in fact, restricted.”

Defendant gave timely notice of appeal to this Court.

II. Issue

Defendants argue the trial court erred by finding and concluding certain revenues were not restricted, and the charter schools were

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therefore entitled to a *pro rata* share of those revenues pursuant to N.C. Gen. Stat. § 115C-238.29H(b) (2009).

III. Standard of Review

“When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts.” *Jackson v. Culbreth*, 199 N.C. App. 531, 537, 681 S.E.2d 813, 817 (2009) (citation and quotation marks omitted). “Evidence must support the findings, the findings must support the conclusions of law, and the conclusions of law must support the ensuing judgment.” *Id.* (citation omitted).

“The trial court’s findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.” *Curran v. Barefoot*, 183 N.C. App. 331, 335, 645 S.E.2d 187, 190 (2007) (citation omitted). “The trial court’s conclusions of law drawn from the findings of fact are reviewable *de novo*.” *Id.*

IV. Analysis

Former N.C. Gen. Stat. § 115C-238.29H governed the allocation of funds between local school administrative units and charter schools during the 2009-10 school year, which is the relevant time frame in this appeal. N.C. Gen. Stat. § 115C-238.29H (2009). N.C. Gen. Stat. § 115C-238.29H(b) required the local school administrative unit to “transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year” for each student who attends a public charter school. N.C. Gen. Stat. § 115C-238.29H(b).

This Court held the phrase “local current expense appropriation” is “synonymous with the phrase ‘local current expense fund’ in the School Budget and Fiscal Control Act, N.C.G.S. § 115C-426(e).” *Francine Delany New School for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 347, 563 S.E.2d 92, 98 (2002), *disc. review denied*, 356 N.C. 670, 577 S.E.2d 117 (2003). N.C. Gen. Stat. § 115C-426(e) defines “local current expense fund” as:

The local current expense fund shall include appropriations sufficient, when added to appropriations from the State Public School Fund, for the current operating expense of the public school system in conformity with the educational goals and policies of the State and the local board of education, within the financial resources and

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consistent with the fiscal policies of the board of county commissioners. These appropriations shall be funded by revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution, moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and other moneys made available or accruing to the local school administrative unit for the current operating expenses of the public school system.

N.C. Gen. Stat. § 115C-426(e) (2009). *See* N.C. Const. art. IX, § 7(a) (“[A]ll moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State . . . shall be faithfully appropriated and used exclusively for maintaining free public schools.”); *Francine Delaney*, 150 N.C. App. at 339, 563 S.E.2d at 93.

The applicable 2009 version of N.C. Gen. Stat. § 115C-426(c) permitted the creation of “other funds . . . to account for trust funds, federal grants restricted as to use, and special programs.” This Court interpreted this statutory provision in two related cases.

In *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ. (Sugar Creek I)*, this Court held county appropriations specifically earmarked for two particular programs were subject to the mandatory provisions of N.C. Gen. Stat. § 115C-238.29H(b). 188 N.C. App. 454, 460, 655 S.E.2d 850, 854, *disc. review denied*, __ N.C. __, 667 S.E.2d 460 (2008). This Court’s decision emphasized the fact that the school board had failed to set up a “separate special fund” for these programs, and placed the appropriations in the school board’s local current expense fund. *Id.* at 460-463, 655 S.E.2d at 855-56.

This holding was expanded in *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ. (Sugar Creek II)*, 195 N.C. App. 348, 360-61, 673 S.E.2d 667, 676, *appeal dismissed and disc. review denied*, 363 N.C. 663, 687 S.E.2d 296 (2009). In *Sugar Creek II*, this Court concluded several sources of revenue with either a designated purpose or for a special program were subject to the per-pupil distribution, because the funds were placed in the local current expense fund, as opposed to a separate fund. This Court reiterated its prior holding in

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Sugar Creek I that “[b]ecause Defendants have held these moneys in their local current expense fund, they are required to share these moneys with Plaintiffs.” *Sugar Creek II*, 195 N.C. App. at 361-62, 673 S.E.2d at 676 (citation omitted).

Based on *Sugar Creek I* and *II*, this Court held “the provisions of Chapter 115C . . . do not require that all monies provided to the local administrative unit be placed into the ‘local current expense fund[.]’” *Thomas Jefferson Classical Acad. Charter Sch. v. Rutherford Cnty. Bd. of Educ. (Thomas Jefferson I)*, 215 N.C. App. 530, 543, 715 S.E.2d 625, 633 (2011), *disc. review denied and appeal dismissed*, __ N.C. __, 724 S.E.2d 531 (2012). “Rather, *Sugar Creek I* and *II* clearly indicate that it is incumbent upon the local administrative unit to place restricted funds into a separate fund.” *Id.* at 544-45, 715 S.E.2d at 634. This Court further stated “[i]f the funds are left in the ‘local current expense fund,’ then they are to be considered in computing the per pupil amount to be allocated to the charter school.” *Id.* at 545, 715 S.E.2d at 634.

While these prior cases clearly indicate local school boards are permitted to place certain restricted funds in a separate fund, so as to not require their inclusion in the charter schools’ *pro rata* share, “restricted funds” were not defined until this Court’s recent decision in *Thomas Jefferson II*. *Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 292 (noting “we have never defined what ‘restricted funds’ are or who has the authority to make that determination.”).

In *Thomas Jefferson II*, this Court relied on our prior holdings in *Sugar Creek I* and *II*, and *Thomas Jefferson I*, and concluded “the local school administrative unit may deposit any ‘restricted’ funds into a fund separate from the current expense fund.” *Id.* (citations omitted). This Court set forth the proper legal framework under which to analyze “restricted” funds:

We further conclude that the determination of which funds may be placed in a separate fund is a question of law and not solely in the discretion of the local school board, given the mandatory language found in the budget statute [N.C. Gen. Stat. § 115C-426(e)]. . . .

Because the issue of whether funds are “restricted” or not is an issue of law, we further hold that the determination of whether funds that accrued to the local school administrative unit were “restricted” is a conclusion of law rather than a finding of fact. . . . Relevant findings

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of fact would concern the origin, purpose, and ultimate use of the funds, not their designation as “restricted.”

Id. at ___, 763 S.E.2d at 293 (citation omitted).

This Court continued by noting “[r]estricted’ is not a term found in any of the relevant statutes,” but is “the Court’s shorthand for those monies that can be placed in a separate fund, i.e. those from ‘trust funds, federal grants restricted as to use, and special programs’ which must be accounted for separately.” *Id.* (quoting N.C. Gen. Stat. § 115C-426(c)).

This Court explained in order to determine which funds were “restricted,” “the question is . . . whether the funds have a limited use and specific purpose, such as to fund a special program.” *Id.* (citation omitted). By contrast, “unrestricted funds are those that could be used for *all* of the K-12 population *without restriction*.” *Id.* (emphasis in original). We held “[b]ased on the prior cases and the language of the applicable statutes, we define ‘restricted’ funds as *those funds which have been designated by the donor for some specific program or purpose, rather than for the general K-12 population of the local school system*.” *Id.* (emphasis supplied).

Defendant argues the trial court erred by finding various sources of revenue were not restricted, and concluding these funds are subject to a per-pupil distribution to the public charter schools. The following sources of revenue are specifically at issue: (1) tuition/fees; (2) indirect costs; (3) Medicaid reimbursement; (4) E-Rate; (5) Juvenile Crime Prevention Council; (6) Dropout Prevention Grant; (7) ROTC; (8) WorkForce Investment Act; and (9) Gear Up Grant. We address each one in turn.

A. Tuition/Fees

[1] Defendant argues the trial court erred by finding the funds labeled “Tuition/Fees” were not restricted, and therefore subject to per-pupil distribution to the charter schools. We disagree.

The trial court made the following finding of fact regarding the origin, purpose, and use of the tuition/fees funds:

15. CCS included moneys designated as “Tuition” and “Tuition/Fees” in its Special Revenue Fund during fiscal year 2009-10. This money consisted of the payment of tuition and fees CCS received from parents of students residing outside of Cleveland County. CCS receives tuition and fees to educate its students, including out-of-district

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students, and these funds are used for CCS's general operating expenses and its general K-12 educational program. The parents that pay tuition and fees to CCS place no restriction on CCS's use of those funds.

The trial court concluded as a matter of law that the money listed as "tuition" and "tuition/fees" were not restricted based on this finding of fact.

CCS argues the money listed as "tuition/fees" was restricted because the money was "paid to the Board by the Rutherford County Board of Education to provide a teacher assistant for a single, specific special education student who resided in Rutherford County but attended CCS." CCS contends this money differs from the money listed as "tuition," which was paid directly from parents. CCS asserts the trial court failed to make findings of fact with respect to the origin, purpose, and use of the "tuition/fees" funds.

David Lee ("Mr. Lee"), the chief financial officer for CCS, was asked at trial whether he had stated in his deposition that the local source money, including money for tuition/fees, was not restricted. He responded in the affirmative. Dr. Nellie Aspel ("Dr. Aspel"), the director of exceptional children for CCS, testified CCS "sign[ed] an annual contract and then we hire the teacher assistant. And then each month we invoice Rutherford County for that month's portion of that TA pay." The Individuals with Disabilities Act requires CCS to provide such services to students with disabilities in accordance with their individualized education plans ("IEPs"). *See* 20 U.S.C. § 1400, *et seq.* Regardless of whether CCS receives reimbursement for this particular student from Rutherford County, providing these services is part of CCS's general operating costs.

We have reviewed the evidence of record and the transcript, and fail to see a significant distinction between the money paid to CCS by Rutherford County Schools, and tuition paid by parents of CCS students residing in Cleveland County. Both sources of tuition funds were used for CCS's general operating expenses and its general K-12 population.

Competent evidence supports the trial court's findings of fact regarding the tuition/fees funds. These findings of fact support the trial court's conclusion of law that this money was not restricted based on origin, purpose, or use. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

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B. Indirect Costs

[2] Defendant argues the trial court erred by finding the funds labeled “indirect costs” were not restricted and subject to the statutory per-pupil distribution to the charter schools. We disagree.

The trial court made the following finding of fact with regard to indirect costs:

19. CCS included moneys designated as “Indirect Cost Allocated” in its Special Revenue Fund during fiscal year 2009-10. This money consisted of reimbursements from the federal government for a portion of CCS’s “general overhead” expenses, which CCS received in connection with its operation of federal programs. CCS refers to these expenses as “indirect costs.” As CCS acknowledges, indirect costs are not attributable to any particular program within CCS, and include various general operating expenses, such as accounting, payroll, purchasing, facilities management, and utilities. The federal government does not place any restriction on how CCS uses the reimbursements it receives for indirect costs.

Testimony at trial tended to show the origin, purpose, and use of the funds for indirect costs. Mr. Lee testified the federal government placed no restrictions on the portion of the federal grants CCS received in relation to indirect costs and operating expenses. Mr. Lee stated the money received from federal grant funds for indirect costs are spent in the normal operations of the school district, and are not spent for any restricted programs or expenses.

Although indirect costs may be connected to federal grant money for a particular program, this fact does not *per se* make these funds restricted. In *Thomas Jefferson II*, this Court stated “the question is . . . whether the funds have a limited use and specific purpose, such as to fund a specific program.” *Thomas Jefferson II*, ___ N.C. App. at ___, 763 S.E.2d at 293 (citation omitted).

Mr. Lee further testified the indirect cost money is “plain money that goes in [the] current expense fund” and was “spent for current operating expenses.” Mr. Lee explained no one required him to deposit the money into a separate fund, and he did so on his own volition. Mr. Lee’s testimony supports the trial court’s findings of fact that these funds “consisted of reimbursements,” because they were part of the federal grant reimbursement money CCS received. Mr. Lee’s testimony also supports

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the trial court's finding of fact that the funds were not "designated by the donor for some specific program or purpose[.]" *Thomas Jefferson II*, ___ N.C. App. at ___, 763 S.E.2d at 293.

The trial court's findings of fact regarding funds labeled "indirect costs" are supported by competent evidence. Any evidence to the contrary does not change our analysis regarding the classification of these funds. Under the applicable standard of review, it is for the trial court to "pass[] upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). "The trial court must . . . determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980) (citations omitted).

The trial court's findings of fact support its conclusion that these funds were not restricted based on their origin, purpose, and use. *See Thomas Jefferson II*, ___ N.C. App. at ___, 763 S.E.2d at 293. The trial court did not err by finding these funds should have been included in the local current expense account and apportioned to the charter schools on a per-pupil basis. This argument is overruled.

C. Medicaid Reimbursement

[3] Defendant argues the trial court erred by concluding the Medicaid reimbursement funds were not restricted. We disagree.

The trial court made the following finding of fact regarding the Medicaid reimbursement funds:

27. CCS used moneys designated in its audit as "Medicaid Reimbursement" for its general operating expenses during its 2009-10 fiscal year. CCS received these reimbursements for services CCS provided for students with individual education plans ("IEP's"), i.e., in accordance with federal law, which requires both CCS and the Charter Schools to provide such services to students with learning disabilities. The evidence shows that CCS used other moneys from its general funds to operate its IEP programs as well, and that the federal government does not restrict the use of the reimbursement funds once received by CCS.

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Testimony regarding the origin, purpose, and use of the Medicaid reimbursement funds tended to show the following: Dr. Aspel stated she was responsible for Medicaid billing for direct services. Dr. Aspel explained students with special needs are given an IEP. An IEP is an outline of special education or specialized instruction-related services students with disabilities will receive throughout the school year. These students are part of the general K-12 population enrolled throughout CCS and the charter schools.

Dr. Aspel testified CCS, as the local education agency (“LEA”), provides services to any disabled students according to the student’s IEP. The federal government subsequently reimburses the LEA for “what [they have] already delivered.” Mr. Lee also admitted the \$162,098.00 CCS received as “Medicaid Reimbursement” was not restricted.

Dr. Aspel explained “[t]he Medicaid [reimbursements] go back into the exceptional children’s budget to help offset the cost of the employment of the physical therapist, occupational therapist, speech therapist, and all the specialized equipment that they need to deliver the services that are on the IEP.” As discussed *supra*, federal law requires both CCS *and* the charter schools to provide these services to students with disabilities *regardless* of whether Medicaid provides reimbursements. The Medicaid reimbursements merely serve as an alternative source of funding to recoup expenses CCS is mandated to incur and provide for certain students with IEPs. These students are part of the general K-12 population.

We emphasize that under the applicable standard of review, “findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings.” *Montague v. Montague*, __ N.C. App. __, __, 767 S.E.2d 71, 74 (2014) (citation and quotation marks omitted). “[I]t is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.” *Coble*, 300 N.C. at 712-13, 268 S.E.2d at 189.

The trial court’s findings of fact regarding Medicaid reimbursement funds indicate the funds originated from the federal government as the donor. The trial court also found these funds were used by CCS to provide services for students with IEPs in the general K-12 population, in accordance with federal law. The transcript and evidence clearly show the donor of the funds did not designate or restrict the funds for a specific purpose. Competent evidence supports the trial court’s findings of fact.

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These findings of fact support the trial court's conclusion of law that the Medicaid reimbursement funds were not restricted based on their origin, purpose, or use. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

D. E-Rate

[4] Defendant argues the trial court erred by concluding E-Rate funds were not restricted. We disagree.

The trial court's finding of fact regarding the E-Rate funds stated:

29. During 2009-10, CCS used moneys designated in its audit as "E-Rate — Other Unrestricted" to reimburse other moneys paid out of its current expense fund for internet and telecommunications. CCS received the "E-Rate" reimbursement funds for operating federal programs. The evidence shows that CCS used moneys from its general fund to pay for CCS's telephones, internet, and telecommunications. Providing internet, telephones, and telecommunication services to school buildings is a utility cost and part of the operating expenses of CCS's general educational program, and such money is not used for any special program. The federal government does not restrict the use of the reimbursement funds once received by CCS.

Testimony regarding the origin, purpose, and use of the E-Rate funds tended to show the following: Dr. Cheryl Lutz ("Dr. Lutz"), the director of technology services for CCS, testified E-Rate is a federal program, which reimburses the school system for a percentage of what it pays for telecommunications and Internet access. The amount of federal reimbursement is calculated based on the school system's free and reduced lunch numbers from across the general K-12 population.

According to Dr. Lutz, CCS contracts with and pays a vendor for Internet and telecommunications services. CCS is reimbursed by the federal government under the E-Rate program for a portion of the money previously expended for Internet and telecommunications services. CCS is required to apply and be approved for the E-Rate program, before it purchases the services and must submit a reimbursement form.

CCS funds these services from its local current expense fund prior to reimbursement from the E-rate program. All CCS K-12 students, staff, faculty, and bus drivers may utilize the Internet and telecommunications services. The transcript and evidence clearly show the donor of these funds did not designate or restrict these funds for some specific purpose.

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The trial court's findings of fact regarding the E-Rate funds indicate the federal government was the origin of these funds. The trial court also found the E-rate funds were used for Internet and telecommunications services for all CCS K-12 students, staff, faculty, and bus drivers.

The trial court's findings of fact are supported by competent evidence. These findings of fact support the trial court's conclusion that the E-Rate funds were not restricted based on the origin, purpose, and use of the moneys. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

E. Juvenile Crime Prevention Council

[5] Defendant argues the trial court erred by concluding the Juvenile Crime Prevention Council ("JCPC") funds were not restricted. We disagree.

The trial court's finding of fact regarding the JCPC funds states:

33. CCS included moneys designated as "JCPC" in its Special Revenue Fund during fiscal year 2009-10 to hire and pay for three school counselors. CCS received this federal grant money to pay for the salaries and benefits of personnel that trained, managed, and supported at-risk students in grades K-12. The evidence revealed that in 2009-10, CCS chose to use the grant to offset salaries and benefits for two school counselors, and to combine this grant with another federal grant, Governor's Crime Commission, to offset the compensation of another school counselor. These counselors served students in CCS's general K-12 population and were therefore part of its general program. The provision of hiring and paying the salaries and benefits of school counselors for students in grades K-12 is a part of CCS's current operating expenses.

Testimony regarding the origin, purpose, and use of the JCPC funds tended to show the following: Rodney Borders ("Mr. Borders") served as the director of alternative programs for CCS during the 2009-2010 school year. Mr. Borders explained CCS sets up an alternative program for students who are "at risk as far as attendance, discipline problems, hardships in the lives, that need a smaller environment." Mr. Borders testified the alternative programs are funded by JCPC moneys, which are obtained through a federal grant.

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Mr. Borders explained the JCPC funds were combined with another grant from the Governor's Crime Commission to hire and pay the salaries and benefits of additional life skills counselors. Mr. Borders testified the JCPC funds were also used to pay the salaries of life skills counselors currently employed by CCS. The life skills counselors were available to all K-12 students in Cleveland County schools.

The trial court's findings of fact regarding the JCPC funds indicates the origin of the funds was from the federal government. The JCPC funds were used to pay the salaries of life skills counselors. These life skills counselors were available to the entire K-12 population of CCS.

The trial court's findings of fact regarding the JCPC funds are supported by competent evidence. These findings of fact support the trial court's conclusion that the JCPC funds were not restricted based on origin, purpose, and use. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

F. Dropout Prevention Grant

[6] Defendant argues the trial court erred by concluding funds designated as the Dropout Prevention Grant were not restricted. We disagree.

The trial court's finding of fact regarding the Dropout Prevention Grant states:

35. CCS included moneys designated as "Dropout Prevention Grant" in its Special Revenue Fund during fiscal year 2009-10. CCS received this state funded grant for purposes of providing a dropout prevention program as part of its general K-12 educational programs and school curriculum. The evidence revealed that CCS was given discretion in deciding how to spend the funds received from the Dropout Prevention Grant. For the 2009-10 fiscal year, CCS decided to spend the funds to purchase computer software programs and general K-12 curriculum programs, to pay for the salaries and benefits of three CCS employees, specifically two teaching assistants and a truancy court coordinator for CCS, and to provide staff development for school counselors. Those employees were each employed by CCS in its general K-12 program.

Testimony regarding the origin, purpose, and use of the Dropout Prevention Grant tended to show: Tony Fogelman ("Mr. Fogelman"), the career and technical education director for CCS, oversaw the Dropout

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Prevention Grant. He explained the Dropout Prevention Grant was a “state-funded grant that provides resources to public school systems, for them to make the decision as to how they want to best spend their money to prevent dropouts, keep kids in school.”

Mr. Fogelman testified the Dropout Prevention Grant was targeted at all CCS students. For the 2009-2010 school year, CSS used the Dropout Prevention Grant to pay for two teaching assistants and a truancy court coordinator.

The trial court’s findings of fact regarding the Dropout Prevention Grant indicate the origin of these funds was from North Carolina state government. The transcript and evidence clearly show the Dropout Prevention Grant was intended to benefit the entire K-12 student population. CCS exercised discretion over how to spend the funds, in furtherance of its goal of preventing students from dropping out of school.

The trial court’s finding of fact regarding the Dropout Prevention Grant is supported by competent evidence. The findings of fact support the trial court’s conclusion that the funds designated for the Dropout Prevention Grant were not restricted based on origin, purpose, or use. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

G. ROTC

[7] Defendant argues the trial court erred by concluding the Reserved Officers’ Training Corps (“ROTC”) funds were not restricted. We disagree.

The trial court’s findings of fact regarding the ROTC funds state:

44. CCS included moneys designated as “ROTC” in its Special Revenue Fund during fiscal year 2009-10 to reimburse the salaries of its high school teachers teaching reserve officers’ training corps courses (“ROTC”). CCS offers ROTC courses to high school students as part of its general high school program and regular high school curriculum.

45. CCS received ROTC moneys from the federal government in connection with its operation of federal programs. During 2009-10, CCS used other moneys from its general fund to pay for the salaries and benefits of its ROTC teachers in the K-12 population, and the federal government provided a reimbursement to CCS for such expenditures.

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The federal government places no restriction on the use of the reimbursement funds once received by CCS.

Evidence regarding the origin, purpose, and use of the ROTC funds tended to show the following: Mr. Lee testified the ROTC funds are reimbursed by the United States Armed Services for partial payment of ROTC instructors' salaries. The instructors' salaries are initially paid out of the current expense fund. CCS is subsequently partially reimbursed by the federal government. Mr. Lee testified the ROTC funds were included in the current expense fund prior to the 2009-2010 school year.

The trial court's findings of fact indicate the origin of the ROTC funds was from the federal government. These funds were used to reimburse ROTC instructors' salaries paid from CCS's current expense fund. The transcript and evidence clearly show the federal government did not restrict the ROTC funds to a specific purpose.

Competent evidence supports the trial court's finding of fact that "[t]he federal government places no restriction on the use of the reimbursement funds once received by CCS." These findings of fact support the trial court's conclusion that the ROTC funds were not restricted based on origin, purpose, or use. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

H. WorkForce Investment Act

[8] Defendant argues the trial court erred in concluding WorkForce Investment Act ("WIA") funds were not restricted. We disagree.

The trial court's findings of fact regarding WIA funds state:

52. During 2009-10, CCS used moneys designated in its audit as "WIA," meaning WorkForce Investment Act, to support, prepare, and train students to enter the workforce upon graduation from high school. The provision of preparing and training high school students for the workforce is part of CCS's general educational program and its regular curriculum.

53. CCS received the WIA funds as a federal grant through Isothermal Community College, which distributes moneys under the WorkForce Investment Act program to school systems within the state. The evidence reveals that CCS had discretion in deciding how to spend this grant for training students to enter the workforce upon graduation. In 2009-10, CCS chose to use this grant to offset the salaries

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of two employees to work at CCS's Job Link Center and to pay the hourly wages of students that were placed in the workforce through the program.

Testimony regarding the origin, purpose, and use of the WIA funds tended to show the following: Mr. Lee testified WIA is a program administered by the Isothermal Community College to transition CCS students into the workforce. Mr. Fogelman testified he was responsible for overseeing WIA money.

Mr. Fogelman stated WIA is a federal program through which the federal government distributes money to the states. He explained the states allocate this money in the form of block grants to school systems through workforce development boards.

Mr. Fogelman testified CCS submitted a grant application to the workforce development board, in which it requested a certain amount of WIA funds. CCS largely spent the money it received to pay the salaries of students who were working for various employers through the program. WIA funds were also used to pay two employees who worked at the Job Link Center, which assists students in finding employment.

Mr. Fogelman stated WIA funds were primarily used to serve the general K-12 population of CCS, because the program is open to every age-eligible student. He testified every student in the school, who qualified, could participate in the program.

The trial court's findings of fact regarding WIA funds indicate the funds originated from the federal government and were allocated throughout North Carolina. WIA funds were used to pay two employees at the Job Link Center and to pay the salaries of those students who participated in the program.

Competent evidence supports the trial court's findings of facts regarding WIA funds. These findings of fact support the trial court's conclusion that WIA funds were not restricted based on the origin, purpose, and use of these funds. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

I. Gear Up Grant

[9] Defendant argues the trial court erred by concluding the Gear Up Grant funds were not restricted. We disagree.

The trial court's finding of fact regarding the Gear Up Grant funds states:

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55. CCS included moneys designated as “Gear Up Grant” in its Special Revenue Fund during fiscal year 2009-10. CCS received this grant from the University of North Carolina to support providing programs that would increase the number of students attending a post-secondary educational institution. The provision of providing a program to students in grades K-12 to increase the number of students who attend college is part of CCS’s general educational programs and its regular curriculum. The evidence revealed that CCS was given great discretion in deciding how to spend its general funds in order to receive reimbursement funds from the Gear Up Grant. In 2009-10, CCS used moneys from the Gear Up Grant to reimburse expenses for tutoring services CCS provided to K-12 students, to pay for the salaries and benefits of CCS personnel, and to provide after-school activities. The University of North Carolina does not restrict the use of the reimbursement funds once received by CCS.

Testimony regarding the use, origin, and source of the Gear Up Grant funds tended to show the following: Juan Cherry (“Mr. Cherry”), a Graham Elementary School counselor, served as the “Gear Up coordinator” during the 2009-2010 school year. Mr. Cherry testified Gear Up is a federal grant program designed to increase the number of students who enter and succeed in post-secondary education. CCS’s Gear Up program was a part of the grant received by the state. The North Carolina Gear Up grant program was administered by the University of North Carolina. Defendant provided tutors, toured university campuses, hosted mentoring programs, and other programs to their students through the Gear Up program. These programs were aimed at achieving higher college attendance rates.

CCS initially spent money out of its current expense fund, and was reimbursed through the Gear Up Grant program on a monthly basis for the money spent on the program. CCS deposited the reimbursement money into its restricted fund. Mr. Cherry testified the Gear Up Grant money was spent on the general K-12 student population, with the intention of increasing the number of CCS students who attend college.

The trial court’s findings of fact regarding the Gear Up Grant funds indicate the origin of these funds was from the state government to the University of North Carolina. These funds were spent on various programs aimed at achieving higher college attendance rates among CCS

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students. The programs were made available to the general K-12 population of CCS.

Competent evidence supports the trial court's finding of fact that "[t]he University of North Carolina does not restrict the use of the reimbursement funds once received by CCS." These findings of fact support the trial court's conclusion that the Gear Up Grant funds were not restricted based on origin, purpose, or use. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

V. Conclusion

The trial court properly concluded certain funds, discussed *supra*, were not restricted. The trial court's findings of fact regarding the origin, purpose, and use of certain funds are supported by competent evidence contained in the record and transcript.

These findings of fact support the trial court's conclusions of law that these funds were not restricted, and must be included in the per-pupil share of funding allotted to the charter schools. The order from which defendant CCS appealed is affirmed.

AFFIRMED.

Judge McCULLOUGH concurs.

Judge BRYANT concurs in part and dissents in part by separate opinion.

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

I concur in the majority opinion affirming the trial court's findings and conclusions regarding the restricted or nonrestricted nature of certain funds; however, I dissent from the majority's holding that the trial court's findings of fact and conclusions of law support its determination that "indirect costs" and "E-rate" funds are nonrestricted.

Indirect Costs

The majority opinion holds that the trial court did not err in finding and concluding that "indirect costs," which are a percentage of the total federal grant funding that pays for the operating expenses incurred by the school system to implement federally funded grant programs, are nonrestricted revenues. I respectfully disagree with this holding. This Court has noted that " 'federal grants restricted as to use' . . . clearly

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have operating expenses . . . but that fact does not make the funds ‘unrestricted.’” *Thomas Jefferson et al. v. Cleveland Cnty. Bd. of Educ.*, ___ N.C. App. ___, ___, 763 S.E.2d 288, 293 (2014) (“*Thomas Jefferson II*”) (instructing the trial court on remand to determine whether funds are restricted). The trial court specifically found that CCS received indirect costs “in connection with its operation of federal programs.” Because the *origin* of revenue for indirect costs was the federal grants themselves, and because the federal grant money was restricted to specific purposes, the funding for operating expenses incurred in connection with those grants is likewise restricted.

Additionally, even though the trial court found that “[t]he federal government [did] not place any restrictions on how CCS *uses* the reimbursements it received for indirect costs,” it nonetheless acknowledges those funds are received in connection with CCS’s operation of federal programs. *See id.* (“[W]e define ‘restricted’ funds as those funds which have been designated by the donor for some specific program or purpose . . .”).

Finally, the majority opinion focuses quite a bit on Mr. Lee’s testimony. With regard to his testimony, it is notable that the trial court found that indirect costs “consisted of reimbursements from the federal government,” when Mr. Lee testified exactly to the contrary. He testified that indirect costs “are not reimbursements at all. They are in fact a part of the full [federal] grant.” It is unclear from the record that there is evidence to support this finding of fact by the trial court. Further, the findings by the trial court confirm that the origin and purpose of the indirect costs were restricted. Here, the trial court found that “CCS received [the indirect costs] in connection with its operation of federal programs,” whose funds were restricted. To then say that the government placed no restriction on the use of those funds is not supported by the record, and further, violates the mandate of the Court in *Thomas Jefferson II* as to the definition of “restricted” funds. *See id.* For these reasons, I disagree with the majority opinion regarding indirect costs, and would hold that the indirect costs are restricted funds.

E-Rate

The majority opinion also holds that the trial court did not err in finding and concluding that E-Rate funding was made available by the federal government for unrestricted *use* for the entire K–12 population and was not *used* for any special program. Again, I disagree.

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The majority opinion, as did the trial court, disregards the origin of the E-Rate funds. The trial court's findings are insufficient to support its conclusion that the E-Rate funds are not restricted. The trial court, in defiance of the mandate of *Thomas Jefferson II*, made conclusory findings as to use, but failed to make findings concerning the funds' origin and purpose. While it is true that all CCS students, staff, and even bus drivers could use the Internet and telecommunications services provided for by the E-Rate funds, the funds were essentially restricted because of the nature of the strict application and approval process, which goes towards the funds' "origin and purpose." *See id.* at ___, 763 S.E.2d at 294 (instructing the trial court on remand to determine whether funds are restricted by examining and making findings of fact about the *origins*, purpose, and uses of the challenged funds). Evidence in the record shows that the funds originated from the federal government for very specific technological purposes and that the funds were used for those specific purposes.

Specifically, E-Rate funds are made available to reimburse a school only after certain pre-approved purchases are made. CCS was required to obtain approval for the purchase of qualified technology services in advance and only then could the school system purchase the service. Once CCS purchased the pre-approved telecommunications and internet access, the school system was eligible to submit an application for reimbursement at a set rate.

E-Rate funding was not made available by the federal government for unrestricted use for the entire K-12 population. Rather, the E-Rate funds were provided by the federal government for a specific purpose. Therefore, the trial court's finding of fact which includes the statement that "[t]he federal government does not restrict the use of the reimbursement funds once received by CCS," is not supported by the evidence. To the contrary, the evidence established that E-rate funds would never have been provided to defendant but for its compliance with the federal government's lengthy and detailed approval process to ensure that only qualified technology services were purchased.

Despite who ultimately benefited from the *use* of the technology, the *funds* were restricted in that pre-approval was required and the funds were used for their specified purpose. Accordingly, I would reverse the trial court and find that the E-rate funds were restricted by the donor—the federal government—and required to be used for a specific purpose.

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WAKEMED, PLAINTIFF

v.

SURGICAL CARE AFFILIATES, LLC, DEFENDANT

No. COA15-127

Filed 3 November 2015

Contracts—indemnity clauses—ambiguous—question for trier of fact

The trial court's order granting defendant-Surgical Care Affiliates' Rule 12(b)(6) motion to dismiss was reversed in a breach of contract action involving contracts providing that defendant would manage the surgical departments at two of plaintiff-WakeMed's facilities. The contentions of both parties regarding the indemnity clauses in the contracts were reasonable, and interpretation of the ambiguity was best left to the trier of fact.

Appeal by plaintiff from order entered 4 August 2014 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 13 August 2015.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, William R. Forstner, and Maureen Demarest Murray, for plaintiff-appellant.

Wyrick Robbins Yates & Ponton LLP, by Paul J. Puryear, Jr., Frank Kirschbaum, and Tobias Hampson, for defendant-appellee.

McCULLOUGH, Judge.

Plaintiff WakeMed appeals from an order of the trial court, granting defendant Surgical Care Affiliates, LLC's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Based on the reasons stated herein, we reverse the order of the trial court.

I. Background

On 17 April 2014, plaintiff (otherwise referred to as "owner") filed a complaint against defendant (otherwise referred to as "manager") alleging a breach of contract claim. Plaintiff alleged that on or about 1 April 2010, plaintiff and defendant entered into two contracts: Management Agreement WakeMed Cary Hospital Surgery Department ("Cary Agreement") and Management Agreement WakeMed North Healthplex Surgical Department ("North Agreement") (collectively the

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“Agreements”). The Agreements provided that defendant would manage the surgical departments at two of plaintiff’s facilities for a monthly fee, pursuant to the applicable terms and conditions. The Agreements had an initial term of seven years with successive renewals of three years. Either party could terminate the Agreements upon sixty days’ written notice for a material breach, with an opportunity for the breaching party to cure within this period.

The complaint alleged that defendant undertook several duties under the Agreements, “including the express obligation to reduce the costs associated with surgical procedures” at WakeMed. Defendant was required to comply with “Global Performance Standards” (“GPS”) which were attached to the Agreements and incorporated by reference as part of the binding contracts. The GPS provided as follows:

The following criteria shall be used to measure and evaluate the overall performance of the Manager in the Department:

- (a) Reduction of average total cost per case adjusted for type of procedure by 5% or greater from pre-Agreement levels (adjusted for inflation), which may include reductions in supply costs per case and reductions in labor costs per case.
- (b) Improvement of perioperative processes from pre-Agreement levels, including turnaround times, publicly-reported clinical measures and on-time case starts.
- (c) Achievement of reasonably acceptable surgeon and patient satisfaction targets, as measured by a third party vendor mutually agreed upon by the Owner and the Manager.

The failure by the Manager to satisfy criterion (a) above, or both criteria (b) and (c) above, shall constitute a material breach for purposes of Article I, Section 6 of the Agreement.

Pursuant to Article I, Section 6 of the Agreements, failure to satisfy the GPS constituted a “material breach” of the Agreements. Plaintiff alleged that defendant failed to achieve a 5% reduction in cost per case and instead, the average total cost per case increased during the time defendant served as manager. Defendant also “failed to maintain surgeon satisfaction, surgical volume diminished, operating room turnover

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rate decreased, and staff departures and turnover increased, all of which were caused by [defendant's] actions and resulted in a significant loss of revenue for [plaintiff.]”

The complaint further alleged that as a result of defendant's material breach, plaintiff terminated the Agreements in 2011. On 10 June 2011, plaintiff provided written notice of breach to defendant, explicitly identifying defendant's failure to satisfy the GPS. The notice of breach permitted defendant to cure the breach within sixty days, but plaintiff alleged that defendant failed to do so. By a letter dated 31 August 2011, plaintiff and defendant mutually agreed that the Agreements had been terminated effective 15 August 2011, “except for a brief period of continued retention of a surgical department manager.” The 31 August 2011 letter expressly reserved the right of plaintiff to seek legal and equitable relief against defendant pursuant to Article I, Section 9 of the Agreements. As a result of defendant's breach of contract, plaintiff alleged that it was damaged in excess of \$10,000.00.

On 13 May 2014, defendant filed a motion to dismiss plaintiff's complaint based upon insufficiency of process and service of process, failure to state a claim upon which relief can be granted, and in the alternative, for summary judgment on the defense of the statute of limitations only pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(4), 12(b)(5), 12(b)(6), and Rule 56. Defendant argued that pursuant to Rule 12(b)(6), plaintiff failed to state a claim because the Agreements contained an exclusive remedy of contract termination and plaintiff elected to exercise that exclusive remedy in the termination of the Agreements. Defendant further argued that it “did not guarantee that it would achieve any particular operating results for plaintiff” and that plaintiff “explicitly agreed to indemnify and hold harmless [defendant] from any claims arising out of [defendant's] performance” under the Agreements.

A hearing on defendant's motion was held at 24 July 2014 Civil Session of Wake County Superior Court, the Honorable Paul Ridgeway presiding. On 4 August 2014, the trial court entered an order granting defendant's motion to dismiss plaintiff's complaint with prejudice on the theory that plaintiff's claim is “barred by the express language of the contract between the parties[.]”

On 28 August 2014, plaintiff filed notice of appeal from the 4 August 2014 order.

II. Standard of Review

“In reviewing a trial court's Rule 12(b)(6) dismissal, the appellate court must inquire whether, as a matter of law, the allegations of the

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complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.” *Newberne v. Dep’t. of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (citation and quotation marks omitted). “A complaint is properly dismissed pursuant to Rule 12(b)(6) when (1) the complaint, on its face, reveals that no law supports the plaintiff’s claim; (2) the complaint, on its face, reveals an absence of facts sufficient to make a good claim; or (3) some fact disclosed in the complaint necessarily defeats the plaintiff’s claim.” *Blow v. DSM Pharms., Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009).

“[W]e review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Gilmore v. Gilmore*, __ N.C. App. __, __, 748 S.E.2d 42, 45 (2013) (citation and quotation marks omitted).

III. Discussion

This appeal centers around the interpretation of a single sentence found within the Agreements; specifically, the last sentence of Article XII, Section 2. Article XII of both Agreements is entitled “Indemnification” and provides as follows, in pertinent part:

1. The Manager does not hereby assume any of the obligations, liabilities or debts of the Owner, except as otherwise expressly provided herein, and shall not, by virtue of its performance hereunder, assume or become liable for any of such obligations, debts or liabilities of the Owner. The Owner hereby agrees to indemnify and hold the Manager, its affiliates and owners, and their respective officers, governors, directors, employees, agents, owners and affiliates (each a “Manager Indemnified Party”) harmless from and against any and all claims, actions, liabilities, losses, costs and expenses of any nature whatsoever, including reasonable attorneys’ fees and other costs of investigating and defending any such claim or action (a “Loss”), which may be asserted against any of the Manger Indemnified Parties, arising out of or related to (i) the operation of the Department (excluding the acts or omissions of any Employees in the course of providing services in the Department), the Hospital and the Owner, (ii) the acts or omissions of the Department, the Hospital and the Owner or its agents or employees, and (iii) the Manager’s performance of its duties hereunder during the term of this

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Agreement, but excluding any Loss arising as a result of the gross negligence or willful misconduct of the Manager.

2. The Manager hereby agrees to indemnify and hold harmless the Owner and its members, officers, governors, directors, employees, agents, and affiliates (each an “Owner Indemnified Party”) from and against any and all Loss which may be asserted against an Owner Indemnified Party as a result of the gross negligence or willful misconduct of the Manager or its agents or employees in connection with the performance by the Manager of its duties hereunder. In no event shall the Manager be liable under this Agreement for any act of professional malpractice committed by any Medical Staff Physician, or other member of the Department’s Medical Staff. **This Article XII Section 2 shall constitute the sole obligation of the Manager with respect to any Loss and any claims arising out of this Agreement, the services provided by the Manager and/or the relationship created hereby, whether such claim is based in contract, tort, fraud or otherwise.**

(emphasis added).

“[T]he goal of construction is to arrive at the intent of the parties when the [contract] was [written.]” *Reaves v. Hayes*, 174 N.C. App. 341, 345, 620 S.E.2d 726, 729 (2005) (citation and quotation marks omitted). “[O]ur courts adhere to the central principle of contract interpretation that [t]he various terms of the [contract] are to be harmoniously construed, and if possible, every word and every provision is to be given effect.” *In re Foreclosure of a Deed of Trust*, 210 N.C. App. 409, 415, 708 S.E.2d 174, 178 (2011) (citation and quotation marks omitted). “It is presumed that each part of the contract means something.” *Brown v. Lumbermens Mut. Casualty Co.*, 326 N.C. 387, 393, 390 S.E.2d 150, 153 (1990) (citation omitted).

“A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law. When an agreement is ambiguous and the intention of the parties is unclear, however, interpretation of the contract is for the jury.” *Commscope Credit Union v. Butler & Burke, LLP*, __ N.C. App. __, __, 764 S.E.2d 642, 651 (2014) (citation omitted). “An ambiguity exists in a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations.” *Variety Wholesalers, Inc. v. Salem Logistics Traffic*

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Servs., LLC, 365 N.C. 520, 525, 723 S.E.2d 744, 748 (2012) (citation omitted). “The fact that a dispute has arisen as to the parties’ interpretation of the contract is some indication that the language of the contract is, at best, ambiguous.” *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 422, 547 S.E.2d 850, 852 (2001) (citation omitted).

In the current case, the clause at issue is found within Article XII, entitled “Indemnification.” Where a contract does not define a term used, “non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended.” *Reaves*, 174 N.C. App. at 345, 620 S.E.2d at 729 (citation omitted). Here, the Agreements do not define the term “indemnification.” “Ordinarily, indemnity connotes liability for derivative fault. In indemnity contracts the engagement is to make good and save another harmless from loss on some obligation which he has incurred or is about to incur to a third party[.]” *Dixie Container Corp. v. Dale*, 273 N.C. 624, 628, 160 S.E.2d 708, 711 (1968) (citation omitted). “The court must construe the contract ‘as a whole’ and an indemnity provision ‘must be appraised in relation to all other provisions.’” *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008) (citation omitted).

On appeal, plaintiff argues that the trial court erred by concluding that plaintiff’s claim is “barred by the express language of the contract between the parties[.]” Plaintiff asserts that the trial court misread the disputed clause as an unambiguous exculpatory clause when rather, it is an ordinary indemnity provision, “further explaining the circumstances in which [defendant] would be obligated to indemnify [plaintiff] against third-party claims.” Plaintiff contends that Section 1 of Article XII sets forth circumstances where plaintiff would indemnify defendant for third party claims made against defendant, even indemnifying defendant from claims made against defendant by third parties to the extent they arose from defendant’s mere negligence. On the other hand, plaintiff interprets Section 2 of Article XII as setting forth circumstances where defendant would indemnify plaintiff for third party claims against plaintiff arising from defendant’s gross negligence or willful misconduct. Furthermore, plaintiff reads Section 2 as the parties agreeing that defendant would not “be liable under this Agreement for any act of professional malpractice committed by any Medical Staff Physician, or other member of the Department’s Medical Staff.”

More importantly, plaintiff argues that defendant’s express agreement to indemnify plaintiff against third party claims arising from defendant’s gross negligence and willful misconduct “is not the only way” in which defendant would be obligated to indemnify plaintiff against third

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party claims. Plaintiff suggests that indemnification obligations, regardless of defendant's contractual indemnity obligations, could arise in one of three ways – express contract, contract implied-in-fact, or through equitable concepts arising from the tort theory of indemnity. Plaintiff states as follows:

For example, [defendant] promised to “[a]ssist Owner in negotiating or retaining contractual relationships for anesthesiology, radiology and pathology services, as appropriate” and to “[a]rrange for the purchase or lease by the Owner of all supplies and equipment.” . . . The circumstances relating to [defendant's] negotiation of such contracts on behalf of [plaintiff] could, under appropriate facts, create a contract to indemnify implied-in-fact. Similarly, if [plaintiff] was secondarily or derivatively liable for any torts committed by [defendant] (*e.g.*, in a lawsuit against [plaintiff] filed by, or relating to the actions of, an employee under [defendant's] supervision and control), [plaintiff] could have a common law right to indemnification under a contract implied-in-law of primary/secondary liability.

Accordingly, plaintiff interprets the challenged clause as a “catch-all” provision “to foreclose any such possible indemnification obligations for [defendant] . . . other than those expressly delineated.” Plaintiff argues that the “catch-all” provision relieves defendant of any other obligation to indemnify plaintiff whether arising in contract, in tort, or otherwise.

In contention with plaintiff's interpretation, defendant argues that the clause constitutes a clear and unambiguous, blended indemnity and exculpatory clause that limits defendant's liability under the Agreements. Defendant agrees with plaintiff's contention inasmuch as the last sentence in Section 2 of Article XII is a “catch-all” to the indemnity provision, protecting defendant from extra-contractual circumstances in which defendant is required to indemnify plaintiff. However, defendant argues that the “plain language of the provision makes clear its application spans beyond indemnity.” Defendant contends as follows:

it states that the indemnity obligations of [defendant] are the sole obligation of [defendant] with respect to “any claims arising out of this Agreement . . . whether such claim is based in contract, tort, fraud or otherwise.” This language is unmistakably broader than an indemnity provision focused on protecting a party against “extra-contractual

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circumstances,” and contrary to [plaintiff’s] argument, speaks directly to contractual circumstances.

Furthermore, defendant argues that reading the clause at issue, in conjunction with Article XIII (entitled “Miscellaneous”), Section 9 of the Agreements, references claims between the parties. Article XIII, Section 9 provides as follows:

The terms and provisions of this Agreement are intended solely for the benefit of the parties hereto and their respective permitted successors or assigns, and it is not the intention of the parties to confer third-party beneficiary rights upon any other person or entity.

Lastly, defendant argues that the title of Article XII, “Indemnification,” does not limit the application of the clause at issue to indemnification only. Defendant directs our attention to Article XIII, Section 5 which states that “[t]he headings used in this Agreement have been inserted for convenience and do not constitute provisions to be construed or interpreted in connection with this Agreement.”

After careful review, we conclude that both plaintiff and defendant’s interpretations of the language of the Agreements are reasonable. *See Dockery*, 144 N.C. App. at 422, 547 S.E.2d at 852 (stating that “[a]mbiguity exists where the contract’s language is reasonably susceptible to either of the interpretations asserted by the parties”). Because the language of the provision creates an ambiguity as to the true intention of the parties, interpretation of an ambiguous contract is best left to the trier of fact. Therefore, we hold that the trial court erred by granting defendant’s 12(b)(6) motion to dismiss and reverse the trial court’s order.

IV. Conclusion

The trial court’s order granting defendant’s Rule 12(b)(6) motion to dismiss is reversed.

REVERSED.

Judges STROUD and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 NOVEMBER 2015)

IN RE B.J.L. No. 15-576	Buncombe (13JT196)	Affirmed
IN RE D.C.J. No. 15-503	Watauga (13JT5)	Affirmed
IN RE K.W. No. 15-435	Wake (14JA369-72)	Affirmed
REAVIS v. COLLINS No. 15-545	Wilkes (13CVS1304)	Dismissed
SARTORI v. N.C. DEPT OF PUB. SAFETY No. 15-319	Wake (14CVS2489)	No Error
STATE v. BAREFOOT No. 15-218	Henderson (12CRS50798)	No Error
STATE v. HOWARD No. 15-16	Wake (12CRS223754) (13CRS185)	New Trial
STATE v. HOWARD No. 15-96	Mecklenburg (11CRS256439) (12CRS200894-899)	NO ERROR IN PART; NO PLAIN ERROR IN PART
STATE v. MANNO No. 15-33	Cleveland (12CRS3538-40) (12CRS3546-47)	No Prejudicial Error at Trial; Remanded for Recalculation of Prior Record Level and Resentencing
STATE v. STONE No. 15-314	Person (12CRS52110) (14CRS875)	Dismissed in part; no error in part.
SUAREZ v. LCD PROPS., LLC No. 15-129	Henderson (12CVS2161)	Affirmed
VOGEL v. FOOD LION No. 14-1301	N.C. Industrial Commission (Y11706)	Affirmed in part; reversed and remanded in part

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ACCOMPLICES AND ACCESSORIES

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ADVERSE POSSESSION

Under color of title—intent—The trial court erred by granting summary judgment for defendants on an adverse possession under color of title claim where there was a material issue of fact as to defendants' subjective intent. The issue of adverse possession cannot be answered without consideration of intent. **Quinn v. Quinn, 374.**

APPEAL AND ERROR

Alimony order—trial recordings unavailable—no issue raised as to sufficiency of findings of fact—briefs and record sufficient for review—Where recordings of the trial court proceedings became unavailable due to the long delay between the proceedings and the entry of the alimony order, the parties' briefs and the record were sufficient to allow the Court of Appeals to review defendant's appeal. The issues raised in defendant's appeal pertained to questions of law and whether the trial court's findings of fact supported its conclusions of law, not the sufficiency of the findings. **Collins v. Collins, 696.**

Appealability—denial of judgment on the pleading—Defendants' interlocutory appeal was properly before the Court of Appeals where the denial of their motion for judgment on the pleadings affected a substantial right. Defendants made a colorable assertion that the claim was barred by collateral estoppel. **Fox v. Johnson, 274.**

Appealability—guilty plea—Defendant's right of appeal after a guilty plea was limited by statute and not available in this case. There were no grounds for certiorari, and the appeal was dismissed without prejudice to defendant's pursuit of a motion for appropriate relief. **State v. Miller, 660.**

Appealability—sovereign immunity—Rule 12(b)(2) motion to dismiss—In an action arising from a pedestrian-auto accident after a Christmas parade, the trial court's denial of the Town's Rule 12(b)(2) motion to dismiss, premised on sovereign immunity, was immediately appealable. **Parker v. Town of Erwin, 84.**

Defective notice of appeal—appellate writ of certiorari—A pro se criminal defendant's petition for writ of certiorari was granted by the Court of Appeals where his notice of appeal was untimely, technically defective, and not served upon the State; the State did not respond to defendant's petition; and the State filed its brief with no reference to defendant's notice of appeal. **State v. Pender, 142.**

Effective assistance of counsel—direct appeal—On appeal from defendant's conviction for armed robbery, the Court of Appeals dismissed defendant's ineffective assistance of counsel claim without prejudice to his right to file a motion for appropriate relief in the trial court. **State v. Gamble, 414.**

APPEAL AND ERROR—Continued

Failure to object—failure to assert plain error—On appeal from defendant's conviction for felony larceny, the Court of Appeals did not review the merits of defendant's argument concerning the admission of some of his prior convictions for impeachment purposes. Even though defendant objected to the State's forecast of the Rule 609(b) evidence, he did not object when the evidence was actually introduced before the jury. Defendant lost his remaining opportunity for appellate review by failing to argue in his appellate brief that the trial court's alleged error amounted to plain error. **State v. Joyner, 644.**

Foreclosure—default—issue not raised at trial—not preserved—On appeal from an order authorizing the substitute trustees to proceed with a foreclosure sale, the Court of Appeals did not consider the merits of respondent's argument that respondent had not personally defaulted on the loan. Respondent failed to raise the issue of default at trial, thereby failing to preserve the issue for appellate review. **In re Foreclosure of Rawls, 316.**

Guilty plea—appeal from denial of motion to exclude search results—no notice—Petitions for certiorari and a pro se appeal from the denial of a motion to suppress cocaine seized in a pat-down search were denied where defendant did not file a notice of intent to appeal before filing a guilty plea. A petition for certiorari in these circumstances may be allowed only if the right to appeal was lost by failure to take timely action; there was Court of Appeals precedent that the right of appeal was lost because the defendant pleaded guilty, not because he failed to take timely action. Although there was an opinion that allowed a writ of certiorari, the earlier precedent had to be followed. **State v. Harris, 137.**

Immediate appealability—sovereign immunity—In a case arising from an injury on school grounds, allegedly from an unsafe condition, only the trial court's ruling on the School Board's motion to dismiss on sovereign immunity grounds was immediately reviewable. **Bellows v. Asheville City Bd. of Educ., 229.**

Interlocutory orders and appeals—summary judgment denied—res judicata and collateral estoppel—no final determinations on merits—Where the trial court denied defendants' motion for summary judgment based on res judicata and collateral estoppel in a lawsuit for breach of contract and quantum meruit, the Court of Appeals dismissed defendants' interlocutory appeal for lack of appellate jurisdiction. None of plaintiff's claims against any of the parties had been finally determined on the merits, so there was no possibility of a result inconsistent with a prior jury verdict or prior decision on the merits by a judge. An order setting aside a default judgment against another party opened up plaintiff's claims to relitigation; furthermore, the trial court's later determination that it lacked subject matter jurisdiction over that party rendered the default judgment void ab initio. **Well v. Worlock, 666.**

Interlocutory order—substantial right—venue—earning a living—An appeal from an interlocutory order granting a preliminary injunction affected the substantial right of having the case heard in the proper venue. However, the substantial right of earning a living was not affected because the preliminary injunction only limited defendant's activities and did not prevent defendant from working in plaintiff's industry. **A & D Envtl. Servs., Inc. v. Miller, 1.**

Interlocutory order—two appeals—The trial court did not err by refusing to consider defendant's contention about an interlocutory order affecting a substantial right in a second action that was taken during the pendency of the appeal in a first action on the same matter where both appeals involved venue. Despite defendant's

APPEAL AND ERROR—Continued

contention that he was advancing a new theory, his argument was embraced by the first appeal. **A & D Env'tl. Servs., Inc. v. Miller, 1.**

Notice of appeal—filed with Business Court electronic system—not sufficient—Plaintiff did not properly give notice of appeal where the only timely notice of appeal was filed with the North Carolina Business Court using its electronic filing system instead of with the clerk of superior court. **Ehrenhaus v. Baker, 17.**

Objection to closing statement overruled—immediate reiteration of statement—preserved for appeal—In defendant's trial for first-degree murder, where the prosecutor stated that defendant could be released from civil commitment after fifty days if found not guilty by reason of insanity and the trial court overruled defense counsel's objection, the Court of Appeals rejected the State's argument that the prosecutor's statement immediately following the objection was unpreserved for appeal. When the prosecutor subsequently stated, "She very well could be back home in two months," the prosecutor was merely reiterating his prior statement. Both statements—immediately before and immediately after the objection—therefore were preserved for appeal. **State v. Dalton, 124.**

Petition for certiorari to Court of Appeals denied—extraordinary writ not justified—Certiorari was not granted by the Court of Appeals in a case involving attorney fees in a class action where the circumstances of the case did not justify the extraordinary remedy. **Ehrenhaus v. Baker, 17.**

Preservation of issues—constitutional issue—not raised at trial—Defendant did not preserve for appeal the issue of whether "sex offender" is unconstitutionally vague where the issue was not raised below. **State v. Mastor, 476.**

Preservation of issues—fatal variance—review by discretionary authority—While defendant did not preserve his fatal variance argument for appeal, the Court of Appeals exercised its discretionary authority to review the argument to prevent manifest injustice. **State v. Jefferies, 455.**

Preservation of issues—issue not asserted at trial—Defendant waived his right to appellate review of an alleged fatal variance between the indictment and the evidence where he did not assert the issue at trial. **State v. Hooks, 435.**

Preservation of issues—motion in limine—no evidence offered at trial—The issue of whether medical records should have been excluded from a medical malpractice case was not preserved for appellate review where plaintiff filed a motion *in limine* but failed to object when the evidence was offered at trial. **Clarke ex rel. Est. of Bohn v. Mikhail, 677.**

Preservation of issues—plain error—evidentiary and instructional errors—Issues involving instructional and evidentiary errors that defendant failed to preserve at trial were reviewed for plain error. **State v. Harris, 728.**

Right to appeal after guilty plea—no motion to suppress—Defendant had no statutory right to appeal the trial court's denial of her motion to dismiss after a guilty plea to a misdemeanor (driving while impaired) was entered. Defendant did not file a motion to suppress and has no right of appeal after denial of her motion to dismiss and entry of a plea of guilty. **State v. Ledbetter, 746.**

Unpreserved argument—circumstances not exceptional—The Court of Appeals declined to invoke Rule 2 of the Appellate Rules to address an unpreserved argument

APPEAL AND ERROR—Continued

where defendant contended that there were fatal variances between indictments for kidnapping and the evidence presented at trial. Exceptional circumstances were not involved. **State v. Pender, 142.**

Writ of certiorari on appeal—outside of Appellate Rules authority—Defendant's appeal from a guilty plea to driving while impaired was dismissed where she contended that the Court of Appeals had the authority to issue a writ of certiorari. Defendant's petition did not invoke any of the three grounds set forth in Appellate Rule 21 to enable the Court of Appeals to issue the writ under that rule, and defendant did not demonstrate the 'exceptional circumstances' necessary to invoke Rule 2 and suspend the requirements of Rule 21 to review the merits of her argument by certiorari. **State v. Ledbetter, 746.**

ARSON

Burning private property—instruction—defendant's presence at scene—The trial court did not err in a prosecution for burning personal property by failing to instruct the jury regarding defendant's presence at the scene of the crime. Defendant's presence was not required to prove a fact necessary to establish any element of the crime or a lesser-included offense. **State v. Jefferies, 455.**

ASSAULT

By pointing a gun—sufficiency of the evidence—Each of defendant's convictions for assault by pointing a gun was supported by the evidence where defendant contended that the State's evidence was too vague for the jury to infer that he pointed a gun at any particular individual. There was evidence from which the jury could reasonably have inferred that defendant pointed his shotgun at each person corralled into a single bedroom. **State v. Pender, 142.**

ATTORNEY FEES

American Rule—class action—settlement—Plaintiff's class action lawsuit challenging the merger of two banks did not result in the establishment of a common fund, so that the common fund exception to the American Rule (prohibiting the payment of attorney fees to the prevailing party without statutory authorization) did not apply. Defendant's payment of plaintiff's attorney fees was provided by a voluntary settlement between the parties. **Ehrenhaus v. Baker, 17.**

Class action—settlement—judicial approval—It has been expressly recognized that parties may agree to the payment of attorney fees in settling disputes. The settlement of class actions, unlike settlements in ordinary civil actions, must be judicially approved in a fairness hearing, during which the trial court must carefully assess the award of attorney fees to ensure that it is fair and reasonable. **Ehrenhaus v. Baker, 17.**

On remand—supporting order from trial court—within scope of remand—On remand in a class action arising from the merger of two banks, a trial court order was within the scope of remand instructions where the trial court had been directed to complete its review of the evidence, articulate a legal basis for any award of attorney fees, and make the appropriate findings and conclusions on the issue of how it arrived at the figure to be awarded. **Ehrenhaus v. Baker, 17.**

ATTORNEYS

Professional conduct violation—notice to attorney—On appeal from an order of discipline of the N.C. State Bar concluding that defendant attorney violated the Rules of Professional Conduct during the course of a commercial real estate transaction, the Court of Appeals rejected defendant's argument that, because he did not receive adequate notice of the conduct upon which the Bar ultimately relied in finding a violation, his due process rights were violated. The factual allegations in the complaint gave defendant sufficient notice of the primary misconduct alleged, and the use of the client's name instead of the client's LLC's name in the complaint did not constitute a material difference depriving defendant of notice. Even assuming the allegations of the complaint were materially different from the findings in the order, the State Bar's pleading was amended by implied consent to conform to the proof presented at trial. **N.C. State Bar v. Merrell, 356.**

Professional conduct violation—real estate transaction—misappropriation of funds—conflict of interest—On appeal from an order of discipline of the N.C. State Bar concluding that defendant attorney violated the Rules of Professional Conduct during the course of a commercial real estate transaction, the Court of Appeals held that the Bar's findings of facts were supported by the evidence and that the conclusions of law were supported by the findings of fact. The evidence showed that defendant transferred funds without receiving the owner of the funds' permission and then failed to take steps to ensure that the funds were not misappropriated. Defendant also engaged in a conflict of interest and failed to provide full disclosure to one of the clients. **N.C. State Bar v. Merrell, 356.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Neglect adjudication—not sufficiently supported by evidence—An adjudication that a juvenile was neglected was reversed where some of the trial court's findings were not supported by competent evidence from the adjudicatory hearing. The trial court's findings focused primarily on contact between the child and his father, who had pled guilty to indecent liberties with a sibling, but the evidence and the findings did not show that the father's single contact with the child harmed him or created a risk of harm. Moreover, there was no evidence that the mother's housing instability impeded her care of the child or exposed him to an injurious environment. **In re J.R., 309.**

CHILD VISITATION

Mother in N.C.—father in Malawi—child's best interests—In a child custody case with a mother in North Carolina and the father in Malawi in which the mother contended that the trial court erred by allowing the father the discretion to exercise visitation in Malawi, the trial court was not required to make a finding or conclusion that it was in the best interest of the child to travel to Malawi. Rather, the trial court's task was to fashion a custody arrangement that was in the child's best interest in the context of extremely unusual circumstances, and the trial court's findings reflected appropriate awareness of the possible dangers to the child of travel to Malawi. The trial court found that "Defendant will provide carefully for the protection and safety of the minor child if visitation is allowed in Malawi" and this finding was amply supported by other findings tending to show that defendant was a person of good moral character who had assiduously sought to exercise his right to visitation and who had several years of experience with conditions in Malawi. **Burger v. Smith, 233.**

CHILD VISITATION—Continued

Mother in N.C.—father in Malawi—visitation schedule—not abuse of discretion—In a child custody case involving a mother in North Carolina and a father in Malawi, the trial court did not abuse its discretion by ordering a visitation schedule of alternating periods of a month with the father followed by two months with the mother and by directing that when the minor child, who was eighteen months old at the time of the hearing, begins kindergarten, defendant would then have visitation during the school's summer break and during the winter and spring breaks. The trial court's findings of fact and conclusions of law demonstrate an intention to fashion a custody plan that would foster the development of a close and meaningful relationship between the minor child and both of his parents. To achieve this goal the trial court was necessarily required to deviate from the most commonly employed custody schedules, and the visitation schedule was an appropriate response to the parties' unusual living situation. If the child's future high school activities render a change of visitation advisable, a modification could be sought at that time. **Burger v. Smith, 233.**

CITIES AND TOWNS

Public water system—challenge to legislation—condemnation—Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the trial court erred by concluding that the legislation violated Article I, Sections 19 and 35 of the state constitution, as an invalid exercise of power to take or condemn property. The Court of Appeals directed the trial court on remand to enter summary judgment in favor of the State on this issue. **City of Asheville v. State of N.C., 249.**

Public water system—challenge to legislation—law of the land—Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the trial court erred by concluding that the legislation violated the law of the land clause in Article I, Section 19 of the state constitution. The Court of Appeals directed the trial court on remand to enter summary judgment in favor of the State on this issue. **City of Asheville v. State of N.C., 249.**

Public water system—challenge to legislation—local act—Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the trial court erred by concluding that the legislation was a local act related to health, sanitation, or non-navigable streams in violation of Article II, Sections 24(1)(a) and (e) of the state constitution. The Court of Appeals directed the trial court on remand to enter summary judgment in favor of the State on this issue. **City of Asheville v. State of N.C., 249.**

Public water system—challenge to legislation—standing—Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the City had standing to challenge the constitutionality of the legislation. The Court of Appeals rejected the State's argument to the contrary because the City had not accepted any benefit from the legislation. **City of Asheville v. State of N.C., 249.**

CIVIL PROCEDURE

Summary judgment—following a Rule (12)(b)(6) dismissal—The trial court's denial of plaintiff's motion for summary judgment in an action for a declaratory judgment construing a will was void ab initio where the trial court had already granted a Rule 12(b)(6) motion against plaintiff, albeit erroneously. A dismissal under Rule 12(b)(6), with prejudice, operates as an adjudication on the merits. **Brittian v. Brittian, 6.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Federal and state rule 12(b)(6)—The trial court erred by denying defendants' motion for judgment on the pleadings as to plaintiffs' malicious prosecution claims based on collateral estoppel where plaintiffs' Rule 12(b)(6) motion had been granted in federal court. The standard under Federal Rule 12(b)(6) is a different, higher pleading standard than mandated under the North Carolina General Statutes. **Fox v. Johnson, 274.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Involuntarily commitment—no Miranda warnings—findings—The trial court did not err in an armed robbery prosecution by not suppressing statements made to officers without *Miranda* warnings while defendant was involuntarily committed to a hospital after a suicide attempt. Defendant only challenged small portions of the trial court's findings, which were supported by the record, and did not demonstrate prejudice. **State v. Hammonds, 602.**

Involuntary commitment to hospital—not automatically in custody—A defendant who was involuntarily committed to a hospital was not automatically "in custody" for purposes of *Miranda* warnings. While involuntary commitment places a person in custody and his freedom of movement may be restricted, the courts have not considered the fact that the defendant was incarcerated as determinative where the questions concerned questions crimes unrelated to the current imprisonment. While persons in government-imposed confinement retain various rights secured by the Bill of Rights, they retain them in forms qualified by the exigencies of prison administration. **State v. Hammonds, 602.**

Involuntary commitment to hospital—not custodial—totality of circumstances—A defendant who was interviewed by officers without *Miranda* warnings after he was involuntarily committed to a hospital was not in custody based on the totality of the circumstances. A reasonable person in defendant's position would understand that the restriction on his movement was due to his involuntary commitment to receive medical treatment, not police interrogation. **State v. Hammonds, 602.**

Involuntary commitment—statement without Miranda warnings—high degree of care—The trial court correctly concluded, based on the totality of the circumstances, that statements made during a police interview were voluntary where the interview took place without *Miranda* warnings in the hospital to which defendant was committed after a suicide attempt. A high degree of care should be exercised to ensure that the rights of a person in defendant's condition are protected. **State v. Hammonds, 602.**

Statements to officers—no threats or promises—Although an armed robbery defendant contended that his confession was not voluntary because police officers made threats, promises, and accusations of lying, the police officers never threatened

CONFESSIONS AND INCRIMINATING STATEMENTS—Continued

defendant and promised only that they would tell the district attorney about his cooperation and that he would be in a superior position to others if he told the facts of the of the incident before others. The trial court's findings supported its conclusion that defendant's confession was voluntary. **State v. Hammonds, 602.**

CONSTITUTIONAL LAW

Effective assistance of counsel—failure of counsel to object—inadmissible evidence—Defendant was not denied effective assistance of counsel in a prosecution for breaking or entering a place of religious worship where his counsel did not object to evidence that he committed another breaking or entering the same night. The evidence tended to show intent and was not inadmissible under Rule 404(b). **State v. Campbell, 563.**

Effective assistance of counsel—guilty plea—deportation consequences—A green card holder and permanent resident of the U.S. received ineffective assistance of counsel in entering a guilty plea to aiding and abetting common law robbery and conspiracy to commit common law robbery where his counsel informed him only that his plea could (not would) result in deportation. When deportation is unclear or uncertain, counsel need only advise the client of the risk, but that is not sufficient when the deportation consequences of defendant's guilty plea to aggravated felonies are truly clear. Moreover, defendant presented sufficient evidence to support a finding that rejection of the plea offer would have been a rational choice, taking into account defendant's fear of deportation, and the trial court's denial of defendant's Motion for Appropriate Relief was reversed for a determination of whether defendant had proven prejudice. **State v. Nkiam, 777.**

Fifth Amendment—domestic violence protective order—civil case—voluntary testimony not an automatic waiver—A domestic violence prevention order was vacated and remanded where the trial court asked defense counsel whether defendant would be claiming her Fifth Amendment right to remain silent and then indicated that she was not going to “do” the Fifth Amendment. The trial court went on to substitute its own questions for cross-examination, with many of those questions going beyond the scope of direct examination. A witness does not automatically waive her Fifth Amendment rights by voluntarily testifying in a civil case. The trial court must evaluate whether a real danger of self-incrimination exists given the implications of the question and the setting in which it was asked. **Herndon v. Herndon, 288.**

North Carolina—Article IX, Section 7(a)—surcharge for improper equipment offenses—must fund education—The Court of Appeals affirmed the trial court's conclusion that the \$50.00 surcharge for improper equipment offenses must be used to fund education pursuant to Article IX, Section 7(a) of the state constitution rather than contributed to the State Confinement Fund. The \$50.00 surcharge imposed by N.C.G.S. § 7A-304(a)(4b) is punitive and imposed for breach of the penal laws of our state. **Richmond Cnty. Bd. of Educ. v. Cowell, 116.**

North Carolina—Article IX, Section 7(a)—surcharge for improper equipment offenses—remedy—The Court of Appeals affirmed the trial court's order requiring that all of the proceeds received in the State Confinement Fund from surcharges for improper equipment offenses in Richmond County be paid to Richmond

CONSTITUTIONAL LAW—Continued

County. It was appropriate for the clerk of superior court of Richmond County to receive the funds and distribute them according to N.C.G.S. § 115C-452. **Richmond Cnty. Bd. of Educ. v. Cowell, 116.**

Representation of counsel—prejudice not shown—A defendant bringing an inadequate representation of counsel claim could not show the requisite prejudice, even assuming that trial counsel's performance was deficient, where the claim involved the age of a kidnapping victim and a fatal variance in the evidence. The age of the victim was not an essential element of kidnapping, and any alleged variance could not have been fatal. **State v. Pender, 142.**

Right to presence—sequestration—prosecutor's argument—In a prosecution for second-degree murder and other offenses, it was noted that defendant's constitutional right to presence was not violated by the prosecutor's argument concerning sequestration. **State v. Gettys, 590.**

Speedy trial—Barker factors—The trial court did not err by determining that the State did not violate defendant's state or federal constitutional right to a speedy trial where the nearly nine-year delay, while extraordinary, was not per se determinative. Applying the four factors in *Barker v. Wingo*, 407 U.S. 514, defendant failed to carry his burden of showing that negligence or willfulness by the State caused the length of delay in his trial. **State v. Carvalho, 394.**

CONTEMPT

Criminal—willful violation of consent order—not raised below—The finding in a criminal contempt proceeding that defendant willfully failed to comply with a consent order was supported by the unchallenged findings from the district court, to which the parties stipulated, and competent evidence in record and from the contempt hearing. Defendant argued that she did not willfully violate the consent order by allowing her children to be in the presence of a convicted sex offender because of the ambiguity of the term. The term "convicted sex offender" was not ambiguous. **State v. Mastor, 476.**

CONTRACTS

Indemnity clauses—ambiguous—question for trier of fact—The trial court's order granting defendant-Surgical Care Affiliates' Rule 12(b)(6) motion to dismiss was reversed in a breach of contract action involving contracts providing that defendant would manage the surgical departments at two of plaintiff-WakeMed's facilities. The contentions of both parties regarding the indemnity clauses in the contracts were reasonable, and interpretation of the ambiguity was best left to the trier of fact. **WakeMed v. Surgical Care Affiliates, LLC, 820.**

Non-compete covenant—parol evidence—contract silent on essential term—The Court of Appeals affirmed the trial court's preliminary injunction order prohibiting defendant, a former employee of plaintiff, from engaging in certain competition with plaintiff. A payment of \$100 to defendant in exchange for her signing the covenant not to compete rendered the covenant binding and enforceable. The parol evidence rule did not prohibit the trial court from considering parol evidence of the \$100 consideration where the contract was silent as to this essential term. **Emp't Staffing Grp., Inc. v. Little, 266.**

CORPORATIONS

Director—dismissal from company—The trial court did not err in granting defendants' motion for summary judgment as to all of plaintiff's claims in an action arising from his termination from a company that transported and handled hazardous materials for concealing his and his son's criminal and driving history. There were two issues: the trial court resolved the first (whether plaintiff resigned or was terminated) by construing the facts in the light most favorable to plaintiff (the non-moving party) and assuming that plaintiff was terminated, but found on the second (the basis of the termination) that there was no genuine issue of fact (plaintiff's concealment of driving and criminal records presented a potential threat to the ability of the company to operate). **Harris v. Testar, Inc., 33.**

Fiduciaries—concealment of records—Plaintiff breached a fiduciary duty to the corporation that terminated him where plaintiff owed the corporation a fiduciary duty as a director, the corporation's business was transporting hazardous materials and it was required to maintain accurate criminal and driving records, and plaintiff concealed the criminal and driving records of himself and his son. **Harris v. Testar, Inc., 33.**

Shareholder's reasonable expectations—terminated director—The trial court's award adequately protected plaintiff's reasonable expectations as a complaining shareholder where the company lawfully terminated plaintiff by applying the Stockholders' agreement. **Harris v. Testar, Inc., 33.**

COURTS

Sessions—recess from Friday to Tuesday—The trial court had jurisdiction to enter judgment where the trial began on a Monday, the State rested on the following Friday, the trial court recessed until the following Tuesday, and defendant was convicted and sentenced on Wednesday. Defendant had advance notice of the recess and was given ample opportunity to object. **State v. Lewis, 757.**

CRIMINAL LAW

Closing arguments—conversation with another inmate—The State's closing arguments were not grossly improper and did not warrant a new trial where defendant was charged with first-degree murder and armed robbery, evidence was introduced of defendant's conversation with another inmate, and the State used that evidence in its closing argument. The State did not ask the jury to use the challenged evidence to convict defendant of the crimes for which he was on trial, nor did the State ask the jury to use the evidence admitted in any other improper manner. **State v. Carvalho, 394.**

First-degree felony murder conviction—underlying felony—failure to arrest judgment—On appeal from defendant's conviction for first-degree felony murder, the Court of Appeals held that the trial court erred by failing to arrest judgment on the underlying felony. The Court of Appeals accordingly arrested judgment on defendant's felony larceny conviction. **State v. McNeill, 762.**

Jury question—referral to written instructions—The trial court did not abuse its discretion in a prosecution for felony murder and armed robbery where the trial court correctly instructed the jury on the offenses, properly responded to a jury question by instructing the jury to reread the written instructions previously given to them, and gave the jury separate verdict sheets for each count that allowed them to select "not guilty" for each offense. **State v. Hazel, 741.**

CRIMINAL LAW—Continued

Prosecutor's argument—no intervention ex mero motu—The trial court did not err when it did not intervene on its own motion during the prosecutor's closing argument in a prosecution for burning personal property where the prosecutor made a flat statement that the victim's testimony was extraordinarily credible. Although the statement was improper, it did not undermine the integrity of the entire trial and did not rise to the level of gross impropriety. **State v. Jefferies, 455.**

Rejection of plea agreement—motion to continue—waiver of right—In defendant's trial for charges related to the manufacture of methamphetamine, the trial court did not err by denying defendant's motion to continue after rejecting his plea agreement. Defendant waived his right to a continuance pursuant to N.C.G.S. § 15A-1023(b) by (1) expressly consenting to being arraigned and proceeding to trial after the court rejected his plea and (2) failing to assert his right to continuance until jeopardy attached, during the second week of trial. He failed to assert his right in "apt time." **State v. Hicks, 628.**

Special instruction—reviewed for abuse of discretion—Defendant's request for a special instruction on sequestration in a prosecution for second-degree murder was reviewed for abuse of discretion where defendant's initial request was not in writing and his second, written request came after the jury had been charged and had left the courtroom to begin its deliberations. **State v. Gettys, 590.**

Special instruction refused—no abuse of discretion—not dispositive issue—The trial court did not abuse its discretion in a prosecution for second-degree murder and related offenses by refusing a requested special instruction where the instruction did not relate to a dispositive issue in the case. **State v. Gettys, 590.**

Sufficiency of evidence—all charges—Defendant preserved his insufficient evidence arguments where the State contended his trial counsel specifically argued insufficient evidence regarding only two elements of all of the crimes defendant was charged with and that defendant's motion to dismiss encompassed only those arguments he specifically made. Defendant's motion to dismiss encompassed all of the charges at issue because defendant's initial motion to dismiss was based on insufficient evidence, defendant referenced each of the crimes with which he was charged, and defendant renewed his motions after the first-degree kidnapping charge was dismissed. **State v. Pender, 142.**

DEEDS

Validity of deed—notarization—alteration after execution—There was no material issue of fact as to the validity of a contested deed where the deed was void, whether due to its notarization or due to the fact that it was altered after execution without plaintiff's knowledge or consent. **Quinn v. Quinn, 374.**

DISCOVERY

Sanctions order—date of entry—argument waived—The wife in a divorce case waived on appeal any argument regarding the date of the entry of a sanctions order where she essentially argued that she was not aware of her discovery obligations until it was too late. The wife's counsel did not mention any concerns about the entry of the sanctions order at the alimony trial, despite the discussion of various portions of the order at the hearing. **Khaja v. Husna, 330.**

DISCOVERY—Continued

Sanctions order—sanctions—abuse of discretion not argued or shown—There was no abuse of discretion in a divorce case in the exclusion of an affidavit as a discovery sanction where the wife did not introduce the affidavit, argue abuse of discretion, or demonstrate abuse of discretion. Moreover, considered in context, the trial court did not require her to do the impossible. **Khaja v. Husna, 330.**

DIVORCE

Alimony—alimony arrearage and attorney fees—reversed based on reversal of alimony order—On appeal from the trial court's orders awarding post-separation support, alimony, an alimony arrearage, and attorney fees in favor of plaintiff, the Court of Appeals reversed the trial court's rulings on alimony arrearage and attorney fees because those rulings were predicated on the trial court's erroneous alimony order that the Court of Appeals reversed and remanded. **Collins v. Collins, 696.**

Alimony—alimony for savings—The trial court abused its discretion in its order awarding alimony to plaintiff by ordering defendant to pay plaintiff an extra \$1,241 per month so that she could "have an opportunity at some savings." An alimony award to allow a party to accumulate savings is improper. The order was reversed and remanded. **Collins v. Collins, 696.**

Alimony—extended duration—no explanation in court's order—The trial court erred in its order awarding alimony to plaintiff by making the award permanent without providing any reason for the extended duration or manner of payment of the award. The order was reversed and remanded. **Collins v. Collins, 696.**

Alimony—insufficient findings of fact—no findings on dependent spouse's current income—The trial court erred in its order awarding alimony to plaintiff by failing to make any findings of fact on plaintiff's current income from which the court could determine whether plaintiff was a dependent spouse. The trial court's order required defendant to pay alimony based on plaintiff's income five to seven years prior to entry of the order. The order was reversed and remanded. **Collins v. Collins, 696.**

Alimony—parity of income—no consideration of statutory requirements—The trial court erred in its order awarding alimony to plaintiff by basing the alimony award on a desire for parity of income rather than the statutory requirements of N.C.G.S. § 50-16.3A. The trial court's findings of fact were limited to the parties' incomes and expenses in the various years preceding the hearing. The trial court was ordered on remand to consider evidence of the factors set forth in the statute. **Collins v. Collins, 696.**

Alimony—prior findings—An alimony order was reversed and remanded where the trial court made it clear that it thought it was bound by all judgments and orders that had preceded the hearing. The trial court was not actually bound by the prior findings of fact. The trial court used findings from the divorce judgment that went beyond the facts needed to address the limited issues before it. Those unnecessary findings from the divorce judgment should have been irrelevant to the trial court when considering alimony. **Khaja v. Husna, 330.**

Excess payment—post-separation support—alimony—In an equitable distribution action where plaintiff had overpaid his post separation obligation and defendant argued that the overpayment should have been reserved for her pending alimony

DIVORCE—Continued

claim, the extent to which defendant's estate was affected by the judgment on equitable distribution could be a factor for argument in determining alimony. **Miller v. Miller, 526.**

Excess payment—post-separation support—income—The amount plaintiff paid in excess of his legal obligation for post-separation support was income in excess of plaintiff's obligation rather than post-separation support or alimony, neither of which should have been considered by the trial court. The trial court did not violate N.C.G.S. § 50-20 by considering in its equitable distribution award the income plaintiff paid to defendant in excess of his court-ordered obligation to pay post-separation support. **Miller v. Miller, 526.**

Marriage in India—procedural posture—issues addressed separately—An "incredibly complex" divorce case was organized by separately looking at the each of the issues addressed by the Divorce Judgment. Although the trial considered a motion to dismiss based upon subject matter jurisdiction, the wife chose not to pursue the motion and there were no arguments about it on appeal. The wife's motion to dismiss based upon Rule 12(b)(6) was converted to a motion for summary judgment, but only on the claim for absolute divorce. The wife did not contest the denial of the motion to dismiss based on an Indian annulment and also did not contest the granting of the claim for absolute divorce, which was affirmed. The wife did, however, contest the trial court's use of findings from the divorce judgment in the alimony order. **Khaja v. Husna, 330.**

Post-separation support—determination of dependent and supporting spouse—comparison of incomes and expenses—On appeal from the trial court's orders awarding post-separation support, alimony, an alimony arrearage, and attorney fees in favor of plaintiff, the Court of Appeals rejected defendant's argument that the trial court erred by determining that defendant was a supporting spouse and plaintiff was a dependent spouse entitled to post-separation support. The order, which focused on the parties' comparative incomes and current expenses, sufficiently addressed the parties' accustomed standard of living established during the marriage. **Collins v. Collins, 696.**

Preliminary injunction—findings—not binding—Findings from a preliminary injunction were not binding upon the trial court at an alimony hearing. **Khaja v. Husna, 330.**

Sanctions order—findings—Viewed within context, as an order addressing discovery issues and violations, a Sanctions Order in a divorce case remained binding on remand, including its prohibition on the wife's presentation of evidence of marital fault by husband. The order was remanded because the appellate court had no way of knowing exactly which prior findings of fact the trial court erroneously relied upon or whether the trial court might otherwise have found differently. **Khaja v. Husna, 330.**

Wife's income—Bureau of Labor Statistics—In a divorce case remanded on other grounds, the trial court erred by taking judicial notice of Bureau of Labor Statistics information on salaries in defendant's occupation and relying so heavily upon these statistics for its finding of fact regarding her earning capacity. **Khaja v. Husna, 330.**

DRUGS

Methamphetamine—precursor chemical—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss for insufficient evidence charges of possession of pseudoephedrine, a precursor chemical to methamphetamine. Although defendant contended that no pseudoephedrine was found on his person or premises, that there was no evidence that he actually made particular purchases, and that no chemical analysis was performed, substantial evidence was introduced that defendant possessed pseudoephedrine, and that pseudoephedrine is a precursor chemical, not a controlled substance, and the State was not required to present evidence that a chemical analysis was performed. **State v. Hooks, 435.**

EMPLOYER AND EMPLOYEE

Non-compete covenant—\$100 consideration—pressure to sign—The Court of Appeals affirmed the trial court's preliminary injunction order prohibiting defendant, a former employee of plaintiff, from engaging in certain competition with plaintiff. The court rejected defendant's argument that a \$100 payment by plaintiff was insufficient consideration to support the covenant not to compete. Even though defendant may have felt pressure to sign the agreement in order to continue her employment, the court has enforced non-compete agreements in similar circumstances in absence of fraud. **Emp't Staffing Grp., Inc. v. Little, 266.**

EVIDENCE

Affidavit not considered—waiver of privilege involved—affidavit ultimately not offered—There was no error in a complicated divorce case where the trial court did not consider the wife's affidavit in opposition to the motion for sanctions/ in limine filed against the wife. Considered in the context of the entire hearing, the wife wanted to blame her prior attorneys for her failures to respond to discovery requests, which she sought to do by her affidavit without waiving attorney-client privilege. When the trial court noted that she would be waiving attorney-client privilege if it accepted the affidavit, she chose not to waive the privilege, did not challenge the trial court's interpretation of the affidavit or its stance on privilege, and declined to present the affidavit. The affidavit was not admitted because the wife's attorney made the strategic decision not to offer it. **Khaja v. Husna, 330.**

Audiotape and transcript—redacted and limiting instruction—Defendant argued the trial court erred in a prosecution for first-degree murder and armed robbery by admitting portions of an audiotape and corresponding transcript of a conversation between defendant and another inmate (Anderson). Given the importance of the credibility of Anderson's testimony to the State's case, it could not be concluded that the trial court was manifestly unreasonable in determining that the relevance of the redacted version of the transcript, combined with a limiting instruction, substantially outweighed any unfair prejudice to defendant. **State v. Carvalho, 394.**

Business record—database of pseudoephedrine purchases—foundation laid—In defendant's trial for charges related to the manufacture of methamphetamine, the trial court did not err by admitting a law enforcement officer's testimony regarding defendant's alleged pseudoephedrine purchases and an exhibit showing a report from the NPLeX database. The officer's testimony as to his familiarity with the NPLeX database provided a sufficient foundation for admission of the evidence as a business record. Even assuming admission of this evidence was erroneous, any error would have been harmless because the State presented ample other evidence of defendant's guilt. **State v. Hicks, 628.**

EVIDENCE—Continued

Clergy privilege—statements to third party about conversation with pastor—no prejudice—In a first-degree murder prosecution, even assuming error in the admission of defendant's statements to a third party about his conversation with a pastor, there was no prejudice where the State presented other relevant and substantial evidence from which the jury could conclude that defendant was guilty. **State v. Crisco, 578.**

Clergy privilege—statements to third party about conversation with pastor—not privileged—The clergy-communicant privilege did not apply in a first-degree murder prosecution where defendant told another witness about talking to a pastor. N.C.G.S. § 8-53.2 does not restrict the applicability of the privilege based upon which party initiates the communication, but it applies only to communications between defendant and the pastor. There was no privilege between defendant and the third party. **State v. Crisco, 578.**

Confidential spousal communication—husband weeping in presence of wife—In a trial for first-degree rape, the trial court did not err by allowing defendant's ex-wife to testify that she saw him crying while looking at a composite photo of the victim's assailant in a newspaper. The incident was not a confidential spousal communication pursuant to N.C.G.S. § 8-57(c) because no testimony indicated that defendant intended to communicate anything to his then-wife by crying at the sight of the picture. **State v. Matsoake, 651.**

Expert witness's testimony—not improper character evidence—Although plaintiff did not object at trial to medical records on the grounds that they presented improper character evidence, the Court of Appeals determined that the evidence was properly admitted because experts for both parties relied on it to form their own opinions of the case, particularly with regard to the issues of proximate cause and damages. An expert witness's opinions do not constitute improper character evidence under N.C.G.S. § 8C-1, Rule 404. **Clarke ex rel. Est. of Bohn v. Mikhail, 677.**

Impeachment—conclusory findings—probative value apparent from record—Defendant failed to preserve for appellate review his argument that the trial court erred by admitting some of his prior convictions for impeachment purposes in his trial for felony larceny. The Court of Appeals concluded that, even assuming defendant had preserved the issue, defendant's argument would not prevail. Even though the trial court made conclusory findings on the challenged evidence, the probative value of the evidence was apparent from the record. **State v. Joyner, 644.**

Other offense—breaking and entering—intent—probative value not substantially outweighed by prejudice—Defendant did not prevail on an ineffective assistance of counsel claim in a prosecution for breaking or entering a place of religious worship where his counsel did not object to evidence that he committed another break-in on the same night. The evidence's probative value was not substantially outweighed by the danger of unfair prejudice, given the temporal proximity of the breaking or entering offenses, the evidence's tendency to show that defendant's intent in entering the church was to commit a larceny, and the trial court's instruction that the jury not consider a prior conviction as evidence of defendant's guilt. **State v. Campbell, 563.**

Partially redacted accident report—no prejudice—information admitted elsewhere—There was no prejudice in an automobile accident wrongful death case where a partially redacted accident report was admitted into evidence.

EVIDENCE—Continued

Information about the plaintiff's alcohol or drug use was redacted while information about defendant's alcohol or drug use was not (there was none). Although plaintiff argued that the contrast raised a presumption of the plaintiff's guilt, the same information was admitted without objection elsewhere. **Scheffer v. Dalton, 548.**

Pills—analysis of one—visual examination of the rest—The trial court did not err in a prosecution for trafficking in opioids by denying defendant's request to instruct the jury on lesser-included conspiracy charges where the State's expert analyzed one of twenty pills and visually examined the remaining nineteen. It was not necessary to test every tablet, and the State's analyst satisfied the State's evidentiary burden by visually confirming that the remaining pills were similar. **State v. Lewis, 757.**

Prior medical records—known to defendants at time of treatment—Even if plaintiff had properly objected to medical records introduced at a medical malpractice trial, the information in the records was known to defendants at the time they treated the patient and was relevant to the issues of both damages and causation. **Clarke ex rel. Est. of Bohn v. Mikhail, 677.**

Recording admitted for corroboration and impeachment—not logically contradictory—Contrary to defendant's contention in a prosecution for second-degree murder and related offenses, admitting a recording of a witness's interview with officers for both corroboration and impeachment was not logically contradictory and counterintuitive. The State did not introduce one statement to serve both purposes; rather, it introduced a recording of a police interview which included both contradictory and impeaching statements. **State v. Gettys, 590.**

Recording of interview—admitted for corroboration and impeachment—The trial court did not abuse its discretion in a prosecution for second-degree murder and related offenses by admitting a recording of a witness's police interview for both corroboration and impeachment in light of court's abundance of caution. **State v. Gettys, 590.**

Sexual abuse of a child—actions following medical evaluation—There was no plain error in a prosecution for sexual abuse of a child in the admission of testimony from a witness from SAFEchild Advocacy Center, which provides medical evaluations for children who may be victims of child abuse or neglect. The witness never asserted that the victim had been abused or explicitly commented on her credibility. The challenged portion of the testimony was nothing more than what the witness did at the conclusion of her examination and was within the permissible range of expert testimony in child sexual abuse cases. **State v. Harris, 728.**

Sexual abuse of a child—testimony of guidance counselor—The testimony of a school guidance counselor was admitted without plain error where defendant contended that the testimony implied that the Department of Social Services had substantiated the victim's claim. Even assuming the testimony was improper, the jury probably would not have reached a different verdict, in light of defendant's incriminating statements and the evidence corroborating the victim's allegations. **State v. Harris, 728.**

Sexual abuse of a child—testimony of therapist—There was no plain error in the admission of the testimony of a therapist specializing in children who have been sexually abused where defendant contended that a portion of her testimony constituted impermissible vouching for the victim's credibility. Defendant did not point to

EVIDENCE—Continued

any part of the testimony where the witness opined that the abuse had occurred or that defendant was the abuser. The testimony concerned the treatment the therapist used; the victim's symptoms, which were consistent with trauma; and the purpose and process of writing a trauma narrative, which laid the foundation for the State to introduce the victim's narrative. The mere fact that the testimony supported the victim's credibility does not render it inadmissible. **State v. Harris, 728.**

Transcript of recorded interview—read for clarification—statements made in reader's presence—The trial court did not err in a prosecution for second-degree murder and related offenses by allowing a detective to read from the transcript of an interview with a witness and to clarify portions of the recording. The detective merely read or clarified statements that had been made in her presence; additionally, the trial court gave a limiting instruction to the jury. **State v. Gettys, 590.**

Victim's reputation for violence—introduced in defendant's case-in-chief—The trial court did not abuse its discretion in a prosecution for second-degree murder by waiting until the defendant's case-in-chief to allow testimony of the victim's reputation for violence rather than allowing that testimony during cross-examination. The trial court expressly permitted defendant to keep the witness under subpoena, and defendant was allowed to call numerous witnesses during his case-in-chief to provide the testimony. Defendant appeared to have chosen not to recall this witness and did not demonstrate that he was prejudiced by that decision in any way. **State v. Henry, 433.**

HOMICIDE

Closing arguments—by prosecution—likelihood of release from civil commitment after 50 days—In defendant's trial for first-degree murder, where the prosecutor stated during closing argument, "[I]t is very possible that in 50 days . . . [defendant] will be back home," if found not guilty by reason of insanity, the trial court erred by overruling defendant's objection. The extent of defendant's mental illness and the gravity of her crimes made it highly unlikely that defendant could be released from civil commitment after only fifty days. The Court of Appeals held that, given the brutality of defendant's crimes, it was likely that the prosecutor's improper statement motivated the jury to render a guilty verdict. Defendant was awarded a new trial. **State v. Dalton, 124.**

Closing arguments—reference to prior conviction—"cold" person—On appeal from defendant's conviction for first-degree felony murder, the Court of Appeals held that the trial court did not err when it did not intervene ex mero motu during the prosecutor's closing arguments. The prosecutor's single reference to defendant's prior conviction, which had already been presented in the evidence with a limiting instruction, and suggestion that defendant was a "cold" person were not grossly improper. **State v. McNeill, 762.**

Closing arguments—suggestion that defendant and witness lied—ex mero motu intervention—On appeal from defendant's conviction for voluntary manslaughter, the Court of Appeals held that the trial court erred by failing to intervene ex mero motu when the State made improper arguments during closing arguments. The State argued that defendant lied on the stand in cooperation with defense counsel and that his expert witness lied because he was being paid to do so. Because defendant's defense was predicated upon his credibility and the credibility of his witnesses, the error was not harmless, and the Court of Appeals vacated defendant's conviction and remanded the case for a new trial. **State v. Huey, 446.**

HOMICIDE—Continued

Felony murder—discharge of weapon into occupied vehicle—merger doctrine not applied—The trial court did not err by refusing to dismiss a charge of felony murder where the underlying felony was discharging a firearm into an occupied vehicle in operation. Although defendant argued that the doctrine of merger applied, a person may be found guilty of this underlying offense even if there was no bodily harm to anyone. **State v. Juarez, 466.**

Felony murder—instructions—self-defense—The trial court committed plain error in a prosecution for first-degree felony murder by instructing the jury that defendant could not receive the benefit of self-defense if he was found to be the aggressor. Even assuming that defendant was the aggressor in the initial encounter, his withdrawal removed him from that role. **State v. Juarez, 466.**

Felony murder—self-defense—lesser offenses—The trial court erred in a first-degree felony murder prosecution by denying defendant's request to instruct the jury on the lesser offenses of second-degree murder and voluntary manslaughter. A finding that defendant acted in reasonable self-defense would have rendered him not guilty of a charge of discharging a firearm into an occupied vehicle; however, the evidence would have been sufficient to support a lesser-included offense. **State v. Juarez, 466.**

First-degree felony murder—felony larceny—sufficiency of evidence—On appeal from defendant's conviction for first-degree felony murder, the Court of Appeals held that the trial court did not err by denying defendant's motion to dismiss the charge and instructing the jury on felony murder. There was sufficient evidence to show that the glass bottle found at the crime scene was a deadly weapon, that the alleged larceny was committed with the use of the glass bottle, and that the killing occurred in the perpetration of the felonious larceny. The State presented evidence that defendant's DNA was present on the broken glass bottle found at the crime scene and that the victim died from blunt force injuries to his head. A jury could reasonably infer that the bottle was used to incapacitate the victim, facilitating defendant's larceny of the victim's vehicle—and that these events formed one continuous transaction. **State v. McNeill, 762.**

Jury instructions—flight—On appeal from defendant's conviction for voluntary manslaughter, the Court of Appeals held that the trial court did not err by instructing the jury on flight. The evidence showed that defendant shot the victim, drove away for a short period of time, and then returned. **State v. Huey, 446.**

IDENTIFICATION OF DEFENDANTS

Photographic lineup—folder method—On appeal from defendant's conviction for armed robbery, the Court of Appeals held that the trial court did not err by admitting the testimony of a police detective concerning an eyewitness's identification of defendant from a photo lineup. The detective's administration of the photo lineup—in which he placed the photos in a folder and shuffled them before presenting them to the eyewitness—met the statutory requirements of the N.C. Eyewitness Identification Reform Act of 2007. The detective's inability to recall which "filler" photos he used did not render his testimony inadmissible. **State v. Gamble, 414.**

IMMUNITY

Sovereign—findings—remanded—In an action arising from a pedestrian-auto accident after a Christmas parade in which sovereign immunity was raised as a

IMMUNITY—Continued

defense, the matter was remanded to the trial court for findings that reflected the trial court's assessment of the evidence presented and its determination of the weight and sufficiency of this evidence, not just a reiteration of plaintiffs' allegations. The trial court was required to determine whether the evidence established that the alleged violations of N.C.G.S. § 160A-296(a) directly and proximately caused the driver of the vehicle to strike the victim. **Parker v. Town of Erwin, 84.**

Sovereign—public official immunity—not considered—In an action arising from a pedestrian-auto accident after a Christmas parade, the issue of whether the Town Defendants' purported violations of N.C.G.S. § 160A-296(a) implicated the public official immunity doctrine was not considered because the case was remanded for a determination of the weight and sufficiency of the evidence concerning the alleged violations of N.C.G.S. § 160A-296(a). **Parker v. Town of Erwin, 84.**

Sovereign—purchase of insurance—trial court as fact-finder—The trial court did not err when it determined that defendant Town did not waive sovereign immunity through the purchase of an insurance policy in an action arising from a pedestrian-auto accident after a Christmas parade. It was incumbent upon the trial court to act as fact-finder and to determine the weight and sufficiency of the evidence presented by the parties. There was competent evidence to support the court's determination. **Parker v. Town of Erwin, 84.**

Sovereign—school grounds injury—maintenance—governmental function—In a case arising from an injury on school grounds, the trial court erred by denying the School Board's motion to dismiss. Under the controlling decision in *Bynum v. Wilson Cnty.*, 367 N.C. 355, the General Assembly's assignment of the ownership, maintenance, and repair of school property to the local school boards is dispositive of the question of whether the function performed by the Board in the present case is governmental. **Bellows v. Asheville City Bd. of Educ., 229.**

INDICTMENT AND INFORMATION

Fatal variance—larceny from church—ownership of stolen property—The trial court erred by failing to dismiss a larceny charge due to a fatal variance between the indictment and the evidence as to the ownership of the stolen property. The larceny indictment alleged that the stolen property belonged to "Andy Stevens and Manna Baptist Church," but the evidence at trial did not demonstrate that Pastor Stevens held title to or had any sort of ownership interest in the stolen property. Possession by an employee of the owner is not a sufficient type of special property interest. **State v. Campbell, 563.**

Fatal variance—name of victim—There was no fatal variance in an indictment that named "Vera Alston" as a victim where the undisputed evidence was that her last name was "Pierson." Fatal variances have not been found where the discrepancy in the victim's name was inadvertent and the individual referred to in the indictment was the same person alleged to be the victim at trial. Here, there was no uncertainty that the identity of the alleged victim was actually "Vera Pierson," and defendant at no time indicated any confusion or surprise as to whom he was charged with kidnapping and assaulting. **State v. Pender, 142.**

Sexual offender registration—failure to report change of address in writing—There was no error in a prosecution for failure to register as a sex offender where defendant contended that the indictment was required to allege that he failed to report his change of address in writing and within three business days. Defendant

INDICTMENT AND INFORMATION—Continued

had notice of the requirements of the statute, had complied on prior occasions, and did not argue that his trial preparation was prejudiced. The indictment in this case was couched in the language of the statute and sufficiently alleged this element of the offense. **State v. McLamb, 486.**

Variance—indictment and instruction—not fatal—There was no fatal variance and no plain error in a prosecution for burning personal property where the trial court instructed the jury to find defendant guilty if it found that he set fire to the bedding of the victim while the indictment charged defendant with setting fire to the victim's bed, jewelry, and personal clothing. The jewelry and the clothing were surplusage and not necessary to establish defendant's guilt. The variance between bed and bedding was not material because there was no evidence to suggest that the bedding was located anywhere other than the bed. **State v. Jefferies, 455.**

INJUNCTIONS

Preliminary—divorce—use of findings—A preliminary injunction in a divorce case was affirmed where the wife did not present any substantive challenge to the entry of the preliminary injunction itself but argued that the trial court erroneously relied on findings from the preliminary injunction in its Alimony Order. **Khaja v. Husna, 330.**

JUDGES

One not overruling another—Rule 12(c) and Rule 12b(6) motions—A Rule 12(c) order was not an improper “overruling” by a second superior court judge of an earlier superior court judge's Rule 12(b)(6) order where different materials and questions were considered. **Fox v. Johnson, 274.**

JUDGMENTS

Foreign-country money judgment—attorney fees—arising from action for support in family matters—enforceable under N.C. Uniform Foreign-Country Money Judgments Recognition Act—Where plaintiff filed a Motion to Recognize a Foreign-Country Money Judgment, the trial court did not err by concluding that a Scottish judgment for attorney fees and expenses was not a judgment for support in family matters and therefore was recognizable under the North Carolina Uniform Foreign-Country Money Judgments Recognition Act. Even though the judgment arose out of an action for support in family matters, the plain language of the statute read in conjunction with the General Assembly's express change in the Act to recognize judgments like the one here supported the trial court's conclusion. **Savage v. Zelent, 535.**

Foreign-country money judgment—failure to appear or appeal—judgment not repugnant to public policy—Where the trial court granted plaintiff's Motion to Recognize a Foreign-Country Money Judgment, the trial court did not err by concluding that the \$148,516.75 Scottish judgment for attorney fees and expenses was not repugnant to the public policy of North Carolina. Defendant invoked the jurisdiction of the Scottish courts but failed to appeal after she lost on the merits, and she also failed to participate in the proceedings to determine expenses. Defendant was therefore precluded from arguing the result was unfair. **Savage v. Zelent, 535.**

JURISDICTION

Motion to dismiss—documentary evidence submitted—court as fact finder—The trial court had the responsibility of acting as a fact-finder when considering a Rule 12(b)(2) motion to dismiss where the parties each submitted affidavits, depositions, and other documentary evidence. **Parker v. Town of Erwin, 84.**

Quasi in rem—vehicles located in N.C.—out-of-state auto broker—The Court of Appeals rejected the argument of appellant, an auto broker incorporated and doing business in New York, that the trial court erred by exercising quasi in rem jurisdiction over a controversy involving vehicles that were located in North Carolina. Pursuant to N.C.G.S. § 1-75.8, plaintiff's claim concerned a security interest in and certificates of title to vehicles located in North Carolina. The requirements of federal due process were also satisfied based on the location of the vehicles in North Carolina, appellants' awareness of the vehicles' destination, and the tangible nature of the vehicles. **Credit Union Auto Buying Serv., Inc. v. Berkshire Props. Grp. Corp., 12.**

Sovereign immunity—Rule 12(b)(2) motion to dismiss—In an action arising from a pedestrian-automobile accident after a Christmas parade, the trial court erred by denying defendant Town's Rule 12(b)(2) motion to dismiss where the activities alleged against the Town Defendants were governmental functions and plaintiffs' claim was barred by sovereign immunity. **Parker v. Town of Erwin, 84.**

JURY

Motion to strike venire—denied—no systematic exclusion—The trial court did not err in a prosecution for second-degree murder and related offenses by denying defendant's motion to strike the jury venire where defendant conceded the absence of the third prong of *Duren v. Missouri*, 439 U.S. 357 (1979), systematic exclusion of a group. A single venire that fails to proportionally represent a cross-section of the community does not constitute systematic exclusion. **State v. Gettys, 590.**

Right to—civil action—issue of fact—Plaintiff's argument concerning the right to trial by jury in a civil action failed where the trial court correctly granted summary judgment. The right to trial by jury accrues only where there is an issue of fact. **Lancaster v. Harold K. Jordan & Co., Inc., 74.**

JUVENILES

Sentencing—flexibility—maximum term—The trial court's disposition and commitment of juvenile for breaking or entering a motor vehicle was affirmed where he was committed to a youth development center for a maximum period just short of 24 months. Although the juvenile argued that the trial court could not sentence a juvenile to a term greater than the maximum sentence within the presumptive range, the Juvenile Code mandates flexibility in crafting a disposition suited to the individual and the trial court can commit a juvenile for the maximum period that any adult could be committed for the same offense without considering aggravating and mitigating factors or prior record levels. Under structured sentencing, the maximum period that any adult could be imprisoned for the offense was 24 months, which this juvenile's sentence did not exceed. **In re R.D., 61.**

KIDNAPPING

Indictments—minor victims—consent—Defendant's indictments for kidnapping were sufficient for victims who were allegedly under 16 even though they alleged that the victims rather than the parents did not consent. Age was not an essential element of the crime of kidnapping but a factor relating to the State's burden of proof. **State v. Pender, 142.**

Parent—his own sons—Two kidnapping convictions were overturned where defendant forced a group of people, including his minor sons, into a single room at the point of a shotgun while he sought his estranged wife. N.C.G.S. § 14-39(a) provides that a person is criminally liable for unlawfully confining a person under the age of 16 without the consent of a parent or legal guardian, which means that a parent cannot kidnap his own child. **State v. Pender, 142.**

Sufficiency of evidence—terrorizing victims—There was sufficient evidence of kidnapping where the State presented evidence that the victims were frightened and that defendant intended to terrorize his estranged wife, along with other evidence from which a jury could infer that defendant's purpose was to terrorize each of the other alleged kidnapping victims. **State v. Pender, 142.**

LACHES

Impact fees—no prejudice by delay—Plaintiffs' claims concerning impact fees were not barred by the doctrine of laches where the cases cited by defendants involved equitable relief but plaintiff's claims were legal. Moreover, defendants did not contend that they undertook any expenditures that would not have been otherwise necessary, that their legal position was negatively impacted by the passage of time, or that they were prejudiced by plaintiffs' delay in bringing suit. **Point S. Props., LLC v. Cape Fear Pub. Util. Auth., 508.**

MEDICAL MALPRACTICE

Damages—punitive—titration of medicine—directed verdict against plaintiff—The trial court properly granted a directed verdict on the issue of punitive damages in a medical malpractice action where the issue concerned the medicine and the dosing schedule used to treat plaintiff for chronic mental illness. The physician's assistant who prescribed the medicine sought to reach a therapeutic dose sooner in order to benefit the patient and her deteriorating condition. Experts testified they had successfully dosed the medication, Lamictal, at an increased rate and the manufacturer's recommended dosing schedule was a recommendation only, from which medical providers could deviate. **Clarke ex rel. Est. of Bohn v. Mikhail, 677.**

Motion to bifurcate trial—eve of trial—The trial court did not abuse its discretion in a medical malpractice case involving mental health treatment by denying plaintiff's motion to bifurcate the trial into liability and damages phases. Although plaintiff's counsel had earlier declined to move for bifurcation in response to the trial court's inquiries, he changed his strategy after the trial court admitted plaintiff's prior records. The trial court ruled that it would be improper to bifurcate on the eve of trial. **Clarke ex rel. Est. of Bohn v. Mikhail, 677.**

MORTGAGES AND DEEDS OF TRUST

Foreclosure—note indorsed in blank—On appeal from an order authorizing the substitute trustees to proceed with a foreclosure sale, the Court of Appeals held that the trial court did not err by concluding that E*Trade (petitioner) was the holder of the note. Petitioner's production of the original note indorsed in blank established that petitioner was the holder of the note. **In re Foreclosure of Rawls, 316.**

MOTOR VEHICLES

Horizontal gaze nystagmus—test—no prejudicial error—The trial court did not commit plain error in allowing an officer to testify to defendant's blood alcohol level. Although the officer appeared to have violated N.C.G.S. § 8C-1, Rule 702(a1) as it related to the Horizontal Gaze Nystagmus Test, the error did not have a probable impact on the jury's verdict. **State v. Turbyfill, 183.**

Impaired driving—unchallenged evidence sufficient—There was a sufficient unchallenged evidence in an impaired driving prosecution to support the trial court's conclusion that there was a reasonable and articulable suspicion for an officer to stop defendant and probable cause for his arrest. **State v. Miller, 660.**

NEGLIGENCE

Contributory—moped—improvised light—The trial court did not err in an automobile accident wrongful death case by submitting contributory negligence to the jury where the victim was riding a moped with an inoperable headlight and a bicycle light velcroed to the handlebars. **Scheffer v. Dalton, 548.**

Instructions—superseding or intervening negligence—The trial court's jury instruction on superseding negligence in a medical malpractice case did not improperly shift the burden of proof to plaintiff to disprove defendants' "affirmative defense." The well-settled principle in North Carolina holds that superseding or intervening negligence is an extension of the element of proximate cause. **Clarke ex rel. Est. of Bohn v. Mikhail, 677.**

Last clear chance—traffic accident—left turn—The trial court erred in an automobile accident wrongful death case by not submitting the issue of last clear chance to the jury. Issues existed as to whether defendant should have discovered plaintiff's peril, whether sufficient time and means existed to avoid the accident, and whether defendant adequately looked through the intersection, behind a passing car, to determine if his path was clear before entering the oncoming lane of travel to make a left turn. **Scheffer v. Dalton, 548.**

Owner of building—lighting—adjacent parking lot—owned by third party—In an action arising from a collision between a pedestrian and an automobile after a Christmas parade, the trial court did not err by dismissing with prejudice claims against the owner of a building next to the site of the accident. Plaintiffs did not allege that the building owner had a duty to illuminate the next-door property, owned by a parking company, and so did not sufficiently allege that the building owner breached a duty owed to plaintiffs. **Parker v. Town of Erwin, 84.**

PHYSICIANS

Peer review evaluation—private cause of action—Where a medical doctor (plaintiff) sued defendants, who performed an evaluation that served as the basis

PHYSICIANS—Continued

for the termination of plaintiff's hospital staff privileges, the trial court did not err by dismissing the complaint for failure to state a claim. Plaintiff could not pursue a claim under the federal peer review law because that law does not provide a private cause of action. In addition, even assuming the state peer review law provided a private cause of action, the allegations in the complaint established that defendants complied with the statute. **Shannon v. Testen, 386.**

Peer review evaluation—statutory immunity—Where a medical doctor (plaintiff) sued defendants, who performed an evaluation that served as the basis for the termination of plaintiff's hospital staff privileges, the trial court did not err by dismissing the complaint for failure to state a claim. Pursuant to N.C.G.S. § 90-21.22(f), which governs peer review agreements by the North Carolina Medical Board, defendants had statutory immunity absent allegations of bad faith. Plaintiff's complaint merely asserted that defendants' evaluation contained factual errors, and it failed to allege bad faith. **Shannon v. Testen, 386.**

PROBATION AND PAROLE

Absconding—probation revocation—The trial court erred by revoking defendant's probation because defendant did not violate the absconding provision of N.C.G.S. § 15A-1343(b). The evidence was sufficient only to find violations of N.C.G.S. § 15A-1343(b)(2) and (3), which are not statutory bases for revocation of probation unless the requirements of N.C.G.S. § 15A-1344(a)(d2) are met. The judgment was reversed and case was remanded for entry of appropriate judgment. **State v. Williams, 198.**

Violation report filed after probation expired—subject matter jurisdiction—On appeal from the trial court's judgments revoking defendant's probation and activating five consecutive sentences, the Court of Appeals held that the trial court lacked subject matter jurisdiction. Even assuming the trial court that originally placed defendant on probation made a clerical error by failing to check the box to order that defendant's probation begin upon his release from incarceration, pursuant to Rule of Civil Procedure 60(a) the Court of Appeals did not have authority to correct a substantive error. Accordingly, the probation officer filed his violation reports after defendant's probation expired and the trial court lacked subject matter jurisdiction under N.C.G.S. § 15A-1344(f) to revoke defendant's probation. **State v. Harwood, 425.**

PUBLIC WORKS

Impact fees—no definite plans for property—The trial court did not err in a case involving impact fees by granting summary judgment in favor of plaintiff-developers. There was no evidence that defendant-public utilities ever planned for water and sewer service to be furnished to the subject properties, although the record did demonstrate that defendant-public authorities had stated their intention to extend service to specific locations. If defendants' contention that the documents indicating a generalized goal of extending water and sewer service to unspecified parts of the county at an unspecified time in the indefinite future were sufficient to authorize imposition of impact fees for services "to be furnished," then fees could be imposed whenever a water and sewer board expressed even the vaguest intention to possibly extend service at some unspecified time in the future. **Point S. Props., LLC v. Cape Fear Pub. Util. Auth., 508.**

PUBLIC WORKS—Continued

Impact fees—source of payments—damages—Summary judgment was properly granted in a case involving impact fees where defendants argued that genuine issues of material fact remained regarding the amount of damages to which plaintiffs could be entitled. Defendants argued that the contested impact fees were paid directly by plaintiff-developers in some cases but in others were paid by a third party; however, defendants did not articulate a defense that would be established by this evidence or cite evidence to support the assertion that the impact fees were passed on to purchasers of homes. **Point S. Props., LLC v. Cape Fear Pub. Util. Auth.**, 508.

RAPE

Jury instructions—omission of lesser-included offense—penetration—no conflict in evidence—In a trial for first-degree rape, the trial court did not err by declining to instruct the jury on attempted first-degree rape. The victim's testimony that "I think he had [penetrated] a couple of times but he was choking me so hard that I was losing my breath and I believed I was going to die" did not create a conflict in the evidence necessitating the instruction on the lesser-included offense. The State presented substantial evidence of penetration—for example, a nurse's testimony that the victim reported penetration and testimony that defendant's semen was recovered from inside of the victim. **State v. Matsoake**, 651.

REAL PROPERTY

Adverse petition—constructive ouster—summary judgment—Summary judgment for respondents was reversed and remanded in an action to petition property that had passed into three undivided interests by inheritance in the 1920s, and in which adverse possession was raised by respondents. The evidence, taken all together and viewed in the light most favorable to petitioner (the developer which had acquired an undivided half interest in the property), created a genuine issue of material fact as to whether the original owner and the heirs who lived on the property recognized the ownership interest of the Baxters (the remaining nonresident heirs, whose interest was acquired by the developer), thus defeating the presumption of constructive ouster. **Atl. Coast Props., Inc. v. Saudners**, 211.

Condominiums—conciierge area—utilities—not common areas—not units—The trial court properly granted summary judgment in favor of plaintiff-homeowner's association's ownership of a disputed concierge area inside the building and electrical, plumbing, and telephone utilities. While the North Carolina Condominium Act permits the declaration creating a condominium to provide special declarant rights, those rights do not include the right to retain ownership of property that is located within a building and not designated as a unit. **Residences at Biltmore Condo. v. Power Dev., LLC**, 711.

RES JUDICATA AND COLLATERAL ESTOPPEL

Identity of parties—Lassiter exception—In a res judicata and collateral estoppel case arising from a failed real estate development involving multiple parties and prior arbitration, the trial court did not err by applying the Lassiter exception to the identity of parties rule (*Thompson v. Lassiter*, 246 N.C. 34, concerning control of the action by a person not a party) and granting summary judgment for defendant Harold K. Jordan and Co., Inc. **Lancaster v. Harold K. Jordan & Co., Inc.**, 74.

SCHOOLS AND EDUCATION

Charter schools—underfunding—unrestricted funds—Dropout Prevention Grant—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that funds designated as the Dropout Prevention Grant were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were intended to benefit the entire K-12 population and that CCS exercised discretion over how to spend the funds supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Charter schools—underfunding—unrestricted funds—E-Rate—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that E-Rate (a federal program that reimburses the school system for a percentage of what it pays for telecommunications and Internet access) funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the federal government did not designate or restrict the funds for a specific purpose and that the funds were used for Internet and telecommunications services for all K-12 CCS students and staff supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Charter schools—underfunding—unrestricted funds—Gear Up Grant—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that Gear Up Grant funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were not restricted and were spent on programs available to the general K-12 population of CCS supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Charter schools—underfunding—unrestricted funds—indirect costs—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that funds labeled "indirect costs" were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds received from federal grants for indirect costs were spent in the normal operations of the school district supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Charter schools—underfunding—unrestricted funds—Juvenile Crime Prevention Council—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by

SCHOOLS AND EDUCATION—Continued

finding that Juvenile Crime Prevention Council funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were used for life skills counselors who were available to the entire K-12 population supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Charter schools—underfunding—unrestricted funds—Medicaid reimbursement—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that Medicaid reimbursement funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the federal government did not designate or restrict the funds for a specific purpose and that CCS used the funds to provide services for students with IEPs in the general K-12 population supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Charter schools—underfunding—unrestricted funds—Reserved Officers' Training Corps—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that Reserved Officers' Training Corps (ROTC) funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were used to reimburse ROTC instructors' salaries paid from CCS's current expense fund and that the federal government did not restrict the funds to a specific purpose supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Charter schools—underfunding—unrestricted funds—tuition/fees—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that funds labeled "Tuition/Fees" were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were used for CCS's general operating expenses and general K-12 population supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Charter schools—underfunding—unrestricted funds—WorkForce Investment Act—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School \$54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that WorkForce Investment Act funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were not restricted and were used to pay two employees at the Job Link Center and to pay the students who participated in the program supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

SEARCH AND SEIZURE

Cell phone location—historical information—reasonable expectation of privacy—Where defendant's cell phone carrier (AT&T) gave law enforcement the location of defendant's cell phone tower "pings" within minutes of calls to or from his cell phone, the Court of Appeals concluded that defendant had no reasonable expectation of privacy in that information. Defendant voluntarily used his cell phone, thereby transmitting his location information to AT&T, a third party, which stored the information as a business record and transmitted it to law enforcement by court order. **State v. Perry, 156.**

Cell phone location—Stored Communications Act—court order—good-faith exception to warrant requirement—Where defendant's cell phone carrier (AT&T) gave law enforcement the location of defendant's cell phone tower "pings" within minutes of calls to or from his cell phone, the Court of Appeals held that, even assuming a search warrant based on probable cause was required, the good-faith exception to the Fourth Amendment warrant requirement applies. The officers reasonably relied upon the court order they received pursuant to the Stored Communications Act to obtain defendant's historical stored cell tower site location records from AT&T. **State v. Perry, 156.**

Seizure—items for manufacture of methamphetamine—destruction without court order—good faith of officers—The trial court did not abuse its discretion by denying defendant's motion for discovery sanctions after the State destroyed evidence seized from his home without an order authorizing destruction. The seized evidence—items used for the manufacture of methamphetamine—was destroyed under the officers' good faith belief that a destruction order had been entered. **State v. Hicks, 628.**

Stored Communications Act—cell phone location—historical information—Where defendant's cell phone carrier (AT&T) gave law enforcement the location of defendant's cell phone tower "pings" within minutes of calls to or from his cell phone, the Court of Appeals rejected defendant's argument that his constitutional rights were violated because the information was obtained without a search warrant based on probable cause. The Court of Appeals concluded that the records were obtained by court order pursuant to the Stored Communications Act and the information was historical rather than real-time. **State v. Perry, 156.**

SENTENCING

Habitual felon—predicate felonies—ambiguous verdict—A conviction for burning personal property and being a habitual felon was remanded for a new trial on the habitual felon charge or for entry of a new judgment based solely on burning personal property where the indictment charging habitual felon status identified three predicate felonies but the trial court instructed on four felonies. The verdict sheet did not identify the felonies, so that it was impossible to tell whether any of the jurors relied on the fourth felony. **State v. Jefferies, 455.**

Restitution—amount—evidence not sufficient—An order of restitution in an armed robbery prosecution was remanded for a new hearing on the amount where there was some evidence to support the award but the evidence was not specific enough to support the amount. **State v. Hammonds, 602.**

SEXUAL OFFENDERS

Convicted sex offender—meaning within terms of consent agreement—In an action in which a mother was held in criminal contempt for violating a child custody consent order by allowing the children to be around a convicted sex offender (Kistrel), Kistrel was a “convicted sex offender” within the meaning of the consent order where the parties stipulated to the district court finding that Kistrel was a convicted sex offender as that term was agreed to by the parties and included in the consent order. **State v. Mastor, 476.**

Convicted sexual offender—not synonymous with registered sexual offender—The superior court’s findings of fact supported its determination that a mother was in indirect criminal contempt where she entered into a child custody agreement that included a provision forbidding contact between the children and “any convicted sex offender”; the mother entered into a relationship with a man convicted of felony secret peeping. (Kistrel); and Kistrel was in the presence of the children on New Year’s Eve. Although the mother contended that Kistrel was not a “convicted sex offender” because he was not required to register as a sex offender, the inherent sexual nature of Kistrel’s conduct was apparent, the trial court could have exercised its discretion to require Kistrel to register as a sex offender, and the fact that the term “convicted sex offender” is not specifically defined in the North Carolina criminal statutes does not foreclose the Court of Appeals’ ability to determine the intended meaning of the words. Kistrel was a convicted sex offender. **State v. Mastor, 476.**

First-degree sexual offense—lesser-included offense of sexual offense with a child by an adult—jury instructions—A conviction for a lesser-included offense, first-degree sexual offense, N.C.G.S. § 14-27.4(a(1)), was vacated and remanded for resentencing where defendant was indicted for that offense but the jury was instructed on sexual offense with a child, adult offender, N.C.G.S. § 14-27.4A(d). The difference between the two statutes concerns the defendant’s age, and this case cannot be distinguished from *State v. Hicks*, 239 N.C. App. 396 (2015) (“In essence, the trial court submitted to the jury the additional element that the State was not required to prove: that defendant was at least 18, an adult, at the time he committed the offense.”). **State v. Harris, 728.**

STATUTES OF LIMITATION AND REPOSE

Impact fees—catch-all ten-year period—The proper statute of limitations for plaintiffs’ action concerning impact fees was the residual or “catch all” ten-year limitation period of N.C.G.S. § 1-56. It was undisputed that plaintiffs filed suit within ten years of their payment of the challenged impact fees and their claims were not barred by the statute of limitations. **Point S. Props., LLC v. Cape Fear Pub. Util. Auth., 508.**

Impact fees—limitation not based on defendants’ duty—The claims of plaintiff developers concerning impact fees were not subject to the three-year statute of limitations for a claim based on a liability set out in N.C.G.S. § 1-52(2). Plaintiffs asserted that defendant-public authorities lacked the authority to impose impact fees under N.C.G.S. § 162A-88 and did not ask defendants to provide water or sewer service or complain of defendants’ failure to provide service. Although N.C.G.S. § 162A-88 granted defendants the authority to levy fees for water and sewer services furnished or to be furnished, the statute did not impose any duty on defendants or expose them to liability. **Point S. Props., LLC v. Cape Fear Pub. Util. Auth., 508.**

STATUTES OF LIMITATION AND REPOSE—Continued

Impact fees—not based on contract—Plaintiffs' claims involving impact fees were not barred by the two-year statute of limitations set out in N.C.G.S. § 1-53(1) for an "action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied." Although defendants-public authorities contended that plaintiffs were seeking damages based on an implied contract, plaintiffs were actually contending that defendants lacked authority to impose the impact fees at issue. **Point S. Props., LLC v. Cape Fear Pub. Util. Auth., 508.**

TERMINATION OF PARENTAL RIGHTS

Conclusions of law—abuse of siblings—danger from other parent—In its order terminating the parental rights of respondent-father, the trial court's findings of fact supported its conclusion that respondent neglected his child at the time of the termination hearing and that there was a likelihood of repetition of neglect. The findings showed that respondent and the child's mother had severely abused the child's siblings, respondent was dishonest about his role in the abuse and his continued contact with the mother, and respondent lacked understanding of the danger that the mother posed to the child. **In re M.P.M., 41.**

Failure to make reasonable progress—The trial court erred by entering an order terminating respondent-mother's parental rights for failure to make reasonable progress on the conditions that led to the removal of her son, who was born while she was incarcerated for drug-related charges. Respondent complied in many ways with the numerous requirements set in the trial court's prior orders, and her few small failures did not support the conclusion that she had failed to make reasonable progress. **In re S.D., 65.**

Failure to pay for child's care—child not in foster home—The trial court erred by concluding that respondent's parental rights could be terminated for failing to pay a reasonable portion of the child's care under N.C.G.S. § 7B-1111(a)(3). This ground for termination applied only if petitioners' home qualified as a foster home, but it did not qualify because the child was not placed with petitioners by a child placing agency and because petitioners were related to the child by blood. **In re E.L.E., 301.**

Findings of fact—abuse by other parent—failure to appreciate—In its order terminating the parental rights of respondent-father, the trial court's findings of facts were supported by clear, cogent, and convincing evidence. Respondent's failure to understand or appreciate the mother's established pattern of child abuse and his own inability to protect the child was supported by testimony from the social worker and his psychological evaluation. **In re M.P.M., 41.**

Neglect—probability of repetition—findings inadequate—The trial court erred by concluding that grounds existed to terminate respondent-mother's parental rights based on neglect where it did not find that there was a probability of repetition of neglect. While there was arguably competent evidence in the record to support such a finding, the absence of the necessary finding required reversal. **In re E.L.E., 301.**

No reasonable progress—conclusion not supported by findings—The trial court's findings of fact did not support its conclusion that respondent-mother had not made reasonable progress under the circumstances toward correcting the

TERMINATION OF PARENTAL RIGHTS—Continued

conditions that led to the removal of her child from her care, and the trial court erred by concluding that respondent's parental rights should be terminated. **In re E.L.E., 301.**

WILLS

Declaratory judgment—caveat—distinguished—The trial court's dismissal of plaintiff-executor's action for a declaratory judgment was in error where it appeared that the trial court mistakenly concluded that plaintiff was challenging the will itself. Any interested person may bring a declaratory judgment action to construe a will, while on the other hand a caveat is a challenge to a purported will. **Brittian v. Brittian, 6.**

WITNESSES

Expert—blood alcohol extrapolation—The trial court did not abuse its discretion in an impaired driving prosecution by allowing a witness to testify as an expert in blood alcohol physiology, pharmacology, and related research on retrograde extrapolation. The witness's testimony confirmed that blood alcohol extrapolation is a scientifically valid field, with principles that have been tested, subjected to peer review and publication, and undisputedly accepted in the scientific community and in our courts. Most of defendant's contentions, although strongly stated, were arguments that went to the weight to be given the testimony, not its admissibility. **State v. Turbyfill, 183.**

Expert—calculation corrected on eve of trial—new calculation excluded—old calculation not reliable—The trial court did not abuse its discretion in an equitable distribution action when it excluded the first of two reports from the same expert valuing the parties' physical therapy business and the expert's opinion testimony. In the original report, the expert failed to factor in certain taxes but corrected the report upon realizing the mistake; however, the opposing party received the corrected report on the eve of trial and it was excluded. The original report was unreliable and not helpful to the finder of fact. **Miller v. Miller, 526.**

Expert—fire marshal—whether fire intentionally set—There was no error, much less plain error, in a prosecution for burning personal property where a fire marshal was allowed to testify. It has been held that a fire marshal may, with a proper foundation, offer an expert opinion as to whether a fire was intentionally set. **State v. Jefferies, 455.**

WORKERS' COMPENSATION

Additional treatment—anxiety and depression—Parsons presumption not applied—remanded—The Industrial Commission erred in a workers' compensation case by failing to apply the presumption from *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, to plaintiff's request for additional medical treatment and compensation for anxiety and depression. The *Parsons* presumption says that an employer must provide medical compensation for the treatment of compensable injuries, which includes additional medical treatment. It was evident from the Commission's opinion that the Commission did not apply the rebuttable *Parsons* presumption to plaintiff's psychological symptoms, and the matter was remanded for application of that presumption and a new determination. **Wilkes v. City of Greenville, 491.**

WORKERS' COMPENSATION—Continued

Asbestosis—last exposure prior to Security Association—not covered claims—The Full Industrial Commission's conclusion in a workers' compensation case that plaintiffs' claims for were not "covered claims" for purposes of compensation was affirmed where plaintiffs suffered from asbestosis, their last injurious exposure occurred prior to their employers becoming members of the North Carolina Self-Insurance Security Association, and their employer (Fieldcrest) became bankrupt. Because the Security Association was not created until 1 October 1986, after each of plaintiffs' last injurious exposure to asbestos occurred, these claims do not constitute "covered claims" within the scope of the statutes. While the Workers' Compensation statutes must be liberally construed, the Court of Appeals must not enlarge the definition of "covered claims" beyond the clearly expressed language of the statutes. **Ketchie v. Fieldcrest Cannon, Inc, 324.**

Temporary total disability benefits—futility of job search—The Industrial Commission in a workers' compensation case erred by concluding that plaintiff was no longer entitled to temporary total disability benefits. Plaintiff demonstrated the futility of engaging in a job search and defendant made no attempt to show that suitable jobs were available to plaintiff. **Wilkes v. City of Greenville, 491.**

