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TABLE OF CONTENTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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ALLYSON K. DUNCAN
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ROBERT F. ORR
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K. EDWARD GREENE
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CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
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LINDA STEPHENS[8]
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CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JESSICA ELAINE VANN BRADLEY, PLAINTIFF
v.
JOSHUA LENNON BRADLEY, DEFENDANT

No. COA16-1303

Filed 17 October 2017

Jurisdiction—personal jurisdiction—minimum contacts—due process—divorce—child custody and support

The trial court did not err in a divorce and child custody and support case by denying defendant husband's motion to dismiss based on lack of personal jurisdiction where the parties never lived together in North Carolina and lived abroad for the majority of the marriage. Defendant had sufficient minimum contacts with North Carolina to satisfy due process, including two marriage ceremonies, a baby shower, storage of marital property, and directing mail to be delivered to plaintiff wife's father while the parties were abroad.

Appeal by defendant from order entered 13 July 2016 by Judge Jeffrey Evan Noecker in New Hanover County District Court. Heard in the Court of Appeals 9 August 2017.

Rice Law, PLLC, by Mark Spencer Williams, Christine M. Sprow, and Ashton Overholt, and The Law Firm of Mark Hayes, by Mark L. Hayes, for plaintiff-appellee.

Parker Poe Adams & Bernstein LLP, by Jonathan E. Hall, Matthew H. Mall, and Michael J. Crook, for defendant-appellant.

DAVIS, Judge.

During the four-year marriage of Joshua and Jessica Bradley, they lived — at various times — in England, Australia, New Jersey, and New York. However, they were married in North Carolina, and over the course of their marriage Joshua engaged in various acts to maintain his ties with this state. The sole issue in this appeal arising from Jessica's divorce action is whether the trial court correctly concluded that North Carolina possessed personal jurisdiction over Joshua. Because we conclude that Joshua had sufficient minimum contacts with North Carolina such that the exercise of jurisdiction over him by a North Carolina court is consistent with principles of due process, we affirm the trial court's order denying Joshua's motion to dismiss pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure.

Factual and Procedural Background

Joshua was born and raised in Virginia. Jessica is from North Carolina. The parties first met in Virginia while Jessica was in graduate school and Joshua was in law school. After Jessica completed her schooling in Virginia, she returned to North Carolina to complete her Master's Degree. She was living in North Carolina with her parents (the "Vanns") in Bladen County at the time that she and Joshua married.

Upon Joshua's graduation from the University of Virginia School of Law in 2009, he was admitted to the New York bar and began working at a law firm in New York City. As part of his employment with the firm, he was sent to work on temporary assignments in various locations. At the time the couple married, Joshua was on a temporary assignment to Sydney, Australia.

Jessica and Joshua had two wedding ceremonies — both of which took place in Bladen County. The first was a "legal marriage ceremony" in March 2011, and the second was a "formal" ceremony in August 2011. For each ceremony, Joshua flew to North Carolina for a few days and then returned to Australia.

The parties lived in Australia as a married couple from September 2011 until July 2013. In July 2013, Joshua was recalled by his employer to the firm's New York office. The parties resided in New York for two months and then moved to New Jersey in October 2013 where they leased real property and lived for nine months.

In May or June 2014, Joshua received another temporary assignment to work in London, England. The parties moved to London and lived

there from July 2014 until June 2015. Because they were moving abroad, they decided to store various items of their personal property in a storage unit. Joshua contacted Jessica's father, Jesse Vann ("Mr. Vann"), and asked him to rent a storage unit in Fayetteville, North Carolina for this purpose. Mr. Vann agreed to do so and rented the storage unit in his own name. Joshua proceeded to ship various property — including marital property of the parties — to Mr. Vann, which he placed in the storage unit in Fayetteville. Joshua continuously paid the fees associated with the storage unit for the next 23 months.

While the parties were living abroad, Joshua arranged for a portion of their mail to be sent to the Vanns' home in North Carolina, and they also received additional mail at his parents' home in Virginia and at his employer's address in New York. Among the items of mail he received at the Vanns' home were certain "boxed shipments."

In May 2014, the parties learned that Jessica was pregnant. During the pregnancy, the parties had two baby showers in the United States — one in Bladen County, North Carolina and one in Virginia. The parties' child, Eden, was born on 1 February 2015 in London, England.

In May 2015, the parties agreed that they would live apart for a period of time. The family flew to Virginia where Jessica and Eden began living with Joshua's parents.

In June 2015, Joshua and Jessica officially decided to separate. Jessica and Eden moved from Joshua's parents' home in Virginia to live with her parents in Bladen County. At the time this action commenced, Jessica was living in North Carolina with Eden, and Joshua was still living in London.

On 1 March 2016, Jessica filed a complaint in New Hanover County District Court seeking child custody, child support, post-separation support, alimony, equitable distribution, and attorneys' fees. On 1 April 2016, Joshua filed a motion to dismiss pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure, asserting that the trial court lacked personal jurisdiction over him. On 14 April 2016, he filed an affidavit in support of his motion. Four days later, he filed an amended motion to dismiss.

A hearing was held on Joshua's amended motion to dismiss on 15 June 2016 before the Honorable Jeffrey Evan Noecker. Prior to the hearing, Joshua filed a second affidavit. On 13 July 2016, the trial court entered an order denying Joshua's amended motion to dismiss and concluding that it possessed personal jurisdiction over Joshua. Joshua filed a timely notice of appeal.

Analysis

I. Appellate Jurisdiction

As an initial matter, we must determine whether we have appellate jurisdiction to hear Joshua's appeal. *See Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) ("[W]hether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*." (citation, quotation marks, and brackets omitted)). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013) (citation and quotation marks omitted). The prohibition against interlocutory appeals "prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

However, "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . ." N.C. Gen. Stat. § 1-277(b) (2015). Thus, Joshua has a right of immediate appeal. *See Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 384, 677 S.E.2d 203, 207 (2009) (holding that "N.C. Gen. Stat. § 1-277(b) allows . . . for an immediate appeal of the denial of a motion to dismiss based on personal jurisdiction"), *disc. review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010).

II. Personal Jurisdiction

Joshua contends that the trial court erred in denying his motion to dismiss under Rule 12(b)(2) as to Jessica's claims for child support, post-separation support, alimony, and equitable distribution.[1] "The standard

1. Joshua does not contest the fact that the trial court possesses jurisdiction with respect to the parties' child custody dispute. "The jurisdiction of the courts of this State to make child custody determinations is controlled by N.C. Gen. Stat. Sec. 50A-3 . . . ." *Hart v. Hart*, 74 N.C. App. 1, 5-6, 327 S.E.2d 631, 635 (1985). "Personal jurisdiction over the nonresident parent is not a requirement under the [statute]." *Id.* at 7, 327 S.E.2d at 635.

of 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." *Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011) (citation, quotation marks, and brackets omitted), *disc. review denied*, 365 N.C. 574, 724 S.E.2d 529 (2012). We have held that "[t]he trial court's determination regarding the existence of grounds for personal jurisdiction is a question of fact." *Eluhu v. Rosenhaus*, 159 N.C. App. 355, 357, 583 S.E.2d 707, 710 (2003), *aff'd per curiam*, 358 N.C. 372, 595 S.E.2d 146 (2004).

> The determination of whether the trial court can properly exercise personal jurisdiction over a non-resident defendant is a two-part inquiry. First, the North Carolina long-arm statute must permit the exercise of personal jurisdiction. Second, the exercise of personal jurisdiction must comport with the due process clause of the Fourteenth Amendment of the United States Constitution.

Filmar Racing, Inc. v. Stewart, 141 N.C. App. 668, 671, 541 S.E.2d 733, 736 (2001) (internal citations and quotation marks omitted).[2]

"In order to determine whether the exercise of personal jurisdiction comports with due process, the trial court must evaluate whether the defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Eluhu*, 159 N.C. App. at 358, 583 S.E.2d at 710 (2003) (citation, quotation marks, and brackets omitted). "The relationship between the defendant and the forum state must be such that the defendant should reasonably anticipate being haled into a North Carolina court." *Bell*, 216 N.C. App. at 544, 716 S.E.2d at 872 (citation and quotation marks omitted).

> Factors for determining existence of minimum contacts include (1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties.

Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 617, 532 S.E.2d 215, 219 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000).

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2. Joshua does not dispute that North Carolina's long-arm statute permits the exercise of jurisdiction over him by a North Carolina court. *See* N.C. Gen. Stat. § 1-75.4 (2015).

"The Court must also weigh and consider the interests of and fairness to the parties involved in the litigation." *Sherlock v. Sherlock*, 143 N.C. App. 300, 304, 545 S.E.2d 757, 761 (2001) (citation omitted). However, as the United States Supreme Court has stated:

> [T]he Due Process Clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294, 62 L. Ed. 2d 490, 499-500 (1980).

As an initial matter, we note that the United States Supreme Court has held the mere fact that a defendant's wedding ceremony took place in a particular state does not — by itself — establish personal jurisdiction over him by the courts of that state. *See Kulko v. Superior Court of Cal.*, 436 U.S. 84, 93, 56 L. Ed. 2d 132, 142 (1978) ("[W]here two New York domiciliaries, for reasons of convenience, marry in the State of California and thereafter spend their entire married life in New York, the fact of their California marriage by itself cannot support a California court's exercise of jurisdiction over a spouse who remains a New York resident . . . ."); *see also Southern v. Southern*, 43 N.C. App. 159, 163, 258 S.E.2d 422, 425 (1979) (citing *Kulko* for proposition that England lacked personal jurisdiction over defendant despite fact that parties were married in London because there was "no indication in the record that England was the parties' matrimonial domicile or that there were any contacts other than the marriage itself sufficient to justify imposing upon defendant the burden of defending suit in England").

Therefore, in order for North Carolina's courts to exercise jurisdiction over Joshua, he must have had sufficient contacts with North Carolina to satisfy due process standards. Before analyzing the trial court's findings in its 13 July 2016 order, we find it instructive to review prior case law from our appellate courts on this subject.

A. Cases Where No Personal Jurisdiction Existed

In *Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985), the parties were married in Illinois, but after four years of marriage they separated. The plaintiff took custody of their young daughter and moved to North Carolina. For ten years, the defendant mailed child support payments to the plaintiff and visited the child in North Carolina. *Id.* at 478, 329 S.E.2d at 665. When the defendant stopped payments after ten years, the plaintiff sued him for child support in North Carolina while he was living in Tokyo, Japan. The defendant moved to dismiss the complaint, arguing that the court did not have personal jurisdiction over him. The trial court denied the motion. *Id.*

On appeal, our Supreme Court held that the trial court had erred in denying the defendant's motion to dismiss. *Id.* at 478, 329 S.E.2d at 666. The Court ruled that "the defendant ha[d] engaged in no acts with respect to North Carolina by which he ha[d] purposefully availed himself of the benefits, protections and privileges of the laws of this State." *Id.* at 480-81, 329 S.E.2d at 667.

> In the instant case the child's presence in North Carolina was not caused by the defendant's acquiescence. Instead, it was solely the result of the plaintiff's decision as the custodial parent to live here with the child. As previously noted, the Supreme Court has expressly stated that unilateral acts by the party claiming a relationship with a non-resident defendant may not, without more, satisfy due process requirements. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). We conclude that *Kulko* compels a finding that this defendant did not purposefully avail himself of the benefits and protections of the laws of this State. A contrary conclusion would discourage voluntary child custody agreements and subject a non-custodial parent to suit in any jurisdiction where the custodial parent chose to reside. *See Kulko v. Superior Court of California*, 436 U.S. 84, 93 (1978).

Id. at 479, 329 S.E.2d at 666.

The Court also determined that the defendant's six visits over ten years to North Carolina to visit the child were insufficient to confer jurisdiction over him. *Id.* In comparing the case to *Kulko*, the Court observed that

> [t]he father's visits to California in *Kulko* were fewer and more distant in time from the litigation than were the visits in this case. The visits by this defendant to North Carolina, however, were no less temporary than those in *Kulko* and were so unrelated to this action that he could not have reasonably anticipated being subjected to suit here.

Id. at 480, 329 S.E.2d at 667.

Finally, the Supreme Court acknowledged that "the presence of the child and one parent in North Carolina might make this State the most convenient forum for the action." *Id.* However, the Court ruled that this fact alone "does not confer personal jurisdiction over a non-resident defendant." *Id.* (citation omitted). The Court stated that it was "mindful that North Carolina has an important interest in ensuring that nonresident parents fulfill their support obligations to their children living here[,]" but that "[a]bsent the constitutionally required minimum contacts . . . this interest will not suffice to make North Carolina a proper forum in which to require the defendant to defend the action . . . ." *Id.* (citation omitted).

In *Carroll v. Carroll*, 88 N.C. App. 453, 363 S.E.2d 872 (1988), the plaintiff and defendant were married in Washington and owned real and personal property in that state. After the parties separated, the plaintiff moved to North Carolina. *Id.* at 455, 363 S.E.2d at 874. The plaintiff subsequently filed a complaint in North Carolina for divorce, child custody, child support, and equitable distribution. *Id.* at 453, 363 S.E.2d at 872-73. In determining that it possessed personal jurisdiction over the defendant, the trial court took into consideration the fact that "certain property of the parties was located in North Carolina." *Id.* at 455, 363 S.E.2d at 874.

On appeal, we held that the trial court lacked personal jurisdiction over the defendant because he had never lived in North Carolina and the record did not specify whether he had consented to his personal property being brought into North Carolina. *Id.* at 456, 363 S.E.2d at 874. In so holding, we stated that

> [t]he fact that there exists some personal property in North Carolina in which the defendant may have an interest because of the equitable distribution statutes is not alone sufficient to establish jurisdiction over the defendant or his property. If there was evidence the defendant brought the property into North Carolina or consented to the placement of property in North Carolina, this would be

> some evidence of contacts with the forum State, the defendant and the litigation. This however, would not itself necessarily be decisive concerning the issue of jurisdiction.

Id. (internal citations omitted).

Tompkins v. Tompkins, 98 N.C. App. 299, 390 S.E.2d 766 (1990), involved a suit by the plaintiff against the defendant in North Carolina seeking alimony and equitable distribution, alleging that the defendant had committed adultery during the marriage. The defendant filed a motion to dismiss for lack of personal jurisdiction, asserting that the complaint contained no evidence that the parties were married in North Carolina, that he was living in the state, or that the misconduct had occurred in the state. *Id.* at 302, 390 S.E.2d at 768. Moreover, the defendant argued that he had

> left the State of North Carolina more than three and one-half years prior to the commencement of this action, had resided in South Carolina since that time, owned no property in North Carolina, conducted no business in this State, and had not invoked the protection of North Carolina law for any purpose or reason since leaving this State.

Id. at 300, 390 S.E.2d at 767. The plaintiff, in turn, contended that because the defendant had "abandoned" her in North Carolina while they were legally married, he had sufficient contacts with the state. *Id.* at 304, 390 S.E.2d at 769.

The trial court dismissed the plaintiff's complaint, and we affirmed, stating that

> plaintiff's allegations of defendant's marital misconduct, absent any allegations going to a nexus between such misconduct and this State, are simply insufficient to permit the reasonable inference that personal jurisdiction over defendant could properly be acquired in this case. . . . [T]he mere fact that the marriage is still in existence at the time an action for alimony is initiated cannot of itself constitute sufficient contacts to establish personal jurisdiction over a foreign defendant. Were it otherwise, this State could exercise personal jurisdiction over a foreign defendant solely by virtue of a plaintiff's unilateral act of moving to North Carolina prior to the termination of the marriage. This is plainly impermissible.

Id. at 304, 390 S.E.2d at 769-70 (citations omitted).

In *Shamley v. Shamley*, 117 N.C. App. 175, 455 S.E.2d 435 (1994), the plaintiff and defendant were married in New York. After twenty years of living in New Jersey, the plaintiff began looking to buy houses, and eventually he bought a home in North Carolina. *Id.* at 176-77, 455 S.E.2d at 436. The defendant accompanied him to North Carolina, but she did not take part in purchasing the house. *Id.* at 181, 455 S.E.2d at 438. While she was in North Carolina during another visit, the defendant purchased an automobile, which she later had titled in New Jersey. *Id.* Upon the parties' separation, the plaintiff sued for absolute divorce and equitable distribution in North Carolina, and the defendant brought a similar suit in New Jersey. *Id.* at 177, 455 S.E.2d at 436. The trial court determined that it did not have personal jurisdiction over the defendant and dismissed the case. *Id.* at 177-78, 455 S.E.2d at 436.

On appeal, we affirmed, holding that the defendant's "only voluntary contacts with North Carolina were during a brief visit in which she looked at houses with [plaintiff] and another visit in which she purchased an automobile . . . ." *Id.* at 182, 455 S.E.2d at 439. We concluded that she "could not, on the basis of these contacts, reasonably anticipate being haled into court here." *Id.*

Finally, *Shaner v. Shaner*, 216 N.C. App. 409, 717 S.E.2d 66 (2011), involved parties who were married in New York and lived together as husband and wife for 41 years. *Id.* at 409, 717 S.E.2d at 67. Five years prior to their divorce, the couple moved to Mooresville, North Carolina to live near their adult children. *Id.* However, after four months, the defendant returned to live in the couple's New York home. *Id.* at 409, 717 S.E.2d at 67-68. The plaintiff subsequently purchased a home in Statesville, North Carolina. *Id.* at 409, 717 S.E.2d at 68. She spent the final three years of the marriage living at times in New York with the defendant and at other times in North Carolina near her children, whom the defendant also briefly visited. *Id.* Upon the parties' separation, the plaintiff filed a complaint for post-separation support, alimony, absolute divorce, and equitable distribution in North Carolina. *Id.* The defendant moved to dismiss the action, and the trial court denied his motion, concluding that it possessed personal jurisdiction over him. *Id.* at 409-10, 717 S.E.2d at 68.

On appeal, we determined that the defendant's "limited contacts with North Carolina" — including the four months that he lived in North Carolina with the plaintiff — were "analogous to those in *Shamley* . . . ." *Id.* at 412, 717 S.E.2d at 69. We concluded that "[b]ecause Defendant could not reasonably anticipate being haled into court on the basis of these contacts, the trial court's exercise of personal jurisdiction over Defendant would violate his due process rights." *Id.*

B. Cases Where Personal Jurisdiction Was Found to Exist

In *Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979), the plaintiff was living in Missouri and the defendant in Alabama when the plaintiff filed suit in North Carolina for alimony and child support. She argued that jurisdiction existed over the defendant because he "own[ed] real property in North Carolina which could be used to satisfy the divorce judgment." *Id.* at 345, 255 S.E.2d at 412. The trial court found that personal jurisdiction existed because the parties had jointly purchased a house in Montreat, North Carolina. *Id.* at 353, 255 S.E.2d at 413.

On appeal, we affirmed, holding that because the defendant was making payments on the house but not paying the plaintiff spousal and child support "the North Carolina property [wa]s certainly a part of the source of the underlying controversy between the plaintiff and the defendant." *Id.* (quotation marks omitted). Thus, we reasoned that

> not allowing plaintiff to obtain jurisdiction over defendant (who left the state of his domicil[e] less than one month after being ordered to make such payments to his wife and children, purchased real estate in North Carolina and incurred financial obligations as a result thereof) could clearly result in defendant being allowed to avoid the court ordered payments by purchasing North Carolina real estate. . . . Clearly, the cause of action here was a direct and foreseeable outgrowth of defendant's contacts with this state.

Id. at 354, 255 S.E.2d at 413.

In *Harris v. Harris*, 104 N.C. App. 574, 581, 410 S.E.2d 527, 532 (1991), the defendant was born in Virginia but attended public schools and universities in North Carolina. *Id.* at 575, 410 S.E.2d at 528. He and the plaintiff were married in North Carolina and established a marital residence in this State for three years during which time their first child was born. *Id.* For the remainder of their eighteen-year marriage, the parties lived in Virginia, although they returned to visit family members in North Carolina during that time. Even after moving to Virginia, the defendant — who owned a dog training business — maintained business contacts with dog trainers, sellers, and purchasers in North Carolina, traveling to the state "at least once a year to participate in dog training exercises or dog shows and competitions." *Id.* at 576, 410 S.E.2d at 529. Upon the parties' divorce, the plaintiff and one of the parties' children returned to live in North Carolina. *Id.*

The plaintiff filed an action for child support, and the defendant moved to dismiss the complaint for lack of personal jurisdiction. *Id.* at 576. The trial court concluded that personal jurisdiction existed over the defendant. *Id.*

Observing that "the defendant has substantial past and present contacts with North Carolina[,]" this Court affirmed the trial court's order, stating as follows:

> The defendant moved to North Carolina at an early age and lived here until 1974. He and the plaintiff were married here in 1971, had a child here in 1973, and resided in North Carolina as husband and wife for nearly three years before moving to Virginia. While in Virginia, they maintained contacts with family members in North Carolina, visiting them during the various holidays. In 1989, the parties separated and the plaintiff returned to North Carolina with their third child and was joined later by their second child. Since the parties' separation, the defendant has maintained his contacts with family members in this State, visiting them on at least two occasions. Furthermore, the defendant has established and maintained business contacts in North Carolina and has travelled routinely to this State to participate in business-related activities. Viewed in light of North Carolina's important interest in ensuring that non-resident parents fulfill their support obligations to their children living here, the quantity, nature, and quality of the defendant's past and present contacts with North Carolina support a finding of "minimum contacts" and therefore support the exercise of personal jurisdiction over him in our courts, probably the most convenient forum for this action.

Id. at 581-82, 410 S.E.2d at 532 (internal citations and quotation marks omitted).

Bates v. Jarrett, 135 N.C. App. 594, 521 S.E.2d 735 (1999), involved a wife and husband who were married and lived in North Carolina for nearly eight years. *Id.* at 600, 521 S.E.2d at 739. Upon their divorce, the husband moved out of the state. The wife sought a domestic violence protective order in Cumberland County, North Carolina but failed to serve the husband. Nevertheless, the husband made an appearance at a domestic violence hearing. *Id.* at 600-01, 521 S.E.2d at 739.

Upon the couple's separation, the husband allowed the wife to bring the couple's Subaru into North Carolina, but then — without the wife's consent — he sold the car and conveyed the title to another couple who was living in North Carolina. *Id.* The couple who bought the Subaru were involved in a motor vehicle accident while driving the vehicle, and the insurance proceeds were paid to them. *Id.*

The wife filed suit against both the Subaru's purchasers and her husband, contending that she had not consented to the sale of the vehicle. *Id.* at 601, 521 S.E.2d at 739. In the same lawsuit, she also filed an equitable distribution claim against her husband. *Id.* at 595, 521 S.E.2d at 736. The husband moved to dismiss the claim against him, arguing that the trial court did not possess personal jurisdiction over him. The trial court concluded that it lacked personal jurisdiction over the husband. *Id.* at 596, 521 S.E.2d at 736.

On appeal, we held that personal jurisdiction existed over the husband. In so holding, we observed that the marital couple had "resided in this State from 1985 until 1992 or 1993" and that the husband had "consented to [the wife] bringing the Subaru to this State." *Id.* at 600, 521 S.E.2d at 739. Moreover, we noted that the husband "had additional contact with the State. He appeared at the domestic violence hearing without being served with process." *Id.* at 600, 521 S.E.2d at 739. Finally, we reasoned that "the actions of [the husband] . . . involving the Subaru constitute sufficient minimum contacts with the State such that he should have reasonably anticipated being haled into Court here over the issues of possession and ownership of this vehicle." *Id.* at 601, 521 S.E.2d at 739.

In *Lang v. Lang*, 157 N.C. App. 703, 579 S.E.2d 919 (2003), the defendant and his wife were married in Germany and remained married for twelve years. One daughter — the plaintiff — was born of the marriage. After the marriage ended, the couple agreed to a separation agreement whereby the defendant would pay spousal and child support. "Sometime thereafter, defendant moved to Henderson County, North Carolina." *Id.* at 704, 579 S.E.2d at 921. There he became involved in the "business of selling real estate in Henderson County, North Carolina" and "signed, as a seller, offers to purchase and contract for real property located in North Carolina . . . ." *Id.* at 709, 579 S.E.2d at 923 (quotation marks omitted). At that time, the plaintiff and her mother both sought support orders in North Carolina based upon the defendant's actions in choosing to live and conduct business activities within the state. *Id.*

Thirty years after the separation agreement was executed, the plaintiff filed another suit against the defendant in North Carolina to enforce

the support judgment she had previously secured against him. *Id.* at 704, 579 S.E.2d at 920-21. The defendant argued that the trial court did not have jurisdiction over him because he "was never a resident or citizen of the State[,]" but the court denied his motion. *Id.* at 704-05, 579 S.E.2d at 921. The trial court found, in pertinent part, that the defendant had been "issued a North Carolina operator's license[,]" had owned a subdivision in Henderson County, North Carolina for ten years and was present in the subdivision "hundreds of times[;]" had been showing homes in the subdivision and "taking back mortgages to assist with the financing[;]" and had purchased and registered a new automobile in North Carolina. *Id.* at 705-06, 579 S.E.2d at 921 (quotation marks omitted).

This Court held that the evidence of the defendant's business activities supported the trial court's finding that his contacts in North Carolina were "continuous and systematic[.]" *Id.* at 709, 579 S.E.2d at 923. We concluded that these contacts were "sufficient to support the conclusion that defendant purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws and could therefore reasonably anticipate being haled into court in North Carolina." *Id.* (citation, quotation marks, and brackets omitted).

In *Butler v. Butler*, 152 N.C. App. 74, 566 S.E.2d 707 (2002), the parties were married in Florida and lived in the Bahamas during the first four years of their marriage. After five years of marriage, the couple purchased a house together in Moore County, North Carolina where the plaintiff and the couple's daughters lived for the remaining four years of the marriage. *Id.* at 75, 566 S.E.2d at 708. The defendant continued living in the Bahamas but visited his family in North Carolina. In addition, he maintained a membership with the "Moore County Hounds, a social and sporting association and ha[d] participated in its activities in Moore County." *Id.* at 77, 566 S.E.2d at 709 (brackets omitted). When the parties separated, the plaintiff sued in North Carolina for child support, alimony, post-separation support, and equitable distribution. *Id.* at 75-76, 566 S.E.2d at 708. The defendant moved to dismiss under Rule 12(b)(2), but the trial court found that he had sufficient minimum contacts with North Carolina to permit the court to exercise personal jurisdiction over him. *Id.* at 76, 566 S.E.2d at 708.

We affirmed, holding as follows:

> Defendant's name appears on both the deed and the [Moore County] home mortgage. Defendant testified that he was convinced that North Carolina was the best place

> for his daughter and stepdaughter to receive an education. Based on this competent evidence, the trial court found as fact that one reason defendant purchased the house in North Carolina was to allow his daughter to be schooled here. Following their move to North Carolina, defendant visited plaintiff and the girls at least once a month for two years, staying in the house for three or more days at a time. During this period, plaintiff and defendant were still married. Thus, we agree with the trial court's characterization of the house in Moore County as a "marital residence." In addition to visiting his family in this State, defendant maintained a membership in Moore County Hounds, a social and sporting association, and participated in the association's activities in Moore County. Finally, the evidence shows that defendant further benefitted from his connections with this State by using the equity line of credit on the Moore County house for business purposes.

Id. at 82, 566 S.E.2d at 712. For these reasons, we determined that "the record supports the conclusion that defendant purposefully availed himself of the benefits and protections of this State's laws." *Id.* at 83, 566 S.E.2d at 713.

In the present case, Jessica relies most heavily on our decision in *Sherlock*. In that case, the parties were married in Durham, North Carolina but never actually lived in the state, instead living abroad for the majority of their nearly sixteen-year marriage. They "resided in Egypt, Korea, the Philippines, India, Indonesia, Australia, and Thailand[,]" and "a six month stay in Georgia was the only time during their marriage that they lived in the United States." *Sherlock*, 143 N.C. App. at 304, 545 S.E.2d at 761. Upon their separation, the plaintiff sued the defendant in North Carolina seeking post-separation support. *Id.* at 301, 545 S.E.2d at 759. The trial court denied the defendant's motion to dismiss for lack of personal jurisdiction. *Id.*

On appeal, we determined that although the defendant was "seldom physically present within the state," he had sufficient minimum contacts with North Carolina for the trial court to exercise personal jurisdiction over him. *Id.* at 306, 545 S.E.2d at 762. In so holding, we summarized the defendant's contacts with North Carolina as follows:

> (1) their marriage ceremony was performed in Durham, North Carolina. Consequently, [the parties'] marriage license was filed there, and the provisions of Chapter 52,

> "Powers and Liabilities of Married Persons," governed various legal aspects of their relationship during the marriage; (2) while he was overseas, the defendant used his father-in-law's Durham address to receive important mail, including federal income tax documents; (3) between 1983 and 1989 the defendant's salary was directly deposited into a Wachovia bank account in Durham, North Carolina; (4) between 1984 and 1995 the defendant had a North Carolina drivers' license. To obtain a license, the defendant must have had at least a nominal "residence" in North Carolina; (5) in 1984, the defendant executed a Power of Attorney in Durham, and made Albert Sheehy, his father-in-law, his Attorney in Fact. This document was filed in the Durham County Registry; (6) in his capacity as Attorney in Fact, Mr. Sheehy conducted business on behalf of plaintiff and defendant while they were overseas; (7) in 1984, the defendant made a Last Will and Testament, naming Mr. Sheehy, of Durham, the executor of his will, and Mary Meschter, also of Durham, as alternate executor; (8) from 1992 to 1995 the defendant retained Frank Brown, a Durham accountant, to receive and pay bills on his behalf; and (9) in 1992, plaintiff and defendant opened an investment account with Edward D. Jones, Oxford, North Carolina, consisting of IRA accounts, money market funds, and mutual funds.

Id. at 304-05, 545 S.E.2d at 761.

Based on these contacts, we ruled that the defendant had "availed himself to the privilege of conducting activities within North Carolina, thus invoking the benefits and protections of its laws." *Id.* at 305, 545 S.E.2d at 762 (citation, quotation marks, and brackets omitted). In so holding, we emphasized the uniqueness of the factual scenario in *Sherlock*:

> This Court recognizes that a state does not attain personal jurisdiction over a defendant simply by being the center of gravity of the controversy or the most convenient location for the trial of the action. In the ordinary divorce case, it might be improper to assert jurisdiction over a defendant who has spent so little time in the forum state. However, the [parties'] history is unusual; their frequent moves from one foreign country to another, and their failure to establish a permanent home anywhere in the United States or

> abroad, require this Court to evaluate their situation on its own merits.

Id. at 306, 545 S.E.2d at 762 (internal citation and quotation marks omitted).

C. Application of Case Law to Present Action

In the present case, the trial court made the following pertinent findings of fact:

> 14. Joshua took a position as an attorney with Sullivan & Cromwell, LLP, a law firm with its headquarters in New York, New York. At all times since accepting this employment in October 2010, he has continued to be employed with Sullivan & Cromwell and is presently employed with this firm. Joshua's employment dictated the location the parties resided throughout their marriage.
>
> . . . .
>
> 16. Joshua and Jessica are Husband and Wife, having lawfully intermarried on or about 28 March 2011 in Bladen County, North Carolina. This was a legal marriage ceremony so that the parties could share one visa application as a married couple to apply for a visa to live in Australia while on temporary assignment with Sullivan & Cromwell.
>
> 17. The parties' marriage application, license and certificate of marriage was [sic] filed in the Bladen County Register of Deeds.
>
> 18. After the parties were legally married, Joshua flew to Sydney[,] Australia in connection with his temporary work assignment there for his employer on or about 5 May 2011. He returned to North Carolina on or about 11 August 2011 for the parties' second wedding ceremony.
>
> 19. The parties had a second "formal" marriage ceremony to which friends and family were invited in Dublin, North Carolina on 14 August 2011. Both parties attended and participated in the event after which they honeymooned in Europe.

20. With the approval of Jessica's father, Jess[e] Van[n], Joshua and Jessica used Mr. Vann's mailing address in Bladenboro, North Carolina as a home base for the receipt of mail and boxed shipments while the parties lived in Australia and then later London.

21. Joshua and Jessica used Jesse Vann's mailing address with his permission in Bladenboro, North Carolina as their home base to receive mail while they lived in Australia and London for such mail as:

    a. One Child Matters, a sponsorship of a child (in both names);

    b. Citibank (joint account);

    c. Capital One investing (which is an investment account in Joshua's sole name);

    d. Citigroup (an account in Joshua's sole name);

    e. TD Ameritrade (an account in Joshua's sole name).

22. The North Carolina address served as their headquarters for mail in the United States (although Joshua also received some mail at his parents' address in Virginia and his employer's address in New York.) All of the mail was statements for credit cards and investment accounts, which the Defendant administered online. On one occasion, Mr. Vann did overnight mail that perceived [sic] to be important to the parties in London.

23. The parties lived together in Australia as a married couple from on or about 3 September 2011 until July 2013.

24. In July 2013, the parties relocated to New York as Joshua was recalled by his employer to the New York Office. They lived in New York for approximately two months after which they established a residence in New Jersey.

25. The parties lived in New Jersey from October 2013 until May or June 2014 when Joshua undertook a temporary work assignment at the law firm's London Office.

26. The parties lived together in London from July 2014 until June 2015.

27. Prior to moving to London, the parties discussed storing items of personal property — much of it marital property but some of it the separate property of Joshua and some of it the separate property of Jessica — in North Carolina while they were to be living in London and they agreed to store the marital and separate property in Fayetteville, North Carolina.

28. Joshua contacted Jesse Vann, Jessica's father to see if he would facilitate the rental of a storage unit in Fayetteville and the receipt of the personal items.

29. On 27 June 2014, Joshua directed a moving company engaged by his employer to wit: Sullivan and Cromwell, to have marital property along with some of his and Jessica's separate property moved from New Jersey to a storage unit in Fayetteville, North Carolina. Joshua intentionally directed marital property to the State of North Carolina.

30. On or about 16 July 2014, Jessica's father, Jesse Vann, rented a storage unit acting under instructions from Joshua Bradley at ExtraSpaceStorage in Fayetteville, North Carolina. Mr. Vann took off a day of work, drove 42 miles to rent the storage unit and signed to receive the property that Joshua had sent to the unit from New Jersey.

31. The unit was rented by Mr. Vann in his own name. By agreement between Joshua and Mr. Vann, Joshua paid the storage unit rental fees and has continued to do so for twenty-three (23) months.

32. Mr. Vann acted as the agent of Joshua in renting the storage unit in North Carolina and receiving the goods on behalf of Joshua. Joshua arranged for Jesse Vann to act in this capacity.

33. The parties learned they were expecting a child in May 2014.

34. A baby shower was held 26 October 2014 in Dublin, North Carolina which Jessica and Joshua both

attended. Both parties also attended a baby shower in . . . Virginia.

35. There was one child born of the parties' marriage to wit: EDEN JOEL VANN BRADLEY born 1 February 2015 in London, England.

36. In late May 2015, Joshua suggested, and the parties agreed, that Jessica return to the United States with the baby. The parties flew back to the United States in June with EDEN after which Joshua returned to work in London while Jessica and Eden lived with Joshua's parents in Virginia for approximately one month until relocating to North Carolina.

37. Joshua has been and admits to being in the State of North Carolina on at least the following dates:

    a. 25 March 2011 through 29 March 2011

    b. 4 May 2011 through 5 May 2011

    c. 11 August 2011 through 15 August 2011

    d. 3 June 2012 through 15 June 2012

    e. 27 November 2013 through 30 November 2013

    f. 20 December 2013 through 26 December 2013

    g. 17 April 2014 through 21 April 2014

    h. 20 June 2014 through 29 June 2014

    i. 25 October 2014 through 1 November 2014

38. At no time after the parties were married did the parties live together as husband and wife within the State of North Carolina. The parties never purchased real property within the State of North Carolina. There is no evidence that Joshua ever had a NC [d]river's license or filed taxes in the State.

. . . .

40. Joshua admits that he "acquiesced to Plaintiff living in North Carolina with the minor child following our separation." However, the Court finds that Joshua did more than acquiesce and actually orchestrated events

which led to Jessica and Eden living in North Carolina in that:

a. He flew back to the United States with Jessica and Eden after discussing living apart for a while and left them at his parents' home in Virginia and returned to London.

b. Jessica began living at his parents' residence in Virginia with EDEN and at her parent's [sic] home in North Carolina with EDEN.

c. At some point, Joshua communicated to Jessica while she was residing with his parents in Virginia and after he had returned to London that their marriage was over.

d. Based on Joshua's actions, it was foreseeable or should have been foreseeable to Joshua that Jessica would return to North Carolina with Eden given his statements to her while she and the minor child were residing with his parents in Virginia.

e. Jessica had no other place to go and Joshua was in London when he broke the news of their separation.

f. It was foreseeable Jessica would return to the State where her parents lived, where she grew up, graduated high school and went to undergraduate college.

g. Jessica went to North Carolina with Joshua's knowledge and with no objection from him.

h. Therefore, Jessica and the minor child, EDEN, resides [sic] in this State as a result of the acts or directives of Joshua.

. . . .

43. Joshua engaged in purposeful conduct which directed his activities through the State of North Carolina.

44. [Joshua] has filed an Affidavit wherein he admits that North Carolina is the "home state" of the minor child, EDEN, and that North Carolina has jurisdiction

over the claim of custody of the minor child under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA).

45. It would be inconvenient for the parties to litigate this matter elsewhere in that:

    a. Child Custody must be litigated in North Carolina as North Carolina is the "home state" under the UCCJEA, and the only state with jurisdiction over Eden's Custody.

    b. Joshua must appear and defend the child custody action in North Carolina if he wishes to present evidence on the child custody issue.

    c. It is therefore reasonable to expect him to travel here and to litigate custody here.

    d. It is illogical and inconvenient for the parties to litigate child custody here and the remaining claims in New Jersey even if New Jersey determines it has personal jurisdiction over Jessica.

    e. It is convenient for the parties to litigate the matter in North Carolina.

    f. Joshua resides in London and must engage in International travel to litigate this matter in New Jersey or North Carolina. There is little difference in the travel options and cost for him in this regard.

    g. Jessica resides in North Carolina.

    h. If this Court granted Defendant's motion, it would require litigation in two states and the parties to have two lawyers in two states. That is inconvenient and is one factor that must be considered.

46. All of Joshua's actions taken together which have been directed toward North Carolina along with his time in the State, his marriage twice in the State, the use of North Carolina as a "home base," sending marital property to be stored, maintained and kept even to this day in North Carolina and his orchestration of events which led to Jessica and Eden being in

the State of North Carolina are facts upon which this Court considers highly relevant.

47. [Joshua] does not contest that North Carolina is the "home state" under the UCCJEA for the minor child, EDEN, nor does he contest that North Carolina has authority to determine the issue of child custody regardless of whether it has *in personam* jurisdiction over him.

Based on these findings of fact, the trial court made the following conclusions of law:

1. The Court has jurisdiction over the parties to this action, the minor child whose custody is involved in this action, and over the subject matter of this action.

2. North Carolina is the "home state" of the minor child, EDEN, as that term is defined by N.C.G.S. 50A-201 (a)(1) and [it] is appropriate for this Court to assume jurisdiction over this matter for the purposes of making an initial child custody determination.

3. The Court should assume, and does assume continuing jurisdiction over the child support matters raised in this proceeding in conformity with the Uniform Interstate Family Support Act (UIFSA) codified at N.C. Gen. Stat. § 52C *et. seq*.

4. Personal jurisdiction over the Defendant is not required to address child custody.

5. Statutory authority for the exercise of personal jurisdiction over the non-resident Defendant exists under North Carolina's "long arm statute" as codified under N.C. Gen. Stat. § 1-75.4(12).

6. The Defendant has had reasonable notice of the claims filed in North Carolina as he was properly served with same.

7. The Defendant has purposefully availed himself of conducting activities within the State of North Carolina thus invoking the benefits and protections of its laws.

8. The Defendant "should reasonably" anticipate being haled into court[ ] in North Carolina as a result of his relationship with the State of North Carolina.

9. It is highly relevant that the Defendant directed marital property to be sent to the State of North Carolina and stored here. If Joshua's items and marital property had been damaged or destroyed in the storage unit in Fayetteville, North Carolina, he would have a cause of action in the State of North Carolina. Likewise, if he neglected to pay the rental fee he could reasonably be expected to be haled into Court in North Carolina (at least through an interpleader action).

10. The Defendant has sufficient contacts with the State of North Carolina to warrant assertion of personal jurisdiction over him such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice.

11. The quality and the nature of Defendant's contacts with the forum state make it such that it is reasonable and fair to require him to conduct his defense in the State of North Carolina.

12. Exercise of personal jurisdiction over the non-resident Defendant complies with the due process requirements of the Fourteenth Amendment of the U.S. Constitution.

The overwhelming majority of the above-quoted findings of fact are not challenged by Joshua, and those unchallenged findings are therefore binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.").[3]

Having thoroughly reviewed the trial court's findings of fact, the record, and the relevant case law, we agree with Jessica that *Sherlock* is the most analogous case to the present action. Here, as in *Sherlock*, the couple lacked a permanent residence during their marriage. Instead,

3. While Joshua challenges portions of Finding Nos. 32 and 40, he is only challenging them to the extent that they contain the trial court's determination that (1) Mr. Vann acted as Joshua's "agent[;]" and (2) Joshua "orchestrated" Jessica's move to North Carolina following their separation.

Joshua and Jessica lived in various locations (both within and outside the United States) as dictated by Joshua's employer. Specifically, during the four years of their marriage, the parties spent the majority of the time living abroad in London and Australia but also lived in New Jersey for nine months and in New York for two months.

Thus, the facts of the present case clearly demonstrate that this is not the "ordinary divorce case[.]" *Sherlock*, 143 N.C. App. at 306, 545 S.E.2d at 762. As in *Sherlock*, the parties' "history is unusual; their frequent moves from one foreign country to another, and their failure to establish a permanent home anywhere in the United States or abroad, require this Court to evaluate their situation on its own merits." *Id.*

In considering the factors relevant to the personal jurisdiction analysis, we first take note of the fact that Joshua and Jessica were married in North Carolina, participating in two separate wedding ceremonies. While Joshua is correct that "marriage by itself cannot support a . . . court's exercise of [personal] jurisdiction over a spouse[,]" *Kulko*, 436 U.S. at 93, 56 L. Ed. 2d at 142, the wedding ceremonies may properly be considered in conjunction with Joshua's other contacts with North Carolina. We also note that a baby shower for the parties was held in North Carolina to celebrate Jessica's pregnancy.

Second, the trial court found as fact that the parties stored various items of property — including marital property — in North Carolina. We deem significant the fact that not only did Joshua consent to storing the property in this state but, in addition, he (1) personally made several of the necessary arrangements for the storage; and (2) continued to pay rental fees for the storage of the property for the 23-month period preceding the hearing in the trial court. Although he could have instead elected to store the property in New Jersey (where he and Jessica had lived for nine months), in Virginia (where his parents resided), or in some other location, Joshua affirmatively chose to do so in North Carolina.[4]

Joshua argues that the rental contract for the storage unit was in Mr. Vann's name rather than in Joshua's own name. However, this distinction does not change the fact that it was *Joshua* who affirmatively chose to store his and Jessica's property in North Carolina and continued to do so for almost two full years. In so doing, he has sought to avail himself of "the benefits, protections and privileges of the laws of this State." *See Miller*, 313 N.C. at 480-81, 329 S.E.2d at 667.

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4. While the trial court did not make a finding as to the specific amount of property the couple stored in North Carolina, evidence was presented at the hearing that the storage rental unit contains a net weight of 2,552 pounds of personal property.

Third, Joshua chose to have at least some portion of his mail directed to the Vanns' Bladen County mailing address. While he attempts to downplay the significance of this factor by arguing that the mail was "unimportant," the point remains that — once again — he voluntarily chose North Carolina for this purpose.

Finally, while we recognize that the purpose of the due process analysis is to protect the *defendant's* due process rights, our case law nevertheless requires that we also take into account as secondary factors the interest of the forum state and the convenience of the parties. *See B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986) (citation omitted) (considering "[t]wo secondary factors, interest of the forum state and convenience to the parties" in applying minimum contacts analysis).

North Carolina has a recognized interest in this action in that the parties were married in this state and Jessica and Eden are both residents of North Carolina. *See Miller*, 313 N.C. at 480, 329 S.E.2d at 667 ("We are . . . mindful that North Carolina has an important interest in ensuring that non-resident parents fulfill their support obligations to their children living here."); *Butler*, 152 N.C. App. at 82, 566 S.E.2d at 712 (" . . . North Carolina has an important interest in the resolution of plaintiff's claims in the instant action, since plaintiff and the parties' daughter currently reside in this State.").

Similarly, although the convenience of a forum alone cannot confer personal jurisdiction over a non-resident defendant, *Miller*, 313 N.C. at 480, 329 S.E.2d at 667 (citation omitted), we cannot ignore the fact that North Carolina is clearly the most convenient forum for this action. It is undisputed that the child custody litigation will be handled in North Carolina and that Joshua will likely be required to travel to the state in connection with that proceeding. If Jessica were required to file the present action in a separate jurisdiction, the parties would then have to simultaneously litigate two lawsuits in two separate states — both arising from the parties' marriage. Furthermore, the portion of the couple's marital property currently located in the North Carolina storage unit will presumably be among the items of property distributed in the equitable distribution proceeding.

We recognize that the contacts of the *Sherlock* defendant with North Carolina were more extensive than Joshua's contacts with this state in the present case. However, we reject Joshua's argument that the facts of *Sherlock* constitute a "floor" for purposes of establishing sufficient minimum contacts in this context. To the contrary, this Court expressly

stated in *Sherlock* that "[t]he quantity and quality of defendant's contacts with North Carolina *far exceed* the 'minimum contacts' required for jurisdiction . . . ." *Sherlock*, 143 N.C. App. at 306, 545 S.E.2d at 762 (emphasis added).

In sum, based on our consideration of the relevant factors, we are satisfied that Joshua has sufficient minimum contacts with North Carolina such that the exercise of personal jurisdiction over him would not offend "traditional notions of fair play and substantial justice." *Id.* at 302, 545 S.E.2d at 760 (citation and quotation marks omitted). Thus, we hold that the trial court possessed personal jurisdiction over Joshua.

Conclusion

For the reasons stated above, we affirm the trial court's 13 July 2016 order.

AFFIRMED.

Judges HUNTER, JR. and MURPHY concur.

IN THE MATTER OF E.B., M.B., A.B.

No. COA17-198

Filed 17 October 2017

1. Termination of Parental Rights—grounds—neglect—domestic violence—sufficiency of findings

The trial court erred in a termination of parental rights case by concluding grounds existed based on neglect under N.C.G.S § 7B-1111(a)(1) and (2) to terminate respondent father's parental rights where the trial court's vague findings did not support that there was a continuation of domestic violence or that grounds existed to terminate respondent's parental rights based on neglect and willful failure to correct the conditions which led to the juveniles' removal from his care.

2. Termination of Parental Rights—living arrangements of children—possibility of future domestic violence

The trial court in a termination of parental rights case was instructed to make additional findings of fact and conclusions of law on remand concerning where the children would live if they were

to return to respondent father's care by considering the effect that living with the mother would have on the children, including the possibility of future domestic violence.

Judge BRYANT concurring in the result only.

Judge HUNTER, JR. concurring in a separate opinion.

Appeal by respondent-father from orders entered 22 November 2016 by Judge Frederick Wilkins in Rockingham County District Court. Heard in the Court of Appeals 10 August 2017.

Beverley A. Smith, for Petitioner-Appellee Rockingham County Department of Social Services.

Lauren Golden, for guardian ad litem.

Peter Wood, for Respondent-Appellant father.

MURPHY, Judge.

"Harvey"[1] the father of juveniles E.B., M.B., and A.B. ("Ernie," "Molly," and "Annie,"[2]), appeals from an order terminating his parental rights. The trial court declared that Harvey had willfully abandoned his children and that he made no reasonable progress on the case plan, thus rendering them neglected. After careful review, we reverse and remand for additional findings of fact and conclusions of law.

Background

On 10 December 2014, the Rockingham County Department of Social Services ("DSS") filed a petition alleging that Ernie, Molly, and Annie were neglected and dependent juveniles due to "severe and ongoing domestic violence" in their home. DSS stated that the family came to its attention after Harvey assaulted a child who was in his home. That child, who is not one of the juveniles who is the subject of this action, entered DSS's care and informed DSS that there was domestic violence in Harvey's home. DSS learned that on 5 June 2013, Ernie was injured

1. The father will be referred to by a pseudonym to protect the identities of the children.

2. The children will be referred to by pseudonyms to protect their identities. E.B. is "Ernie," M.B. is "Molly," and A.B. is "Annie."

when his mother ("Gert"[3]) threw a metal cup which hit Ernie in the face. Harvey and Gert gave differing stories as to whether Gert intended to throw the cup at Eddie or at Harvey. Harvey's family was referred for in-home services.

On 8 December 2014, a social worker went to Harvey's home for a scheduled visit to provide services. During a check of the home, the DSS worker heard an altercation taking place inside of the home and decided to call the police. On arrival, the social worker observed a lamp, and then wooden pieces from a broken table thrown from a window in the residence. The social worker called the police. Harvey and Gert later acknowledged to the social worker that they had been in an altercation. All three juveniles were present during the incident. Harvey and the juveniles were transported to the paternal grandmother's home with, according to DSS, "the understanding that they were to remain there for the time being while new arrangements were made to address the ongoing domestic violence."

On 10 December 2014, DSS social worker Jordan Houchins went to the residence to discuss the 8 December 2014 incident with Gert. The social worker found their home in ruins. There were multiple holes in walls in the residence; all of the tables in the house had been destroyed; and there were broken dishes on the floor of the juveniles' bedrooms. These conditions resulted from numerous domestic violence incidences. Gert told the social worker that she and Harvey had hit each other during these altercations. Gert, however, refused to seek a domestic violence protection order and did not want to go to a shelter. When the social worker examined the juveniles' bedrooms, she found Harvey hiding under a blanket in one of the beds. Harvey claimed to be sleeping, and denied that he was hiding from the social worker. He became belligerent when confronted by the social worker. The social worker attempted to assume emergency custody of the children. Harvey then picked up Molly, an infant, and left the residence. Molly was not appropriately dressed as she was wearing only a "onesie" and it was a "bitterly cold morning." Law enforcement subsequently located Harvey and Molly several blocks from the residence. DSS subsequently obtained non-secure custody of all the juveniles.

On 10 November 2015, the trial court adjudicated the juveniles to be neglected and dependent after Harvey and Gert admitted to the altercations alleged in the petition. The trial court ordered Harvey to comply

3. Gert will be referred to by a pseudonym in order to protect the identities of the children.

with a case plan, which included: (1) complete a domestic violence offender treatment/education and counseling; (2) complete an approved parenting class; (3) submit to a mental health assessment and comply with all recommendations; (4) obtain and maintain suitable housing for the juveniles; (5) obtain employment with income sufficient to provide for the basic needs of the juveniles; and (6) obtain transportation sufficient to provide for Harvey's and the juveniles' basic needs.

The trial court initially ordered a permanent plan of reunification for the juveniles. The trial court later changed the primary permanent plan to adoption because Harvey and Gert "continue[d] to engage in domestic violence." The secondary plan remained reunification. On 28 September 2016, DSS filed a petition to terminate Harvey's and Gert's parental rights pursuant to N.C.G.S. § 7b-1111(a)(1) (neglect) and (2) (failure to make reasonable progress) (2015).

Analysis

[1] N.C.G.S. § 7B-1111 sets out the statutory grounds for terminating parental rights. A finding of any one of the separately enumerated grounds is sufficient to support termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). "The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re D.J.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (citing *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed*, *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001)). We review the trial court's conclusions of law de novo. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

In the instant case, the trial court concluded that grounds existed to terminate Harvey's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) and (2). First, regarding N.C.G.S. § 7B-1111(a)(1), where termination is based on neglect, our General Statutes define a "[n]eglected 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.

N.C.G.S. § 7B-101(15) (2015). 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) (citations and quotations omitted).

Second, to terminate a parent's rights under N.C.G.S. § 7B-1111(a)(2), 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 foster care or placement outside the home for over twelve months; and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. *In re O.C.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (2005) (internal citations omitted), *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

Here, in support of its conclusion that grounds existed pursuant to N.C.G.S § 7B-1111(a)(1) and (2) to terminate Harvey's parental rights, the trial court found as fact:

> 7. The minor children were adjudicated to be neglected and dependent juveniles on February 5 2015 . . . .
>
> . . . .
>
> 12. Both parents entered counseling at Hope Services in February and March of 2016 following an incident of domestic violence in January of 2016.
>
> 13. After attending weekly sessions of counseling at Hope Services, another incident of domestic violence occurred on July 5, 2016.
>
> 14. All three minor children were placed in the nonsecure custody of the Department due to severe domestic violence between the parents. The domestic violence was also a finding of fact in the adjudication order from February of 2015.

Based on these findings, the trial court concluded:

> 17. The respondent-father . . . neglected the juveniles within the meaning of N.C.G.S. §§ 7B-101 and 7B-1111(a)(1), in that: The minor children were adjudicated neglected and dependent on February 5, 2015 based on their exposure to domestic violence by the respondent parents. *There is no evidence of changed circumstances related to the respondent as he continues to engage in domestic violence with the respondent-mother.* It is likely that the respondent-father's neglect would be repeated in the future if the children were returned to his care.

> 18. Pursuant to N.C.G.S. § 7B-1111(a)(2), the respondent-father . . . left the minor children in foster care placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. The children have been placed in foster care since December 10, 2014, and *the respondent-father has not taken corrective action to alleviate those conditions that led to the children's removal as there is the continuation of domestic violence between the respondent parents.*

(Emphasis added).

Harvey contends that the trial court's findings concerning domestic violence were insufficient to support the court's conclusions of law. We agree.

Our Supreme Court has stated:

> Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each . . . link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

Here, it is apparent from the court's conclusions of law 17 and 18 that the sole basis for termination of Harvey's parental rights was the alleged continuation of domestic violence between Harvey and Gert. However, the only findings made by the trial court concerning continuing incidents of domestic violence were findings 12 and 13, in which the court merely found that the "incident[s]" of domestic violence "occurred" in January and July of 2016. The trial court's succinct findings shed little light on the circumstances of the domestic violence, its severity, or the impact on the juveniles. Most importantly, entirely absent from the findings are facts showing Harvey was engaged in the domestic violence incident involving Gert. Instead, the evidence clearly demonstrated that Gert was the aggressor and was the only one involved in domestic violence. Thus, there is insufficient evidence to support the trial court's conclusion that

Harvey continued to engage in domestic violence. We conclude that the trial court's vague findings regarding domestic violence lack the required specificity necessary "to enable an appellate court to review the decision and test the correctness of the judgment." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982); *see also In re Gleisner*, 141 N.C. App. 475, 481, 539 S.E.2d 362, 366 (2000) (the trial court's "vague and apparently inaccurate" finding of fact could not be used as a basis for the trial court's determination that the juvenile was neglected because it "impedes our ability to determine whether the trial court's conclusions are supported by the findings.").

Consequently, we hold the trial court's findings do not support the trial court's determination that there was a continuation of domestic violence, as well as its conclusion that grounds existed to terminate Harvey's parental rights based on neglect and willful failure to correct the conditions which led to the juveniles' removal from Harvey's care.

[2] However, there remains an issue concerning Harvey's living situation. As was found during the original adjudication of neglect of the children, Harvey appears to live with Gert. The trial court terminated her parental rights, but she did not appeal that order. On remand, the trial court must make additional findings of fact and conclusions of law concerning where the children will live if they are to return to Harvey's care. It should inquire into the effect that living with Gert will have on the children, including the possibility of future domestic violence. Accordingly, we reverse the trial court's order terminating Harvey's parental rights and remand for further findings of fact.

REVERSED AND REMANDED.

Judge BRYANT concurs in the result only.

Judge HUNTER, JR. concurs in a separate opinion.

HUNTER, JR., Robert N., Judge, concurring in separate opinion.

I concur with the majority opinion. The trial court's findings do not support the conclusion that grounds existed to terminate the father's parental rights. The trial court seems to base this conclusion on two incidents of domestic violence which occurred in 2016. However, as a result of these incidents the mother was charged with assault and resisting an officer. There is nothing in the record indicating the role, if any, the father played in these incidents.

Furthermore, there is evidence in the record tending to show the father has made progress on his case plan. Specifically, he completed a parenting class, submitted to a mental health assessment, obtained employment as a truck driver, obtained and maintained transportation, and obtained stable housing. He has complied with the child support order and interacted appropriately with the children during visits, in addition to attending weekly domestic violence counseling services.

On remand the trial court needs to address these issues to determine whether this and other evidence support a finding that the father did or did not make sufficient progress on his case plan during the time the children were in the custody of the Department of Social Services. I would leave to the trial court the decision whether or not to take additional evidence on remand.

LEONORA MORIGGIA, Plaintiff
v.
LINDA CASTELO, Defendant

No. COA16-444

Filed 17 October 2017

1. Appeal and Error—standard of proof—child custody—clear, cogent, and convincing evidence—avoidance of unnecessary delay

The Court of Appeals in a child custody case reviewed the conclusions of law based upon the findings as if they were based upon clear, cogent, and convincing evidence in order to avoid unnecessary delay. On remand, the trial court should make findings based upon this standard of proof, and should affirmatively state the standard of proof in the order.

2. Child Custody and Support—life partners—standing—contradictory conclusions of law—subject matter jurisdiction—consideration of facts preceding child's birth

The trial court erred in a child custody case by granting defendant life partner's motion to dismiss under Rule 12(b)(1) and dismissing plaintiff life partner's complaint for lack of standing where the order made contradictory conclusions of law on subject matter jurisdiction. Further, the trial court should have considered the facts preceding the child's birth in making its conclusions and should not

have relied upon the facts that the parties were not married, pursued no legal adoption, and did not list plaintiff as a parent on the birth certificate.

3. Appeal and Error—preservation of issues—child custody hearing—time constraint—failure to request additional time

The trial court did not abuse its discretion in a child custody case by terminating plaintiff life partner's testimony and limiting plaintiff's evidentiary presentation to one hour where plaintiff failed to request any additional time at the hearing.

Appeal by plaintiff from order entered 4 January 2016 by Judge Anna Worley in District Court, Wake County. Heard in the Court of Appeals 16 November 2016.

Hatch, Little & Bunn, LLP, by Justin R. Apple and Kathy H. Lucas, for plaintiff-appellant.

Rik Lovett & Associates, by S. Thomas Currin II, for defendant-appellee.

STROUD, Judge.

Plaintiff Leonora Moriggia ("plaintiff") appeals from the trial court's order granting defendant Linda Castelo ("defendant")'s motion to dismiss under Rule 12(b)(1) and dismissing plaintiff's complaint for lack of standing. On appeal, plaintiff argues that she has standing to maintain an action for custody and that defendant acted inconsistently with her parental status by intentionally and voluntarily creating a family unit and making plaintiff a *de facto* parent. Because the trial court's findings of fact do not support its conclusion that plaintiff has no standing to maintain a custody action, we vacate the order and remand for further proceedings.

Background

Plaintiff's complaint alleged that plaintiff and defendant were a lesbian couple who never married but "were in a committed and loving relationship from January 2006 until October 2014[.]" The couple decided during the relationship to have a child. Defendant was selected to carry the child because plaintiff had already experienced a pregnancy when she gave birth to her biological daughter, Trisha,[1] whom

1. We use pseudonyms throughout to protect the identity of the minor children.

she brought into the relationship. Both parties' eggs were harvested, but after attempts at artificial insemination were unsuccessful, they agreed to use a donor sperm and donor egg. On 11 June 2013, the minor child, Raven, was born.

The parties separated in October 2014, and on 11 March 2015, plaintiff filed her complaint for child custody seeking joint temporary and permanent custody of Raven. Defendant answered on 1 May 2015 with a motion to dismiss and alternative counterclaim for child custody, seeking sole legal and physical custody. In her motion to dismiss plaintiff's complaint, defendant contended that plaintiff "is not a parent of [Raven] either legally or biologically" and argued that she "does not have standing to bring and maintain a child custody action against Defendant, who is [Raven]'s legal and physical mother." The hearing on temporary custody and defendant's motion to dismiss was held on 21 July 2015, and the trial court took the motion to dismiss under advisement. On 4 January 2016, the trial court entered an order dismissing plaintiff's complaint for child custody for lack of standing.

The trial court's order found, in relevant part, that:

> 7. Plaintiff and Defendant were involved in a romantic, homosexual relationship and considered each other to be life partners.
>
> 8. Plaintiff and Defendant lived together from January 2006 until December 2008, at which time they separated, and then resumed living together from January 2010 until October 2014.
>
> 9. The parties broke off their relationship in October of 2014 but continued to live together in the same residence until Plaintiff left on February 14, 2015.
>
> 10. Plaintiff filed this custody action on March 11, 2015.
>
> 11. When the parties briefly separated in December of 2008 . . . Defendant would have visitation with [Trisha] and [Trisha] would frequently spend the night with Defendant at her residence.
>
> 12. During the parties' relationship they discussed their family and together planned on adding at least one child to their family.
>
> 13. Beginning in 2012, the parties attended appointments at Carolina Conceptions where they discussed *in vitro*

fertilization. Both parties jointly signed a contract with Carolina Conception for the conception of the minor child, [Raven], in this matter.

14. The parties discussed using artificial insemination as a means of getting pregnant and it was agreed Defendant would go through the pregnancy. . . .

15. When the Defendant was determined to be infertile, the Plaintiff's eggs were harvested in an attempt to artificially inseminate the Defendant; however, the Plaintiff did not produce enough eggs for the procedure.

16. The parties then discussed and researched adoption, both attending an informational meeting; however, shortly thereafter agreed that the adoption process was not for them because of the cost and potential for the biological parent to attempt involvement with any potential adoptive child. Plaintiff and Defendant nonetheless decided to continue seeking to enlarge their family. The parties then went back to Carolina Conceptions and elected to proceed with the artificial insemination process using donor sperm and donor egg through the anonymous process.

17. Defendant ultimately became pregnant via *in vitro* fertilization by a donor sperm and a donor egg. Plaintiff and Defendant share no genes with the child and have a completely different genetic code.

. . . .

19. Once the parties became aware that Defendant was pregnant, they made an announcement to [Trisha] welcoming her into the "Big Sister's Club." . . . . Defendant told [Trisha] that she was [Raven]'s big sister.

20. On August 29, 2012, Defendant was listed as Recipient and Plaintiff as "Partner", collectively they were referred to as "Recipient Couple". The parties acknowledge in the Contract that any child resulting from the procedure will be their legitimate child in all aspects, including descent and distribution as our child. . . .

21. Plaintiff contended that her $5,575 check made out to Carolina Conceptions was a contribution to the $20,000 overall cost and was intended by Plaintiff to create a

family with Defendant. She also testified that she owed the Defendant these funds as satisfaction of an outstanding debt Plaintiff owed to Defendant.

22. Defendant contends that the $5,757 [sic][2] was in satisfaction of an outstanding debt Plaintiff owed Defendant.

23. The parties also pulled a combined $18,000 out of their 401(k) retirement accounts combined to pay the costs of the artificial insemination procedure.

. . . .

25. Prior to the pregnancy, the Defendant intended that Plaintiff serve as a parent to [Raven]. At the time of [Raven]'s birth, Defendant had changed her mind as to Plaintiff's role as a parent to [Raven]. She began excluding Plaintiff from any parenting role, insisting that she, alone, be treated as [Raven]'s mother.

26. The parties planned the baby's nursery together, Plaintiff's friend purchased [Raven's] crib. [Raven's] dresser and other furniture and some clothing for the baby were purchased using a gift card received from the baby showers.

27. There were two baby showers. One shower was held in New Jersey on Defendant's behalf, and Plaintiff and Defendant's family contributed financially toward the shower. Half of the people in attendance were Plaintiff's family and friends.

. . . .

30. Just before Defendant went into labor, Plaintiff and her mother thoroughly cleaned the family's home to get it ready for [Raven]'s arrival. The Defendant posted a note thanking her "mother in law" for assisting in the cleaning for "our daughter".

31. During the artificial insemination process with Carolina Conceptions, Plaintiff would be included in the

---

2. This appears to be a typo in the trial court's order, as the previous finding and the hearing transcript indicate that plaintiff's check was for $5,575.00, not $5,757.00. We also note that findings 21 and 22 are not findings of fact but are recitations of each party's contentions regarding a disputed fact.

email communications. Defendant would refer to Plaintiff and Defendant as "We" when inquiring about the next steps and would sign the email as "Linda & Lee".

32. The Plaintiff attended all of the Defendant's ultrasound and other prenatal appointments unless the appointment was just to take her blood pressure since she was an at risk pregnancy.

33. The Plaintiff and Defendant both attended the recipient classes required by Carolina Conceptions and parenting classes during Defendant's pregnancy.

34. During Defendant's pregnancy she sent an e-mail to Plaintiff indicating how much she loved Plaintiff and couldn't wait to raise the "niblet" together.

35. Plaintiff has a bond with [Raven]. [Trisha] also has a bond with [Raven].

36. Defendant encouraged a sisterhood between the children, [Trisha and Raven], and the sisterhood was to be permanent and ongoing well beyond the parties' life time.

37. The Defendant once gave Plaintiff a Mother's Day card addressed to "Leemo" on [Raven]'s behalf.

38. In a text, Defendant assured Plaintiff after they separated that she would continue to see [Raven] as she was her "mama too".

39. Plaintiff and [Trisha] lived with Defendant during conception, birth and for the first twenty (20) months of [Raven]'s life.

40. Only the Defendant's name appeared on the Birth Certificate on the announcement of the child's birth.

41. After the birth of [Raven], Defendant sent an email to Carolina Conceptions thanking them on behalf of [plaintiff], Big Sister [Trisha] and Baby [Raven]. She states, "[Plaintiff, Trisha and I] are so elated to have her as part of our extended family," and they have "made us the happiest family on earth." Pictures were then included of the birth announcement, Plaintiff holding [Raven] and Defendant and [Raven].

. . . .

43. Plaintiff is not listed as a parent on the child's Birth Certificate.

44. The Plaintiff was present during Defendant's labor at Rex Hospital. . . .

45. The Plaintiff was identified as "co parent" to [Raven] by the hospital and Defendant did not dispute the identification.

46. The Defendant identified Plaintiff on her General Consent to admission when being admitted for delivery and identified her as "life partner".

47. Upon birth, Plaintiff was excluded so Defendant could bond with the child without Plaintiff present.

48. After the birth of [Raven], Defendant made postings on social media with pictures of Plaintiff, [Raven and Trisha], referring to them as her family.

49. The Plaintiff knew of a nanny for [Raven] through a classmate of [Trisha's] and the parties met with and interviewed Angela Lopez together for the position. Angela Lopes [sic] was hired as [Raven's] nanny and served in the capacity until late December of 2014.

50. [Raven's nanny] was under the belief that both parties were equally responsible for [Raven]. . . . It was not until after the parties broke up in October that Defendant approached her and asked that she communicate with her directly.

51. Subsequent to [Raven]'s birth, the Plaintiff was not held out as [Raven]'s parent and the Defendant did not cede decision making authority.

52. The Plaintiff did not create a permanent parent-like relationship with the minor child, only a "significant loving, adult care taker" relationship, not that of a parent.

53. No steps were made by the parties to make the family unit permanent. The parties were not married in this or any other state.

54. After the birth of [Raven], Plaintiff and Defendant discussed that should Plaintiff pass away, Defendant would care for [Raven and Trisha]. Should Defendant pass away,

Plaintiff would care for [Raven and Trisha] and should both parties pass away leaving behind their children, the Defendant's sister, Judy, would care for both [Raven and Trisha].

55. Defendant paid for daycare costs exclusively from her own funds from the birth of the child until the parties separated.

56. Other than [Raven's] daycare costs incurred by Defendant and [Trisha's] afterschool costs incurred by Plaintiff, the parties equally contributed to the household finances.

57. Defendant insisted on providing care and bonding with her child when she was home, to the exclusion of Plaintiff.

. . . .

59. After the parties ended their romantic relationship, the Defendant placed [Raven] in a daycare facility and listed Plaintiff as an emergency contact until January 9, 2015. Defendant did give access to her sisters.

60. Plaintiff was not involved in the preparation of the child's baptism, though she did provide [Trisha's] baptism gown for [Raven]. While the Plaintiff was in attendance, she was not a part of the ceremony.

. . . .

62. Defendant selected [Raven's] pediatrician and made all decisions for daycare, medical care and pediatrician choices. The Plaintiff attended at least one well-baby visit and took [Raven] to the doctor with Defendant, when she was sick. Plaintiff was listed as an emergency contact on the pediatrician records and "Partner" as relationship to Defendant.

63. During the relationship Defendant was the primary caretaker for [Raven].

64. [Raven] and [Trisha] had a special and loving bond as sisters and were close to each other.

65. Both parties contributed to the household expenses.

. . . .

68. One of the reasons for the break-up was Defendant's insistence upon being the primary parent to the child. . . .

69. After separation the Plaintiff mailed monthly checks for $300 to the Defendant for "Child Support" which were never cashed by the Defendant and were mailed back to the Plaintiff.

70. Defendant did not allow Plaintiff visitation after both parties separated, nor was there any mention of a visitation schedule for the Plaintiff to see the child at the time of separation.

71. The Defendant took no steps to make the Plaintiff the caregiver of the child, should the Defendant predecease the child.

72. On March 6th, 2015, the Defendant sent Plaintiff a text stating that since Plaintiff "threatened to sue for visitation" she could never let her take her daughter without her being present.

73. After March, 2015, the Defendant's intent was that the Plaintiff no longer be involved in the child's upbringing.

74. While prior to the birth, the Defendant intended for the parties to equally participate in the care for [Raven], at the time of her birth, Defendant's intentions changed.

75. Prior to the child's birth, the parties planned together for the minor child.

76. At all times relevant to custody, however, that is, at all times after the birth of the child, the Defendant demonstrated her desire to be the child's sole parent.

77. The Court finds that there was no voluntary creation of a family unit, or a permanent parent-like relationship; nor does the Court find that the Defendant ceded her parental authority to the Plaintiff for any manner.

The trial court then concluded:

1. The parties are properly before the Court, and the Court has jurisdiction over the subject matter, custody, of this action and has personal jurisdiction of the parties to this action.

> 2. However, Plaintiff does not have standing to raise this matter, and it should be dismissed pursuant to Rule 12(b)(1). Similarly, since she has failed to establish her standing to raise the matter, she has failed to state a claim upon which relief can be granted.
>
> . . . .
>
> 6. Despite some isolated instances of Defendant acknowledging Plaintiff as a parent to [Raven], following the birth of the minor child, the Defendant did not cede parental authority to the Plaintiff.
>
> 7. The Plaintiff was a loving caretaker for the minor child, had a substantial relationship with [Raven], but was not intended by Defendant to be a parental figure.
>
> . . . .
>
> 9. There were no acts inconsistent with the Defendant's parental rights, such as to grant Plaintiff the right to claim third party custody.

Plaintiff timely filed her notice of appeal to this Court.

Discussion

On appeal, plaintiff raises several issues, beginning with whether plaintiff has standing to maintain an action for child custody and the trial court erred in dismissing her complaint.

I. Preliminary matters

[1] Before we address the substantive issues raised by plaintiff, we note the trial court's order does not indicate the standard of proof for any of its findings of fact, nor does the transcript assist us in determining if the trial court relied upon clear, cogent and convincing evidence for any of the findings. Neither party has raised this issue on appeal, but since it is integral to the jurisdictional determination and since we are remanding this case for further proceedings, we note that on remand the trial court must be clear that it is applying the "clear, cogent, and convincing" standard. "[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessene*r, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001). *See also Heatzig v. MacLean*, 191 N.C. App. 451, 460, 664 S.E.2d 347, 354 (2008) ("The evidence required to show that a parent has acted inconsistently with her constitutionally

protected parental status must be clear, cogent and convincing."). Of course, we realize that here, the trial court concluded that defendant's conduct was *not* inconsistent with her protected status as a parent. But the difficulty in reviewing this order comes in part from the fact that the findings the trial court made -- if made by clear, cogent, and convincing evidence -- do not support the trial court's conclusion. On remand, the trial court shall make findings based upon this standard of proof and should affirmatively state the standard of proof in the order on remand.

In our analysis below, we will therefore review *de novo* the trial court's conclusion on lack of subject matter jurisdiction based upon the uncontested findings of fact, while recognizing that *if* those findings were not based upon the proper standard of proof, the findings would not be sufficient as a matter of law to show that defendant's actions were "inconsistent with his or her protected status" and could not support plaintiff's standing. And although there is no affirmative statement of the standard in the order, we also have no reason to believe that the trial court failed to use the correct standard of clear, cogent, and convincing evidence for the findings. As a practical matter, if we remanded only for the trial court to state the standard it actually used in this order, thus requiring another appeal from the revised order, we would delay a final disposition of this custody matter for a long time, and that delay would not be in the best interest of the child. We will thus review the conclusions of law based upon the findings as they stand and as if they were based upon clear, cogent, and convincing evidence.

II. Standing to Maintain Action for Child Custody

[2] Plaintiff argues the trial court erred by concluding that she did not have standing to bring a custody claim and dismissing her complaint under Rule 12(b)(1). We first note that the order makes contradictory conclusions of law on subject matter jurisdiction, since standing is an issue of subject matter jurisdiction:

> Based upon the foregoing findings of fact and upon the stipulation of the parties in open court, the court CONCLUDES AS A MATTER OF LAW:
>
> 1. The parties are properly before the Court, and the Court has *jurisdiction over the subject matter*, custody, of this action and has personal jurisdiction of the parties to this action.
>
> 2. However, *Plaintiff does not have standing to raise this matter, and it should be dismissed pursuant to Rule 12(b)(1).* Similarly, since she has failed to establish her

> standing to raise the matter, she has failed to state a claim upon which relief can be granted.

(Emphasis added).

Subject matter jurisdiction is *the* basis for motions under Rule 12(b)(1): "Standing concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss. Our review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*." *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) (citations omitted). *See also Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878-79 (2002) ("Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction. Therefore, issues pertaining to standing may be raised for the first time on appeal, including *sua sponte* by the Court." (Citations omitted)).

Although the trial court first concluded that it had jurisdiction over the "subject matter, custody," it then concluded that "[p]laintiff does not have standing to raise this matter, and it should be dismissed pursuant to Rule 12(b)(1)." But in any event, we review standing *de novo*, so we may resolve this contradiction based upon the trial court's findings of fact. *See Fuller*, 145 N.C. App. at 395, 553 S.E.2d at 46 ("Our review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*." (Citation omitted)).

Under N.C. Gen. Stat. § 50-13.1(a) (2015), "[a]ny parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child[.]" *See also Mason v. Dwinnell*, 190 N.C. App. 209, 219, 660 S.E.2d 58, 65 (2008) ("Standing in custody disputes is governed by N.C. Gen. Stat. § 50-13.1(a) (2007), which states that any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child. Nevertheless, as with N.C. Gen. Stat. § 50-13.2, our courts have concluded that the federal and state constitutions place limitations on the application of § 50-13.1." (Citation, quotation marks, brackets, and ellipses omitted)).

In *Ellison v. Ramos*, 130 N.C. App. 389, 394, 502 S.E.2d 891, 894 (1998), this Court held "that a relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing." This Court clarified in *Ellison* that

> we confine our holding to an adjudication of the facts of the case before us: where a third party and a child have

> an established relationship in the nature of a parent-child relationship, the third party does have standing as an "other person" under N.C. Gen. Stat. § 50-13.1(a) to seek custody.

Id. at 395, 502 S.E.2d at 895. *See also Smith v. Barbour*, 154 N.C. App. 402, 408, 571 S.E.2d 872, 877 (2002) ("Both parents and third parties have a right to sue for custody. In a custody dispute between a parent and a non-parent, the non-parent must first establish that he has standing, based on a relationship with the child, to bring the action." (Citation omitted)).

In *Mason*, this Court elaborated on *Ellison* further and noted that

> despite the statute's broad language, in the context of a third party seeking custody of a child from a natural (biological) parent, our Supreme Court has indicated that there are limits on the "other persons" who can bring such an action. A conclusion otherwise would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children.

Mason, 190 N.C. App. at 219, 660 S.E.2d at 65 (citations and quotation marks omitted). The *Mason* Court found "no serious dispute that Mason established that she had standing under N.C. Gen. Stat. § 50-13.1," where her complaint alleged that she jointly raised the child with her domestic partner Dwinnell, that they signed an agreement acknowledging Mason as a "de facto" parent, that she had formed a parenting relationship with the child, and that the minor child had spent his life with both Mason and Dwinnell providing emotional and financial support and care. *Id.* at 220, 660 S.E.2d at 65.

This Court has elaborated further on standing in custody disputes, explaining:

> As in many custody cases, the struggling of adults over children raises concern regarding the consequences of the rulings for the children involved. Our General Assembly acted on this concern by mandating that disputes over custody be resolved solely by application of the "best interest of the child" standard. Nevertheless, our federal and state constitutions, as construed by the United States and North Carolina Supreme Courts, do not allow this standard to be used as between a legal parent and a third party unless the evidence establishes that the

> legal parent acted in a manner inconsistent with his or her constitutionally-protected status as a parent. No litmus test or set of factors can determine whether this standard has been met. Instead, the legal parent's conduct would, of course, need to be viewed on a case-by-case basis[.]

Estroff v. Chatterjee, 190 N.C. App. 61, 63-64, 660 S.E.2d 73, 75 (2008) (citations, quotation marks, and footnote omitted). Thus, to maintain a claim for custody on this basis, the party seeking custody must allege facts demonstrating a sufficient relationship with the child and then must demonstrate that the parent has acted in a manner inconsistent with his or her protected status as a parent. *See*, *e.g.*, *Heatzig*, 191 N.C. App. at 454, 664 S.E.2d at 350 ("If a legal parent (biological or adoptive) acts in a manner inconsistent with his or her constitutionally-protected status, the parent may forfeit this paramount status, and the application of the 'best interest of the child' standard in a custody dispute with a non-parent would not offend the Due Process Clause.").

This Court also noted in *Heatzig* that "in order to constitute acts inconsistent with a parent's constitutionally protected status, the acts *are not* required to be 'bad acts' that would endanger the children." *Id.* at 455, 664 S.E.2d at 351. Similarly, in *Boseman v. Jarrell*, our Supreme Court explained:

> A parent loses this paramount interest [in the custody of his or her children] if he or she is found to be unfit or acts inconsistently with his or her constitutionally protected status. However, there is no bright line beyond which a parent's conduct meets this standard. . . . [C]onduct rising to the statutory level warranting termination of parental rights is unnecessary. Rather, unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct can also rise to this level so as to be inconsistent with the protected status of natural parents.

Boseman v. Jarrell, 364 N.C. 537, 549-50, 704 S.E.2d 494, 503 (2010) (citations, quotation marks, brackets, and ellipses omitted).

Turning to the order on appeal, the trial court's uncontested findings of fact -- which we are treating as being based upon clear, cogent, and convincing evidence as discussed above -- show that plaintiff and defendant were in a committed relationship and jointly decided to have a child and to raise that child together. They continued to live together as a family unit until their relationship ended, when Raven was about

20 months old. When their relationship deteriorated and they ultimately separated, defendant changed her intentions, but she had participated in creating a family unit which included plaintiff. For example, as the trial court found, Raven's relationship with Trisha, plaintiff's child, was "a special and loving bond as sisters[.]"

The trial court's findings of fact are to some extent contradictory. For example, the court found that "[s]ubsequent to [Raven]'s birth, the Plaintiff was not held out as [Raven]'s parent. . . ." But the trial court also made findings of fact of instances of plaintiff being held out as a parent. Specifically, the trial court found that defendant gave plaintiff a Mother's Day card "addressed to 'Leemo' on [Raven's] behalf"; that defendant had "assured Plaintiff after they separated that she would continue to see [Raven] as she was her 'mama too' "; that "Defendant sent an email to Carolina Conceptions thanking them on behalf of Lee, Big Sister [Trisha] and Baby [Raven]. She states, 'Lee, [Trisha] and I are so elated to have her as part of our extended family,' and they have 'made us the happiest family on earth.' "; and that the parties had discussed that the survivor would care for both children upon the death of either party.

Plaintiff also argues that the trial court erred in failing to consider facts and circumstances preceding Raven's birth. We agree. Specifically, the trial court found that "[a]t all times relevant to custody, however, that is, at all times *after the birth of the child*, the Defendant demonstrated her desire to be the child's sole parent." (Emphasis added). The trial court based its conclusion that plaintiff had no standing upon its finding that defendant changed her intention to co-parent with plaintiff immediately after Raven's birth, despite her former intention to create a joint family, as shown during the parties' extensive efforts to conceive and preparation for Raven's birth. Even setting aside the fact that other findings tend to indicate that defendant continued to have the intention to co-parent with plaintiff at least until the parties' separation, the trial court's findings state it *did not consider* the parties' actions prior to Raven's birth because they were not "relevant" to this inquiry on intent. But defendant's actions prior to the child's birth are relevant to determining her intention.

Although the events prior to birth alone are not controlling, they must be considered along with actions after the child's birth. All of North Carolina's prior cases addressing similar same-sex partners who had a child and then separated have discussed the parties' actions in planning and preparing for their family even before the child's conception and birth. *See*, *e.g.*, *Estroff*, 190 N.C. App. at 69, 660 S.E.2d at 78 ("[I]t is appropriate to consider the legal parent's intentions regarding

the relationship between his or her child and the third party during the time that relationship was being formed and perpetuated."). *See also Davis v. Swan*, 206 N.C. App. 521, 528, 697 S.E.2d 473, 478 (2010) ("Here, the trial court made numerous findings of fact, which are unchallenged on appeal, that demonstrate Swan's intent jointly to create a family with [her former domestic partner] Davis and intentionally to identify her as a parent of the minor child.").

Although the specific facts of each case are unique, prior cases have addressed the parties' actions leading up to the inception of the custody dispute, including actions before a child's birth, as relevant to determining this intention. These cases naturally involve same-sex couples, so each couple had to decide who would carry the child and how the child would be conceived. For example, in *Boseman*, our Supreme Court noted the parties' actions prior to the child's birth:

> The record in the case *sub judice* indicates that defendant intentionally and voluntarily created a family unit in which plaintiff was intended to act -- and acted -- as a parent. The *parties jointly decided to bring a child into their relationship*, *worked together to conceive a child*, chose the child's first name together, and gave the child a last name that "is a hyphenated name composed of both parties' last names." The parties also publicly held themselves out as the child's parents at a baptismal ceremony and to their respective families. The record also contains ample evidence that defendant allowed plaintiff and the minor child to develop a parental relationship. Defendant even "agrees that [plaintiff] . . . is and has been a good parent."

Boseman, 364 N.C. at 552, 704 S.E.2d at 504 (emphasis added).

It is true that in *Boseman*, the parties took additional actions to make the parental relationship between the plaintiff and the child permanent, since the parties jointly participated in an adoption proceeding so the defendant would become the child's legal parent. *Id.* at 540, 704 S.E.2d at 497. That adoption was vacated in *Boseman*, but the underlying custody action remained. *Id.* at 553, 704 S.E.2d at 505. But if the parties' actions prior to the child's birth in *Boseman* were irrelevant, the Supreme Court would not have noted these actions. These facts are part of the relevant inquiry, along with the parties' actions after the child is born.

In all of these cases, whether months or years after the child's birth, the parties became estranged, and either during the time immediately

preceding the estrangement or at that time, the biological parent's intentions as to the former partner changed and she denied her partner access to the child. The birth parent *changed* her intentions in every case, but her intention at that point is not controlling. The issue is whether, before the end of the relationship, she had the intent to create that relationship with the partner and whether she overtly did so, leading both the child and others to believe that the partner was in a parental role. Our Court has noted that the trial court should focus on the parties' actions and intentions prior to their estrangement, and may include the time *prior* to the child's birth:

> [T]he court's focus must be on whether the legal parent has voluntarily chosen to create a family unit and to cede to the third party a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with his or her child. The parent's intentions regarding that relationship are necessarily relevant to that inquiry. By looking at both the legal parent's conduct and his or her intentions, we ensure that the situation is not one in which the third party has assumed a parent-like status on his or her own without that being the goal of the legal parent.
>
> . . . .
>
> We agree with the New Jersey Supreme Court that the focus must, however, be on the legal parent's intent during the formation and pendency of the parent-child relationship between the third party and the child. *Intentions after the ending of the relationship between the parties are not relevant because the right of the legal parent does not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the party's separation she regretted having done so*.

Estroff, 190 N.C. App. at 70-71, 660 S.E.2d at 78-79 (citations, quotation marks, and brackets omitted) (emphasis added).

Estroff indicates that the actions and intentions during the relationship of the parties, during the planning of the family, and before the estrangement carry more weight than those at the end of the relationship, since the court noted that "[i]ntentions after the ending of the relationship between the parties are not relevant because the right of the legal parent does not extend to erasing a relationship between

her partner and her child which she voluntarily created and actively fostered simply because after the party's separation she regretted having done so." *Id.* at 70-71, 660 S.E.2d at 79 (citation, quotation marks, and brackets omitted). *See also Davis*, 206 N.C. App. at 526, 697 S.E.2d at 477 ("Also, the trial court must consider the intent of the legal parent, in addition to her conduct.").

Here, by finding that the parties' actions and intentions prior to Raven's birth were *not* relevant, the trial court failed to consider all of the factors which show "intent during the formation and pendency of the parent-child relationship between the third party and the child." *Id.* at 70, 660 S.E.2d at 79 (citation and quotation marks omitted). Instead, the trial court focused more on the defendant's change of intention upon the ending of the relationship, which is "not relevant because the right of the legal parent does not extend to erasing a relationship between her partner and her child which she voluntarily created[.]" *Id.* at 70-71, 660 S.E.2d at 79 (citation, quotation marks, and brackets omitted). To the contrary, the facts as to the parties' planning of Raven's birth and clearly stated intentions, particularly in relation to the process through Carolina Conceptions and at the hospital, tend to show the intent to form a family unit, with defendant as a co-parent. Had the parties separated immediately upon Raven's birth, these actions prior to birth would not alone establish standing for defendant's custody claim, since defendant and Raven would never have formed a relationship, but that is not this case. Living together as a family for over a year would demonstrate a continuing intention, even though defendant's intentions later changed.

The trial court also focused on other facts with limited relevance to the proper legal conclusion. For example, the trial court found that the parties did not take "steps. . . to make the family unit permanent":

> 52. The Plaintiff did not create a permanent parent-like relationship with the minor child, only a "significant loving, adult care taker" relationship, not that of a parent.
>
> 53. No steps were made by the parties to make the family unit permanent. The parties were not married in this or any other state.

Marriage was not an available option for these parties in North Carolina prior to their relationship ending in October 2014.[3] Other states

3. Nor would adoption have been an option. *See Boseman*, 364 N.C. at 546; 704 S.E.2d at 501 (finding adoption decree void and plaintiff [former same-sex partner of

recognized same-sex marriages earlier, but marriage of the parties still would not change the legal relationship between plaintiff and Raven. Heterosexual couples often marry after one party has had a child from a previous relationship, but the legal marriage itself does not give the step-parent any claim to parental rights in relation to the child. *See*, *e.g.*, *Moyer v. Moyer*, 122 N.C. App. 723, 724-25, 471 S.E.2d 676, 678 (1996) ("At common law, the relationship between stepparent and stepchild does not of itself confer any rights or impose any duties upon either party. In contrast, if a stepfather voluntarily takes the child into his home or under his care in such a manner that he places himself *in loco parentis* to the child, he assumes a parental obligation to support the child which continues as long as the relationship lasts. . . . However, the fact that a stepfather is *in loco parentis* to a minor child during marriage to the child's mother does not create a legal duty to continue support of the child after the marriage has been terminated either by death or divorce." (Citations omitted)); *Duffey v. Duffey*, 113 N.C. App. 382, 387, 438 S.E.2d 445, 448-49 (1994) ("If we are to impose the same obligations and duties on a stepparent, then it is only fair to confer the same rights and privileges, such as visitation and custody, to a stepparent. However, to do so would necessarily interfere with a child's relationship with his or her noncustodial, natural parent. Clearly this is not what the legislature intended.").

And although both same-sex and heterosexual marriages are intended to be permanent, sometimes they end in divorce, and the divorce of the partners does not change the legal relationship of the partners to their children. This Court has rejected the argument that the legal ability to marry or adopt has "legal significance":

> Likewise, we find immaterial Dwinnell's arguments that she and Mason could not marry, and Mason could not adopt the child under North Carolina law. We cannot improve on the Pennsylvania Supreme Court's explanation as to why "the nature of the relationship" has no legal significance to the issues of custody and visitation: *"The ability to marry the biological parent and the ability to*

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defendant] not legally recognizable as the minor child's parent where "[p]laintiff was not seeking an adoption available under Chapter 48. In her petition for adoption, plaintiff explained to the adoption court that she sought an adoption decree that would establish the legal relationship of parent and child with the minor child, but not sever that same relationship between defendant and the minor child. As we have established, such relief does not exist under Chapter 48." (Citations omitted)).

> *adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties.* What is relevant, however, is the method by which the third party gained authority to do so."

Mason, 190 N.C. App. at 218-19, 660 S.E.2d at 64 (citation omitted) (emphasis omitted) (emphasis added). Likewise, the trial court found that plaintiff was "not listed as a parent on the child's Birth Certificate," but it would have been impossible in North Carolina for her to have been listed on the birth certificate when Raven was born in 2013, as same-sex marriage was not yet recognized. *See, e.g.*, *Mason*, *id.* at 211-12, 660 S.E.2d at 60 ("Although Dwinnell's name was the only name listed as a parent on the child's birth certificate, evidence was presented that the parties mutually desired to include both Mason and Dwinnell on the birth certificate, but the hospital refused to do so.").

Here, defendant's actions before Raven's birth -- if we assume that the trial court made its findings based upon clear, cogent, and convincing evidence -- indicate her intent to create a parental relationship between Raven and plaintiff. The trial court found that both parties signed a contract with Carolina Conceptions which states "that any child resulting from the procedure will be their legitimate child in all aspects" and identifies the parties collectively as "Recipient Couple." The trial court also found that "[p]rior to the pregnancy, the Defendant intended that Plaintiff serve as a parent to [Raven]." The court's order contains numerous other findings noting plaintiff's bond with Raven and emails and other correspondence by defendant identifying plaintiff as a mother to Raven and Trisha as Raven's sister. Based upon the uncontested findings and assuming that these findings were based upon clear, cogent, and convincing evidence, the trial court erred in concluding that plaintiff did not have standing to support her claim for custody. In addition, the trial court should have considered the facts preceding Raven's birth in making its conclusions and should not have relied upon the facts that the parties were not married, pursued no legal adoption, and did not list plaintiff as a parent on the birth certificate. We therefore vacate the order and remand this matter to the trial court for further proceedings consistent with this opinion.

III. Limitation of time for hearing

[3] Although we have determined that we must vacate and remand the trial court's order, we will discuss plaintiff's remaining issue as it may be relevant for the trial court's consideration of the issues on remand.

Plaintiff argues that the trial court abused its discretion in terminating plaintiff's testimony and limiting plaintiff's evidentiary presentation to one hour. But plaintiff requested no additional time at the hearing, so she has waived this argument on appeal. *See*, *e.g.*, *Hoover v. Hoover*, __ N.C. App. __, __, 788 S.E.2d 615, 618 ("N.C. R. App. P. Rule 10(a)(1) (2014) provides in relevant part 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 have obtained a ruling upon the party's request, objection, or motion. 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." (Citations, quotation marks, and brackets omitted)), *disc. review denied*, __ N.C. __, 794 S.E.2d 519 (2016).

At the start of the hearing, both the trial judge and plaintiff's attorney noted that the court was setting aside two hours for a temporary custody hearing. No objection was lodged in relation to the time constraint. Plaintiff argues on appeal that the trial court ended up doing much more than determining temporary custody, since the trial court dismissed the action, but the trial court could not address even temporary custody without first determining whether plaintiff had standing to pursue a custody claim. Under the local district court rules for a temporary custody hearing, which defendant filed as a memorandum of additional authority, Rule 7.3 notes that "[t]emporary custody hearings shall be limited to two (2) hours. Each party will have up to one (1) hour to present his or her case, including direct and cross-examination, opening and closing arguments." The rules also state that additional time may be requested by parties "[w]ith written notice to the opposing party at least seven (7) days prior to the scheduled hearing date[.]" Plaintiff did not request additional time under Rule 7.3. We find the trial court did not abuse its discretion by limiting plaintiff's presentation to one hour.

Conclusion

In conclusion, we must vacate the trial court's order dismissing plaintiff's custody complaint for lack of standing. Because the trial court's order does not properly address or weigh evidence of events before Raven's birth; relies at least in part on matters such as the parties' failure to marry; and does not indicate that the proper standard of clear, cogent, and convincing evidence was used, we vacate the trial court's order and remand to the court for further proceedings consistent with this opinion. Specifically, the trial court should enter a new order addressing the jurisdictional issue containing findings of fact based

upon clear, cogent and convincing evidence. Depending upon that order, if the custody claims remain to be determined, the trial court shall allow the parties to present evidence at another hearing.

VACATED AND REMANDED.

Judges HUNTER, Jr. and DAVIS concur.

RAYMOND CLIFTON PARKER, Plaintiff

v.

MICHAEL DeSHERBININ and wife, ELIZABETH DeSHERBININ, Defendants

No. COA17-377

Filed 17 October 2017

1. Evidence—findings of fact—construction of fence—property line—boundary of property—sufficiency of evidence

The trial court erred in a property dispute case by making a finding of fact that appellant constructed a fence along what he believed to be the northern boundary line of his property where the overwhelming non-contradicted evidence indicated appellant constructed a fence within the boundary of his property as purportedly established by a 1982 survey.

2. Evidence—findings of fact—disputed area not mowed—possession of disputed area—concession to open and continuous possession

The trial court erred in a property dispute case by making a finding of fact that the disputed area could not be mowed because it was so overgrown and there was nothing visible to indicate anyone was in possession of or maintaining the disputed area. Appellees conceded to appellant's open and continuous possession of that portion of the disputed area up to the location of appellant's chain link fence.

3. Evidence—conclusions of law—adverse possession—color of title—unresolved factual issues—metes and bounds description

The trial court erred in a property dispute case by making a conclusion of law that appellant had not established adverse possession to the south side of the disputed area bounded by the chain link fence. There remained unresolved factual issues of whether the

metes-and-bounds description contained in appellant's deed and the incorporated reference to a 1982 survey accurately described the extent of appellant's property to establish he possessed color of title to the remaining disputed area.

4. Appeal and Error—preservation of issues—abandoned during appellate oral arguments

The Court of Appeals did not address appellant's asserted claims for negligence and nuisance in his amended complaint where on appeal appellant's counsel abandoned these claims at oral argument.

Appeal by plaintiff from judgment entered 22 September 2016 and from order entered 1 December 2016 by Judge Mary Ann Tally in New Hanover County Superior Court. Heard in the Court of Appeals 26 September 2017.

Hodges, Coxe, Potter, & Phillips, LLP, by Bradley A. Coxe, for Plaintiff-Appellant.

H. Kenneth Stephens, II for Defendant-Appellees.

TYSON, Judge.

Raymond Clifton Parker ("Appellant") appeals from denial of a directed verdict made at the close of Appellant's evidence and renewed at the close of all evidence dated 29 August 2016, from a judgment entered on 22 September 2016 in favor of Michael and Elizabeth DeSherbinin (collectively "Appellees"), and from an order dated 1 December 2016, denying Appellant's motion for judgment notwithstanding the verdict, to amend the judgment and for a new trial. For the following reasons, we affirm in part, reverse in part the trial court's judgment, and remand for further findings of fact.

I. Background

Appellant and Appellees own adjoining tracts of real property located in New Hanover County, adjacent to the Intracoastal Waterway. Appellant acquired his property, located at 19 Bridge Rd., from himself as trustee of the Grace Pittman Trust by a general warranty deed dated 21 December 1983. The deed was recorded on 16 January 1984 in Book 1243, at Page 769, in the New Hanover County Registry.

The Appellees acquired their property, a vacant lot, located at 1450 Edgewater Club Rd., by a warranty deed from John Anderson Overton

and Holland Ann Overton, dated 16 December 2013 and recorded 17 December 2013 at Book 5788, at Page 1866, in the New Hanover County Registry. Appellees purchased their property with the intent to build a residence. The Appellees hired a surveyor, Marc Glenn, to survey the property and prepare a plat.

Glenn's survey (the "Glenn survey") fixed the boundary between Appellant's and Appellees' properties to be approximately 5 feet south of the line established in a survey completed in 1982 by surveyor George Losak (the "Losak survey") and recorded at Map Book 21, at Page 63, in the New Hanover County Registry. The Glenn survey shows a chain link fence installed by Appellant to the north of the boundary line between the parties' properties. The Glenn survey failed to reference the prior recorded Losak surveys or show any overlaps in the surveyed boundary lines.

In the Spring of 2014, Appellant and Appellees met regarding the boundary line between their properties. Appellant informed Appellees of an existing issue regarding the location of the boundary line. Appellees were also made aware, by their seller, prior to their purchase, that a dispute existed over the boundary line of the two properties. Appellees' attorney closed on the property as shown in the Glenn survey, certified title thereto and obtained title insurance thereon.

Appellees filed for a building permit for the residence they intended to construct at 1450 Edgewater Club Rd. Appellees attached a copy of the Glenn survey to their building permit application. Appellant complained and shared the recorded Losak survey with the New Hanover County planning and zoning office, prior to the issuance of the Appellees' building permit being issued, but to no avail.

Appellees continued to build their residence based on their belief the Glenn survey correctly showed the boundary. Appellant commissioned yet another survey from Charles Riggs, a registered licensed surveyor (the "Riggs survey"), while Appellees' house was under construction.

Appellant filed an initial complaint on 23 June 2015 and an amended complaint on 7 January 2016. Appellant asserted claims for negligence, nuisance, declaratory judgment to identify the boundary line, adverse possession under color of title, and adverse possession under twenty years of continuous possession. On 4 March 2016, Appellees filed an answer denying Appellant's claims and a counterclaim seeking a declaratory judgment to identify and establish the boundary line based upon their Glenn survey.

On 29 August 2016, the case came to trial. The parties agreed to waive trial by jury. Appellant moved for a directed verdict at the close of his evidence and renewed again at the close of all evidence. These motions were denied.

Among the findings of fact made by the trial court are the following:

> 7. The Plaintiff's and Defendants' properties adjoin each other with the Defendants' property lying adjacent to and to the north of Plaintiff's property.
>
> 8. A map of Edgewater Subdivision recorded in Map Book 2, at Page 113, is the original map of Edgewater Subdivision (herein "Edgewater Map") and created said subdivision.
>
> 9, Plaintiff's and Defendants' properties are portions of Lots 4 and Lot 5 as shown on the map of Edgewater Subdivision, as recorded in Map Book 2, at Page 113, of the New Hanover County Registry.
>
> 10. The Defendants engaged James B. Blanchard, PLS, a licensed registered land surveyor to perform a survey of the parties properties in February, 2016 to establish the dividing line between Lots 4 and 5 of Edgewater Subdivision as shown on Map Book 2, at Page 113, of the New Hanover County Registry and then to establish the boundary-line between the property of the parties.
>
> 11. At the trial of this matter, Defendants presented the testimony of Mr. Blanchard who was tendered to and accepted by the Court without objection by Plaintiff as an expert witness in land surveying.
>
> 12. That none of the original monuments shown on the Edgewater Map could be located by Mr. Blanchard.
>
> 13. Mr. Blanchard established the dividing line between Lots 4 and 5 of Edgewater Subdivision as follows:
>
> a. By determining the northern line of Edgewater Subdivision by determining the southern line of Avenel Subdivision, the adjoining property to the north of Edgewater, as shown on a map recorded in Map Book 31, at Page 36 (herein "Avenel Map") and a map recorded in Map Book 7, at Page 14, both in the New Hanover County Registry.

b. That concrete monuments evidencing the southern line of Avenel and the northern line of Edgewater are shown on the Avenel Map and were located by Mr. Blanchard.

c. Mr. Blanchard established a line southwardly and perpendicular to the northern line of Edgewater Subdivision and along the eastern right of way of Final Landing Lane, as shown on the Edgewater Map, for the distance shown on the Edgewater Subdivision Map required to reach the dividing line between Lots 4 and 5 all as shown on the Edgewater Map.

d. Mr. Blanchard located the northern line of the tract adjoining Edgewater Subdivision on the south, i.e. the southern line of Edgewater Subdivision, as shown on a map recorded in Map Book 11, at Page 17, of the New Hanover County Registry.

e. Mr. Blanchard found monuments confirming his determination of the southern line of Edgewater Subdivision as shown on the original Edgewater Map.

f. That the Edgewater Map showed a fence running along the northern line of Edgewater Subdivision and that Mr. Blanchard, during the performance of his field work, located remnants of a wire fence running along the line which he determined to be the northern line of Edgewater.

14. The Defendants introduced a map by Mr. Blanchard dated July 9, 2016 (Defendants' Exhibit 21, herein the "Blanchard Map"), showing the findings of his survey and illustrating his testimony and opinions as to the location of the boundary-line between Lots 4 and 5 of Edgewater Subdivision, as well as the boundary-line between the Defendants' tract to the north described in Deed Book 5788, at Page 1866, of the New Hanover County Registry, and Plaintiff's tract to the south described in Deed Book 1243, at Page 769, of the New Hanover County Registry.

15. George Losak, registered land surveyor, prepared a map for "The William Lyon Company" dated December 30, 1982, recorded in February 10, 1983 and in Map Book 21, at Page 63, of the New Hanover County Registry (the "Losak Survey") showing or purporting to show the property later purchased by Plaintiff.

16. In August 1983, Mr. Losak prepared a second map of the property for "The Grace Pittman Trust" which was recorded on September 7, 1983 in Map Book 22, at Page 20, of the New Hanover County Registry. The purpose of this map was to correct errors contained in the Losak Survey.

17. Plaintiff's deed dated December 21, 1983 and recorded on January 16, 1984 referred to the Losak Survey, recorded in Map Book 21, at Page 63, of the New Hanover County Registry.

18. The Losak Survey referred to hereinabove depicts pipes and monuments which Mr. Losak ignored in determining the boundary-line between the subject properties.

19. The Court finds Mr. Blanchard's testimony to be credible and correct as to the location of the boundary-line between the Plaintiff's and Defendants' properties.

20. The true location of the boundary-line between Plaintiff's property and Defendants' property is shown on the Blanchard Map dated July 9, 2016 which describes the dividing line between the parties' properties as follows:

. . . .

21. Defendants purchased their property, also known as 1450 Edgewater Club Road, in December of 2013.

22. At the time the Defendants purchased their property the Plaintiff and Defendants' predecessor in title were engaged in a dispute with regard to the boundary-line between the parties' tracts.

. . . .

24. The Defendants hired Polaris Surveying, LLC and Marc Glenn, PLS to survey the property and prepare a boundary survey, a site plan, and topographical survey.

25. Marc Glenn determined the boundary-line to be as shown on his map recorded in Map Book 58, at Page 363, of the New Hanover County Registry, which is substantially where Mr. Blanchard locates the boundary-line.

. . . .

30. After closing on their property the Defendants had a chance meeting with the Plaintiff on site on or about April or May of 2014 while they were meeting with a contractor during the design phase of their home.

31. During this chance meeting Plaintiff raised the boundary-line issue and told Defendants about the Losak Survey and the monuments Losak found, but he did not show any of the monuments to the Defendants nor did he point them out.

32. In October 2014, after hiring several surveyors and attempting to hire several other surveyors Plaintiff hired Charles Riggs to survey his property and to confirm the description contained on the Losak Surveys.

33. At the time Plaintiff hired Mr. Riggs the Defendants house was approximately forty percent (40%) complete.

34. Charles Riggs provided the Plaintiff with a survey reflecting his findings on January 30, 2015.

35. The Defendants first saw the Riggs Survey in 2015 when their house was approximately seventy percent (70%) complete.

36. The New Hanover County zoning ordinance requires a minimum side set back of fifteen feet (15') for structures built on Defendants' property.

37. In 1985, the Plaintiff constructed a fence along what he believed to be the northern-boundary line of his property and the southern boundary-line of Defendants' property. This area is hereto referred to [as] the "Disputed Area".

38. After 2005, Plaintiff would occasionally reach through the fence or lean over the fence to trim vines growing on the property to the north of the fence, the property now owned by Defendants.

39. The [D]isputed [A]rea could not be mowed because it was so overgrown. There was nothing visible to indicate anyone was in possession of or maintaining the Disputed Area.

The trial court also made the following relevant conclusions of law:

> 2. Plaintiff's and Defendants' chains of title and vesting deeds both establish that the dividing line between the property, i.e. their common boundary, is the dividing line between tracts 4 and 5 of Edgewater Subdivision as shown on the map of said subdivision recorded in Map Book 2, at Page 113, of the New Hanover County Registry or can only be determined by locating the line between Lots 4 and 5 of Edgewater Subdivision.
>
> 3. That the true boundary-line between Plaintiff and Defendants is as shown on the Blanchard Map referred to in the findings of fact and further more particularly described as follows:
>
> . . . .
>
> 4. That the Defendants were not negligent in purchasing their property or in proceeding with the construction of their residence on their property.
>
> 5. That the construction and location of Defendants' home does not violate the fifteen foot (15') minimum side set back requirement of the New Hanover County zoning ordinance.
>
> 6. That the actions of the Defendants did not constitute a substantial interference with the Plaintiff's use of his property and were not unreasonable and therefore do not constitute a nuisance.
>
> 7. That Plaintiff's possession, if any, of any portion of the [D]isputed [A]rea was not open, notorious, or continuous and therefore [does] not constitute adverse possession either with or without color of title.

On 22 September 2016, the trial court found in favor of Appellees on all of Appellant's claims and entered judgment. Appellant filed a motion for judgment notwithstanding the verdict, a motion to amend the judgment, and a motion for a new trial which were all denied by the trial court on 1 December 2016. Appellant timely filed an amended notice of appeal on 30 December 2016.

II. Statement of Jurisdiction

Jurisdiction lies in this Court from a final judgment of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015).

III. Standard of Review

Where trial is other than by jury, "[t]he trial judge acts as both judge and jury and considers and weighs all the competent evidence before him. If different inferences may be drawn from the evidence, the trial judge determines which inferences shall be drawn and which shall be rejected." *In re Estate of Trogdon*, 330 N.C. 143, 147-48, 409 S.E.2d 897, 900 (1991) (emphasis and citation omitted).

> In a bench trial in which the superior court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Hanson v. Legasus of North Carolina, LLC, 205 N.C. App. 296, 299, 695 S.E.2d 499, 501 (2010) (citation omitted).

IV. Analysis

Appellant argues several of the trial court's findings of fact are unsupported by competent evidence, and several of the trial court's conclusions of law are not supported and improper in light of the relevant findings of facts and law. We address the disputed findings of fact and conclusions of law in turn.

A. Finding of Fact 37

[1] Appellant argues no competent evidence supports the trial court's finding of fact 37 that "in 1985, the [Appellant] constructed a fence *along what he believed to be the northern-boundary line of his property* and the southern boundary-line of [Appellees'] property." (Emphasis supplied.). Appellees do not contest Appellant's assertion and testimony that the chain link fence was not placed on what Appellant considered to be the boundary line of the subject properties.

After reviewing the record and stipulations of counsel at oral argument, we hold that no evidence supports the trial court's finding of fact 37 that "Appellant constructed a fence along what he believed to be the northern-boundary line of his property." The overwhelming, non-contradicted evidence indicates Appellant constructed a fence within the boundary of his property as purportedly established by the Losak survey.

Appellant testified at trial that when he purchased the property at 19 Bridge Rd., a low fence referred to as the "neighbor's fence" was inside the boundary line on the Losak survey. The Losak survey indicates the "neighbor's fence" was one to five feet south of the boundary line purportedly established by the Losak survey.

Appellant testified that sometime in 1984 or 1985, he constructed a chain link fence adjacent to the "neighbor's fence" as indicated on the Losak survey. Appellant stated he did not put the chain link fence on what he believed to be the property line, because dogwood trees and vegetation existed along the purported property line. Appellant stated he wanted enough space to remain between the purported property line and the chain link fence to prevent the neighbors from damaging the fence.

Appellant additionally testified the chain link fence had not been moved since it was constructed in 1984 or 1985. Appellant submitted a photograph labeled Plaintiff's Exhibit 25.20 which showed the chain link fence as it was located in the mid-1980's and in the present day.

Appellant's expert, Charles Riggs, produced a survey which shows the Losak survey line claimed by Appellant and the Blanchard survey line claimed by Appellees, and determined by the trial court to be the boundary line. The Riggs survey indicates the chain link fence was located between the disputed survey lines.

Also submitted into evidence was a 5 December 2013 email from Holly Overton, Appellees' predecessor-in-title to 1450 Edgewater Club Rd., to Nicole Valentine, the buyer's agent for Appellees, which discusses the location of the chain link fence. In her email, Ms. Overton mentioned the Losak survey line and the Blanchard survey line and stated the chain link fence "is located in the middle of the two property lines mapped."

As Appellant accurately argues, no testimony or other evidence supports the trial court's finding of fact 37 that "in 1985, the [Appellant] constructed a fence along what he believed to be the northern-boundary line of his property and the southern boundary-line of [Appellees'] property." Appellees' only argument against Appellant on this point is that because "Appellant never located the chain link fence on the ground it is impossible to locate the fence with any more precision."

However, counsel agree the chain link fence is "known and visible" and is in the same location it was in when Appellant first built it in 1984 or 1985. Furthermore, no evidence was presented at trial to contradict the location of the chain link fence as surveyed by Appellant's surveyor, Riggs.

No competent evidence supports the trial court's finding of fact 37.

B. Finding of Fact 39

[2] Appellant argues insufficient evidence supports the trial court's finding of fact 39: "The [D]isputed [A]rea could not be mowed because it was so overgrown. There was nothing visible to indicate anyone was in possession of or maintaining the Disputed Area." Appellees concede competent evidence was presented of Appellant's open and continuous possession of that portion of the Disputed Area up to the location of Appellant's chain link fence.

Appellant produced photographs, admitted into evidence, which tend to show the condition of the property as maintained by Appellant since he first acquired it in 1983. Appellant's unchallenged photographs depict a maintained and cleared lawn, with storage and buildings established along the fence line.

An email from Holly Overton, the Appellees' predecessor-in-title to 1450 Edgewater Club Rd., to Nicole Valentine, the Appellees' agent, stated Appellant would trim bushes along the chain link fence in the Disputed Area and store his equipment. Appellees presented no evidence to dispute Appellant's continued maintenance of the property in the portion of the Disputed Area south of the chain link fence.

The trial court's finding of fact 39 is not supported by competent evidence, to the extent it expresses the Disputed Area "could not be mowed because it was so overgrown. There was nothing visible to indicate anyone was in possession of or maintaining the Disputed Area".

C. Conclusion of Law 7

[3] Appellant argues the trial court's conclusion of law 7 is in error based upon the law of adverse possession and the unsupported findings of fact that he did not use, maintain, and possess the Disputed Area on his property's side of the chain link fence.

Conclusion of law 7 states: "That Plaintiff's possession, if any, of any portion of the [D]isputed [A]rea was not open, notorious, or continuous and therefore [does] not constitute adverse possession either with or without color of title."

1. Adverse Possession for Twenty Years

In North Carolina, '[t]o acquire title to land by adverse possession, the claimant must show actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period[.]' " *Jones*

v. Miles, 189 N.C. App. 289, 292, 658 S.E.2d 23, 26 (2008) (citation omitted); *Federal Paper Board Co. v. Hartsfield*, 87 N.C. App. 667, 671, 362 S.E.2d 169, 171 (1987) (holding that "[t]itle to land may be acquired by adverse possession when there is actual, open, notorious, exclusive, continuous and hostile occupation and possession of the land of another under claim of right or color of title for the entire period required by the statute.") (internal quotation marks and citation omitted).

Adverse possession of privately owned property without color of title must be maintained for twenty years in order for the claimant to acquire title to the land. N.C. Gen. Stat. § 1-40 (2015).

Presuming, *arguendo*, the trial court was correct in determining the Blanchard survey line was the correct boundary line between the parties' properties of Lots 4 and 5, uncontradicted evidence proves Appellant's actual occupation and continuous use of the property on the southern half of the Disputed Area since he acquired 19 Bridge Rd. in the early 1980s.

Appellant's installation of the chain link fence and his admitted maintenance of the area around and inside it since he established the fence in 1984 or 1985 shows his actual, open, notorious, exclusive and hostile use of property located on the south side of the chain link fence in the Disputed Area to support his claim for adverse possession under the requisite twenty year possession period. *See Blue v. Brown*, 178 N.C. 334, 337, 100 S.E. 518, 519 (1919) (holding a fence, maintained for many years, a hedgerow and possession for 30 or 40 years justified verdict for adverse possession); *Brittain v. Correll*, 77 N.C. App. 572, 575, 335 S.E.2d 513, 515 (1985) (holding a fence and other outbuildings showed claimants were asserting exclusive right over the disputed property); *Snover v. Grabenstein*, 106 N.C. App. 453, 459, 417 S.E.2d 284, 287 (1992) (holding that fence in place for more than fifty years such that the possession exercised by parties on either side of it was open, notorious and continuous so as to constitute adverse possession).

Appellees presented no evidence that they, or their predecessors-in-title, disputed or gave permission to Appellant to erect his chain link fence in the Disputed Area, until they sent a letter to Appellant in 2014, more than thirty years after Appellant built the fence. Appellees presented no evidence that anyone, other than Appellant, claimed, used, or maintained the area on the south side of the chain link fence after Appellant acquired 19 Bridge Rd. in 1983.

The uncontradicted evidence shows Appellant's actual, open, notorious, exclusive, continuous and hostile occupation and possession of

the area on the south side of the chain link fence within the Disputed Area for the statutory period. *See Federal Paper Board*, 87 N.C. App. at 671, 362 S.E.2d at 171.

Appellees' counsel conceded at oral argument before this Court that Appellant's uncontradicted evidence established adverse possession to the portion of the Disputed Area on the south side of the chain link fence. The trial court erred, as a matter of law, in concluding Appellant had not established adverse possession to the south side of the Disputed Area bounded by the chain link fence.

2. Color of Title

Appellant argues he is entitled to the entire Disputed Area on the north and south side of the chain link fence through adverse possession under color of title.

Appellant asserts the deed under which he acquired title to 19 Bridge Rd. establishes color of title so that he is entitled to the area of property located north of the chain link fence in the Disputed Area by adverse possession under color of title. By statute, when the claimant's possession is maintained under an instrument that constitutes "color of title," the prescriptive period is reduced from twenty to seven years. N.C. Gen. Stat. § 1-38(a) (2015).

Appellees argue Appellant's adverse possession under color of title claim fails, as a matter of law, because the Losak survey referenced in Appellant's deed stated an incorrect boundary line.

Our Supreme Court has held:

> A deed offered as color of title is such only for the land designated and described in it. *Norman v. Williams*, 241 N.C. 732, 86 S.E.2d 593; *Locklear v. Oxendine*, 233 N.C. 710, 65 S.E.2d 673; *Barfield v. Hill*, 163 N.C. 262, 79 S.E. 677. "A deed cannot be color of title to land in general, but must attach to some particular tract." *Barker v. Southern Railway*, 125 N.C. 596, 34 S.E. 701. To constitute color of title a deed must contain a description identifying the land or referring to something that will identify it with certainty. *Carrow v. Davis*, 248 N.C. 740, 105 S.E.2d 60; *Powell v. Mills*, 237 N.C. 582, 75 S.E.2d 759.
>
> . . . .
>
> When a party introduces a deed in evidence which he intends to use as color of title, he must, in order to give

> legal efficacy to his possession, prove that the boundaries described in the deed cover the land in dispute. *Smith v. Fite*, 92 N.C. 319. *He must not only offer the deed upon which he relies for color of title, he must by proof fit the description in the deed to the land it covers-in accordance with appropriate law relating to course and distance, and natural objects and other monuments called for in the deed. Wachovia Bank & Trust Co. v. Miller*, 243 N.C. 1, 89 S.E.2d 765; *Skipper v. Yow*, 238 N.C. 659, 78 S.E.2d 600; *Williams v. Robertson*, 235 N.C. 478, 70 S.E.2d 692; *Locklear v. Oxendine, supra; Smith v. Benson*, 227 N.C. 56, 40 S.E.2d 451.

McDaris v. "T" Corp., 265 N.C. 298, 300-01, 144 S.E.2d 59, 61 (1965) (emphasis supplied).

A plaintiff's burden at trial is also well established:

> [I[n order to present a prima facie case [of adverse possession], [a plaintiff] must . . . show that the disputed tract lies within the boundaries of their property. *See Cutts v. Casey*, 271 N.C. 165, 167, 155 S.E.2d 519, 521 (1967); *Batson v. Bell*, 249 N.C. 718, 719, 107 S.E.2d 562, 563 (1959). *Plaintiffs thus bear the burden of establishing the on-the-ground location of the boundary lines which they claim. Virginia Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 391, 343 S.E.2d 188, 194, *disc. review denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). If they introduce deeds into evidence as proof of title, they must "locate the land by fitting the description in the deeds to the earth's surface." *Andrews v. Bruton*, 242 N.C. 93, 96, 86 S.E.2d 786, 788 (1955).

Chappell v. Donnelly, 113 N.C. App. 626, 629, 439 S.E.2d 802, 805 (1994).

The evidence shows Appellant acquired title to 19 Bridge Rd. pursuant to a recorded deed in 1983. Appellant's deed contains a metes-and-bounds description, and refers and incorporates into the deed the recorded survey prepared by George Losak. *See Collins v. Land Co.*, 128 N.C. 563, 565, 39 S.E. 21, 22 (1901) ("[A] map or plat, referred to in a deed, becomes a part of the deed as if it were written therein[.]").

The trial court's conclusion of law 7 is not supported by the trial court's findings of fact and is in error as a matter of law, to the extent it states Appellant has not established adverse possession of the Disputed

Area south of the chain link fence. *See Hanson*, 205 N.C. App. at 299, 695 S.E.2d at 499 (citation omitted). There remain unresolved factual issues of whether the metes-and-bounds description contained in Appellant's deed and the incorporated reference to the Losak survey accurately describe the extent of Appellant's property.

Even though the trial court found the Blanchard survey accurately shows the true boundary line between the Appellant and Appellees' properties, the court made no findings regarding whether Appellant had shown the on-the-ground boundary lines described in his deed and depicted in the Losak survey referenced therein. To determine whether Appellant has adversely possessed the remaining portion of the Disputed Area under color of title, it is necessary for the trial court to make findings of fact regarding whether Appellant can fit the description of the deed and survey under which he claims color of title to the portion of the Disputed Area north of his chain link fence. *Andrews*, 242 N.C. at 96, 86 S.E.2d at 788.

We reverse and remand this matter to the trial court to determine whether the deed and survey under which Appellant acquired title sufficiently describes the remaining portion of the Disputed Area.

3. Lappage

Appellant argues this case involves an issue regarding the parties presenting overlapping claims of ownership to the Disputed Area, known as a "lappage."

In a case of "lappage," a dispute between property owners where their respective titles purport to grant ownership to and over an overlapping area, the adverse claimant is not required to show actual possession of the entire area under lappage:

> It is thoroughly established law that when a person having color of title to a particular tract of land, which the written instrument, that is color of title, describes *by known and visible lines and boundaries*, enters into and adversely holds a part of such tract under the authority ostensibly given him by such instrument asserting ownership of the whole, *his ensuing possession is not limited to the portion of the tract as to which there has been an entry or actual possession, but is commensurate with the limits of the tract to which the instrument purports to give him title*, provided that at the inception, and during the continuance of the possession, there has been no adverse

> possession of the tract in whole or in part by another: and in this State such possession, if exclusive, open, continuous and adverse for seven consecutive years, the title being out of the State, will ripen into an unimpeachable title to the whole, provided there has been and is no adverse possession of the tract in whole or in part during such seven consecutive years by another.

Wachovia Bank & Tr. Co. v. Miller, 243 N.C. 1, 6, 89 S.E.2d 765, 769 (1955) (emphasis supplied) (citations omitted).

If on remand, the trial court determines the Appellant's metes-and-bounds deed description and incorporated reference to the Losak survey contained in Appellant's deed can be located upon the ground and is sufficient to establish Defendant possessed color of title to the remaining Disputed Area, Defendant will be entitled to quiet title to the entirety of the Disputed Area, based on his undisputed adverse possession for twenty years of that portion of the Disputed Area south of the chain link fence. *See id.*

D. Nuisance and Negligence Claims

[4] Appellant asserted claims for negligence and nuisance in his amended complaint. On appeal, Appellant's counsel abandoned these claims at oral argument. Therefore, we decline to address the parties' arguments regarding these claims. Those portions of the trial court's judgment relating to negligence and nuisance are affirmed.

V. Conclusion

A review of the record evidence and the testimony presented at trial and stipulations of counsel on appeal, shows some of the findings of fact made by the trial court are not supported by any competent, substantial evidence. The trial court's conclusion that Appellant was not entitled to the portion on the south side of the chain link fence within the Disputed Area by virtue of adverse possession for twenty years is error as a matter of law.

Unresolved factual issues remain regarding whether Appellant's deed and the recorded Losak survey referenced and incorporated therein provide color of title to the entirety of the Disputed Area, requiring remand to the trial court for further findings of fact. Conclusion of law 7 is reversed and the matter remanded to the trial court to make additional findings of fact and conclusions of law with regard to Appellant's claim of adverse possession by color of title, and to enter judgment accordingly.

We remand this case with instructions to the trial court to enter judgment to quiet title and award Appellant ownership to the portion of the Disputed Area on the south side of Appellant's chain link fence. If the physical location of the chain link fence is not otherwise sufficiently located, the trial court is to direct James Blanchard, P.L.S. or another licensed surveyor, to physically locate, fit and describe the location of Appellant's chain link fence. The expense of said survey shall be taxed as court costs.

On remand, Appellant bears the burden of establishing that the boundaries described in his deed and the incorporated Losak survey, through which he acquired title to 19 Beach Rd., describe the portion of the Disputed Area north of the chain link fence. *See McDaris*, 265 N.C. at 300-01, 144 S.E.2d at 61 (citation omitted).

If the trial court finds and concludes that Appellant meets this burden, the trial court is to also enter judgment quieting title and awarding Appellant ownership of that portion of the Disputed Area north of the chain link fence and to the entire Disputed Area. *See Wachovia Bank*, 243 N.C. at 6, 89 S.E.2d at 769.

The decision of the trial court is affirmed in part, reversed in part and the case is remanded for further findings as noted herein. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges BRYANT and INMAN concur.

NICHOLAS A. RIDDLE, PLAINTIFF
v.
BUNCOMBE COUNTY BOARD OF EDUCATION; JAMES BEATTY, IN HIS INDIVIDUAL CAPACITY, AND IN HIS OFFICIAL CAPACITY WITH THE BUNCOMBE COUNTY BOARD OF EDUCATION; AND RODERICK BROWN, JR., IN HIS INDIVIDUAL CAPACITY, AND IN HIS OFFICIAL CAPACITY WITH THE BUNCOMBE COUNTY BOARD OF EDUCATION, DEFENDANTS

No. COA16-1155

Filed 17 October 2017

Emotional Distress—negligent infliction of emotional distress—motion to dismiss—temporary fright—reasonable foreseeability

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's negligent infliction of emotional distress claims as a proximate result of defendants' allegedly negligent acts which led to the death of plaintiff's high school football teammate and friend. Allegations of "temporary fright" were insufficient to satisfy the element of severe emotional distress, and plaintiff's allegations were also insufficient to establish the reasonable foreseeability of his severe emotional distress under the *Ruark* factors.

Appeal by plaintiff from order entered 19 May 2016 by Judge Gary Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 19 April 2017.

Charles G. Monnett III & Associates, by Randall J. Phillips, for plaintiff-appellant.

York Williams, L.L.P., by Gregory C. York and Jared A. Johnson, for defendant-appellees.

Ball Barden & Cury, P.A., by Alexandra Cury, for defendant-appellee Roderick Brown, Jr., in his individual capacity.

CALABRIA, Judge.

Nicholas A. Riddle ("plaintiff") appeals from the trial court's order dismissing his action pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015). Plaintiff alleged negligent infliction of emotional distress claims against the Buncombe County Board of Education ("BCBE"); James Beatty ("Beatty"), individually and in his official capacity with the BCBE; and Roderick Brown, Jr. ("Brown"), individually and in his official capacity with the BCBE (collectively, "defendants"). On appeal, the

issue is whether it was reasonably foreseeable that plaintiff would suffer severe emotional distress as a proximate result of defendants' allegedly negligent acts, which led to the death of plaintiff's teammate and friend, Donald Boyer Crotty ("Crotty"). After careful review, we hold that plaintiff's injury was not reasonably foreseeable. Therefore, we affirm the trial court's order dismissing plaintiff's action.

I. Background

As plaintiff's claims were dismissed pretrial pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), "the facts set forth herein are taken from the allegations of the complaint, which must be taken as true at this point." *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 286, 395 S.E.2d 85, 87, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990).

In July 2011, Beatty was a teacher and the varsity football coach at T.C. Roberson High School ("T.C. Roberson") in Buncombe County, North Carolina. Plaintiff and Brown were members of the football team. T.C. Roberson football players had access to various equipment, including a John Deere motorized vehicle ("the John Deere") that was routinely used to move items during and after practice. Beatty authorized the team's use of the John Deere, notwithstanding the fact that all players were minors and that none of BCBE's representatives had ever trained or instructed them regarding the vehicle's safe operation.

According to the complaint, on 11 July 2011, plaintiff, Brown, and other members of the team were scrimmaging and participating in drills on the T.C. Roberson football field. Beatty instructed Brown to use the John Deere to transport large Gatorade coolers across the field from an area near the 50-yard line. Brown, traveling at an unsafe and excessive rate of speed, drove the John Deere across the field as plaintiff, Crotty, and several players walked toward him. When they realized that Brown was driving directly at them, the players moved to avoid the John Deere. However, Brown simultaneously turned the steering wheel to the right and collided with Crotty, entrapping him with the front hood of the vehicle. Crotty's head struck the asphalt running track, and the John Deere's right tires traveled over his body and head. Crotty immediately displayed signs of brain injury and was only partially responsive as witnesses tended to him.

On 11 February 2016, plaintiff filed the instant action in Buncombe County Superior Court.[1] Plaintiff alleged, *inter alia*, that Beatty and

1. Plaintiff also filed a separate cause of action against BCBE alleging violations of his constitutional rights. Plaintiff voluntarily dismissed the constitutional claim at the hearing on defendants' motion to dismiss on 9 May 2016.

Brown committed negligent acts that proximately and foreseeably caused plaintiff to suffer severe emotional distress, and that all defendants were jointly and severally liable for plaintiff's injury.[2] On 1 April 2016, defendants filed an answer denying negligence and asserting various affirmative defenses. Defendants' answer also included a motion to dismiss for failure to state a claim upon which relief could be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Following a hearing, the trial court granted defendants' motion to dismiss. Plaintiff appeals.

II. Analysis

Plaintiff argues that the trial court erroneously granted defendants' motion to dismiss because he sufficiently alleged claims for negligent infliction of emotional distress arising out of concern for (1) himself and (2) his teammate and friend, Crotty. We disagree.

A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). On appeal, "[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

"An action for the negligent infliction of emotional distress may arise from a concern for one's own welfare, or concern for another's." *Robblee v. Budd Servs., Inc.*, 136 N.C. App. 793, 795, 525 S.E.2d 847, 849, *disc. review denied*, 352 N.C. 676, 545 S.E.2d 228 (2000). To state a claim for negligent infliction of emotional distress, the plaintiff must allege that: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress, and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 321-22 (1993) (citation and internal ellipsis omitted).

The term "severe emotional distress" means "an emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression,

2. In addition to negligent infliction of emotional distress, plaintiff's complaint also asserted a claim for "uninsured and/or underinsured motorist coverages." However, because plaintiff's appellate brief does not address this claim, we will not discuss it further on appeal.

phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Id.* at 672, 435 S.E.2d at 322. While no physical injury is required, *Ruark*, 327 N.C. at 304, 395 S.E.2d at 97, North Carolina courts have consistently reiterated that the plaintiff's emotional distress must be severe in order to recover under this tort. *See id.* (explaining that "mere temporary fright, disappointment or regret will not suffice"); *see also Pierce v. Atl. Grp., Inc.*, 219 N.C. App. 19, 32, 724 S.E.2d 568, 577 (affirming the trial court's 12(b)(6) dismissal of the plaintiff's claim where the sole allegation of emotional distress was "serious on and off the job stress, severely affecting his relationship with his wife and family members"), *disc. review denied*, 366 N.C. 235, 731 S.E.2d 413 (2012).

Moreover, absent reasonable foreseeability, the defendant will not be liable for the plaintiff's severe emotional distress. *See Gardner v. Gardner*, 334 N.C. 662, 667, 435 S.E.2d 324, 328 (1993) (stating that "[p]art of living involves some unhappy and disagreeable emotions with which we must cope without recovery of damages"). Accordingly, where the defendant's conduct would not cause injury to a person of normal sensitivity, "proof of knowledge by the defendant of the plaintiff's peculiar susceptibility to emotional distress is required . . . ." *Wrenn v. Byrd*, 120 N.C. App. 761, 767, 464 S.E.2d 89, 93 (1995) (construing *Gardner*, 334 N.C. at 667, 435 S.E.2d at 328 (additional citations omitted)), *disc. review denied*, 342 N.C. 666, 467 S.E.2d 738 (1996).

"Questions of foreseeability and proximate cause must be determined under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury." *Ruark*, 327 N.C. at 305, 395 S.E.2d at 98. "[T]he trial judge is required to dismiss the claim as a matter of law upon a determination that the injury is too remote." *Wrenn*, 120 N.C. App. at 765, 464 S.E.2d at 92. In actions arising from concern for another's welfare—frequently called "bystander claims"—factors bearing on foreseeability include "the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act." *Ruark*, 327 N.C. at 305, 395 S.E.2d at 98. However, these are not "mechanistic requirements," and "[t]he presence or absence of such factors simply is not determinative in all cases." *Sorrells*, 334 N.C. at 672, 435 S.E.2d at 322.

Here, as in many negligent infliction of emotional distress cases, the dispositive issue is foreseeability. At the hearing on 9 May 2016, the trial court granted defendants' motion to dismiss after finding no "reasonable foreseeability . . . that would lead to the plaintiff's alleged severe

emotional distress." The following paragraphs of plaintiff's complaint address the foreseeability of his injury:

> 25. As Defendant Brown approached the players who were walking and then struck Donald Crotty, Plaintiff Nicholas A. Riddle narrowly avoided being struck by the John Deere while still in close proximity to Donald Crotty, and experienced fear, terror and severe emotional distress for his own safety and the safety of the other football players.
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> . . .
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> 27. Plaintiff witnessed the injuries to Crotty from being struck by [the] John Deere vehicle, experienced severe emotional distress at that time, and the Plaintiff has in fact since continued to suffer since the event from the type of severe emotional distress recognized and diagnosed by professionals trained to do so, and has required care, treatment, therapy and medications from medical and mental healthcare providers as a proximate result thereof.
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> 28. Plaintiff and Donald Crotty were both personally known to Defendants Beatty and Brown as fellow teammates and friends; Plaintiff was physically present in the immediately [sic] vicinity of, and contemporaneously observed, Defendants' negligent acts and the resulting injuries to Donald Crotty; and, Defendants Beatty and Brown knew or reasonably should have foreseen that their negligence and resulting injury to Donald Crotty would cause . . . the severe emotional distress suffered by Plaintiff Nicholas A. Riddle, and that Plaintiff would be susceptible thereto.

Taking these allegations as true, we first address plaintiff's claim arising from concern for himself. The sole allegation that could arguably support such a claim is in paragraph 25, in which plaintiff states he "narrowly avoided being struck by the John Deere while still in close proximity to Donald Crotty, and experienced fear, terror and severe emotional distress for his own safety . . . ." However, allegations of "temporary fright" are insufficient to satisfy the element of severe emotional distress. *Ruark*, 327 N.C. at 304, 395 S.E.2d at 97. While plaintiff avers in paragraph 27 that he "has in fact since continued to suffer since the event from the type of severe emotional distress recognized and diagnosed by professionals trained to do so," the remainder of the paragraph's allegations clearly pertain to his distress at "witness[ing]

the injuries to Crotty," i.e. plaintiff's "concern for another." Accordingly, plaintiff's claim arising from concern for himself fails as a matter of law.

We next address plaintiff's claim arising out of concern for his teammate and friend, Crotty. As plaintiff acknowledges, this appears to be a "case of first impression" in North Carolina's bystander claim jurisprudence, as our prior cases have all involved close familial relationships. *See, e.g.*, *Andersen v. Baccus*, 335 N.C. 526, 439 S.E.2d 136 (1994) (husband-wife and parent-child); *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 334 N.C. 669, 435 S.E.2d 320 (1993) (parent-child); *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993) (parent-child); *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, *P.A.*, 327 N.C. 283, 395 S.E.2d 85 (1990) (parent-unborn child); *Wrenn v. Byrd*, 120 N.C. App. 761, 464 S.E.2d 89 (1995) (wife-husband). Plaintiff cites no case from *any jurisdiction* legitimizing a bystander claim similar to that which he alleges in this case. However, he is correct that under *Ruark*, "the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned" is but one factor to consider in determining foreseeability. 327 N.C. at 305, 395 S.E.2d at 98.

Nevertheless, applying the *Ruark* factors to the complaint, we conclude that plaintiff's allegations are insufficient to establish the reasonable foreseeability of his severe emotional distress. That plaintiff "was physically present in the immediate[] vicinity of, and contemporaneously observed" Crotty's injuries favors foreseeability. *Id.* However, no factor is determinative in all cases. *Sorrells*, 334 N.C. at 672, 435 S.E.2d at 322. Here, plaintiff's allegations regarding his relationship with Crotty fail to support the foreseeability of his injury. Except for paragraph 28's statement that defendants knew plaintiff and Crotty "as fellow teammates and friends," the complaint contains no allegation or facts suggesting that the pair shared an unusually close relationship. Nor does plaintiff explain how his friendship with Crotty demonstrates any "peculiar susceptibility" to severe emotional distress. *Wrenn*, 120 N.C. App. at 767, 464 S.E.2d at 93.

In conclusion, we hold that plaintiff's complaint fails to state a cognizable claim for negligent infliction of emotional distress arising from concern for himself or Crotty. Therefore, we affirm the trial court's order dismissing plaintiff's action.

AFFIRMED.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
DYQUAON KENNER BRAWLEY, DEFENDANT

No. COA17-287

Filed 17 October 2017

Indictment and Information—larceny from merchant—identity of victim—entity capable of owning property

The superior court lacked jurisdiction to try defendant for the charge of larceny from a merchant under N.C.G.S. § 14-72.11(2) where the charging indictment failed to identify the victim. The name "Belk's Department Stores" did not itself import that the victim was a corporation or other type of entity capable of owning property.

Judge ARROWOOD dissenting.

Appeal by Defendant from judgment entered 21 September 2016 by Judge Christopher W. Bragg in Rowan County Superior Court. Heard in the Court of Appeals 7 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Elizabeth Leonard McKay, for the State.

Appellate Defender G. Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Defendant.

DILLON, Judge.

Dyquaon Kenner Brawley ("Defendant") appeals from the trial court's judgment convicting him of larceny from a merchant. Defendant challenges the trial court's jurisdiction stemming from an alleged error in his indictment. After thorough review, we vacate the judgment on jurisdictional grounds.

I. Background

In September of 2015, Defendant was caught on surveillance stealing clothing from a Belk's department store in Salisbury. Defendant removed the security tags from multiple shirts before fleeing the premises.

A grand jury indicted Defendant for larceny from a merchant. A jury convicted him of the charge. Defendant timely appealed.

II. Summary

The charging indictment in this case identifies the victim as "Belk's Department Stores, an entity capable of owning property." On appeal, Defendant argues that the trial court lacked jurisdiction to render a verdict against him because the charging indictment failed to adequately identify *the victim* of the larceny. Based on jurisprudence from our Supreme Court and our Court as explained below, we are compelled to agree. We therefore vacate Defendant's conviction.

III. Analysis

We review the sufficiency of an indictment *de novo*. *See State v. Sturdivant*, 304 N.C. 293, 309, 283 S.E.2d 719, 730 (1981). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

"It is hornbook law that a valid bill of indictment [returned by a grand jury] is a *condition precedent* to the jurisdiction of the Superior Court to determine the guilt or innocence of the defendant, and to give authority to the court to render a valid judgment." *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968) (emphasis added).[1] "To be sufficient under our Constitution, an indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (internal citations and quotation marks omitted). Therefore, "[a] conviction based on an invalid indictment must be vacated." *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015).

In the present case, the jury convicted Defendant of larceny from a merchant under N.C. Gen. Stat. § 14-72.11(2). One essential element of any larceny is that the defendant "took the property *of another*." *State v. Coats*, 74 N.C. App. 110, 112, 327 S.E.2d 298, 300 (1985) (emphasis added).

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1. Our Supreme Court has explained that "every [defendant] charged with a criminal offense has a right to the decision of twenty-four of his fellow-citizens upon the question of guilt [as to every element of the crime charged:] *First*, by a grand jury [of twelve]; and, *secondly*, by a petit jury [of twelve.]" *State v. Barker*, 107 N.C. 913, 918, 12 S.E. 115, 117 (1890). Indeed, our state Constitution recognizes that "no person shall be put to answer any criminal charge [in superior court] but by indictment, presentment, or impeachment." N.C. Const. art. I, § 22; *see State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952) (explaining the history and purpose of this constitutional requirement).

Here, the grand jury returned an indictment alleging that Defendant:

> did steal, take and carry away two polo brand shirts by removing the anti-theft device attached to each shirt, *the personal property of Belk's Department Stores*, *an entity capable of owning property*, having a value of $134.50[.]

(Emphasis added.) It certainly could be argued that the indictment sufficiently alleges that the two polo shirts did not belong to Defendant, and, therefore, were the property "of another." However, our Supreme Court has consistently held that the indictment must go further by clearly specifying the *identity* of the victim. *Campbell*, 368 N.C. at 86, 772 S.E.2d at 443.

In specifying the identity of a victim who is not a natural person, our Supreme Court provides that a larceny indictment is valid only if either: (1) the victim, as named, "itself imports an association or a corporation [or other legal entity] capable of owning property[;]" or, (2) there is an allegation that the victim, as named, "if not a natural person, is a corporation or otherwise a legal entity capable of owning property[.]" *Id.*

A victim's name imports that the victim is an entity capable of owning property when the name includes a word like "corporation," "incorporated," "limited," "church," or an abbreviated form thereof. *Id.* Here, however, the name "Belk's Department Stores" does not itself import that the victim, as named in the indictment, is a corporation or other type of entity capable of owning property: "Stores" is not a type of *legal* entity recognized in North Carolina. *See*, *e.g.*, *State v. Brown*, 184 N.C. App. 539, 542-43, 646 S.E.2d 590, 592 (2007) (holding "Smoker Friendly Store" insufficient).

The indictment does, though, include an allegation that Belk's is "an entity capable of owning property." The issue presented by this case, therefore, is whether alleging that Belk's is some unnamed type of entity capable of owning property is sufficient *or* whether the specific type of entity must be pleaded. We hold that the holdings and reasoning in decisions from our Supreme Court and our Court compel us to conclude that the allegation that Belk's is some unnamed type of "entity capable of owning property" is not sufficient.

Our Supreme Court has held on numerous occasions that where the larceny victim is not a natural person or an entity whose name imports that it is a legal entity, the indictment must specify that the victim "is a corporation or *otherwise a legal entity capable of owning property*."

Campbell, 368 N.C. at 86, 772 S.E.2d at 443 (emphasis added).[2] The State essentially argues that the italicized portion of this quote from *Campbell* means that an indictment which fails to specify the victim's entity type is, nonetheless, sufficient so long as the indictment otherwise alleges that the victim is a legal entity. Defendant argues that the italicized language should not be read so literally, but rather our Supreme Court meant that the indictment must specify the victim's entity type, whether a corporation or otherwise. For the following reasons, we must accept Defendant's interpretation.

First, the allegations regarding the identity of the victim in the present case are essentially the same as those which our Supreme Court has consistently held to be insufficient. For instance, like the indictment in the present case, the indictment in *Thornton* – the seminal case from our Supreme Court on the issue – (1) alleged a victim name which otherwise did not import a natural person or entity capable of owning property, identifying the victim as "The Chuck Wagon"; (2) failed to specify the victim's entity type; and (3) essentially alleged that the victim, otherwise, was capable of owning property. *Thornton*, 251 N.C. at 659-60, 111 S.E.2d at 901-02. In the present case, the indictment alleged that Belk's was an entity capable of owning property by expressly stating as such. In *Thornton*, the indictment alleged that The Chuck Wagon was an entity capable of owning/possessing property by alleging that that The Chuck Wagon "entrusted" certain of *its* property to the defendant, who in turn converted the property "*belonging to* said The Chuck Wagon" for his own use. *Id.* (emphasis added). In sum, our Supreme Court in *Thornton* held that an indictment identifying the victim as "The Chuck Wagon" and alleging that the The Chuck Wagon could have property "belonging" to it did not satisfy the requirement that the victim be identified. *Id.* at 662, 111 S.E.2d at 904. There is no practical difference between the allegations in *Thornton* and those in the present case concerning the victim's identity. We are bound by the holding in *Thornton* and similar holdings.

Second, our Supreme Court has consistently held that it is the State's burden to prove the victim's identity. *See*, *e.g.*, *Campbell*, 368 N.C. at 86, 772 S.E.2d at 443. Merely stating that the victim named is an entity capable of owning property fails to identify with specificity the identity of the victim. For instance, it is permissible in North Carolina for a

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2. *See also*, *e.g.*, *State v. Thornton*, 251 N.C. 658, 661, 111 S.E.2d 901, 903 (1960); *State v. Jessup*, 279 N.C. 108, 112, 181 S.E.2d 594, 597 (1971) (holding that a larceny indictment must "allege the ownership of the property either in a natural person or [in] a legal entity capable of owning" property).

limited partnership and a corporation to share the same name, so long as they are different entity types. As such, it is *possible* for there to be a "Belk's Department Stores, a corporation" and, at the same time, a "Belk's Department Stores, a limited partnership." Allowing the State merely to allege "Belk's Department Stores" as some entity type capable of owning property would relieve the State of its obligation to identify with sufficient specificity who the victim was. Indeed, our Supreme Court once vacated a conviction where the indictment alleged the victim named was a sole proprietorship but the evidence at trial showed that the victim named was, in fact, a corporation, confirming that alleging the victim's entity type is crucial. *State v. Brown*, 263 N.C. 786, 787-88, 140 S.E.2d 413, 413-14 (1965) (holding it a fatal variance where indictment alleged victim as "Stroup Sheet Metal Works, H.B. Stroup, Jr., owner" and the evidence showed that the victim was "Stroup Sheet Metal Works, Inc.").

Third, the State does not cite, nor has our research uncovered, any North Carolina case where an indictment failing to allege a specific form of entity was deemed sufficient. In every instance, an indictment has been sustained only where the type of entity is specified.

We are further persuaded by our reasoning in *State v. Thompson*, 6 N.C. App. 64, 169 S.E.2d 241 (1969). In that case, the defendant was convicted of stealing three dresses from an entity referred to in the indictment solely as "Belk's Department Store, 113 E. Trade Street." *Id.* at 65, 169 S.E.2d at 242. We vacated the conviction, essentially explaining that the indictment was fatal because it failed to specify the type of legal entity "Belk's Department Store" was:

> Here, we cannot say that "Belk's Department Store" imports a corporation, there is no allegation that it is a corporation, nor is there any allegation that it is a proprietorship or a partnership. The name "Belk's Department Store" certainly does not suggest a natural person. . . . [W]e are compelled to hold the warrant is fatally defective.

Id. at 66, 169 S.E.2d at 242.

IV. Conclusion

The purpose of an indictment is to put a defendant on reasonable notice of the charge against him so that he may prepare for trial and to protect him from double jeopardy. *State v. Spivey*, 368 N.C. 739, 742, 782 S.E.2d 872, 874 (2015). The indictment in the present case appears to be sufficient in accomplishing its purpose: it alleges the date and location of

the crime and the items that he stole. It is also clear from the indictment that the grand jury found that the items did not belong to Defendant but were the property "of another." However, our Supreme Court has consistently held that the State must allege not only facts sufficient to show that the property did not belong to Defendant, but also the identity of the actual owner. By merely alleging that the owner was "Belk's Department Stores, an entity capable of owning property," the State has failed to allege with specificity the identity of the actual owner.

Our Supreme Court has recently relaxed the requirement for specifying the victim's entity type in indictments charging injury to *real* property. *See Spivey*, 368 N.C. at 744, 782 S.E.2d at 875 (holding an identification of the owner as "Katy's Eats" sufficient to identify the real property at issue). However, our Supreme Court has not relaxed this rule with respect to indictments charging larceny of *personal* property. *Id.*; *Campbell*, 368 N.C. at 86, 772 S.E.2d at 443. Therefore, we must conclude that the superior court lacked jurisdiction to try Defendant as charged.

VACATED.

Judge HUNTER, JR., concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the majority's holding that the State has failed to allege with specificity the identity of the owner in defendant's indictment for larceny against a merchant. As such, I would find no error with respect to the trial. However, I would find that the restitution ordered by the court was not supported by evidence in the record, and would vacate that order and remand for a new hearing on restitution.

On or about 19 September 2015, defendant and Ms. Lamaya Sanders ("Ms. Sanders") were driving from Greensboro to Salisbury when defendant suggested to Ms. Sanders that they go to Belk's and steal some polo shirts. Ms. Sanders agreed to help. Defendant selected a black polo shirt and Ms. Sanders removed the tag and placed it in her bag. She also removed a tag from a red polo shirt and placed it in her bag. Defendant picked out other shirts, but Ms. Sanders could not remove the tags. Defendant and Ms. Sanders then left the store.

The thefts were filmed on the Belk's' security system. The loss prevention officer called the Salisbury police and obtained the tag number

for defendant's vehicle as he and Ms. Sanders fled the parking lot. Based upon the information provided by the Belk's' loss prevention officer, the Salisbury police obtained warrants for defendant and Ms. Sanders. Ms. Sanders pleaded guilty in District Court in November 2018 and had completed her active sentence when she was subpoenaed and testified against defendant.

On 16 May 2016, the grand jury indicted defendant alleging that he:

> unlawfully, willfully and feloniously did: steal, take and carry away two polo brand shirts by removing the anti-theft device attached to each shirt, the personal property of *Belk's Department Stores*, *an entity capable of owning property*, having a value of $134.50.

(emphasis added).

The issue presented by defendant's appeal is whether it is sufficient to allege a store name, together with the allegation that the store is a legal entity capable of owning property, to meet the requirements of N.C. Gen. Stat. § 15A-924(5). The statute states that a criminal pleading must contain "[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(5) (2015).

Contrary to the holding of the majority's opinion, I believe this indictment adequately identified the victim of the larceny and was sufficient to convey jurisdiction on the Superior Court to determine the guilt or innocence of defendant.

Defendant was charged with violating N.C. Gen. Stat. § 14-72.11(2) which in pertinent part provides:

> A person is guilty of a Class H felony if the person commits larceny against a merchant . . .
>
> (2) By removing, destroying, or deactivating a component of an antishoplifting or inventory control device to prevent the activation of any antishoplifting or inventory control device.

N.C. Gen. Stat. § 14-72.11(2) (2015).

In *State v. Campbell*, 368 N.C. 83, 772 S.E.2d 440 (2015), the larceny indictment alleged that the defendant stole the personal property

of "Andy Stevens and Manna Baptist Church." *Id.* at 86, 772 S.E.2d at 443. The issue before the North Carolina Supreme Court was whether the larceny indictment was fatally flawed because it did not specifically state that the church was an entity capable of owning property. *Id.* at 84, 772 S.E.2d at 442. Our Supreme Court held:

> The purpose of the indictment is to give a defendant reasonable notice of the charge against him so that he may prepare for trial. . . . To be valid a larceny indictment must allege the ownership of the [stolen] property either in a natural person or a legal entity capable of owning (or holding) property.

Id. at 86, 772 S.E.2d at 443 (internal quotation marks and citations omitted). The North Carolina Supreme Court, overruling the line of the Court of Appeals cases deciding otherwise, further held 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[.]" *Id.* at 87, 772 S.E.2d at 444. Accordingly, the larceny indictment was upheld as valid on its face and the decision of the Court of Appeals was reversed and remanded.

Given the complexity of corporate structures in today's society, I think an allegation that the merchant named in the indictment is a legal entity capable of owning property is sufficient to meet the requirements that an indictment apprise the defendant of the conduct which is the subject of the accusation. Contrary to the majority's belief that our Supreme Court has not relaxed the rule with respect to indictments charging larceny, I believe that our Supreme Court has refined its earlier holding in *State v. Thornton*, 251 N.C. 658, 111 S.E.2d 901 (1960), through its ruling in *Campbell*. I also believe that *State v. Thompson*, 6 N.C. App. 64, 169 S.E.2d 241 (1969), which merely identified the victim as "Belk's Department Store, 113 E. Trade Street[,]" is distinguishable from the present case as there was no allegation that the victim was a legal entity capable of owning property.

Therefore, I vote to find no error in defendant's conviction. However, I do not believe that the State presented sufficient evidence to support the award of restitution in the Judgment. Thus, I would vacate and remand the matter for a new hearing on restitution.

STATE OF NORTH CAROLINA
v.
REUBEN TIMOTHY CURRY, DEFENDANT

No. COA16-1113

Filed 17 October 2017

1. Attorneys—motion to withdraw—personal conflict—inability to believe defendant—no disagreement about trial strategy—no identifiable conflict of interest

The trial court did not abuse its discretion in a first-degree murder case by denying defense counsel's motion to withdraw where it was based on a personal conflict regarding his inability to believe what defendant told him, and where counsel had represented defendant for nearly three years and there was no disagreement about trial strategy or an identifiable conflict of interest.

2. Constitutional Law—effective assistance of counsel—failure to articulate specific nature of problems

Defendant's trial counsel did not provide ineffective assistance of counsel in a first-degree murder case by allegedly failing to articulate "the specific nature of the problems" between counsel and defendant where defendant was the sole cause of any purported conflict and there was no reasonable assertion by defendant that an impasse existed requiring a finding that counsel was professionally deficient. Further, the parties agreed about the trial strategy.

3. Constitutional Law—effective assistance of counsel—failure to take third opportunity to cross-examine witnesses

Defendant's trial counsel did not provide ineffective assistance of counsel in a first-degree murder case by allegedly failing to take advantage of a third opportunity to cross-examine one of the State's witnesses concerning who actually shot the victim. Defendant was convicted because he was a participant in an attempted robbery and ensuing "gun battle," and there was no reasonable probability of a different result in this case.

Judge ZACHARY concurs in result only.

Appeal by defendant from judgment entered 4 March 2016 by Judge Gregory R. Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State.

Paul F. Herzog for defendant-appellant.

BERGER, Judge.

On March 4, 2016, Reuben Timothy Curry ("Defendant") was sentenced to life in prison after a Mecklenburg County jury found him guilty of first degree murder. Defendant alleges the trial court abused its discretion in denying defense counsel's motion to withdraw. Defendant also contends his trial counsel provided ineffective assistance on two separate grounds: (1) counsel failed to articulate "the specific nature of the problems" between counsel and Defendant such that the trial court was unable to determine if an impasse existed; and (2) counsel failed to take advantage of a third opportunity to cross-examine one of the State's witnesses. As to each of Defendant's arguments, we disagree.

Factual & Procedural Background

Ronny Steele ("Steele") died from a gunshot wound he suffered on February 25, 2013. Evidence presented at trial tended to show that Defendant was a participant in an ambush-style attempted robbery and ensuing "gun battle" in which Steele was killed. Defendant was indicted for first-degree murder and robbery with a dangerous weapon.

Just prior to trial, Defendant provided defense counsel with a list of three facts he wished to concede: (1) he was at the scene of the crime; (2) he "had or fired a gun"; and (3) he was part of an attempted robbery. A closed hearing was held regarding these possible admissions, and counsel advised the trial court that Defendant's newly discovered veracity would impact his ability to handle the case and implicate *Harbison* concerns. Defense counsel was concerned that he could no longer be an effective advocate for Defendant "knowing what I know now."

The trial court conducted the following colloquy with Defendant, in closed proceedings:

> THE COURT: Okay. Mr. Curry, would you stand please, sir.
>
> Once again, this conversation is not confidential but it's confidential in terms of where we are in the proceeding right now.

The DA is not present. The jury's not present. It's just me and the court reporter, your attorney, and you, the sheriff and the clerk and a family member of yours, I believe.

DEFENDANT: Yes, sir.

THE COURT: What your attorney is wanting to make sure you understand is you don't have to make admissions of any kind that you were there at the scene of this occurrence, that you had or fired a gun, or that you were part of what the jury may believe was an attempted robbery. Those are all getting real close to admissions -- some admissions of guilt on your part.

DEFENDANT: Yes, sir.

THE COURT: Do you understand that?

DEFENDANT: I'm aware of it.

THE COURT: And that puts your attorney in a very, very precarious position because, as the trial goes forward, his job is that you carry all the weight to the end the presumption of not guilty that's with you right now. You understand?

DEFENDANT: Yes, Your Honor. I'm aware.

THE COURT: Why are you asking him to say things that may tend to indicate your guilt of this matter?

DEFENDANT: Because the things I asked him to say, they don't speak to the crime that I'm on trial for. So I'm really not trying to hide the fact because there were prior statements made during the investigation of this matter that the DA received and I -- I had worries about them maybe introducing those statements and trying to use them as the -- portray me into a liar.

THE COURT: Unless you take the stand, your prior statements won't ever -- the jury will never hear any statements you made -- well, I take it back.

They may -- if you were -- are there statements that are going to come in of [Defendant's] after Miranda?

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: Okay. And so the only statement --

[DEFENSE COUNSEL]: Well, first there was no Miranda warnings, but that part of the interrogation, the DA elected not to proceed with that part. So the part that --

THE COURT: Right. The interrogation that occurred at the law enforcement center, the DA said he's not going to use that at this point. The only thing that's going to come into evidence in terms of what you may have said were those -- I think the statements at the hospital.

DEFENDANT: Correct.

THE COURT: Right. Those statements that you may have made at the hospital to that very first detective that showed up there. And that was Detective Redfern.

DEFENDANT: Yes, sir.

[DEFENSE COUNSEL]: Correct.

THE COURT: But I don't think Detective Redfern's statements are going to go as far as you're asking your attorney to go in getting real close to that edge of making admissions against your interest. You're asking your attorney to ride a very fine line, in that, if he says you were there, if he says you had or fired a gun, and if he says that you may find that I was part of an attempted robbery, that's getting right up to the edge of going beyond your presumption of innocence and giving the jury stuff that you don't have to give the jury.

Your attorney can -- as he's done during the three or four days we've already been involved in this has argued to this jury at every phase that you're innocent until proven guilty beyond a reasonable doubt. He's never wavered from that. And you're asking him now to take some steps that put him in a very difficult position.

It's your case. And as I told you I think when I had the discussion with you earlier, your wishes control what happens.

DEFENDANT: Yes.

THE COURT: You have -- your attorney has to do what you say. In other words -- you'll get to this point much later in the trial. If you want to testify, he might advise you not to but you -- if you want to testify, no one can stop you.

DEFENDANT: Yes, Your Honor.

THE COURT: That's another part of the trial.

There's a theory in the law that says, if there's an impasse between the two of you on how you should proceed, that he has to follow your wishes. Now he's worried about following -- that's why he's brought it to my attention, outside of the DAs, is that he's worried that if he follows your wishes, you're putting him in a position of admitting things to this jury that he doesn't want to -- I don't think he wants to admit.

Do you, [defense counsel]?

[DEFENSE COUNSEL]: Do not, Your Honor.

THE COURT: I don't think he thinks that's in your best interest to admit these things.

DEFENDANT: We spoke briefly before you entered and I was getting his advice on it. So, I mean, I may not necessarily go through with it but I just would ask him --

THE COURT: Good. I'll give you some more time to talk with him about it because now that you and I have discussed it, you may see -- I think that his indication is -- how long have you been a defense attorney, [defense counsel]?

[DEFENSE COUNSEL]: Since 1986.

THE COURT: Okay. And his advice I think -- I'm telling you his advice is, don't ask him to include these things in your opening statement. It's against your interest and it is perilously close to proving some things that the State really has to prove. Okay?

DEFENDANT: Yes, Your Honor.

THE COURT: So I'm going to give you some more time to talk to [defense counsel] regarding this and then you may ask -- and then this will be part of the record but if you choose after this conversation to have him not include these things in the opening statement, they won't be included. There will be -- the jury and the DA will never know about it.

DEFENDANT: Okay.

THE COURT: Okay?

DEFENDANT: Yes, sir.

THE COURT: So go ahead and talk to [defense counsel].

Defendant and the court subsequently discussed this situation, and Defendant told the court,

> I mean, there's a method to my madness. I mean, I was thinking I don't want the jury to look at me as -- in a deceptive manner, like I'm trying to deceive them on certain parts of the case.
>
> But we discussed this. Like I said, I told him that if he felt more confident doing it the way that he was -- that he was initially going to do it, and I was fine with that.

The trial court then specifically asked Defendant about the admissions and his satisfaction with counsel:

> THE COURT: Okay. So now what's your decision about the issue of whether you were there or the issue of whether or not you fired a gun?
>
> DEFENDANT: I leave it to him. I let him -- he can go with what he had.
>
> THE COURT: You're not making any specific request that he include those things in his opening statement?
>
> DEFENDANT: No, sir, Your Honor.
>
> THE COURT: So you changed your mind regarding that issue?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Okay. And I think that's good advice that you follow -- I think your attorney's advice is that you not include those things in your opening statement. And so you're following your attorney's advice?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Okay. Are you making that decision of your own free will, fully understanding what you're doing?
>
> DEFENDANT: Yes, sir.

> THE COURT: Do you have any questions of me regarding that decision?
>
> DEFENDANT: None, Your Honor. No, sir, Your Honor.
>
> THE COURT: Are you satisfied with your attorney's services to this point in urging that you allow him to make the opening statement that he wants to make and not include these elements that you wanted?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Are you satisfied with his services?
>
> DEFENDANT: Yes, sir.
>
> . . . .
>
> THE COURT: Okay. So he's going to make his opening the way he thinks it ought to be made in your behalf and not include those things -- one, two, and three -- that we discussed. He's not going to make those things.
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And you're okay with that?
>
> DEFENDANT: Yes, Your Honor.

Defense counsel again expressed to the court that the three new facts provided "five minutes before opening statement" and subsequent out-of-hand dismissal of those facts by Defendant created concerns about counsel's ability to zealously represent Defendant.

At trial, defense counsel gave an opening statement in which he told the jury, among other things, that Defendant "is not guilty of attempted armed robbery," that the evidence will "show that [Defendant] did not attempt to rob anyone," and that the "evidence will show that it was not a robbery or an attempted armed robbery." These statements were contrary to the facts Defendant disclosed to counsel.

Defense counsel, at the direction of the trial court and the North Carolina State Bar, filed a Motion to Withdraw As Counsel during the trial. Counsel's motion to withdraw specifically alleged the following:

(1) Defendant wanted counsel to raise the three factual issues discussed above. Counsel addressed these issues with the

trial court, and the court advised Defendant he should follow counsel's advice and not include the information in opening.

(2) Defendant and defense counsel continued to discuss the request, and Defendant agreed to withdraw one of his requests.

(3) When they returned to the courtroom, "[c]ounsel expressed to the [c]ourt that counsel was conflicted by what he had just learned by reading Defendant's request to be told to the jury in the Opening Statement."

(4) After additional discussion with the trial court, Defendant agreed that counsel could conduct opening without Defendant's three requested facts.

(5) Counsel and Defendant discussed how the proposed facts "caused a conflict in counsel's trial strategy and created a conflict concerning counsel['s] duties pursuant to the Rules of Professional Conduct."

(6) At that point, "discussions with Defendant[] and the statements made by Defendant only tended to exacerbate the conflicts."

(7) Defense counsel then believed that, based upon the seriousness of the charge and the Rules of Professional Conduct, that he needed to contact the North Carolina State Bar "to seek guidance and advice."

(8) Counsel was unable to reach the appropriate person with the Bar, and provided relevant information to the court. The trial court agreed that the issue "merited a discussion with Ethics Counsel at the North Carolina State Bar."

(9) Counsel spoke with Ms. Nichole P. McLaughlin, Assistant Ethics Counsel with the North Carolina State Bar, about the following: "the nature of the charge"; "the length of time counsel has represented the [D]efendant"; "where we were in the trial proceedings"; Defendant's request and subsequent discussions; and "how counsel perceived the information impacted the opening statement, ability to conduct effective cross examination and execute *the previously prepared trial strategy* going forward." (Emphasis added).

(10) Ms. McLaughlin advised counsel to review Rules of Professional Conduct 1.1,[1] 1.3,[2] 1.7,[3] and 1.16,[4] reminded counsel of the confidentiality requirements of Rule 1.6,[5] and to seek the trial court's permission to withdraw because he had "a personal conflict."

(11) Counsel reviewed the Rules of Professional Conduct and stated:

a. "There is a conflict to counsel [sic] adherence to Rule 1.3, Diligence to the client, and Rule 3.3 Candor towards the tribunal."

b. "There is a conflict to counsel [sic] adherence to Rule 1.6, Confidentiality of information and Rule 3.3, Candor towards the tribunal."

c. "There is conflict pursuant to Rule 1.3, Diligence, that counsel has reservation concerning the ability to zealous [sic] advocate on client's behalf."

d. Counsel's duty of candor to the trial court pursuant to Rule 3.3 "has resulted and will continue to result in such an extreme deterioration of the client-counsel relationship that counsel can no longer competently represent the client pursuant to Rule 3.3, Comment (16)."

(12) Counsel was concerned that his adherence to Rule 3.3 as it relates to the cross examination of one witness may have negatively impacted Defendant.

Defense counsel informed the court that the attorney-client relationship had been destroyed because "counsel does not know what to believe." Defense counsel and the court then had the following discussion:

> [DEFENSE COUNSEL]: I try and present my defense strategy based on what the evidence shows till the client tells me what happened. Then that does, I guess, some -- impose some requirement that counsel marshal the defense that client requests. But it goes back in this case

1. Rule 1.1 Competence
2. Rule 1.3 Diligence
3. Rule 1.7 Conflict of Interest: Current Clients
4. Rule 1.16 Declining or Terminating Representation
5. Rule 1.6 Confidentiality of Information

> of whether or not I can believe what he's told me. And my conclusion at this point is that I cannot believe anything that he's told me with regard to the mere material issues at point in this case because they've changed over time.
>
> THE COURT: And that's the vacillation that I'm talking about. If he has changed what he's telling his attorney, he can't benefit from that at this stage of this trial. You'll just have to do -- do the professional job that I know that you can do to represent him.

The trial court denied defense counsel's motion to withdraw. The jury convicted Defendant of first-degree murder on the theories of felony murder and lying in wait, and Defendant was sentenced to life in prison without parole. The State did not proceed on the robbery with a dangerous weapon charge. Defendant gave notice of appeal in open court.

Analysis

Defendant contends the trial court erred in denying counsel's motion to withdraw, and alleged defense counsel provided ineffective assistance by (1) failing to articulate that an impasse existed, and (2) failing to take advantage of an additional opportunity to cross examine one of the State's witnesses. As to each of Defendant's contentions, we disagree.

I. Motion to Withdraw

[1] A motion to withdraw as counsel may be granted upon "good cause" shown. N.C. Gen. Stat. § 15A-144 (2015). "Whether an attorney can withdraw as counsel is a matter in the sound discretion of the trial judge." *State v. Moore*, 103 N.C. App. 87, 100, 404 S.E.2d 695, 702 (citation omitted), *disc. rev. denied*, 330 N.C. 122, 409 S.E.2d 607 (1991). "Appellate courts will not second-guess a trial court's exercise of its discretion absent evidence of abuse." *State v. Smith*, 241 N.C. App. 619, 625, 773 S.E.2d 114, 118-19 (citation and quotation marks omitted), *disc. review denied*, 368 N.C. 355, 776 S.E.2d 857 (2015). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Defense counsel set forth several purported reasons to justify his withdrawal; however, all stemmed from what the State Bar called a "personal conflict." The content of the motion and the arguments of counsel to the court demonstrate that the "personal conflict" was directly related to his inability to believe what Defendant told him. As

the State Bar confirmed, defense counsel did not have an actual conflict, and there is no evidence he breached the rules of professional conduct. Counsel had represented Defendant for nearly three years, and had presumably expended significant time and resources preparing for trial. In addition, there was no disagreement about trial strategy, nor was there an identifiable conflict of interest. The trial court was correct to advise defense counsel that he would "just have to do - - do the professional job that I know that you can do to represent him." It cannot be said that the trial court's denial of the motion to withdraw was arbitrary or manifestly unsupported by reason.

Moreover, Defendant is required to show prejudicial error resulted from the denial of the motion to withdraw. *State v. Thomas*, 350 N.C. 315, 328, 514 S.E.2d 486, 495 ("In order to establish prejudicial error arising from the trial court's denial of a motion to withdraw, a defendant must show that he received ineffective assistance of counsel." (citation omitted)), *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). As more fully discussed below, Defendant has failed to establish a reasonable probability of a different result in this case.

II. Ineffective Assistance of Counsel

Ineffective assistance of counsel ("IAC") claims are typically "considered through a motion for appropriate relief filed in the trial court and not on direct appeal." *State v. Mills*, 205 N.C. App. 577, 586, 696 S.E.2d 742, 748 (2010) (citing *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001)). *See also State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal." (citation omitted)). "However, a defendant's ineffective assistance of counsel claim brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required . . . ." *Mills*, 205 N.C. App. at 586, 696 S.E.2d at 748 (citation and quotation marks omitted). No further investigation is necessary in this matter as there is ample evidence in the record to decide Defendant's two IAC claims.

Under the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 19 and 23 of the North Carolina Constitution, "[a] defendant's right to counsel includes the right to effective assistance of counsel." *State v. Braswel*l, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citation omitted). In *Braswell*, our Supreme Court "expressly adopt[ed] the test set out in *Strickland v. Washington* [, 466 U.S. 668, 80 L. Ed. 2d 674 (1984),] as a uniform standard to be

applied to measure ineffective assistance of counsel under the North Carolina Constitution." *Braswell*, 312 N.C. at 562-63, 324 S.E.2d at 248.

On appeal, a defendant must show that counsel's conduct "fell below an objective standard of reasonableness" to prevail. *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693. To meet this burden, the 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.

Id. at 687, 80 L. Ed. 2d at 693. Furthermore, a defendant alleging that counsel failed to carry out his duties with the proficiency required by the Sixth Amendment must identify the specific acts or omissions of counsel that were not the result of "reasonable professional judgment." *Id.* at 690, 80 L. Ed. 2d at 674.

A. Purported Impasse

[2] Defendant asserts that his counsel was ineffective by "failing to articulate for the record the specific nature of the problems between himself and the defendant leading to an impasse." We disagree.

It is well established in our courts that "[t]actical decisions, such as which witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer." *State v. Ward*, ___ N.C. App. ___, ___, 792 S.E.2d 579, 582 (2016) (citations and quotation marks omitted), *disc. rev. denied*, ___ N.C. ___, 795 S.E.2d 371 (2017). "However, when counsel and a fully informed criminal defendant . . . reach an absolute impasse as to such tactical decisions [during trial], the client's wishes must control . . . ." *Id.* (citation omitted). However, no actual impasse exists where there is no conflict between a defendant and counsel. *State v. Wilkinson*, 344 N.C. 198, 211-12, 474 S.E.2d 375, 382 (1996). Moreover, when a defendant fails to complain about trial counsel's tactics and actions, there is no actual impasse. *State v. McCarver*, 341 N.C. 364, 385, 462 S.E.2d 25, 36 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). In the case at hand, there was neither disagreement regarding

tactical decisions, nor was there anything in the record which would suggest any conflict between defendant and defense counsel. Thus, no impasse existed.

Defendant's arguments on this issue go solely to issues surrounding counsel having "no confidence in anything his client told him, and that he did not know what to believe when it came to [Defendant's] statements about the events of February 25, 2013." Defendant makes no argument rooted in law that an impasse existed, besides using conclusory terms. In addition, Defendant points to no authority which would require a finding of an impasse where defense counsel did not believe what a criminal-defendant client told him.

Throughout the trial, defense counsel informed the court and Defendant of the nature of the concerns or disagreements the two had, but counsel specifically followed Defendant's wishes and desires concerning representation. Defense counsel gave the opening statement that he and Defendant agreed upon, despite counsel's knowledge that what he was relaying to the jury was inconsistent with the Defendant's newly discovered veracity. If Defendant was "fine with that," as he informed the court, no impasse existed. This is true regardless of defense counsel's personal conflict, ethical quandary, or Defendant's perceived malleability of the truth.

Defendant was the sole cause of any purported conflict that developed, and there has been no reasonable or legitimate assertion by Defendant that an impasse existed that would require a finding that counsel was professionally deficient in this case. Because Defendant, of his own free will, was in agreement with counsel as to the actions to be taken at trial, Defendant's contention that his counsel was ineffective is without merit, and this IAC claim is denied.

B. Failure to Cross-Examine Witness

[3] Defendant also alleges trial counsel provided ineffective assistance when he did not cross-examine witness Tarod Ratlif for a third time to inquire about his "recollection concerning who actually shot the victim." Defendant asserts that additional questioning "would have supported his theory" that Brandon Thompson ("Thompson") killed Ronny Steele. Defendant concedes that no additional investigation is needed, and this issue can be decided on the merits.

Ratlif testified on direct examination that a group that included Defendant and a group that included Thompson exchanged gunfire on the evening Steele was killed.

> Q. Okay. Can you tell me -- could you tell from where the gunshots were coming?
>
> A. Yes.
>
> Q. And from where did you hear gunshots coming?
>
> A. From both sides of me, from the left and the right.
>
> Q. So you can hear them coming from your left side and your right side?
>
> A. Yes, sir.
>
> Q. And do you know exactly how many gunshots you heard?
>
> A. No, sir. Not today.

Ratlif testified that after the shooting, Steele informed him he was hit, but Ratlif did not believe Steele.

In discussions with the trial court and Defendant regarding Ratlif's testimony, defense counsel stated, "Recalling Mr. Ratlif -- think I went about as far with Mr. Ratlif as I could do based upon what I knew . . . ." The trial court, regarding counsel's questioning of Ratlif, stated:

> But I thought that in your cross-examination of Mr. Ratlif and [another witness] that you set forth the theory that this, A, may not have been a robbery at all; and B, once somebody other than [Defendant] may have shot Mr. Steele in this gun battle. And I think you argued that this was a gun battle in your opening remarks. Nobody on the stand so far has pointed a finger at [Defendant] as the perpetrator of any crime.

That prompted the following exchange between the trial court and Defendant:

> DEFENDANT: I just want to state that I am concerned with his confidence of going forward as far as with the -- you know, his ability to be a fully effective, but I am -- I am -- I have been satisfied with his service so far and I feel like I wouldn't rather any different attorney be my attorney unless, you know, he is at the point to where he can't be fully effective going forward.
>
> THE COURT: He's a professional. He can -- [defense counsel] has said under my questioning, he's protecting

your rights. He's not divulging matters that -- client confidentiality matters. He's not divulging them. He's done, I thought, a fine job of setting forth your theory of the case so far that someone else shot Mr. Steele or maybe shot in a gun battle. That Mr. Ratlif or [another witness] has pointed a finger at you.

And I thought [defense counsel] did a good job of cross-examination pointing out conflicts in their testimony and their statements to the police in their prior testimony and prior matters involving the death of Mr. Steele. I know there have been prior trials where Mr. Ratlif and [another witness] testified. And I thought [defense counsel] pointed out some good conflicts. You know what I mean by that?

DEFENDANT: Yes, sir.

THE COURT: Some statements they made earlier that were different from the statements they were making in this trial.

Did you think [defense counsel] did a good job of that?

DEFENDANT: Yes, sir.

THE COURT: Okay. So as we go forward, he's going to -- he's going to keep me advised if you -- if we reach a stage where you want a particular thing to happen with your case and you don't think [defense counsel] understands it or is going to do it, as long as it's a lawful request and you're -- and you're not asking him to violate the law or perpetuate a fraud upon the [c]ourt and as long as any request that you make of [defense counsel] can be supported by a good faith argument for an extension modification or reversal of existing law, then he will comply with your wishes as the trial progresses in defending your case the way that you want to defend it. Okay?

DEFENDANT: Yes, sir.

THE COURT: And at this point, you are satisfied with [defense counsel's] representation of you in this trial?

DEFENDANT: Yes, Your Honor. I've been satisfied with [defense counsel].

Defense counsel in his motion to withdraw did state that he was concerned that his failure to ask additional questions regarding

Thompson's actions may have precluded jury instructions consistent with *State v. Bonner*, 330 N.C. 536, 411 S.E.2d 598 (1992), and *State v. Oxendine*, 187 N.C. 658, 122 S.E. 568 (1924). Defendant acknowledges and the transcript reveals, however, that the trial court gave instructions consistent with *Bonner* and *Oxendine*. In addition, defense counsel argued in closing:

> And we know Brandon Thompson had a gun. But you haven't seen Brandon Thompson come into this courtroom. We know Brandon Thompson was shooting because Tarod Ratlif said he was shooting, but you haven't seen Brandon Thompson come into this courtroom and testify to you under oath that he did not have a gun. And if he had a gun, why didn't he give it to the police? He hasn't come in.

Ratlif testified that he heard gunfire coming from the direction of Defendant and Thompson. He also testified that Thompson had a gun and did not deny that Thompson had shot the gun. Counsel's questioning allowed him to argue to the jury that someone other than Defendant shot Steele. As the trial court noted, defense counsel "set forth the theory that this . . . may not have been a robbery at all; and . . . somebody other than [Defendant] may have shot Mr. Steele in this gun battle."

In fact, Defendant concedes in his brief that the jury considered whether Thompson shot Steele. During deliberations, the jury submitted the following question to the trial court: "If [Thompson] shot and killed [Steele,] how would that apply to element [two]?" While the prosecutor provided language that he believed addressed the jury's question, it was Defendant who requested the following instruction be given: "The killing of Ronny Steele must be the act of the [D]efendant or by someone with -- with whom the [D]efendant was acting in concert."

The trial court addressed several items with the jury, and then discussed the question regarding Thompson:

> THE COURT: The next is actually a question. The next thing says, "If [Thompson] shot and killed [Steele], how would that apply to element two?"
>
> In response to that question, this is the response from the Court:
>
> The killing of Ronny Eugene Steele must be by an act of the Defendant, Reuben Timothy Curry, or by an act of someone with whom the [D]efendant was acting in concert with.

Does that answer that question?

[JUROR]: Yes, sir.

The jury was properly instructed that Defendant could only be convicted if he, or "someone with whom the [D]efendant was acting in concert with" killed Steele. The jury deliberated on and considered whether Thompson shot Steele based on the question they submitted.

Even if we assume that Defendant satisfied the first *Strickland* prong for both issues, which he has not, Defendant cannot satisfy the second prong as there is no showing of prejudice. There was sufficient evidence before the trial court that Defendant, or those acting in concert with Defendant, shot and killed Steele. Defendant was at the crime scene. Defendant was convicted because he was a participant in an attempted robbery and ensuing "gun battle" during which Steele was fatally shot, even if he may not have fired the fatal bullet. There is no reasonable probability of a different result in this case. Based upon the abundant evidence in the record, Defendant's IAC claims are denied.

Conclusion

Upon consideration of the record herein and the arguments of counsel, we conclude the trial court did not abuse its discretion in denying defense counsel's motion to withdraw, and Defendant's IAC claims are denied.

NO ERROR IN PART; DENIED IN PART.

Judge DILLON concurs.

Judge ZACHARY concurs in result only.

STATE v. DUNSTON

[256 N.C. App. 103 (2017)]

STATE OF NORTH CAROLINA
v.
RICHARD DUNSTON, DEFENDANT

No. COA16-1254

Filed 17 October 2017

Drugs—maintaining vehicle for keeping or selling controlled substances—motion to dismiss—totality of circumstances—perpetrator

The trial court did not err by denying defendant's motion to dismiss the charge of maintaining a vehicle for keeping or selling controlled substances under N.C.G.S. § 90-108(a)(7) where based upon the totality of the circumstances there was substantial evidence introduced at trial for each essential element of the offense and that defendant was the perpetrator.

Judge DILLON concurring with separate opinion.

Judge ZACHARY dissenting.

Appeal by Defendant from judgment entered 14 April 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 10 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Christina S. Hayes, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

BERGER, Judge.

On April 14, 2016, a Wake County jury convicted Richard Dunston ("Defendant") of trafficking opium or heroin, and maintaining a vehicle for keeping or selling controlled substances. Defendant was sentenced pursuant to N.C. Gen. Stat. § 90-95(h)(4) (2015) and received a mandatory sentence of 90 to 120 months in prison, and ordered to pay a fine of $100,000.00. Defendant does not appeal his conviction or sentence from trafficking opium or heroin, but rather contends the trial court erred in denying his motion to dismiss the charge of maintaining a vehicle for keeping or selling controlled substances. We disagree.

Factual & Procedural Background

At trial, evidence tended to show that on September 6, 2013, officers with the Raleigh Police Department's Selective Enforcement Unit were conducting surveillance at a business known to have a high volume of illicit drug activity. Defendant was observed walking towards a white Cadillac in the parking lot. An individual, later identified as Defendant's nephew, Darius Davis ("Davis"), was in the driver's seat of the Cadillac. Defendant began speaking with Davis, and opened a package of cigars. Defendant removed the plastic filters from the cigars, and based upon the officer's training and experience, appeared to replace the tobacco in the cigars with marijuana. Defendant then licked the paper, re-rolled, and replaced the plastic filters back on the "cigars."

Davis was observed exchanging cash in a hand-to-hand transaction with an older male he met in the parking lot. Defendant and Davis then began an extended conversation with each other, and Defendant sat in the passenger seat of the Cadillac. Davis drove away from the business, and officers initiated a traffic stop of the vehicle.

Davis consented to a search of his person, which yielded a bag of marijuana. Defendant was then removed from the vehicle and searched. Defendant had no contraband on his person, not even the "cigars" he was observed handling earlier. Officers then conducted a search of the Cadillac, leading to the discovery of an open container of alcohol under the front passenger's seat and a travel bag containing a 19.29 gram mixture of heroin, codeine, and morphine on the back seat. The travel bag also contained plastic baggies, two sets of digital scales, and three cell phones. Defendant admitted that the Cadillac and travel bag belonged to him. Officers later determined, however, that the Cadillac was owned by Defendant's former girlfriend, Latisha Thompson ("Thompson").

Thompson and Defendant dated for approximately eleven years, but the relationship ended nearly five years before the trial. She acknowledged that the Cadillac was registered in her name, but Defendant purchased, used, and maintained the car. Thompson also testified that she believed associating with Defendant was not in Davis's best interests. Defendant then asked Thompson:

> [DEFENDANT]: So how -- so let me ask you a question: So why would you feel that Mr. Davis was getting himself into something he didn't deserve?
>
> [THOMPSON]: Because I knew. I was with you [for] 11 years.

[DEFENDANT]: Exactly what is that supposed to mean?

. . . .

[THOMPSON]: I knew the lifestyle. I knew what was going on.

At the close of evidence, Defendant made a general motion to dismiss, which the trial court denied. Defendant timely gave notice of appeal.

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). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). Our Supreme Court has stated:

> In ruling on a motion to dismiss, both the trial court and the reviewing court must consider the evidence in the light most favorable to the state, and the state is entitled to every reasonable inference to be drawn from the evidence. If there is any evidence that tends to prove the fact in issue or that reasonably supports a logical and legitimate deduction as to the existence of that fact and does not merely raise a suspicion or conjecture regarding it, then it is proper to submit the case to the jury.

State v. Artis, 325 N.C. 278, 301, 384 S.E.2d 470, 483 (1989) (citations omitted), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

Analysis

Defendant contends the trial court erred in denying his motion to dismiss, arguing that there was insufficient evidence to support his conviction of maintaining a vehicle for keeping or selling controlled substances. A defendant may properly be convicted of maintaining a vehicle for keeping or selling a controlled substance if the State proves beyond a reasonable doubt that the defendant knowingly kept or maintained a vehicle "used for the keeping or selling of" controlled substances. N.C. Gen. Stat. § 90-108(a)(7) (2015). Defendant contends

that our case law establishes a bright-line rule whereby one incident of keeping or selling controlled substances is insufficient to sustain a conviction for maintaining a vehicle for keeping or selling a controlled substance. We disagree.

Our Supreme Court held in *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994), "[t]he determination of whether a vehicle, or a building, is used for keeping or selling controlled substances will depend on the totality of the circumstances." *See also State v. Dickerson*, 152 N.C. App. 714, 716, 568 S.E.2d 281, 282 (2002) ("[T]he fact that a defendant was in his vehicle on one occasion when he sold a controlled substance does not *by itself* demonstrate the vehicle was kept or maintained to sell a controlled substance." (emphasis added)); *State v. Thompson*, 188 N.C. App. 102, 105-06, 654 S.E.2d 814, 817 (this Court must look at the totality of the circumstances, examining such factors as the quantity of drugs, paraphernalia found at the location, the amount of money recovered, and "the presence of multiple cellular phones or pagers" (citations omitted)), *disc. rev. denied*, ___ N.C. ___, 662 S.E.2d 391 (2008).

When viewed in the light most favorable to the State, there was substantial evidence introduced at trial for each essential element of the offense of maintaining a vehicle for keeping or selling controlled substances, and that Defendant was the perpetrator. Here, Defendant was in the vehicle at a location known to law enforcement for a high level of illicit drug activity. Defendant was observed by law enforcement unwrapping cigars and re-rolling them after manipulating them. Based upon the law enforcement officer's training and experience, Defendant's actions were consistent with those commonly used in distributing marijuana. While in the parking lot, Davis, the driver of the vehicle, was observed in a hand-to-hand exchange of cash with another individual. When later searched by officers, Davis was discovered to have marijuana, and Defendant no longer possessed the "cigars" he was observed with earlier.

Additionally, Defendant possessed a trafficking quantity of heroin, along with plastic baggies, two sets of digital scales, three cell phones, and $155.00 in cash. Thompson, Defendant's ex-girlfriend and registered owner of the vehicle, testified that she was concerned about Defendant's negative influence on his nephew, Davis, because she "knew the lifestyle."

Based upon the totality of the circumstances, there was sufficient evidence for the jury to find Defendant knowingly kept or maintained the white Cadillac for the keeping or selling of controlled substances.

Conclusion

Defendant received a fair trial, and his motion to dismiss was properly denied by the trial court.

NO ERROR.

Judge DILLON concurs with separate opinion.

Judge ZACHARY dissents with separate opinion.

DILLON, Judge, concurring.

I fully concur in the majority opinion. I write separately to expound on portions of our Supreme Court's decision in *State v. Mitchell*, 336 N.C. 22, 442 S.E.2d 24 (1994), which I believe address the concerns of the dissenting opinion.

The dissenting opinion correctly points out that evidence of a *single* drug transaction from a vehicle, by itself, will not sustain a conviction for keeping a vehicle for the sale of illegal drugs. However, it is not imperative that the State *in every case* put forth evidence of drug activity from the vehicle at two different points in time to get to the jury. Rather, evidence found in a vehicle by police in a single encounter *may* be sufficient to get to the jury where warranted by the totality of the circumstances:

> Although the contents of a vehicle are clearly relevant in determining [the vehicle's] use, its contents are not dispositive when, as here, they do not establish that the use of the vehicle was a prohibited one. The determination of whether a vehicle, or a building, is used for keeping or selling controlled substances will depend on the totality of the circumstances.

Id. at 34, 442 S.E.2d at 30.

Our Supreme Court then cites, with approval, a decision from our Court as an example where the evidence found in a vehicle during a single stop was sufficient to establish that the vehicle was being kept for the sale of marijuana. "Where, for example, the defendant, found with twelve envelopes containing marijuana in his vehicle, together with more than four hundred dollars, admits to selling marijuana . . . then defendant may be convicted of maintaining a vehicle . . . used for

or selling a controlled substance. *Id.* at 34, 442 S.E.2d at 30-31 (citing *State v. Bright*, 78 N.C. App. 239, 240, 337 S.E.2d 87, 87-88 (1985)). Our Supreme Court then stated that, by contrast, "where the State has merely shown that the defendant had two bags of marijuana while in his car, that his car contained a marijuana cigarette the following day, and that his home contained marijuana and drug paraphernalia, the State has not shown that the vehicle was used for selling or keeping a controlled substance." *Id.* at 34, 442 S.E.2d at 31.

The evidence in the present case is much more like the evidence discovered in the *Bright* case. Here, as noted in the majority opinion, there was evidence of a drug transaction from the vehicle and the discovery of marijuana, a trafficking quantity of heroin, plastic baggies, two sets of digital scales, three cell phones, and $155 in cash.

In conclusion, the State is *not* required to put forth evidence of two separate drug transactions from a vehicle to get to the jury. The evidence found in a vehicle from one encounter *may* be sufficient, as it was in *Bright*. I agree with the conclusion reached in the majority opinion that the evidence in the present case was sufficient to get to the jury.

ZACHARY, Judge, dissenting.

For the reasons that follow, I respectfully dissent and vote to reverse the trial court's denial of defendant's motion to dismiss and to vacate defendant's conviction under N.C. Gen. Stat. § 90-108(a)(7).

In order to prove a violation of N.C. Gen. Stat. § 90-108(a)(7), the State must establish that the defendant kept or maintained a vehicle *with the intent that it be "used for the keeping or selling* of" controlled substances. N.C. Gen. Stat. § 90-108(a)(7) (2017) (emphasis added). Our Supreme Court has held that a conviction under N.C. Gen. Stat. § 90-108(a)(7) requires evidence of intentional possession and use of a vehicle for prohibited purposes "that occurs over a duration of time." *State v. Mitchell*, 336 N.C. 22, 32, 442 S.E.2d 24, 30 (1994). Absent an admission, proof of a single incident is not sufficient to establish that one of the *defendant's purposes* in maintaining the vehicle involves the keeping and selling of narcotics. *See Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30 ("[O]ur legislature [did not] intend[] to create a separate crime simply because the controlled substance was temporarily in a vehicle.").

As the majority correctly notes, "[t]he determination of whether a . . . place is used for keeping or selling a controlled substance 'will depend on the totality of the circumstances.' " *State v. Frazier*, 142 N.C.

App. 361, 366, 542 S.E.2d 682, 686 (2001) (quoting *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30). It is evident that "the contents of a vehicle are clearly relevant in determining its use," although "its contents are not dispositive when . . . they do not establish that the use of the vehicle was a prohibited one." *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30. The concurrence cites *State v. Bright* for the principle that one instance of narcotics being sold from or found in a vehicle may indeed satisfy the "totality of the circumstances" test for a felony conviction under N.C. Gen. Stat. § 90-108(a)(7). *State v. Bright*, 78 N.C. App. 239, 337 S.E.2d 87 (1985). However, *Bright* is inapposite to a discussion of the issue at hand.

For one, *Bright* touched only on the elements of the *misdemeanor* charge under N.C. Gen. Stat. § 90-108—which does not require any showing of intent that the vehicle be used for the keeping or sale of controlled substances—and not on the different elements of the *felony* charge, which is the charge at issue here. *Id.* Moreover, this Court in *Bright* did not address the number of incidents required for a conviction under N.C. Gen. Stat. § 90-108(a)(7). Instead, the chief question in *Bright* was whether a misdemeanor crime of " 'maintaining a motor [vehicle] to which persons resorted to for the keeping or sale of marijuana' exists." *Bright*, 78 N.C. App. at 241-42, 337 S.E.2d at 88 (quoting *State v. Church*, 73 N.C. App. 645, 327 S.E.2d 33 (1985)). This Court held that it did. *Id.* at 243, 337 S.E.2d at 89. In sum, *Bright* involved a different offense, and did not speak to whether the *felony* charge, which requires intent, could be established by only one incident.

In addition, our Supreme Court in *Mitchell* did not cite *Bright* for the proposition that one instance of drugs being found in a motor vehicle is enough to sustain a conviction under N.C. Gen. Stat. § 90-108(a)(7). Instead, *Mitchell* reiterated the principle that "an individual within a vehicle possessed marijuana on one occasion cannot establish that the vehicle is 'used for keeping' marijuana; nor can one marijuana cigarette found within the car establish that element." *Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30. *Bright* was simply cited as a contrasting example in which the totality of the circumstances test had been met in a misdemeanor case, where "the defendant, found with twelve envelopes containing marijuana in his vehicle, together with more than four hundred dollars, admits to selling marijuana[.]" *Id.* Notwithstanding the one example from *Bright*, the Supreme Court reversed the defendant's conviction under N.C. Gen. Stat. § 90-108(a)(7).

Despite the precedent that *Mitchell* established, the majority relies on the "totality of the circumstances" test in order to hold that, in

appropriate circumstances, a defendant may nonetheless be convicted under N.C. Gen. Stat. § 90-108(a)(7) based upon a single instance of narcotics being sold from the defendant's vehicle. The majority asserts that a contrary view would improperly "establish[] a bright-line rule whereby one incident of keeping or selling controlled substances is insufficient to sustain a conviction for maintaining a vehicle for keeping or selling a controlled substance." However, the "bright-line rule" to which the majority refers has, indeed, been previously established by this Court. In *State v. Lane*, we followed exactly that rule, which had been promulgated by an earlier case:

> In *State v. Dickerson*, this Court held that one isolated incident of a defendant having been seated in a motor vehicle while selling a controlled substance is insufficient to warrant a charge to the jury of keeping or maintaining a motor vehicle for the sale and/or delivery of that substance. *State v. Dickerson*, 152 N.C. App. 714, 716, 568 S.E.2d 281, 282 (2002). This Court reasoned:
>
> Pursuant to N.C. Gen. Stat. § 90-108(a)(7), it is illegal to "knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances]." The statute thus prohibits the keeping or maintaining of a vehicle only when it is used for "keeping or selling" controlled substances. As stated by our Supreme Court in *State v. Mitchell*, the word "keep . . . denotes not just possession, but possession that occurs over a duration of time." Thus, the fact "that an individual within a vehicle possesses marijuana on one occasion cannot establish . . . the vehicle is 'used for keeping' marijuana; nor can one marijuana cigarette found within the car establish that element." Likewise, *the fact that a defendant was in his vehicle on one occasion when he sold a controlled substance does not by itself demonstrate the vehicle was kept or maintained to sell a controlled substance.*
>
> *Id.* (quoting N.C.G.S. § 90-108(a)(7) (2001) and *State v. Mitchell*, 336 N.C. 22, 32-33, 442 S.E.2d 24, 30 (1994)) (alteration in original). The evidence in the case before us does not indicate possession of cocaine in the vehicle that occurred over a duration of time, nor is there evidence that defendant had used the vehicle on a prior occasion to sell cocaine. We therefore agree with defendant that his motion to dismiss should have been granted.

State v. Lane, 163 N.C. App. 495, 499-500, 594 S.E.2d 107, 110-111 (2004) (emphasis added). It is axiomatic that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted).

The present case is functionally indistinguishable not just from *Mitchell*, but from both *Lane* and *Dickerson* as well. The circumstances upon which the majority bases its holding are features of the single incident, with the sole exception of a witness's generalized, undefined reference to defendant's "lifestyle." Absent from the record is any evidence which would indicate that defendant kept or sold controlled substances in the vehicle "over a duration of time[,]" *Lane*, 163 N.C. App. at 500, 594 S.E.2d at 111, or on more than one occasion. Instead, the State's evidence establishes only that narcotics were present in defendant's vehicle for a few hours on 6 September 2013. The officers found no residue or remnants suggesting the prior presence of narcotics in the vehicle, or any storage or hiding compartments suggesting that narcotics had been kept in the vehicle in the past. *See Lane*, 163 N.C. App. at 500, 594 S.E.2d at 111 (A conviction under N.C. Gen. Stat. § 90-108(a)(7) may be sustained where there is evidence "that [the] defendant had used the vehicle on a prior occasion to sell" or keep narcotics.). There is no record of defendant ever having previously been charged with, or convicted of, keeping or selling narcotics in his vehicle. *Id.* Moreover, in the instant case, defendant did not admit to selling drugs. *See Bright*, 78 N.C. App. at 240, 337 S.E.2d at 87. While "[t]he evidence, including defendant's actions [and] the contents of his car . . . are entirely consistent with drug use, or with the sale of drugs generally," that alone is not enough to "implicate [his] *car* with the sale of drugs." *Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30 (emphasis added).

In this case, the totality of the circumstances—including the ambiguous, unexplained reference to defendant's "lifestyle"—show only that defendant was found with narcotics in his vehicle on one occasion. Thus, all this Court has before us is one isolated incident. Without something else, I do not believe this one instance raises more than a mere "suspicion or conjecture" that defendant's purpose in maintaining the vehicle was for the keeping or selling of narcotics. *State v. Alston*, 310 N.C. 399, 404, 312 S.E.2d 470, 473 (1984). Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JOANNA ROBERTA MADONNA, DEFENDANT

No. COA16-1300

Filed 17 October 2017

1. Homicide—first-degree murder—motion to dismiss—sufficiency of evidence—premeditation and deliberation

The trial court did not err in a first-degree murder case by denying defendant's motions to dismiss the charge where there was substantial evidence of premeditation and deliberation, including that the married couple was arguing, defendant wife had begun a romantic relationship with her therapist and planned to ask her husband for a divorce, a home computer revealed internet searches about killing, defendant got a gun and knife from her nephew, defendant texted her therapist afterwards that it was almost done and got ugly, defendant disposed of her bloodstained clothing, and defendant threw away some of her husband's important belongings.

2. Homicide—first-degree murder—motion to dismiss—sufficiency of evidence—self-defense

The trial court did not err in a first-degree murder case by denying defendant's motions to dismiss where the State presented substantial evidence tending to contradict defendant wife's claim of self-defense, including the frailty and numerous disabilities of her husband. Further, even after the victim had been wounded twice by gunshots, defendant stabbed him twelve times.

3. Criminal Law—prosecutor's arguments—improper remarks—fundamental fairness—overwhelming evidence of guilt

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion for a mistrial and failing to intervene ex mero motu when the prosecutor made improper remarks during closing argument that did not render the trial and conviction fundamentally unfair based on the overwhelming evidence of defendant's guilt.

4. Evidence—witness testimony—contacted attorney—terminated pregnancies—reason for marrying victim—already admitted without objection—no prejudicial error

The trial court did not abuse its discretion in a first-degree murder case by allowing certain witness testimony, including a

statement by defendant that she had already contacted an attorney when the police came to her house to investigate her husband's death, that defendant had terminated two pregnancies, and that defendant stated she married the victim because he had cancer and would be dying soon—where the same evidence was already admitted without objection or there was no reasonable possibility of a different result given the overwhelming evidence of defendant's guilt.

Judge BERGER concurring in separate opinion.

Appeal by Defendant from judgment entered 28 September 2015 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 10 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

George B. Currin for the Defendant.

DILLON, Judge.

Joanna Roberta Madonna ("Defendant") appeals from judgment entered upon a jury verdict finding her guilty of first-degree murder.

I. Background

Defendant and Jose Perez ("Mr. Perez") met in 2008 and were married in 2009. In June 2013, Mr. Perez was killed during an altercation with Defendant. At trial, Defendant proceeded on a theory of self-defense.

Mr. Perez and Defendant were the only individuals at the scene of the altercation. Because Mr. Perez did not live to tell his version of events, Defendant's account of the altercation was the only direct evidence available at trial. Defendant testified to her version of events as follows: While driving in a car with Mr. Perez, Defendant told Mr. Perez that she wanted a divorce. Mr. Perez responded by saying that he would kill himself if she left him. Mr. Perez then clutched his chest, claimed that he was going to have a heart attack, and asked Defendant to pull over. After Defendant pulled the car over, she got out of the car to help Mr. Perez, but before she was able to reach the passenger door of the car, she heard a gunshot. Mr. Perez pointed the gun at Defendant and himself, and when Defendant attempted to take the gun from Mr. Perez, it went off and shot him in the face. Defendant dropped the gun, got back in the car, and began driving toward the VA hospital. Mr. Perez again started clutching

his chest and asking Defendant to pull over. When she again got out of the car to check on him, Mr. Perez jumped out of the car and knocked Defendant over, crushing her with his body weight. Defendant became concerned that Mr. Perez was going to choke her to death. Defendant saw a knife on the ground and "started swinging at [Mr. Perez]" until he was no longer holding her down. Defendant testified that at that point, she thought Mr. Perez would still be able to get up, so Defendant threw the knife in the woods, removed Mr. Perez's shoes so he could not chase her, and left the scene.

The State presented considerable circumstantial evidence which tended to contradict Defendant's version of events. Following the trial, the jury convicted Defendant of first-degree murder. Defendant timely appealed.

II. Analysis

On appeal, Defendant contends that the trial court erred in (1) denying her motions to dismiss, (2) denying her motion for mistrial and failing to intervene *ex mero motu* where the prosecutor made grossly improper remarks during closing argument, and (3) allowing inadmissible and prejudicial witness testimony. We address each argument in turn.

A. Motions to Dismiss

Defendant first argues that the trial court erred in denying her motions to dismiss at the close of the State's evidence and the close of all evidence. On appeal, Defendant contends that (1) the State failed to present substantial evidence of premeditation and deliberation, and (2) the State failed to present substantial evidence from which the jury could reasonably conclude that Defendant did *not* act in self-defense.

We review the trial court's denial of a motion to dismiss for insufficiency of the evidence *de novo*. *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016).

> When considering a motion to dismiss for insufficiency of evidence, the court is concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury. The evidence must be considered in the light most favorable to the state; all contradictions and discrepancies therein must be resolved in the state's favor; and the state must be given the benefit of every reasonable inference to be drawn in its favor from the evidence. There must be substantial evidence of all elements of the crime charged, and that the defendant was the perpetrator of the crime.

Id. (citations omitted). Substantial evidence is "relevant evidence that a reasonable mind might accept as sufficient to support a conclusion." *State v. Allen*, 346 N.C. 731, 739, 488 S.E.2d 188, 192 (1997).

1. Premeditation and Deliberation

[1] To establish the offense of first-degree murder, the State must show that the defendant unlawfully killed the victim with malice, premeditation, and deliberation. *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991). Premeditation is defined as "thought [] beforehand for some length of time, however short[.]" *State v. Robbins*, 275 N.C. 537, 542, 169 S.E.2d 858, 861-62 (1969). Deliberation means that the act is done "in a cool state of the blood in furtherance of some fixed design." *State v. Buffkin*, 209 N.C. 117, 125, 183 S.E. 543, 548 (1936). "The question as to whether or not there has been deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances." *Id.* at 125, 183 S.E. at 547. Factors to be considered in determining whether the defendant committed the crime after premeditation and deliberation include:

> (1) [W]ant of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

State v. Hamlet, 312 N.C. 162, 170, 321 S.E.2d 837, 843 (1984).

The following evidence relevant to the issue of premeditation and deliberation was presented at trial:

Mr. Perez suffered from a heart condition and other ailments. In the months leading up to the June 2013 death of Mr. Perez, Defendant and Mr. Perez began arguing, mostly about financial issues. Defendant had begun a romantic relationship with her therapist and planned to ask Mr. Perez for a divorce.

Pursuant to a search of a home computer, law enforcement discovered internet searches from March 2013 including "upon death of a veteran," "can tasers kill people," "can tasers kill people with a heart condition," "what is the best handgun for under $200," "death in absentia USA," and "declare someone dead if missing 3 years."

On the day Mr. Perez was killed, Defendant visited her nephew, who was a gun enthusiast. While visiting, Defendant expressed concerns about her personal safety due to break-ins in her neighborhood, and her nephew gave her a gun and a knife. Shortly after being given these weapons, Defendant returned home and asked Mr. Perez to go on a drive with her so that she could ask him for a divorce. Defendant took both the gun and the knife with her in the car and used the weapons to kill Mr. Perez, shooting him and then stabbing him approximately twelve (12) times.

Later in the day, after killing Mr. Perez, Defendant texted her therapist "it's almost done" and "it got ugly." Following Mr. Perez's death, Defendant disposed of her bloodstained clothing, threw away Mr. Perez's medications and identification, and maintained that Mr. Perez had either gone to Florida or was at a rehabilitation center.

We hold that this evidence was relevant and constitutes substantial evidence that the killing of Mr. Perez was premeditated and deliberate. *See id.* at 170, 321 S.E.2d at 843.

2. Self-Defense

[2] When there is some evidence of self-defense, "[t]he burden is upon the State to prove beyond a reasonable doubt that the defendant did not act in self-defense[.]" *State v. Herbin*, 298 N.C. 441, 445, 259 S.E.2d 263, 267 (1979). Thus, the test on a motion to dismiss is "whether the State has presented substantial evidence which, when taken in the light most favorable to the State, would be sufficient to convince a rational trier of fact that the defendant did *not* act in self-defense." *State v. Presson*, 229 N.C. App. 325, 329, 747 S.E.2d 651, 655 (2013) (emphasis added).

In addition to the evidence recounted above, the State presented the following evidence which tended to contradict Defendant's claim of self-defense: Mr. Perez was diabetic, had coronary heart disease, was a lung cancer survivor, and suffered from numerous physical disabilities, including nerve damage and atrophied hands that made it difficult for him to grasp objects. Doctors testified that it would be difficult for Mr. Perez to use a gun or grasp a knife, and that he was "relatively frail" and "moved slowly." The VA had approved a plan to equip Mr. Perez and Defendant's home with a wheelchair lift, ramps, a bathroom modification, and special doorknobs in order to accommodate Mr. Perez's disabilities. In contrast, Defendant was physically active, sang in a band, and worked as a house cleaner and in a law office doing filing. Defendant had superficial injuries inconsistent with her account of a violent struggle. Defendant's therapist testified that Defendant showed

him "knife wounds" on her arms that in fact looked like scratches, not cuts.

Further, when viewed in the light most favorable to the State, the evidence tends to show that even after Mr. Perez had been wounded twice by gunshots, Defendant stabbed him twelve (12) times. And Defendant suffered minimal injuries compared to the nature and severity of the injuries sustained by Mr. Perez. *See id.* at 330, 747 S.E.2d at 656.

In conclusion, regardless of whether Defendant may have presented evidence which tended to contradict the State's evidence on the issue of self-defense, we conclude that the State presented substantial evidence that Defendant did *not* act in self-defense. Accordingly, we conclude that the trial court did not err in denying Defendant's motion to dismiss the charge of first-degree murder.

B. Closing Argument

[3] Defendant's second set of arguments relates to statements made by the prosecutor during closing argument.

Counsel is generally allowed wide latitude in argument to the jury. *State v. Huffstetler*, 312 N.C. 92, 112, 322 S.E.2d 110, 123 (1984). Counsel for both sides is permitted to 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 or her side of the case." *Id.* However, during a closing argument, an attorney may not "become abusive, inject his personal experiences, [or] express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant[.]" N.C. Gen. Stat. § 15A-1230(a) (2015).

Defendant first contends that the prosecutor was abusive in her closing argument when she stated that Defendant "can't keep her knees together or her mouth shut." Defendant moved for a mistrial immediately following the prosecutor's closing argument on the grounds that this statement was inappropriate and violated Defendant's due process rights. The trial court noted Defendant's objection for the record but denied the motion for mistrial.

We review a trial court's denial of a motion for mistrial for abuse of discretion. *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 36 (1995). The grant of a mistrial is a "drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Stocks*, 319 N.C. 437, 441, 355 S.E.2d 492, 494 (1987).

We conclude that the prosecutor's statement that Defendant "can't keep her knees together or her mouth shut" was improperly abusive. *See* N.C. Gen. Stat. § 15A-1230(a). However, we do not believe this comment alone – or even this comment coupled with the other comments by the prosecutor discussed below – made it impossible for Defendant to obtain a fair trial and impartial verdict, and thus did not require that the trial court impose the "drastic remedy" of granting Defendant's motion for mistrial.

Defendant also contends that during her closing argument, the prosecutor repeatedly made inappropriate comments that Defendant was a liar, had lied on the stand, was promiscuous, had previously had abortions, and currently abused drugs.

Control of counsel's arguments is left largely to the discretion of the trial court. *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995). "When no objections are made at trial . . . the prosecutor's argument is subject to limited appellate review for gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*." *Id.* Our review requires a two-step inquiry: "(1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2017).

In order to determine whether a prosecutor's remarks are grossly improper, "the remarks must be viewed in context and in light of the overall factual circumstances to which they refer." *Id.* An argument is not improper "when it is consistent with the record and does not travel into the fields of conjecture or personal opinion." *State v. Small*, 328 N.C. 175, 184-85, 400 S.E.2d 413, 419 (1991).

An attorney may not express any "personal belief as to the truth or falsity of the evidence" during closing argument. N.C. Gen. Stat. § 15A-1230(a). Our Supreme Court has held that it is improper for an attorney to assert during argument to the jury that a witness is lying on the stand or is a liar. *State v. Sexton*, 336 N.C. 321, 363, 444 S.E.2d 879, 903 (1994) ("It is improper for the district attorney, and defense counsel as well, to assert in his argument 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. *State v. McKenna*, 289 N.C. 668, 686, 224 S.E.2d 537, 550 (1976)[.]"); *see also Huey*, ___ N.C. at ___, ___ S.E.2d at ___ ("A prosecutor is not permitted to insult a defendant or assert the defendant is a liar."). Our Supreme Court has recently held that it was improper for a prosecutor, when referring to the defendant, to state that "innocent men don't lie,"

and to assert that when the defendant "was given a chance to just tell [the jury] the truth, he decided he's going to tell you[, the jury,] whatever version he thought would get you to vote not guilty." *Huey*, ___ N.C. at ___, ___ S.E.2d at ___.

However, an attorney *may* "argue to the jury that they should not believe a witness[.]" *Id.* "The question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone." *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784 (1995).

Here, Defendant contends that the prosecutor made numerous inappropriate statements to the jury, including:

> This defendant talks and talks and out comes falsehood, deception, distortion, and fabrication. She stood before you and put her hand on the bible, and she swore to tell the truth, . . . [a]nd then she sat in that chair and testified, [] and *every time her lips moved another monstrous lie came out*.
>
> She has been untruthful to you.
>
> She was dishonest then, and she's been dishonest now.
>
> How could she think you could possibly believe any of the evil fairytale she has told you?

Although Defendant did admit on the stand that she had lied numerous times *in the past*, we are compelled by Supreme Court precedent to conclude that these statements, in which the prosecutor specifically stated that Defendant lied to the jury *while testifying at trial*, were clearly improper. *See Huey*, ___ N.C. at ___, ___ S.E.2d at ___; *Couch v. Private Diagnostic Clinic*, 351 N.C. 92, 93, 520 S.E.2d 785, 785 (1999) (holding that counsel engaged in grossly improper jury argument where the argument included "at least nineteen explicit characterizations of the defense witnesses and opposing counsel as liars"); *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."); *see also* R. Prof. Conduct N.C. St. B. 3.4(e) (providing that a lawyer *shall not* "state a personal opinion as to the . . . credibility of a witness"). The prosecutor also improperly referred to Defendant as a "narcissist." *See State v. Matthews*, 358 N.C. 102, 111, 591 S.E.2d 535, 541-42 (2004) (holding that it was improper for the prosecutor to engage in "name-calling").

However, our Supreme Court has noted that where there is overwhelming evidence against a defendant, statements that are improper

may not, in every case, amount to prejudice and reversible error. *Huey*, ___ N.C. at ___, ___ S.E.2d at ___ (citing *Sexton*, 336 N.C. at 363-64, 444 S.E.2d at 903). "To demonstrate prejudice, defendant has the burden to show a 'reasonable possibility that, had the error[s] in question not been committed, a different result would have been reached at the trial.' " *Huey*, ___ N.C. at ___; ___ S.E.2d at ___; N.C. Gen. Stat. § 15A-1443(a)(2015).

In this case, considering the overwhelming evidence of Defendant's guilt, we hold that although some of the prosecutor's remarks were certainly improper, they did not render the trial and conviction fundamentally unfair. *See Huey*, ___ N.C. at ___, ___ S.E.2d at ___ (stating that in order for an appellate court to order a new trial, the prosecutor's comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process") (internal marks omitted); *see also State v. Garcell*, 363 N.C. 10, 61, 678 S.E.2d 618, 650 (2009). Therefore, the trial court did not err in failing to intervene *ex mero motu*. *See State v. Campbell*, 359 N.C. 644, 679, 617 S.E.2d 1, 23 (2005) (noting that, even if the prosecutor's comments in closing argument were improper, "the jury instructions informed the jury not to rely on the closing arguments as their guide in evaluating the evidence[,]" and "when viewed as a whole . . . the prosecutor's challenged arguments did not so infuse the proceeding with impropriety as to impede defendant's right to a fair trial").

As our Supreme Court has stated:

> The power and effectiveness of a closing argument is a vital part of the adversarial process that forms the basis of our justice system. A well-reasoned, well-articulated closing argument can be a critical part of winning a case. Yet, arguments, no matter how effective, must avoid base tactics such as . . . comments dominated by counsel's personal opinion; [and] . . . name-calling[.] . . . Our holding here, and other similar holdings finding no prejudice in various closing arguments, must not be taken as an invitation to try similar arguments again. We, once again, instruct trial judges to be prepared to intervene *ex mero motu* when improper arguments are made.

Huey, ___ N.C. at ___, ___ S.E.2d at ____ (internal marks and citation omitted).

C. Witness Testimony

[4] In her final argument, Defendant contends that the trial court erred when it allowed improper witness testimony. The decision to admit

or exclude evidence is within the inherent authority of the trial court, and is thus reviewed under the abuse of discretion standard. *See State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 808-09 (2015).

First, Defendant contends that the trial court should not have allowed evidence of a statement she made to police when they came to her residence to investigate Mr. Perez's death. Specifically, Defendant argues that her statement that she had already contacted an attorney was constitutionally protected. *See State v. Erickson*, 181 N.C. App. 479, 487, 640 S.E.2d 761, 768 (2007) (noting that it is improper for the prosecutor to elicit "testimony regarding the defendant's invocation of his constitutional rights"). On appeal, Defendant points to the prosecutor's question regarding this statement during cross-examination of Defendant; however, this evidence was also admitted without objection earlier in the trial during the testimony of a detective. Accordingly, Defendant failed to preserve this objection for appellate review. *See State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 566 (1984) ("[W]here evidence is admitted over objection, and the same evidence has been previously admitted . . . without objection, the benefit of the objection is lost.").

Defendant also contends that the trial court abused its discretion in overruling defense counsel's objection to the prosecutor's question regarding whether Defendant had terminated two pregnancies. However, Defendant later admitted, without objection, that she had written a letter to a Catholic priest during her time in jail which included the phrase "I got pregnant twice and had two abortions." Therefore, Defendant has waived her right to challenge the admission of this evidence on appeal. *See State v. Moses*, 316 N.C. 356, 362, 341 S.E.2d 551, 554-55 (1986) ("[W]hen evidence is admitted over objection but the same evidence is thereafter admitted without objection, the benefit of the objection ordinarily is lost."). During cross-examination, Defendant admitted that she had written the letter and that it contained the statement regarding the abortions. *See e.g.*, *id.*

Finally, Defendant contends that it was error for the trial court to allow testimony from her therapist and a detective about a statement made by her therapist that Defendant told him she had married Mr. Perez because he had cancer and would be dying soon. Even assuming that it was an abuse of discretion to admit this evidence, Defendant has failed to establish that she was prejudiced by its admission in light of other overwhelming evidence of Defendant's guilt of the crime of first-degree murder. *See* N.C. Gen. Stat. § 15A-1443(a) ("A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not

been committed, a different result would have been reached at trial[.]"). Accordingly, this argument is overruled.

NO PREJUDICIAL ERROR.

Judge ZACHARY concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I fully concur with the majority opinion, but write separately to address the prosecutor's statements regarding Defendant's "evil fairytale" and other conjured facts.

Pursuant to N.C. Gen. Stat. § 15A-1230, an attorney is not permitted to

> express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, . . . [but a]n attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2015).

While on the stand, Defendant testified as follows:

> I made up – I lied to [my daughter]. I lied to [my daughter]. I lied to [my daughter]. And I believe that I said that yesterday. I told [my daughter] whatever I needed to tell her to get her to be quiet. Yes, I lied to [my daughter].
>
> . . . .
>
> And I did lie to [my defense attorney]. I did not give him all the information either. . . . Yes, I did. I lied to him and told him that the gun was at the same place where Jose was.
>
> . . . .
>
> Yes. That was a lie. I told everybody that lie. [Answer to question concerning Jose's whereabouts after she killed him].
>
> . . . .

> No. I had lied and said I was going to a meeting, and I sat there in [his] living room while he was watching golf and -- I'm sorry.
>
> . . . .
>
> I lied to the police. I lied to my children. I lied to everybody.

In a letter written from jail, Defendant admitted, "I lied to everyone around me. I lied to my children . . . . I lied to my friends about money. . . . I lied to fellow inmates." Further, in summarizing the evidence against his client, defense counsel made the following statements in closing, "She did -- took some stupid actions to lie to people. She took some stupid actions to lie to people. . . . She's just lying."

What do you call someone who testifies that they have lied "to everybody"? It is difficult for me to conclude that an attorney should be precluded from asserting that a defendant has been untruthful when the defendant testifies she "lied to everybody" and her defense attorney acknowledges that truth.[1]

There will certainly be more murders. Just as certainly, there will be defendants who manufacture stories in an effort to conceal their involvement in criminal activity. And, while it is permissible to label those defendants as "killers," prosecutors are forbidden from asserting they are dishonest.

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1. Interestingly, defense counsel argued to the jury that the victim in this case was a liar, not only asserting that he was untruthful, but stating, "She knew what kind of lies [Jose] was telling," and "It wasn't -- it was the final straw to separate her from that relationship, not just to show you that Jose was lying about stuff but just where her mindset was."

STATE OF NORTH CAROLINA
v.
PATTY MEADOWS

No. COA16-1207

Filed 17 October 2017

1. Constitutional Law—effective assistance of counsel—eliciting damaging testimony—failure to object—no reasonable probability of different result

A defendant did not receive ineffective assistance of counsel in an opium trafficking case, based on allegedly eliciting damaging testimony and failing to object to other testimony, where there was no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different.

2. Sentencing—sentencing hearings—Rule 10(b)(1)

The Court of Appeals was bound to follow the Supreme Court's application of N.C. R. App. P. 10(a)(1) requiring a timely request, objection, or motion to preserve issues for appellate review during sentencing hearings post-*Canady*. The holdings in *Hargett* and its progeny that held that an error at sentencing was not considered an error at trial for the purpose of Rule 10(a)(1) were contrary to prior opinions of the Court of Appeals, contrary to both prior and subsequent holdings of our Supreme Court, and did not constitute binding precedent.

3. Appeal and Error—appealability—waiver—sentencing hearing—failure to object or request continuance—Rule 10(a)(1)

Defendant waived any argument in an opium trafficking case that a sentencing hearing should not have been conducted at a particular time, or in front of a particular judge, by failing to either object to the commencement of the hearing or request a continuance as required by N.C. R. App. P. 10(a)(1).

4. Appeal and Error—preservation of issues—sentencing argument—failure to object at trial—consecutive sentences

Defendant failed to preserve for appellate review in an opium trafficking case her sentencing argument, that imposition of "consecutive sentences of 70 to 93 months on a 72-year-old first offender for a single drug transaction" violated defendant's Eighth Amendment right, by failing to object at trial as required by N.C. R. App. P. 10(a)(1).

5. Appeal and Error—preservation of issues—sentencing argument—failure to object at trial—consecutive sentences—consolidation

Defendant failed to preserve for appellate review in an opium trafficking case her sentencing argument, that the trial court abused its discretion in sentencing her to two consecutive sentences, and only consolidating the third conviction for sentencing, by failing to object at trial as required by N.C. R. App. P. 10(a)(1).

Judge MURPHY concurring in result only.

Appeal by Defendant from judgments entered 7 April 2016 and judgment entered 8 April 2016 by Judge Gary M. Gavenus in Superior Court, Madison County, after a jury trial before Judge R. Gregory Horne on 4 and 5 April 2016. Heard in the Court of Appeals 25 May 2017.

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

Michael E. Casterline for Defendant-Appellant.

McGEE, Chief Judge.

Patty Meadows ("Defendant") was convicted on 7 April 2016 of one count each of trafficking opium by sale, by delivery, and by possession. The events leading to Defendant's arrest and conviction occurred on 14 September 2011.

I. *Factual and Procedural Basis*

In early September 2011, multiple sources informed the Madison County Sheriff's Office that Defendant's husband, Troy Meadows ("Troy"), was selling large quantities of prescription pills. A confidential informant, Jeffrey Chandler ("Chandler") told officers that Troy would be obtaining pills on 14 September 2011, pursuant to a prescription, for the purposes of illegal re-sale. Chandler informed officers that he had obtained this information from Jason Shetley ("Shetley") who, in the past, had illegally purchased pills from Troy.

Sheriff's officers planned a controlled buy for 14 September 2011. The plan was for Chandler to ask Shetley to purchase pills from Troy, using bills provided by the Sheriff's Office, and thereby obtain probable cause to search Troy's and Defendant's house ("the Meadows home" or "the house") on Rollins Road. Officers gave Chandler $420.00 ("the

buy money") on 14 September 2011 for the purchase. The buy money had been photocopied so that individual serial numbers were recorded. Chandler contacted Shetley to set up the purchase. Shetley was to make the purchase with the buy money provided by Chandler, and purchase twenty-five oxycodone pills for himself and fifty for Chandler. At trial, Shetley testified he called Troy about 9:00 a.m. on 14 September 2011 to tell him he wanted to purchase seventy-five oxycodone pills. Chandler then met with Shetley and Shetley's girlfriend, Catherine Davis ("Davis"). Chandler used approximately $20.00 of the buy money to purchase gas for Shetley's car ("the car"). Chandler, Shetley, and Davis then drove to the Meadows home.

Madison County Sheriff's Detective Coy Phillips, now a captain ("Capt. Phillips"), was watching the house that morning. Shetley entered the Meadows home at approximately 9:45 a.m., while Chandler and Davis waited in Shetley's car. At trial, Shetley further testified that he never saw Troy that morning – that he "just pulled up, went and knocked on the door, and [Defendant] was in the kitchen and told me to come in. She had the pills out [on the table]. I bought the pills from her." According to Shetley, Defendant told him she had already counted out the seventy-five pills, and he then counted out twenty-five pills, which he put in a pill bottle he had brought with him. He then counted out an additional fifty pills, which he put in a plastic baggie provided by Defendant. Shetley testified that he gave Defendant payment, which she counted. Shetley then left the house.

About five minutes after Shetley entered the house, Capt. Phillips observed him exit the house and return to the car. Shetley, Chandler and Davis then drove away from the Meadows home. Capt. Phillips continued to watch the house until a deputy arrived "to secure [the house] because we were going to execute a search warrant at [the house]." Shortly after the car left the house, it was stopped by officers, including Madison County Chief Deputy Michael Garrison ("Chief Garrison"),[1] and the occupants were searched. Shetley testified that, when he saw police approaching, he threw his bottle of twenty-five pills out the car window, but that Chandler held onto the plastic baggie that contained the fifty pills. Officers recovered a plastic baggie containing fifty oxycodone pills from Chandler, and recovered a bottle containing twenty-five oxycodone pills from the side of the road in the vicinity of the car. Officers had maintained constant visual contact with Chandler from the time he was

1. Chief Garrison was serving as the Mars Hill Chief of Police at the time of Defendant's trial.

given the $420.00 until the time they stopped and searched the car and its occupants. One of the photocopied twenty dollar bills was found in Shetley's sock, but the remainder of the buy money was not recovered from the car or its occupants. Shetley and Davis were arrested, and taken to the Sheriff's Office.

Chief Garrison testified he secured the house immediately after arresting Shetley and Davis and, at that time, Defendant was the only person at the house. Chief Garrison left the house at approximately 10:00 a.m., while deputies remained to keep the house and Defendant secure. Troy and Defendant's daughter arrived sometime after 10:00 a.m., though the exact times they were at the house are unclear. Chief Garrison further testified he returned to the house just after 4:00 p.m. to execute a search warrant he had obtained, and that the house and its occupants were continuously monitored until the search of the house was completed, after 7:00 p.m. According to Chief Garrison, Troy "did show up there [at the house] and then we transported him back to the [S]heriff's [O]ffice." Troy was also arrested that day. Chief Garrison testified that "to the best of [his] recollection," Troy did not return to the house after being transported to the Sheriff's Office. Capt. Phillips testified that he interviewed Troy at the Sheriff's Office from 4:29 p.m. until 7:16 p.m., and then returned to the Meadows home. Capt. Phillips did not indicate in his testimony that he brought Troy with him when he returned to the Meadows home, and Defendant's counsel did not ask Capt. Phillips that question.

Chief Garrison testified that, after serving the search warrant, he "identified a large quantity of narcotics and medications on the dining room table." Items recovered included "other pill bottles, empty pill bottles, white pills and pink pills[,]" and plastic baggies similar to the one recovered from Chandler that contained the fifty pills Shetley had purchased for him. Chief Garrison testified that, after officers had searched the house for more than three hours in an unsuccessful attempt to locate the remainder of the buy money, he confronted Defendant directly. Chief Garrison testified that he told Defendant: "I knew my buy money was in the house and I wanted to get it." According to Chief Garrison, Defendant "told me it was in a pocket, a jacket pocket in the, I believe it was the bedroom closet." Chief Garrison testified that officers recovered $380.00 from "a blue jacket hanging in a closet" that was later identified as the remaining buy money.

Chief Garrison then identified State's exhibit 12 as an envelope containing the $380.00 of buy money recovered from the Meadows home. Chief Garrison read from the log sheet attached to State's exhibit 12,

and testified that the log sheet "has [the] suspect['s] name, which is Troy Meadows, the date and time recovered which is 9/14/11 at . . . 7:01 p.m. It has Detective Matt Davis was the recovering deputy. The description, it says, $380 U.S. currency recovered from back bedroom, blue jacket pocket."

Although both Chief Garrison and Capt. Phillips testified they believed Defendant was involved in the 14 September 2011 transaction, Defendant was not arrested until 22 July 2013.[2] Defendant testified at trial, contradicting the testimony of Chief Garrison and Shetley. Defendant testified she had no knowledge of the drug transaction, that she never saw Shetley that morning, and that she did not know where the $380.00 was hidden until Troy told her sometime after 6:30 p.m. The two containers of pills were sent to the State Bureau of Investigation ("S.B.I.") lab to be analyzed by Colin Andrews, who determined the pills were oxycodone, and described them in his report as "a pill bottle containing 25 pink tablets [and] a plastic bag containing 50 pink tablets." Defendant was found guilty of all three trafficking charges on 7 April 2016. Defendant appeals.

II. *Analysis*

A. Ineffective Assistance of Counsel

[1] Defendant argues she was denied effective assistance of counsel because her defense counsel "elicited damaging testimony from [Capt.] Phillips that Shetley was 'honest[,]' " and also failed to object to Chief Garrison's testimony that "[Defendant] was as guilty as Troy was." We disagree.

"A defendant's right to counsel includes the right to the effective assistance of counsel. When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 247–48 (1985) (citations omitted). However,

> if a reviewing court can determine at the outset that 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.

2. This testimony is the subject of one of Defendant's arguments on appeal.

Id. at 563, 324 S.E.2d at 248–49. Because we hold "there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different," we reject Defendant's ineffective assistance of counsel ("IAC") arguments without making any determination concerning whether Defendant's counsel was actually deficient. *Id.* at 563, 324 S.E.2d at 249.

1. *Vouching for Shetley's Credibility*

Concerning Defendant's first argument, her counsel questioned Capt. Phillips concerning two interviews he conducted with Shetley after Shetley's arrest:

> Q. My question was, when you conducted that first interview [on 14 September 2011], did you feel, leaving that interview did you feel or form an opinion as to whether or not [Shetley] was being honest with you?
>
> A. Yes, sir, I did.
>
> Q. So you felt after that first interview he was telling you the truth?
>
> A. No, sir.
>
> . . . .
>
> Q. So at that time you had an idea, hey, this isn't, this doesn't make sense.
>
> A. Yes, sir.
>
> . . . .
>
> Q. Did you during that first interview ask [Shetley] about his drug use at the time?
>
> A. Yes, sir, I did.
>
> Q. And what was his response to, to whether or not he used drugs?
>
> A. He said he didn't use drugs.
>
> . . . .
>
> Q. And [Shetley] gave you another statement [on 16 September 2011], did he not?
>
> A. He did, yes, sir.

Q. Did he at that time admit or deny having a drug problem?

A. At this point he admitted it, yes, sir.

. . . .

Q. And again, [Shetley] admitted to you that he had a very bad drug problem.

A. Yes, sir, he stated he had a pill problem.

Q. And based on your knowledge and experience as a law enforcement officer, do people with drug problems typically break into other people's houses to supply their habit?

A. Sometimes.

Q. Did Mr. Shetley admit that to you?

A. Yes, sir.

. . . .

Q. And you filled out this Officers Investigation Report as lead detective.

A. Yes, sir.

Q. And part 10, you stated that . . . Davis was honest and cooperative.

A. Yes, sir.

Q. And that Troy . . . and . . . Shetley were also honest with Detective . . . Phillips.

A. Yes, sir.

Q. And you signed that form on 9/19.

A. Yes, sir.

. . . .

Q. And at that time the statements, the follow-up statements, at least with Shetley, and the other statements you got, you felt that the witnesses were honest and cooperative.

A. Yes, sir.

Based upon the testimony above, Defendant argues that her counsel's representation was deficient because he "elicited damaging testimony from [Capt.] Phillips that Shetley was 'honest.' " However, because we do not believe Defendant can show the necessary prejudice to sustain her IAC claim, as we will discuss in greater detail below, we do not need to consider whether Defendant's counsel's representation of Defendant was actually deficient. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248–49.

2. *Chief Garrison's Opinion of Defendant's Guilt*

Defendant next argues that her counsel committed IAC by failing to object when Chief Garrison testified: "I felt like [Defendant] should be charged at that time; she was as guilty as Troy was." We disagree.

Law enforcement officers may not express any opinion that they believe a defendant to be guilty of the crimes for which the defendant is on trial. *State v. Carrillo*, 164 N.C. App. 204, 211, 595 S.E.2d 219, 224 (2004). However, although the admission of the statement by Chief Garrison constituted error, as in *Carrillo*, we hold that Defendant fails to show that the error was so prejudicial, on the facts before us, as to require a new trial. *Id.*

Initially, during direct questioning by the State concerning why Defendant was not arrested on 14 September 2011, Chief Garrison testified to the following, without objection:

> Q. Chief Garrison, was there some – I'm going to follow up on a couple of [Defendant's counsel's] questions. Was there some discussion of [Defendant] being charged back in September of 2011?
>
> A. There was. *Initially I felt that [Defendant] had direct involvement in the drug transaction, and based on that that she should have been charged accordingly.* There was a discussion and based on that discussion we made a determination not to charge her at that time. Subsequently, uh, I'm trying to think, it was probably a little over a year and four months later we submitted the evidence to the SBI and the SBI labs came back as far as what the quantities and the product were as far as the pills. Determination was made at that time to pursue a grand jury indictment, which we did, and the grand jury found probable cause to have her indicted, and that's what brought her here today. (Emphasis added).

Defendant does not argue on appeal that failure to object to this testimony constituted IAC. Therefore, any such argument has been abandoned, and we must evaluate the prejudice of the contested testimony in light of this uncontested testimony. *See* N.C. R. App. P. 28(b)(6); *State v. Evans*, __ N.C. App. __, __, 795 S.E.2d 444, 455 (2017).

Immediately following the above exchange, the State continued:

> Q So you [Chief Garrison] said that the conversation that you had [with other officers] back in September 2011 was not to never charge [Defendant], it was just not to charge her at the time?
>
> A. The conversation was I felt like [Defendant] should be charged at that time; she was as guilty as Troy was. However, after we had a discussion about it and we made a determination collectively not to pursue that at that time.

Defendant's counsel also failed to object to this testimony, which is not substantially different from the unchallenged prior testimony. Chief Garrison's prior testimony clearly indicated he believed, from the beginning, that Defendant was "direct[ly] involve[ed] in the drug transaction, and based on that that she should have been charged accordingly." Chief Garrison's later testimony — that he believed Defendant "was as guilty as Troy was[,]" — does not contribute significantly to any prejudice already suffered by Defendant from the unchallenged statement.

Further, we find that the evidence against Defendant was substantial. Comparing the facts before us with those in *Carrillo*, *supra*, we find the evidence against Defendant at least as compelling as that in *Carrillo*. In *Carrillo*, two officers testified, without objection, in ways that strongly indicated their opinion that the defendant was guilty of trafficking in cocaine. Although this Court held that admission of testimony indicating the officers believed the defendant was guilty constituted error, we concluded, in light of the following evidence, that the defendant failed to demonstrate the improper testimony was sufficiently prejudicial to warrant a new trial pursuant to either plain error analysis or IAC:

> Evidence at trial showed that the package was intercepted by the U.S. Customs agents and contained three ceramic turtles with a substantial amount of cocaine concealed inside. The package was mailed from a location in Mexico that U.S. Customs agents had identified as a mail origination point for cocaine sent to the United States. The package

> was addressed to defendant at his residence. Defendant accepted the package. It was found inside his residence minutes after he had taken possession of it. Broken pieces of similar turtles containing traces of cocaine were also found inside his apartment.

Carrillo, 164 N.C. App.at 210–11, 595 S.E.2d at 224. This Court held in *Carrillo* that the defendant had failed to prove plain error, then summarily overruled the defendant's argument that his counsel's failure to object to the officers' testimonies constituted IAC:

> If we were to conclude there was a reasonable probability that the outcome would have been different, this Court [would have to] consider whether counsel's actions were in fact deficient. As we have already determined, defendant has failed to show [plain error –] that a different outcome at trial would have occurred if defense counsel had objected to this testimony. This [argument] is overruled.

Id. at 211, 595 S.E.2d at 224.

In the present case, the relevant evidence presented at trial, discussed in part above, is sufficient to defeat Defendant's claim of IAC. Defendant testified she was in a back bedroom at the time Shetley entered the house because her back was bothering her and she could not move. In addition, Defendant initially testified that Troy was gone from the house from some time before 9:30 a.m. until he returned at approximately 11:30 a.m., and that Troy was accompanied by officers when he entered the house. She further testified she did not see or hear anyone in the house until Troy returned at 11:30 a.m. After Troy returned to the house, he was subsequently taken to the Sheriff's Office and arrested.

Defendant further testified that, though she knew the officers were searching for money, she had no knowledge whatsoever of any cash that might have been used in a drug transaction *until after 6:30 p.m.* Defendant testified that Officer Davis questioned her on her front porch, and "showed me four or five . . . pink . . . pills . . ., and . . . he said, does [Troy] sell his medicine every month? I said, I wouldn't worry, there's so many. And he said, does he take these? And I said, I've never seen those [pink pills] in my home[,]" that the oxycodone that Troy was prescribed were white pills. However, the pink pills recovered from Chandler and Shetley were determined to be oxycodone by the SBI, and additional pink pills were recovered from the dining table when the house was searched.

According to Defendant, after Troy was taken to the Sheriff's Office the first time, he was returned by Sheriff Buddy Harwood ("Sheriff Harwood") and Capt. Phillips at approximately 6:30 p.m. Defendant testified that she first learned about the hidden money during a conversation with Troy, at around 6:30 p.m., in which Sheriff Harwood participated. Defendant further testified that she never told Chief Garrison about the location of the money – that it was only Sheriff Harwood who was informed of the location of the $380.00. Defendant testified that Troy was present at the house when the money was recovered and that, once she and her daughter recovered the money, they handed it to Capt. Phillips.

However, after reviewing his report, Capt. Phillips testified that he began interviewing Troy at the Sheriff's Office at 4:29 p.m. on 14 September 2011, and did not conclude the interview *until 7:16 p.m.* It was only after concluding that interview with Troy at 7:16 p.m. that Capt. Phillips returned to the Meadows home. There was no testimony from anyone other than Defendant that Troy returned to the house after he was interviewed at the Sheriff's Office. The log sheet that accompanied an evidence bag that contained the $380.00, indicated that the money was recovered from the Meadows home *at 7:01 p.m.* by Detective Davis. According to those two documents, Defendant could not have discussed the whereabouts of the buy money with Troy at approximately 6:30 p.m., because Troy was at the Sheriff's Office in the middle of an approximately three-hour interview with Capt. Phillips. More importantly, Troy was still at the Sheriff's Office being interviewed by Capt. Phillips at the time the $380.00 was recovered from a jacket pocket in a back bedroom closet of the Meadows home.

According to Defendant's testimony, after Sheriff Harwood was informed where the money was located, Defendant "told [Sheriff Harwood] that [she would] tell my daughter where the money was at and she could go get it." Defendant testified that neither Sheriff Harwood nor Capt. Phillips made any effort to have officers escort her to retrieve the money. Defendant's own counsel asked Defendant: "So you're telling me that at some point in time you got off the couch and went in the back room with no officer watching you?" Defendant answered that was correct, that she and her daughter retrieved the money without escort of any kind. The $380.00 recovered was later confirmed to be the remainder of the buy money. That Defendant would be sent unescorted to retrieve the main evidence in the investigation defies logic, protocol as testified to by Chief Garrison, and what actually occurred as testified to by Chief Garrison. Chief Garrison testified that he "stood guard" with Defendant

during the search, and that Officer Davis was the officer who recovered the $380.00 from the jacket in the bedroom closet.

Defendant's own testimony cannot explain how the $380.00 in buy money could have been placed in a jacket pocket in a back room closet by anyone other than herself. All the evidence shows that Shetley entered the Meadows home with $400.00 of the buy money and left with only $20.00, which was recovered from Shetley when the car was stopped. Therefore, the $380.00 of buy money recovered from the Meadows home had to have been left in the home by Shetley between 9:45 a.m. and 9:50 a.m., at the same time he acquired the seventy-five pills of oxycodone, and at a time Defendant herself testified she was alone in the house. Shetley had no opportunity to give the $380.00 to Troy, and when Troy returned to the house before his arrest, he was accompanied by officers, and not allowed to freely roam the house. Assuming, *arguendo*, Troy did return to the house a second time, according to Capt. Phillips' report and testimony, it would have to have been after the buy money was already recovered.

On the facts before us, because we hold "that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different," we reject Defendant's argument and need not "determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. This argument is without merit.

B. Sentencing

Defendant argues four errors were committed at her sentencing hearing. Defendant argues the trial court erred in Defendant's sentencing because a judge — different from the judge who presided over the trial — issued the sentence and improperly "overruled" a prior order of the trial judge. Defendant also argues that the trial court "abused [its] discretion by imposing consecutive sentences of 70 to 93 months on a 72-year-old first offender for a single drug transaction," and that this sentence violated Defendant's Eighth Amendment right that her sentence be proportional to her crime. We disagree.

Defendant did not object to any of these alleged errors at her sentencing hearing. North Carolina Rule of Appellate Procedure Rule 10(a)(1) states:

> 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) (2015).[3] Despite her failure to object, Defendant makes no argument in her brief indicating why we should address the first two alleged errors – that a judge different from the judge who presided over the trial issued the sentence and improperly "overruled" a prior order of the trial judge. Concerning Defendant's remaining arguments – that her long sentence constituted an abuse of discretion and violated the Eighth Amendment – she contends: "An error at sentencing [including a constitutional claim] may be reviewed on appeal, absent an objection in the court below. *State v. Pettigrew*, 204 N.C. App. 248, 258, 693 S.E.2d 698, 704–05 (2010)."

1. *Rule 10(a)(1) and State v. Canady*

[2] We assume, *arguendo*, that Defendant contends that all of her arguments are preserved without objection because they allegedly occurred at sentencing. *See Id.* Defendant is correct that this Court addressed the defendant's argument in *Pettigrew*, even though the defendant had not raised his objection at his sentencing hearing. This Court reasoned:

> The State argues that [the d]efendant has not preserved this issue for appellate review because [the d]efendant did not raise [his] constitutional issue at trial. However, in *State v. Curmon*, 171 N.C. App. 697, 615 S.E.2d 417 (2005), our Court held that "[a]n error at sentencing is not considered an error at trial for the purpose of Rule 10[(a)](1) because this rule is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal." Accordingly, [the d]efendant was not required to object at sentencing to preserve this issue on appeal.

Pettigrew, 204 N.C. App. at 258, 693 S.E.2d at 704–05 (citations omitted). *Curmon* cited *State v. Hargett*, 157 N.C. App. 90, 93, 577 S.E.2d 703, 705 (2003), which in turn cited our Supreme Court's opinion in *State*

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3. Rule 10 was amended effective 1 October 2009, and certain provisions were changed and subsections moved. Prior to the 2009 amendment, the language cited above from subsection (a)(1) was located in subsection (b)(1). Therefore, all pre-amendment opinions refer to Rule 10(b)(1) when referring to what is now Rule 10(a)(1). In an attempt to achieve agreement between citations in this opinion, we will change (b) to (a) as needed, which will be indicated by brackets.

v. Canady, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991). Our research shows that *Canady* is the genesis of a line of opinions from this Court that contend Rule 10(a)(1) does not apply in sentencing hearings.

However, this Court has also regularly held, post-*Canady*, that objection to alleged errors at sentencing *is required in order to preserve them for appellate review*. *See, e.g.*, *State v. Baldwin*, 240 N.C. App. 413, 421–22, 770 S.E.2d 167, 173–74 (2015); *State v. Phillips*, 227 N.C. App. 416, 422, 742 S.E.2d 338, 342–43 (2013); *State v. Facyson*, 227 N.C. App. 576, 582, 743 S.E.2d 252, 256 (2013); and *State v. Flaugher*, 214 N.C. App. 370, 388, 713 S.E.2d 576, 590 (2011). In *State v. Freeman*, this Court's holding directly contradicts the *Canady* analysis in *Pettigrew* and Defendant's Eighth Amendment argument in the present case:

> Defendant further argues that his sentence is grossly disproportionate to the severity of the crime and violates the Eighth Amendment prohibition against cruel and unusual punishment. Defendant did not object at trial, however, and "constitutional arguments will not be considered for the first time on appeal." . . . . Defendant has failed to preserve his Eighth Amendment argument, and we dismiss defendant's assignment of error.

State v. Freeman, 185 N.C. App. 408, 414, 648 S.E.2d 876, 881 (2007) (citations omitted); *see also State v. Lewis*, 231 N.C. App. 438, 444, 752 S.E.2d 216, 220 (2013). In light of this conflict between opinions of this Court concerning treatment of the failure to object to errors during sentencing hearings in the wake of *Canady*, we must attempt to determine the correct precedent to apply in the present case.[4] Because it is this Court's occasional application of certain wording in *Canady* that has resulted in a lack of uniformity in some of this Court's opinions, we first analyze *Canady*. In *Canady*, the defendant's sole argument was "that it was error for the [trial] court to rely on the statement of the prosecuting attorney in finding the aggravating factor." *Canady*, 330 N.C. at 399, 410 S.E.2d at 876. This was essentially an argument that there was insufficient evidence to support the sole aggravating factor found by the trial court. However, the defendant failed to object to this error at his sentencing hearing. *Id.* at 400, 410 S.E.2d at 877.

For reasons we will discuss in greater detail below, a majority of our Supreme Court held that the error had been properly preserved

4. In a dissent in *Freeman*, the dissenting judge acknowledged that she had applied Rule 10(a)(1) inconsistently in her prior opinions. *Freeman*, 185 N.C. App. at 420, 648 S.E.2d at 885.

for appellate review despite the defendant's lack of objection at the sentencing hearing. Justice Meyer dissented based upon, *inter alia*, his belief that, pursuant to Rule 10(a)(1), the defendant's failure to object at the sentencing hearing constituted a waiver of his right to appellate review: "What the majority fails to recognize, however, is that Rule 10[(a)](1) . . . limits this Court's appellate review to exceptions which have been *properly preserved* for review." *Canady*, 330 N.C. at 404, 410 S.E.2d at 879 (Justice Meyer dissenting). Justice Meyer cautioned: "The majority today discards our longstanding rules of appellate procedure." *Id.* at 406, 410 S.E.2d at 880.

The majority in *Canady* then addressed and dismissed the concerns of Justice Meyer on two different bases:

> Assuming Rule 10 requires an exception to be made to the finding of an aggravating factor, we hold the defendant has complied with the Rule. At the time of sentencing the judge said, "[f]or the record, the Court did take into consideration two previous felony convictions, possession of marijuana and LSD, and a charge of escape from the department of corrections." The defendant marked an exception to this statement and made it the subject of an assignment of error. This was sufficient to preserve the question for appellate review.
>
> Justice Meyer in his dissent relies on Rule 10[(a)](1) of the Rules of Appellate Procedure and argues that an objection to the finding of the aggravating factor should have been made at the time the factor was found.
>
> . . . .
>
> [Rule 10(a)(1)] does not have any application to this case. It is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal. The purpose of the rule is to require a party to call the [trial] court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal. If we did not have this rule, a party could allow evidence to be introduced or other things to happen during a trial as a matter of trial strategy and then assign error to them if the strategy does not work. That is not present in this case. *The defendant did not want the [trial] court to*

> *find the aggravating factor, and the [trial] court knew or should have known it. This is sufficient to support an [argument on appeal].*
>
> . . . .
>
> [W]e have held that Rule 10[(a)](1) does not apply to this case. We base this holding on our knowledge of the way our judicial system works. As we understand the dissent by Justice Meyer, he would require a party to object to any finding of fact in a judgment at the time the finding of fact is made. This would be a near impossibility in many cases in which the court renders a judgment at some time after the trial is concluded. We do not believe it was the intention of Rule 10[(a)](1) to impose such a requirement. We shall not require that after a trial is completed and a judge is preparing a judgment or making findings of aggravating factors in a criminal case, that a party object as each fact or factor is found in order to preserve the question for appeal.

Id. at 401–02, 410 S.E.2d at 877–78 (citations omitted). Though we see how the language used in *Canady* could lead to misapplication of its holding, in our reading, the holding appears to be fairly limited. First, the Court held that, if Rule 10 applied in that case, the defendant sufficiently complied with it. Second, and more relevant to the present case, the Court did not state that Rule 10(a)(1) never applied to sentencing hearings. The Court stated, "we have held that Rule 10[(a)](1) does not apply to *this case*." *Id.* at 402, 410 S.E.2d at 878 (emphasis added). This language does not indicate that the Court did not consider sentencing hearings to be a part of the trial – a fact that is further supported by the Court's explanation of the purpose of Rule 10(a)(1), which purpose is just as valid at a sentencing hearing as it is at the guilt/innocence phase of the trial. The Court explained:

> We do not believe it was the intention of Rule 10[(a)](1) to impose . . . a requirement . . . . that after a trial is completed and a judge is preparing a judgment or making findings of aggravating factors in a criminal case, that a party object as each fact or factor is found in order to preserve the question for appeal.

Id. at 402, 410 S.E.2d at 878. This holding merely states that Rule 10(a)(1) does not apply after the proceedings have concluded – including the

sentencing hearing – and the trial court is in the process of memorializing its judgment.[5]

However, this Court has read *Canady* much more broadly. The first opinion to cite *Canady* for the proposition that Rule 10(a)(1) does not apply to sentencing hearings was *Hargett*, in which this Court considered the defendant's double jeopardy argument even though he had failed to object at sentencing:

> Defendant failed to object to the sentencing at trial. N.C. Rule 10[(a)](1) requires an objection at trial for preservation of an issue on appeal. Our Supreme Court has held that *an error at sentencing is not considered an error at trial for the purpose of N.C. Rule 10[(a)](1)* of the North Carolina Rules of Appellate Procedure. *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991).

Hargett, 157 N.C. App. at 92, 577 S.E.2d at 705 (emphasis added). Following the precedent set in *Hargett*, *Canady* has continued to be interpreted by this Court, intermittently, as including a blanket holding that any error at sentencing is preserved for appellate review even absent objection because Rule 10(a)(1) does not apply at sentencing. *See State v. McNair*, __ N.C. App. __, 797 S.E.2d 712 (2017) (unpublished); *State v. Dove*, __ N.C. App. __, 790 S.E.2d 755 (2016) (unpublished); *State v. Allah*, 231 N.C. App. 88, 97, 750 S.E.2d 903, 910 (2013) (citation omitted) ("Admittedly, N.C. R. App. P. 10(a)(1) provides that, as a general proposition, a party must have raised an issue before the trial court before presenting it to this Court for appellate review. However, according to well-established North Carolina law, N.C. R. App. P. 10(a)(1) does not apply to sentencing-related issues.").

We do not believe *Hargett* correctly states the holding in *Canady*; at a minimum, *Canady* does not include language similar to that ascribed to it in *Hargett*. The next opinion to cite *Canady* summarized the *Canady* holding in a manner more in line with the particular facts of *Canady*, and suggested that the defendant had failed to preserve his argument for appellate review by failing to object at sentencing:

> We note that the defendant *cannot* argue insufficient evidence [to support amount of restitution ordered] when

5. We also note that when *Canady* was decided, it was the judge acting as the trial court, and not the trier of fact, who decided whether to find an aggravating factor.

> there was no objection at trial, and no other way for the court to be alerted to defendant's position that the determination was wrong. *See State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991) (court allowed argument on appeal that aggravating factor was in error even without objection *when defendant had argued for the minimum sentence, thus alerting the judge that he didn't want the aggravating factor*).

State v. Dickens, 161 N.C. App. 742, 590 S.E.2d 24, 2003 WL 22952108, at *3 (2003) (unpublished) (emphasis added). This Court applied a more limited holding from *Canady* in subsequent opinions as well:

> While it is true that defendant must normally make specific objections to preserve issues on appeal, our Supreme Court has stated "We shall not require that *after a trial is completed and a judge is preparing a judgment or making findings of aggravating factors* in a criminal case, that a party object as each fact or factor is found in order to preserve the question for appeal." *State v. Canady*, 330 N.C. 398, 402, 410 S.E.2d 875, 878 (1991). The *Canady* Court further held that when a defendant argues for sentencing in the mitigated range, no further objection is required to preserve the issue on appeal when the trial judge sentences her in the aggravated range. *Id.* In the case at bar, defendant argued for a sentence in the mitigated range, but was sentenced from the aggravated range. She properly preserved her right to appeal the trial court's determination of aggravating and mitigating factors.

State v. Byrd, 164 N.C. App. 522, 526, 596 S.E.2d 860, 862–63 (2004) (emphasis added); *see also State v. Borders*, 164 N.C. App. 120, 124, 594 S.E.2d 813, 816 (2004) (citation omitted) (*Canady* held that preserving review of the trial court's finding of non-statutory aggravating factors for appellate review by objecting "is unnecessary because it is clear that a defendant does 'not want the [trial] court to find [an] aggravating factor and the [trial] court kn[ows] or should . . . know[ ] it' "). This Court has also applied Rule 10(a)(1) requirements without mentioning *Canady*. *See State v. Jamison*, 234 N.C. App. 231, 237, 758 S.E.2d 666, 671 (2014); *State v. Martin*, 222 N.C. App. 213, 218-19, 729 S.E.2d 717, 722 (2012); *Freeman*, 185 N.C. App. at 413-14, 648 S.E.2d at 881. Finally, in *State v. Pimental*, 165 N.C. App. 547, 600 S.E.2d 898, 2004 WL 1622290, at *2 (2004) (unpublished), this Court actually cited *Hargett* and *Canady*

in support of its holding that the State could not challenge sentencing issues that it had failed to object to at trial.

We acknowledge that in *State v. Culross*, this Court, in an unpublished opinion, rejected a request to review the line of cases applying the *Hargett* interpretation of *Canady*, holding that we were bound by this Court's interpretation in *Hargett*:

> [T]he State contends that the rule applied in *Owens*[6] [which cites *Hargett*], i.e. that a Defendant need not preserve errors during sentencing by objection or motion, is based on this Court's misinterpretation of our Supreme Court's opinion in *Canady*, *supra*. The State's argument is misplaced, however. Whether a misinterpretation or not, this Court has "repeatedly applied *Canady* to reject contentions that a challenge to a sentence on appeal is precluded by a failure to object below." "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Further, "[w]hile we recognize that a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel . . . the panel is bound by that prior decision until it is overturned by a higher court."

State v. Culross, 217 N.C. App. 400, 720 S.E.2d 30, 2011 WL 6046692, at *2 (2011) (citations omitted) (unpublished). While *Culross* correctly states the law, it is an incomplete statement of the law.

First, precisely because of *In re Civil Penalty*, when there are conflicting lines of opinions from this Court, we generally look to our earliest relevant opinion in order to resolve the conflict. As indicated above, *Hargett* is the earliest opinion of this Court that we can locate holding that Rule 10(a)(1) does not apply in sentencing hearings. *However*, we find multiple prior opinions of this Court, filed between *Canady* – which was filed on 6 December 1991 – and *Hargett* – which was filed on 1 April 2003 – that *declined to review alleged errors at sentencing when the defendant had failed to object as required by*

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6. *State v. Owens*, 205 N.C. App. 260, 266, 695 S.E.2d 823, 828 (2010), addressing a double jeopardy argument despite the defendant's failure to object during sentencing based on *Hargett*.

Rule 10 (a)(1). *See, e.g.*, *State v. Love*, 156 N.C. App. 309, 317–18, 576 S.E.2d 709, 714 (2003); *State v. Williams*, 149 N.C. App. 795, 799, 561 S.E.2d 925, 927 (2002); *State v. Hilbert*, 145 N.C. App. 440, 445, 549 S.E.2d 882, 885 (2001); *State v. Clifton*, 125 N.C. App. 471, 480, 481 S.E.2d 393, 398–99 (1997); *State v. Evans*, 125 N.C. App. 301, 304, 480 S.E.2d 435, 436–37 (1997) ("[The d]efendant lastly contends that the trial court abused its discretion by finding certain mitigating factors in one judgment but failing to do so in the other judgments. However, a party must present to the trial court a timely request, objection or motion in order to preserve a question for appellate review. N.C. R. App. P. 10[(a)](1)."). This Court, in *Hargett* and in subsequent opinions relying on *Hargett's* interpretation of *Canady*, was without authority to "overrule" prior cases of this Court, filed after *Canady*, that consistently held Rule 10(a)(1) applied during sentencing hearings. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

Second, and more definitively, any conflict between this Court and our Supreme Court must be resolved in favor of our Supreme Court. Although this Court has cited *Canady* at least forty times, many of which involve that opinion's analysis of Rule 10, our Supreme Court has only cited *Canady* three times, and two of those citations did not involve Rule 10 whatsoever. The single Supreme Court opinion citing *Canady* concerning Rule 10 is a civil case, which cites *Canady* for the general proposition that the purpose of Rule 10(a)(1) is to preclude appeal from issues that were not first brought to the attention of the trial court. *Reep v. Beck*, 360 N.C. 34, 36–37, 619 S.E.2d 497, 499–500 (2005).

Contrary to the *Hargett* line of cases from this Court, our Supreme Court has continuously enforced the requirements of Rule 10(a)(1) with respect to sentencing hearings post-*Canady*, and has never applied *Canady* in order to circumvent Rule 10(a)(1) in sentencing hearings. For example, in *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), our Supreme Court held that multiple alleged errors at sentencing had not been preserved for appellate review as required by Rule 10(a)(1). First, our Supreme Court refused to review two defendants' arguments that their sentencing hearings should not have been joined because the defendants had not objected at trial. The Court discussed one of the defendant's failure to object in the following manner:

> [Defendant] Tilmon never actually renewed his prior motion to sever, nor did he object to joinder of the cases for sentencing. Therefore, the trial court never ruled on this issue. Tilmon's purported efforts, during the sentencing phase, to revive his previous motion to sever were insufficient to satisfy N.C. R. App. P. 10 to preserve appellate review of this issue.

Id. at 460–61, 533 S.E.2d at 231;[7] *Id.* at 463, 533 S.E.2d at 232; *Id.* at 464, 533 S.E.2d at 233; *Id.* at 465, 533 S.E.2d at 234; *Id.* at 481, 533 S.E.2d at 243; *see also*, *e.g.*, *State v. Augustine*, 359 N.C. 709, 731, 616 S.E.2d 515, 531 (2005); *State v. Roache*, 358 N.C. 243, 326, 595 S.E.2d 381, 433 (2004); *State v. Walters*, 357 N.C. 68, 91, 588 S.E.2d 344, 358 (2003); *State v. Davis*, 353 N.C. 1, 20, 539 S.E.2d 243, 257 (2000) (citation omitted) (the "defendant failed to make an objection at [the sentencing hearing] on constitutional grounds. This failure to preserve the issue results in waiver. N.C. R. App. P. 10(b)(1)"); *State v. Smith*, 352 N.C. 531, 557–58, 532 S.E.2d 773, 790 (2000); *State v. McNeil*, 350 N.C. 657, 681, 518 S.E.2d 486, 501 (1999); *State v. Thomas*, 350 N.C. 315, 363, 514 S.E.2d 486, 515 (1999); *State v. Flippen*, 349 N.C. 264, 276, 506 S.E.2d 702, 710 (1998).

This Court has declined to follow *Hargett* based upon that opinion's conflict with opinions of our Supreme Court in at least two prior occasions. In *State v. Williams*, in declining to address a double jeopardy issue to which the defendant had failed to object at sentencing, this Court recognized:

> *Hargett* . . . is inconsistent with numerous Supreme Court cases holding that a double jeopardy argument cannot be raised for the first time on appeal. *See*, *e.g.*, *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) ("To the extent defendant relies on constitutional double jeopardy principles, we agree that his argument is not preserved because [c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal."). Because we are bound to follow the Supreme Court, we hold that defendant's argument is not preserved.

State v. Williams, 215 N.C. App. 412, 425, 715 S.E.2d 553, 561 (2011) (citations omitted); *see also Flaugher*, 214 N.C. App. at 388, 713 S.E.2d at 590 (*Hargett* is inconsistent with Supreme Court cases holding that a defendant cannot raise a sentencing-based constitutional argument for the first time on appeal – because the defendant failed to raise double jeopardy issue at sentencing, issue was not preserved for appellate review). "Because we are bound to follow the Supreme Court," our Supreme Court's unabated application of Rule 10(a)(1) to sentencing

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7. We note that our Supreme Court cited this section of *Golphin* in *Reep*, 360 N.C. at 37, 619 S.E.2d at 500, in the same analysis in which it cited *Canady*, further bolstering the argument that our Supreme Court has never interpreted *Canady* in the same manner as *Hargett*.

hearings post-*Canady* must control over opinions of this Court holding otherwise. *Williams*, 215 N.C. App. at 425, 715 S.E.2d at 561.[8]

2. *Failure to Continue Sentencing*

[3] Defendant's first two arguments – that the trial court erred in Defendant's sentencing because a judge different from the one who presided over the trial issued the sentence, and the sentencing judge improperly "overruled" a prior order of the trial judge – are essentially arguments that the trial court erred in failing to continue sentencing until the original trial court judge was available to conduct the sentencing hearing. We do not address Defendant's arguments because they have not been preserved for appellate review.

When Defendant presented for sentencing, her counsel indicated Defendant was ready and prepared to proceed. Defendant did not request a continuance, nor did she make any objection to the commencement of sentencing. When the trial court asked at the conclusion of sentencing if Defendant's counsel had any questions, Defendant's counsel responded: "None from the defense." Our Supreme Court rejected a similar argument in *State v. Call*, in which the "defendant contend[ed] the trial court committed reversible error by failing to exercise its discretion when it declined to continue defendant's capital sentencing proceeding." *State v. Call*, 353 N.C. 400, 415, 545 S.E.2d 190, 200 (2001). Our Supreme Court refused to review the defendant's argument because

> [t]he record . . . demonstrates that defendant neither requested a continuance nor objected to the trial court's response to the prosecutor's suggested course of action.[9] Thus, the trial court was never called upon by defendant to exercise its discretion, and defendant has failed to preserve this issue for appellate review. See N.C. R.

8. We note that Supreme Court opinions filed subsequent to *Canady* call into question even the more limited reading of its holding. *State v. Thompson*, 359 N.C. 77, 107, 604 S.E.2d 850, 871 (2004) (failure to object to two of seven aggravating factors resulted in those two aggravating factors not being preserved for appellate review pursuant to Rule 10(a)(1)); *State v. Bell*, 359 N.C. 1, 30–31, 603 S.E.2d 93, 113–14 (2004) (failure to object to submission of certain aggravating circumstances at sentencing violated Rule 10(a)(1) and issue was not preserved for appellate review); *State v. Tirado*, 358 N.C. 551, 598–99, 599 S.E.2d 515, 546 (2004) (citations omitted) (the defendant "did not object, as required by Rule 10[(a)](1) of the Rules of Appellate Procedure, to the trial court's submission of any of these three aggravating circumstances, either alone or in combination with one another. Under these circumstances, we review for plain error").

9. The prosecutor had suggested a continuance.

> App. P. 10[(a)](1); *State v. Smith*, 352 N.C. 531, 557-58, 532 S.E.2d 773, 790 (2000). Accordingly, this [argument] is rejected.

Call, 353 N.C. at 415-16, 545 S.E.2d at 200-01.

We hold that Defendant has waived any argument that the sentencing hearing should not have been conducted at that particular time, or in front of that particular judge, by failing to either object to the commencement of the hearing, or request a continuance thereof. *Id.* at 415-16, 545 S.E.2d at 200-01. This argument is without merit.

3. *Eighth Amendment*

[4] Defendant argues that imposition of "consecutive sentences of 70 to 93 months on a 72-year-old first offender for a single drug transaction" violated Defendant's Eighth Amendment right that her sentence to be proportional to her crime. Defendant argues that her failure to object to her sentence at the sentencing hearing did not serve to waive her right to appellate review based upon the *Hargett* line of cases interpreting *Canady*.

We have determined that the *Hargett* line of cases are in conflict with controlling precedent, and cannot serve to mitigate Defendant's failure to object at trial as required by Rule 10(a)(1). Therefore, Defendant has waived appellate review of the alleged constitutional violation by failing to object at sentencing. *Davis*, 353 N.C. at 20, 539 S.E.2d at 257; *Flippen*, 349 N.C. at 276, 506 S.E.2d at 710 ("Defendant further waived review of any constitutional issue by failing to raise a constitutional issue at the sentencing proceeding."); *Freeman*, 185 N.C. App. at 413-14, 648 S.E.2d at 881 (Eighth Amendment argument that sentence was grossly disproportionate to the crime was abandoned because the defendant failed to object at trial).

4. *Abuse of Discretion*

[5] Defendant argues that the trial court abused its discretion in sentencing her to two consecutive sentences, and only consolidating the third conviction for sentencing. Defendant argues that this issue was preserved, even absent objection, pursuant to *Hargett* and its progeny. To the extent Defendant failed to preserve this issue pursuant to Rule 10(a)(1), it has been waived.

Assuming, *arguendo*, this issue was preserved at trial, we reject Defendant's argument. At sentencing, Defendant argued for consolidated sentences in the mitigated range. The mandated sentence for trafficking

in more than four but less than fourteen grams of opium is a minimum of seventy months and a maximum of ninety-three months. N.C. Gen. Stat. § 90-95(h)(4)(a.) (2015). The trial court may only deviate from N.C.G.S. § 90-95(h)(4)(a.) if the defendant to be sentenced has provided law enforcement "substantial assistance" in identifying, arresting or convicting others who have participated in the crime for which the defendant is convicted. N.C.G.S. § 90-95(h)(5). Defendant was given the seventy months minimum, ninety-three months maximum sentence required by statute for each of her three trafficking convictions. However, although Defendant requested that each sentence run concurrently, the trial court ordered that two of Defendant's sentences run concurrently, but that those two sentences run consecutive to the third conviction.

> "When multiple sentences of imprisonment are imposed on a person at the same time . . . the sentences may run either concurrently or consecutively, as determined by the court." N.C. Gen. Stat. § 15A–1354(a) (2009). The trial court has the discretion to determine whether to impose concurrent or consecutive sentences.

State v. Nunez, 204 N.C. App. 164, 169–70, 693 S.E.2d 223, 227 (2010). A sentence within the provided statutory range will be presumed correct unless " 'the record discloses that the [trial] court considered irrelevant and improper matter in determining the severity of the sentence[.]' " *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987) (citations omitted). In the present case, the trial court sentenced Defendant to a minimum of 140 months, which is seventy months less than the 210 months allowed by statute. Defendant has failed to show that the sentence imposed constituted an abuse of discretion. This argument is without merit.

III. *Conclusion*

We hold that (1) Defendant was not denied effective assistance of counsel because any errors made by Defendant's counsel did not result in prejudice sufficient to sustain an IAC claim; (2) the holdings in *Hargett* and its progeny that "[o]ur Supreme Court [in *Canady*] has held that an error at sentencing is not considered an error at trial for the purpose of N.C. Rule 10[(a)](1)[,]" *Hargett*, 157 N.C. App. at 92, 577 S.E.2d at 705, are contrary to prior opinions of this Court, and contrary to both prior and subsequent holdings of our Supreme Court, and do not constitute binding precedent; (3) Defendant has failed to preserve her sentencing arguments for appellate review as required by Rule 10(a)(1);

and (4) Defendant's argument that the trial court abused its discretion fails, even assuming it was preserved for appellate review.

NO ERROR.

Judge STROUD concurs.

Judge MURPHY concurs in the result only.

STATE OF NORTH CAROLINA
v.
DARIAN JARELLE MOSLEY

No. COA17-345

Filed 17 October 2017

Sentencing—second-degree murder—Class B1 or B2 offense—depraved-heart malice

The trial court erred in a second-degree murder case by sentencing defendant as a Class B1 offender where the jury's general verdict of guilty to second-degree murder was ambiguous and there was evidence of depraved-heart malice to support a Class B2 offense based on defendant's reckless use of a rifle (a deadly weapon).

Appeal by defendant from judgment entered 24 May 2016 by Judge R. Gregory Horne in McDowell County Superior Court. Heard in the Court of Appeals 21 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Steven Armstrong, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

ARROWOOD, Judge.

Darian Jarelle Mosley ("defendant") appeals from judgment entered upon his conviction for second degree murder. For the following reasons, we vacate and remand to the trial court for resentencing.

I. Background

On 20 May 2013, a McDowell County Grand Jury indicted defendant on one charge of first degree murder. The case was called for a jury trial in McDowell County Superior Court on 16 May 2016, the Honorable R. Gregory Horne, Judge, presiding.

The evidence presented at trial tended to show the following facts: Defendant and the victim were in a relationship. In the early morning hours of 16 April 2013, defendant and the victim had an argument, during the course of which the victim was fatally shot in the abdomen by a .22 rifle held by defendant.

Defendant did not deny that he shot the victim, but stated it was an accident. Defendant testified that he left the victim's residence following the initial dispute, but returned shortly thereafter to gather his belongings, specifically his clothes and his rifle. Defendant testified that as he was leaving with his belongings, he stopped in the bedroom doorway to talk to the victim, who was in the bedroom. Defendant had a plastic bag of clothes in his right hand and the rifle in his left hand with his finger around the trigger. Defendant also testified that "[the victim] reached towards the gun, and [he] took it away from her, and that's when the gun went off."

On cross-examination, defendant further testified that the victim wanted him to put this belongings down and as he pushed the victim away, she grabbed the barrel of the rifle and it went off. Defendant knew how to fire the rifle, but never had any safety training. Defendant stated that he always carried the rifle around with his finger on the trigger and that he never used the safety. Defendant also testified he did not know the rifle was loaded.

At the conclusion of the evidence, the trial court instructed the jury on first degree murder and the lesser included offenses of second degree murder, voluntary manslaughter, and involuntary manslaughter in accordance with N.C.P.I--Crim. 206.13, the pattern instruction for first degree murder where a deadly weapon is used, not involving self-defense, covering all lesser included homicide offenses. Included in the instructions for first degree murder, the trial court instructed the jury on the definitions of express malice and deadly weapon implied malice. The trial court did not give the additional definition of malice included in N.C.P.I--Crim. 206.30A when it instructed on second degree murder, only stating that malice was required. On 24 May 2016, the jury returned a general verdict finding defendant guilty of second degree murder. The trial judge entered judgment sentencing defendant to 240 to 300 months

imprisonment for second degree murder, a term within the presumptive range of punishment for a Class B1 felony. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant argues the trial court erred in sentencing him for second degree murder as a Class B1 offense because "[t]he jury's verdict of second-degree murder failed to support the trial court's imposition of a Class B1 sentence and supported only a sentence for a Class B2 offense." Thus, defendant asserts this Court must remand for resentencing. Alternatively, defendant argues that if this Court denies relief under his first argument, this Court should order a new trial because the trial court plainly erred in omitting an "inherently dangerous acts" definition of malice from the second degree murder instructions. We reach only the first issue on appeal, which is similar to an issue recently addressed by this Court in *State v. Lail*, 251 N.C. App. 463, 795 S.E.2d 401 (2016), *disc. review denied*, 369 N.C. 524, 796 S.E.2d 927 (2017).[1] "We review *de novo* whether the sentence imposed was authorized by the jury's verdict." *Id.* at 471, 795 S.E.2d at 408.

In *Lail*, the defendant appealed from a judgment sentencing him as a B1 felon for second degree murder. Specifically,

> [the d]efendant conted[ed] the trial court improperly sentenced him as a B1 felon based on the jury's general verdict, since the evidence presented may have supported a finding that he acted with depraved-heart malice. Therefore, [the] defendant argue[d], the jury's verdict failing to specify whether depraved-heart malice theory supported its conviction did not authorize the trial judge to sentence him as a B1 felon but requires that he be resentenced as a B2 felon.

Id. at 471, 795 S.E.2d at 408. Before addressing the defendant's argument, this Court explained the relevant law on malice as it relates to second degree murder as follows:

> Malice is an essential element of second-degree murder. *See, e.g.*, *State v. Thomas*, 325 N.C. 583, 604, 386 S.E.2d 555, 567 (1989). North Carolina recognizes at least three malice theories:

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1. We note that this Court issued its opinion in *Lail* after the trial court entered judgment in the present case. Thus, the trial court did not have the benefit of *Lail's* guidance.

> (1) "express hatred, ill-will or spite"; (2) commission of inherently dangerous acts in such a reckless and wanton manner as to "manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"; or (3) a "condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification."
>
> *State v. Coble*, 351 N.C. 448, 450-51, 527 S.E.2d 45, 47 (2000) (quoting *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982)). "The second type of malice [is] commonly referred to as 'depraved-heart' malice[.]" *State v. Fuller*, 138 N.C. App. 481, 484, 531 S.E.2d 861, 864 (2000) (citing *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000)).

Id. at 469, 795 S.E.2d at 407. The Court further explained that while "depraved-heart malice" had been frequently used to support second degree murder convictions in drunk driving cases, it was not limited to such situations. *Id.* at 469-70, 795 S.E.2d at 407.

Prior to 2012, all second degree murders were classified as Class B2 felonies. In 2012, our General Assembly amended N.C. Gen. Stat. § 14-17 to classify all second degree murders as Class B1 felonies except for in two specific exceptions, in which second degree murder remains a Class B2 felony. *See* 2012 N.C. Sess. Laws ch. 165, § 1. The exception at issue here is found in N.C. Gen. Stat. § 14-17(b)(1), which states:

> The malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.

N.C. Gen. Stat. § 14-17(b)(1) (2015). This exception is the previous common law definition of depraved-heart malice. *See Coble*, 351 N.C. at 450-51, 527 S.E.2d at 47.

In *Lail*, the Court rejected the defendant's contention finding that

> [n]o evidence presented would have supported a finding that [the] defendant acted with B2 depraved-heart malice. The evidence presented supported only B1 theories of malice and the jury was instructed only on those theories. Therefore, although the jury was not instructed to answer under what malice theory it convicted defendant of

> second-degree murder, it [was] readily apparent from the evidence presented and instructions given that the jury, by their verdict, found defendant guilty of B1 second-degree murder.

251 N.C. App. at 475, 795 S.E.2d at 410. Pertinent to this case, however, this Court noted that

> a general verdict would be ambiguous for sentencing purposes where the jury is charged on second-degree murder and presented with evidence that may allow them to find that either B2 depraved-heart malice or another B1 malice theory existed. In such a situation, courts cannot speculate as to which malice theory the jury used to support its conviction of second-degree murder. *See State v. Goodman*, 298 N.C. 1, 16, 257 S.E.2d 569, 580 (1979) ("If the jury's verdict were general, not specifying the theory upon which guilt was found, the court would have no way of knowing what theory the jury used and would not have proper basis for passing judgment.").

Id. at 475-76, 795 S.E.2d at 411.

In the present case, the jury unanimously convicted defendant of second degree murder. The jury verdict, however, was silent on whether the second degree murder was a Class B1 or a Class B2 offense. Defendant's first argument on appeal is that the jury's general verdict of guilty of second degree murder is ambiguous for sentencing purposes because there was evidence in this case of depraved-heart malice to support a verdict of guilty of a Class B2 second degree murder. We agree.

As this Court made clear in *Lail*, our Supreme Court has held that "the reckless use of a deadly weapon constituted a depraved-heart malice theory supporting a murder conviction." *Id.* at 472, 795 S.E.2d at 409 (citing *State v. Lilliston*, 141 N.C. 857, 859, 54 S.E. 427, 427 (1906) (upholding murder conviction under depraved-heart malice theory where the defendant in the crowded reception room of a railroad station engaged in a shootout, causing the death of an innocent bystander)).

In the case *sub judice*, unlike in *Lail*, there was evidence of defendant's reckless use of a rifle, a deadly weapon. Specifically, defendant testified that as he was arguing with the victim, he was holding the rifle with his finger on the trigger and without the safety on. Defendant stated this was how he always handled the rifle – finger on the trigger and no safety. Defendant testified that in this instance, the gun

went off when the victim grabbed the barrel of the rifle and he pushed her away. There was also testimony about the safety on the rifle and testimony from a firearm expert that "[y]ou would never teach anyone to have their finger on the trigger until they are ready to fire." Moreover, the State argued to the jury that defendant's actions amounted to more than criminal negligence, claiming that defendant's handling of the rifle amounted to "gross recklessness or carelessness as to amount to the heedless indifference to the safety and rights of others."

In response to defendant's argument that the evidence supported a depraved-heart theory of malice and a Class B2 second degree murder, the State points to other evidence presented in the case from which the State claims the trial judge could have correctly concluded that the Class B1 felony sentence was proper. That evidence, however, is not in question. There is no doubt that there is evidence of malice supporting a Class B1 second degree murder. The issue presently before this Court is whether there is also evidence from which the jury could have found depraved-heart malice to convict defendant of a Class B2 second degree murder. We hold there is such evidence in this case.

Because there was evidence presented which would have supported a verdict on second degree murder on more than one theory of malice, and because those theories support different levels of punishment under N.C. Gen. Stat. § 14-17(b), the verdict rendered in this case was ambiguous. When a verdict is ambiguous, neither we nor the trial court is free to speculate as to the basis of a jury's verdict, and the verdict should be construed in favor of the defendant. *State v. Whittington*, 318 N.C. 114, 123, 347 S.E.2d 403, 408 (1986); *see also State v. Williams*, 235 N.C. 429, 430, 70 S.E.2d 1, 2 (1952) ("Any ambiguity in a verdict will be construed in favor of the defendant."). Given the ambiguity in the second degree murder verdict in this case, we vacate defendant's sentence and remand the matter for resentencing for second degree murder as a Class B2 felony offense.

In order to avoid such ambiguity in the future, we recommend two actions. First, the second degree murder instructions contained as a lesser included offense in N.C.P.I.–Crim. 206.13 should be expanded to explain all the theories of malice that can support a verdict of second degree murder, as set forth in N.C.P.I.–Crim. 206.30A. Secondly, when there is evidence to support more than one theory of malice for second degree murder, the trial court should present a special verdict form that requires the jury to specify the theory of malice found to support a second degree murder conviction.

III. Conclusion

For the reasons discussed above, we hold the trial court erred in sentencing defendant for second degree murder as a Class B1 offense. Thus, we vacate the judgment and remand the matter for resentencing for second degree murder as a Class B2 felony offense.

VACATED AND REMANDED.

Judges HUNTER, JR., and DILLON concur.

KIM TIGANI, PLAINTIFF
v.
GREGORY TIGANI, DEFENDANT

No. COA17-82

Filed 17 October 2017

Contempt—civil contempt—failure to pay attorney fees—sufficiency of evidence

The trial court erred by finding defendant in civil contempt of court for his failure to abide by the terms of an order directing him to pay $20,096.68 to his wife's attorney in a domestic litigation case where the order was not supported by any evidence introduced at the hearing.

Appeal by defendant from order entered 15 August 2016 by Judge Joseph Williams in Union County District Court. Heard in the Court of Appeals 23 August 2017.

Plumides, Romano, Johnson and Cacheris, PC, by Richard B. Johnson, for plaintiff-appellee.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellant.

ZACHARY, Judge.

Gregory Tigani (defendant) appeals from an order finding him in civil contempt of court for his failure to abide by the terms of an order of the trial court directing defendant to pay $20,096.68 in attorney's fees

to the attorney hired by Kim Tigani (plaintiff) in the course of domestic litigation between the parties. On appeal, defendant argues that the trial court erred by finding defendant in contempt of court for his failure to abide by the order to pay attorney's fees to plaintiff's counsel and by ordering that defendant be incarcerated until he purged himself of his contempt. Defendant contends that the court's findings were not supported by competent evidence. After careful review of defendant's arguments, in light of the record on appeal and the applicable law, we conclude that defendant's arguments have merit and that the contempt order should be reversed.

Factual and Procedural Background

Plaintiff and defendant were married in 1986, separated in 2006, and executed a separation agreement in 2007. In 2011, plaintiff filed a complaint alleging that defendant had breached the terms of the separation agreement and seeking specific performance and attorney's fees. Defendant filed an answer and counterclaims. In 2015, the matter was tried before a jury, which found that both parties had breached the separation agreement, that plaintiff was entitled to damages of $62,000, and that defendant was entitled to nominal damages of $1.00. On 2 October 2015, the trial court entered orders that awarded plaintiff $62,000 in damages and denied plaintiff's request for specific performance.

The present appeal arises from the court's order, also entered 2 October 2015, awarding plaintiff's attorney's fees. The trial court ordered defendant to pay plaintiff's counsel, Mr. Richard Johnson, a total of $20,096.68 in attorney's fees, with $10,048.34 due no later than 1 November 2015, and the remainder payable no later than 1 March 2016. On 25 November 2015, plaintiff's counsel filed a verified motion asking the court to hold defendant in contempt of court for failure to make the payment that was due by 1 November 2015. The first sentence of plaintiff's motion, entitled "Motion For Contempt," stated that plaintiff was "moving the Court for an Order to Show Cause directed to Defendant[.]" Plaintiff set out the relevant facts and asked the trial court to issue "an Order directing Defendant to appear and show cause" why he should not be held in contempt. Plaintiff also requested issuance of "an Order finding Defendant in contempt of this Court and committing Defendant to custody until such time as he fully complies" with the order to pay attorney's fees. Plaintiff served defendant's counsel with her Notice of Hearing indicating that the "matters for hearing" were a "SHOW CAUSE," among other matters. Defendant moved for a continuance, which was denied. The trial court conducted a hearing on the motion on 25 July 2016. Neither defendant nor his counsel attended

the hearing. After hearing from plaintiff's counsel, the trial court ruled that defendant was in civil contempt of court for his failure to abide by the terms of the court's order.

On 15 August 2016, the court entered an order finding defendant "in contempt of court for his failure to comply with" the order to pay attorney's fees, and ordering that defendant be incarcerated in the Union County jail until he paid the full amount of attorney's fees. On the same day that the order was entered, defendant filed a motion under N.C. Gen. Stat. § 1A-1, Rule 60, asking the court to set aside the contempt order. On 25 August 2016, defendant's appellate counsel filed a petition for writ of *supersedeas* and a motion for a temporary stay with this Court, which were both denied the same day. On 26 August 2016, before the court had ruled on defendant's Rule 60 motion, defendant entered notice of appeal to this Court. Also on 26 August 2016, plaintiff's counsel asked the trial court to issue an order for defendant's arrest. Because defendant had given notice of appeal, the court ruled that it was divested of jurisdiction and denied the request that it order defendant's arrest.

Standard of Review

It is well-established that "[t]he standard of review we follow in a contempt proceeding is 'limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.' " *Miller v. Miller*, 153 N.C. App. 40, 50, 568 S.E.2d 914, 920 (2002) (quoting *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997)). "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 142 (2009) (internal quotation marks omitted). However, "[i]f, as here, the finding that the failure to pay was willful is not supported by the record, the decree committing defendant to imprisonment for contempt must be set aside." *Henderson v. Henderson*, 307 N.C. 401, 409, 298 S.E.2d 345, 351 (1983).

Civil Contempt: Legal Principles

The purpose of a proceeding for civil contempt "is not to punish, but to coerce the defendant to comply with the order." *Bethea v. McDonald*, 70 N.C. App. 566, 570, 320 S.E.2d 690, 693 (1984) (citing *Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980)). N.C. Gen. Stat. § 5A-21(a) (2015) provides that:

> (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

"A person who is found in civil contempt may be imprisoned as long as the civil contempt continues[.]" N.C. Gen. Stat. § 5A-21(b). However, "a defendant in a civil contempt action should not be fined or incarcerated for failing to comply with a court order without a determination by the trial court that the defendant is presently capable of complying[.]" *McBride v. McBride*, 334 N.C. 124, 130, 431 S.E.2d 14, 18 (1993) (citation omitted). Thus:

> . . . [I]n order to find a party in civil contempt, the court must find that the party acted willfully in failing to comply with the order at issue. "Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." Therefore, in order to address the requirement of willfulness, "the trial court must make findings as to the ability of the [contemnor] to comply with the court order during the period when in default." . . . Second, once the trial court has found that the party had the means to comply with the prior order and deliberately refused to do so, "the court may commit such [party] to jail[.] . . . At that point, however, . . . the court must find that the party has the present ability to pay the total outstanding amount.

Clark v. Gragg, 171 N.C. App. 120, 122-23, 614 S.E.2d 356, 358-59 (2005) (quoting *Sowers v. Toliver*, 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002), and *Bennett v. Bennett*, 21 N.C. App. 390, 393-94, 204 S.E.2d 554, 556 (1974)).

N.C. Gen. Stat. § 5A-23(a) (2015) provides that a proceeding for civil contempt may be initiated "by the order of a judicial official directing the alleged contemnor to appear . . . and show cause why he should not

be held in civil contempt," or "by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears . . . and shows cause why he should not be held in contempt." Under either of these circumstances, the alleged contemnor has the burden of proof. In addition, pursuant to N.C. Gen. Stat. § 5A-23(a1), "[p]roceedings for civil contempt may be initiated by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. . . . The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party." "[W]hen an aggrieved party rather than a judicial official initiates a proceeding for civil contempt, the burden of proof is on the aggrieved party, N.C. Gen. Stat. § 5A-23(a1) [(2015)], because there has not been a judicial finding of probable cause." *Moss v. Moss*, 222 N.C. App. 75, 77, 730 S.E.2d 203, 205 (2012) (citing *Trivette v. Trivette*, 162 N.C. App. 55, 60, 590 S.E.2d 298, 303 (2004)).

In the present case, the nature of plaintiff's motion is not entirely clear. The motion is captioned "Motion for Contempt." However, the first sentence of the motion states that plaintiff is "moving the Court for an Order to Show Cause," and in her prayer for relief plaintiff asks the trial court to issue both a show cause order and an order finding defendant in contempt of court. In addition, the Notice of Hearing indicates that the matter for hearing was a "SHOW CAUSE." Based on the language of the motion and the notice of hearing, defendant might have believed that the hearing conducted on 25 July 2016 could have resulted in nothing more than issuance of a show cause order, to be heard at some future date. However, defendant has not argued on appeal that he lacked notice that the court might enter an order finding him in contempt. Accordingly, we do not address the issue of whether plaintiff's motion, which includes elements of both a motion seeking to have a party held in contempt and a motion merely seeking issuance of a show cause order, properly provided defendant with notice that he might be held in civil contempt of court.

Discussion

Defendant appeals from an order finding him in civil contempt of court for failure to abide by the terms of the court's order to pay attorney's fees to plaintiff's counsel. The trial court's order states, in relevant part, the following:

> . . . [A]fter reviewing the Court file and the exhibits introduced into evidence and hearing the arguments of counsel; the Court enters the following findings of fact, conclusions of law, and decree: . . .

> 1. By an order for Attorney's Fees entered herein on October 4, 2015, by Judge Joseph Williams, Defendant was ordered to pay $20,096.68 in attorney's fees with $10,048.34 due on or before November 1, 2015 and the remain[der] due on or before March 1, 2016.
>
> 2. Defendant has willfully and deliberately violated said Order by:
>
> a. Failing and refusing to pay any of the attorney's fees since the Order was entered.
>
> 3. Defendant is in contempt of Court for his failure to comply with the above Order as he has not paid any attorney's fees.
>
> 4. Defendant's failure to comply with the previous Order entered herein is willful and deliberate and he has the means and ability to comply with the Order as evidenced by his bank statements.

Based upon its findings of fact, the Court concluded in pertinent part that:

. . .

> 2. Defendant is in contempt of Court for his failure to comply with the above Order as he has not paid the attorney's fees as previously ordered.
>
> 3. Defendant's failure to comply with the previous Order entered herein is willful and deliberate and he has the means and ability to comply with the Order as evidenced by his bank statements.

Based upon its findings and conclusions, the trial court entered an order stating in relevant part that:

. . .

> 2. Defendant shall be placed in the custody of the Union County Sheriff's Department until he pays the previously ordered attorney's fees of $20,096.68.
>
> 3. That sentence is suspended until August 15, 2016, provided Defendant purges his contempt by:
>
> a. Paying the full amount of attorney's fees owed, $20,096.68, on or before August 15, 2016.

As discussed above, a party may be held in civil contempt of a court order if (1) the order remains in force; (2) the purpose of the order may be served by compliance with the order; (3) the party's noncompliance is willful; and (4) the party is able to comply with the order. In this case, defendant does not dispute that he was ordered to pay $20,096.68 in attorney's fees or that he had not complied with the order at the time of the hearing. Defendant contends, however, that the trial court's finding that his "failure to comply with the previous Order entered herein is willful and deliberate and he has the means and ability to comply with the Order as evidenced by his bank statements" was not supported by any record evidence. Upon review of the record, we agree.

At the hearing on plaintiff's "Motion For Contempt," no witnesses testified and no exhibits were offered into evidence. The transcript of the proceeding indicates that plaintiff's counsel proffered for the trial court's review documents that he described as defendant's "bank statements" encompassing a mixture of business and personal records from the period between November 2015 and March 2016. The bank records were not introduced into evidence or authenticated by any witness, and are not part of the record on appeal. In addition, assuming the accuracy of plaintiff's counsel's description of the bank records, the records did not reflect defendant's financial circumstances on 25 July 2016, which is the relevant time for purposes of determining defendant's *present* ability to pay. Nor did plaintiff's counsel offer testimony from any witness.

An order finding a party in contempt of court and ordering him incarcerated until he complies must be supported by competent evidence:

> To justify conditioning defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that defendant has the present ability to pay those arrearages. The majority of cases have held that to satisfy the "present ability" test defendant must possess some amount of cash, or asset readily converted to cash. . . . . The record before this court is unclear as to what evidence if any was taken to show defendant's present ability or lack of present ability to pay the arrearage. Therefore, the judgment is vacated and the action remanded to the district court for further proceedings not inconsistent with this opinion.

McMiller v. McMiller, 77 N.C. App. 808, 809-10, 336 S.E.2d 134, 135-136 (1985). In the present case, the record contains no witness testimony or exhibits that were introduced into evidence. As a result, there is no

competent evidence on the issue of defendant's financial circumstances in July 2016, or on his ability to pay the amount of attorney's fees that he owed. We conclude that the trial court's conclusion that defendant had the present ability to comply with the order directing him to pay plaintiff's attorney's fees was unsupported by any record evidence.

In urging us to reach a contrary conclusion, plaintiff notes that this Court has previously held that a court's finding that the contemnor had the "present means to comply" was "minimally" sufficient to satisfy the requirements for a valid order finding a party in contempt. In cases such as those cited by plaintiff, we held that the court's order, although lacking in specific detail, was sufficient to uphold a contempt order when the order was supported by record evidence. For example, in *Maxwell v. Maxwell*, 212 N.C. App. 614, 713 S.E.2d 489 (2011), this Court discussed an earlier case, *Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986):

> In *Adkins*, the trial court found that the defendant had the present means to comply with a court order and purge himself of a finding of contempt. On appeal, this Court reviewed the record evidence and held that the unspecific finding of a present means to comply was sufficient in light of competent evidence presented in support of the findings. Similarly, in the present action, though the trial court's finding as to Plaintiff's ability [to comply] with the contempt order is unspecific, there was competent evidence in the record to support the trial court's finding of fact. Accordingly, Plaintiff's argument on appeal is without merit.

Maxwell, 212 N.C. App. at 619-20, 713 S.E.2d at 493 (emphasis added). In the present case, unlike those cited by plaintiff, the trial court's finding was unsupported by any record evidence.

Plaintiff also argues that, by failing to appear at the hearing on plaintiff's counsel's contempt motion, plaintiff waived the right to object to the presentation of his bank statements to the trial court. However, defendant does not argue that it was error for the trial court to review the documents proffered by plaintiff's counsel, but that the trial court's findings and conclusions are not supported by record evidence. Plaintiff has not cited any cases in which an order of the trial court was upheld despite the absence of any documentary or testimonial evidence. Moreover, the "appellate courts can judicially know only what appears of record." *Jackson v. Housing Authority of High Point*, 321 N.C. 584, 586, 364 S.E.2d 416, 417 (1988) (citation omitted).

For the reasons discussed above, we conclude that the trial court erred by finding defendant in civil contempt of court for his failure to abide by the terms of the order directing him to pay attorney's fees, given that the order was not supported by any evidence introduced at the hearing. Accordingly, the contempt order must be reversed and remanded.

REVERSED AND REMANDED.

Judges CALABRIA and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 OCTOBER 2017)

ARAGON v. LEGACY IMPS., INC. No. 17-339	Wake (15CVS13843)	Affirmed
AVIS RENT A CAR SYS., LLC v. ANDREWS No. 16-1054	Cabarrus (15CVD918)	Affirmed in part, reversed and remanded in part
BOLDON v. BOLDON No. 17-170	Catawba (15CVD2135)	Affirmed
BOONE v. HAYES-BOONE No. 17-312	Iredell (06CVD3173)	Affirmed
BREWER v. FIRST STOP CORE & BATTERY, LLC No. 17-424	N.C. Industrial Commission (14-779562)	Affirmed
DRURY v. DRURY No. 17-273	Henderson (11CVD2201)	Affirmed
LASECKI v. LASECKI No. 17-544	Iredell (13CVD1797)	Vacated and Remanded
LOPEZ v. LOPEZ No. 17-10	Harnett (15CVD1966)	Affirmed
MARTIN v. ORANGE WATER & SEWER AUTH. No. 17-242	N.C. Industrial Commission (14-723669)	Affirmed
MOORE v. MOORE No. 16-1160	Mecklenburg (14CVD23093)	Affirmed in part; vacated and remanded in part
STATE v. BELL No. 17-361	Henderson (16CRS190-191)	No Error
STATE v. BOBICH No. 17-145	Surry (13CRS53028)	Reversed
STATE v. BRADSHAW No. 17-196	Sampson (13CRS50880-81)	No Error
STATE v. DAVIS No. 17-109	Forsyth (14CRS58904) (14CRS58906)	No Error

STATE v. FAULK No. 17-429	Columbus (14CRS576) (14CRS579)	No Error
STATE v. HURLEY No. 16-1202	Pender (15CRS1298-99)	AFFIRMED IN PART; VACATED IN PART; REMANDED WITH INSTRUCTIONS.
STATE v. McKOY No. 17-107	Harnett (13CRS50614) (13CRS50616)	AFFIRMED IN PART; DISMISSED IN PART.
STATE v. ROSE No. 17-190	Durham (12CRS63056)	No plain error in part, no error in part, reversed and remanded in part.
STATE v. SING No. 17-296	Mecklenburg (12CRS239307-308)	No Error
STATE v. TAYLOR No. 16-1291	Forsyth (13CRS58608)	No prejudicial error in part, no plain error in part, no error in part.
STATE v. WHITE No. 16-945	Graham (13CRS50226)	No Error

ATLANTIC COAST PROPERTIES, INC., A DELAWARE CORPORATION, PETITIONER
v.
ANGERONA M. SAUNDERS AND HUSBAND, ALGUSTUS O. SAUNDERS, JR., LUCY M. TILLETT, PATRICIA W. MOORE-PLEDGER, GENEVIVE M. GOODMAN, LYNETTE C. WINSLOW, AND CARLTON RAY WINSLOW, RESPONDENTS

No. COA17-472

Filed 7 November 2017

Pleadings—company—failure to aver legal existence—failure to show capacity to sue—partition of real property

The trial court did not err in an action to partition real property by entering summary judgment in favor of respondent property owners where petitioner company failed to affirmatively aver its legal existence and capacity to sue.

Judge DILLON dissenting.

Appeal by petitioner from order entered 16 November 2016 by Judge Milton F. Fitch, Jr. in Currituck County Superior Court. Heard in the Court of Appeals 16 October 2017.

Hornthal, Riley, Ellis & Maland, LLP, by M. H. Hood Ellis, for petitioner-appellant.

Nexsen Pruet PLLC, by Norman W. Shearin, for respondent-appellees.

CALABRIA, Judge.

Where petitioner's petition failed to affirmatively aver its legal existence and capacity to sue, and petitioner challenged that fact neither at trial nor on appeal, the trial court did not err in entering summary judgment in favor of respondents. We affirm.

I. Factual and Procedural Background

On 7 April 2006, Atlantic Coast Properties, Inc. ("petitioner") filed a verified petition to partition a piece of real property in Currituck County. In this petition, petitioner alleged that it possessed a one-half undivided interest in the property, with the remaining interests divided evenly between Edna May Winslow and Angerona Lovie Moore Saunders, each owning a one-quarter undivided interest. On 17 May 2006, Edna Winslow, Angerona Saunders, and her husband, Algustus O. Saunders,

Jr., filed an answer alleging, *inter alia*, that they had been in actual and exclusive possession of the property for over twenty years, that they were its sole owners, that petitioner had no interest in the property, and that they further had exercised adverse possession, and adverse possession under color of title. They further alleged that if petitioner possessed any interest in the property, it acquired that interest as a result of constructive fraud and unfair and deceptive practices. Due to the nature of these counterclaims, the Clerk of Court granted a motion to transfer the action to superior court.

On 28 September 2007, Edna Winslow, Angerona Saunders, and Algustus Saunders moved for summary judgment. On 4 November 2013, the trial court entered a consent order substituting parties. Due to the death of Edna Winslow on 5 March 2013, her heirs at law were substituted as respondents. Thus, the caption was updated to list Lucy M. Tillett, Particia W. Moore-Pledger, Genevive M. Goodman, Lynette C. Winslow, and Carlton Ray Winslow, in addition to Angerona M. Saunders and Algustus O. Saunders, Jr., (collectively, "respondents") as respondents.

On 29 May 2014, the trial court granted respondents' motion for summary judgment. Petitioner appealed, and on appeal, this Court reversed, holding that petitioner "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." *Atl. Coast Props., Inc. v. Saunders*, ___ N.C. App. ___, ___, 777 S.E.2d 292, 298 (2015), *aff'd per curiam*, 368 N.C. 776, 783 S.E.2d 733 (2016). The matter was remanded to the trial court.

On 16 October 2013, respondents filed a second motion for summary judgment.[1] In this motion, respondents alleged that petitioner was incorporated in Delaware on 26 October 2004; that petitioner's petition was filed on 31 March 2006, at a time when petitioner was not authorized to do business in North Carolina and therefore not a proper party to commence the proceeding; that petitioner was only issued a certificate of authority to do business in North Carolina on 16 August 2007; that on 13 March 2013, petitioner's corporate charter was suspended in Delaware due to tax delinquency; and on 15 May 2013, petitioner's certificate of authority in North Carolina was suspended for failure to comply with Department of Revenue requirements. Respondents therefore alleged that petitioner's conduct since its certificate of

1. The motion for summary judgment includes reference to a motion to dismiss, purportedly filed by respondents on 30 September 2016. This motion to dismiss is absent from the record, and not properly before us.

authority was suspended was null and void, and that petitioner was no longer a legal entity which could maintain the action. On 16 November 2016, the trial court granted respondents' motion, determining that:

> [Petitioner]'s corporate charter in the State of Delaware was declared void on March 1, 2013, that [petitioner] and its registered agent, M. H[.] Hood Ellis, was sent a notification of revenue suspension from the North Carolina Department of the Secretary of State in May, 2013 which informed [petitioner] that "(a)ny act performed . . . during the period of suspension is invalid and of no effect"; and it further appearing to the Court that [petitioner]'s notice of appeal was filed and served on June 27, 2014 during the period of revenue suspension; and it also appearing to the Court that [petitioner] filed its petition herein prior to applying for a certificate of authority in the State of North Carolina and failed to plead its capacity to sue as required by Rule 9(a) of the Rules of Civil Procedure; and the Court takes judicial notice and concludes that the corporate charter of [petitioner] has been void in its state of incorporation since March 1, 2013, and that its certificate of authority has been suspended by the North Carolina Department of the Secretary of State since May 15, 2013 and not reinstated, and therefore any act performed by [petitioner] during the period of suspension from and after May 15, 2013 is invalid and of no effect, and [petitioner] does not have the capacity to maintain this action.

The trial court therefore dismissed the petition with prejudice.

Petitioner appeals.

II. Summary Judgment

In its sole argument on appeal, petitioner contends that the trial court erred in granting summary judgment in favor of respondents. We disagree.

A. Standard of Review

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

B. Analysis

At the hearing on the summary judgment motion at issue, respondents alleged that the matter should be dismissed because petitioner lacked the capacity to maintain the suit. Respondents purportedly submitted uncertified copies of certificates to underscore their point. In response, petitioner alleged that the certificates were not certified or under seal, and the motion for summary judgment was not verified. Respondents replied that the certificates were public records, and that therefore there was no need to question their authenticity. Respondents nonetheless offered to have the documents certified. Respondents argued, however, that "[t]hat doesn't change the facts. It doesn't reinstate the corporate charter. It doesn't issue a certificate of authority, you know." Petitioner then approached the court with a procedural objection, contending that a suspended corporation may sue and continue to maintain a civil action. Petitioner apparently cited N.C. Gen. Stat. § 55A-14-06, which provides that "[d]issolution of a corporation does not: . . . [a]bate or suspend a proceeding pending by or against the corporation on the effective date of dissolution[.]" N.C. Gen. Stat. § 55A-14-06(b)(5) (2015). Respondents argued, however, that the statute dealt with domestic corporations where dissolution is filed, and petitioner was a foreign corporation which had suffered a revenue suspension. Respondents further alleged that the initial petition failed to comply with Rule 9 of the North Carolina Rules of Civil Procedure, which requires a corporation to plead its capacity to sue. *See* N.C.R. Civ. P. 9(a). The trial court, noting petitioner's objections, granted respondents' motion in open court, and subsequently entered a written order.

On appeal, petitioner once more takes issue with the form of the documents presented to the trial court, arguing that the documents should not have been admitted upon summary judgment motion, that petitioner was not required to have a certificate of authority in order to own property, and that a North Carolina corporation suspended under the Revenue Act may nonetheless engage in continued litigation.

Petitioner argues, and we acknowledge, that certain deficiencies may be remedied prior to trial. N.C. Gen. Stat. § 55-15-02 specifically provides that "[n]o foreign corporation transacting business in this State . . . shall be permitted to maintain any action or proceeding . . . unless the foreign corporation has obtained a certificate of authority *prior to trial*." N.C. Gen. Stat. § 55-15-02(a) (2015) (emphasis added). We have previously held that a corporate entity lacking a certificate of authority may rectify that situation at any time prior to trial. *See Harold Lang Jewelers, Inc. v. Johnson*, 156 N.C. App. 187, 192, 576 S.E.2d 360,

363 (2003) (holding that "Lang was aware that Johnson's motion was pending and could have obtained the certificate in the year and a half that passed between the filing of the motion and the court's dismissal of the case"); *Kyle & Assocs., Inc. v. Mahan*, 161 N.C. App. 341, 344, 587 S.E.2d 914, 916 (2003) (where the plaintiff corporation "received a certificate of authority after defendant raised the issue, but before the North Carolina court considered the matter[,]" the plaintiff complied with N.C. Gen. Stat. § 55-15-02(a)), *aff'd per curiam*, 359 N.C. 176, 605 S.E.2d 142 (2004). Were petitioner's lack of a certificate the only thing preventing it from maintaining the action at issue, we recognize that petitioner could have remedied the matter by obtaining a certificate prior to trial. However, the lack of a certificate was not the only thing preventing petitioner from maintaining an action.

Tellingly, neither at trial nor on appeal has petitioner challenged the facts that its charter was suspended in Delaware, that its certificate of authority was suspended in North Carolina, nor that it failed to plead capacity to sue in its initial petition. Petitioner challenges the documents which allege these facts, but not the facts themselves. Any of the trial court's findings pertaining to these unchallenged facts are therefore binding upon this Court. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Further, petitioner raises no argument on appeal with respect to the fact that it failed to allege capacity to sue pursuant to Rule 9. Because petitioner fails to raise this argument, it is deemed abandoned. *See* N.C.R. App. P. 28(b)(6) ("[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned").

It is undisputed that petitioner failed to allege its capacity to sue. Rule 9 specifically mandates that "[a]ny party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue[.]" N.C.R. Civ. P. 9(a). It is likewise undisputed that petitioner is a corporation, and thus a "party not a natural person[.]"

We have previously held that an affirmative averment of legal existence and capacity to sue is a prerequisite to standing for a non-person plaintiff. *See North Iredell Neighbors for Rural Life v. Iredell Cty.*, 196 N.C. App. 68, 75, 674 S.E.2d 436, 441 (2009) (where the plaintiff organization failed to make an affirmative averment of legal existence and capacity to sue, "[t]he trial court properly found that [the plaintiff organization] 'd[id] not have standing to bring suit in this matter[]' "). As such, we hold that petitioner's failure to plead its legal existence and capacity to sue failed to establish its standing to bring suit. The

trial court therefore did not err in entering summary judgment in favor of respondents.

AFFIRMED.

Judge ARROWOOD concurs.

Judge DILLON dissents in a separate opinion.

DILLON, Judge, dissenting.

Petitioner is a Delaware corporation which purportedly owns an interest in certain real estate in North Carolina (the "Property") as a tenant in common. Petitioner, however, has been dissolved and does not have a certificate of authority to transact business in North Carolina from our Secretary of State.

Petitioner filed this special proceeding seeking a partition of the Property. The trial court granted summary judgment for Respondents, who argue that they are the sole owners of the Property. The trial court based its summary judgment order on its conclusion that Petitioner lacked the capacity to seek a partition because (1) it is a dissolved Delaware corporation without a certificate of authority to transact business in North Carolina and (2) it failed to plead its capacity to sue as required by Rule 9(a) of our Rules of Civil Procedure.

The majority affirms the order and reasoning of the trial court. However, because I believe that the law is clear that Petitioner does not need a certificate of authority to petition for a partition of its real estate and because I believe that Petitioner has not violated Rule 9(a), I respectfully dissent.

I. Certificate of Authority

The majority correctly explains that a foreign corporation does not need a certificate of authority to maintain a proceeding in our courts if it is not "transacting business" in North Carolina. Here, Petitioner argues that it is not "transacting business" in North Carolina and therefore does not need a certificate of authority in order to petition the trial court to partition the Property. I agree. Specifically, the only activities Petitioner engages in within our State are (1) that it purportedly owns an interest in the Property, and (2) it has brought this proceeding to partition the Property. Our General Assembly has expressly held that a foreign corporation is not considered to be "transacting business" for purposes

of requiring a certificate of authority "by reason of . . . [o]wning, without more, real or personal property," N.C. Gen. Stat. § 55-15-01(b)(11) (2015), or "by reason of . . . [m]aintaining or defending any action or suit[.]" N.C. Gen. Stat. § 55-15-01(b)(1).[1] Therefore, Petitioner does not need a certificate of authority issued by our Secretary of State to maintain this special proceeding.

Further, I believe that the fact that Petitioner is dissolved does not change the result. Our General Assembly has provided that a dissolved corporation may still dispose of its properties, N.C. Gen. Stat. § 55-14-05(a)(2) (2015); it may do every other act necessary to wind up and liquidate its assets, N.C. Gen. Stat. § 55-14-05(a)(5); and it is not otherwise prevented from commencing a proceeding in its corporate name, N.C. Gen. Stat. § 55-14-05(b)(5). And our Supreme Court has held that a foreign corporation has the authority to deal with its real property in the same manner as a North Carolina corporation. *See Barcello v. Hapgood*, 118 N.C. 712, 729, 24 S.E. 124, 126 (1896) ("The general rule is that foreign corporations may acquire real and personal property such as a tract of land . . . , like domestic corporations[.]").

II. Rule 9(a) of the N.C. Rules of Civil Procedure.

Rule 9(a) of our Rules of Civil Procedure requires that "[a]ny party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue." Here, Petitioner alleged that it was a Delaware corporation, but otherwise did not allege that it had engaged in any activity other than owning real estate. Therefore, for the reasons stated in the prior section, I do not believe that Petitioner was required to aver that it had not been dissolved or had obtained a certificate of authority to transact business in North Carolina. Indeed, the General Assembly has provided that dissolved corporations are not prevented from suing in their own name. N.C. Gen. Stat. § 55-14-05(b)(5). Accordingly, I believe that summary judgment on the basis of a failure to comply with Rule 9(a) was error.

For the foregoing reasons, my vote is to reverse the order of summary judgment.

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1. If Petitioner is successful in obtaining a partition, it may be that Petitioner will, one day in the future, sell its portion of the Property. However, even the Petitioner's act of selling the Property is not considered "transacting business" for purposes of Chapter 55. *See* N.C. Gen. Stat. § 55-15-01(b)(9) ("Transacting business" does not include "[c]onducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature[.]").

BOOKER v. STREGE

[256 N.C. App. 172 (2017)]

DANA BOOKER, PLAINTIFF
v.
RYAN STREGE, DEFENDANT

No. COA16-698

Filed 7 November 2017

1. Child Custody and Support—Uniform Child Custody Jurisdiction and Enforcement Act—Michigan orders—subject matter jurisdiction

The trial court did not err in a child custody case by concluding that North Carolina had subject matter jurisdiction to enter two orders where the trial court's initial denial of enforcement of Michigan orders did not speak to the trial court's broader subject matter jurisdiction over the entire case. Further, the trial court followed the mandates of the Uniform Child Custody Jurisdiction and Enforcement Act.

2. Child Custody and Support—child custody modification—substantial change in circumstances—welfare of children

The trial court did not err in a child custody case by concluding that there had been a substantial change of circumstances justifying modification of custody affecting the welfare of the children in the hope of avoiding further parental conflict for major decisions, including school enrollment.

Appeal by defendant from orders entered 24 November 2015 and 8 February 2016 by Judge Susan Dotson-Smith in District Court, Buncombe County. Heard in the Court of Appeals 23 February 2017.

The Tanner Law Firm, PLLC, by James E. Tanner III, for plaintiff-appellee.

Emily Sutton Dezio, for defendant-appellant.

STROUD, Judge.

The trial court properly exercised subject matter jurisdiction under the UCCJEA and its findings of fact support the conclusion of a substantial change of circumstances affecting the welfare of the children so modification of the prior custody order was appropriate. We therefore affirm.

I. Background

On 5 April 2011, plaintiff-mother and defendant-father entered into a "CONSENT JUDGMENT FOR CUSTODY AND PARENTING TIME" in Michigan agreeing to joint legal custody of their two children with the "children's legal residence" being with their mother and their home state designated as Michigan. On 29 October 2013, another consent order was entered in Michigan allowing plaintiff and the children to move to North Carolina. The court in Michigan noted it "will retain continuing exclusive jurisdiction over this action" and "neither party will file to move or change jurisdiction from the Wayne County Circuit Court for all issues of custody and parenting time for at least five (5) years from the date of entry of this Order." On 1 December 2014, the parties signed one final consent order in Michigan primarily regarding parenting time and the court determined the order "resolves all claims between the parties, and closes the case."

Also on 1 December 2014, plaintiff filed a "PETITION FOR REGISTRATION OF FOREIGN CHILD CUSTODY ORDER" in North Carolina to register the Michigan orders; defendant's address was noted as South Dakota. On or about 3 February 2015, defendant filed an objection to the petition "on the basis that there is an active case in Michigan[.]" On 2 March 2015, the trial court "registered and confirmed" all three of the Michigan orders.

On 4 March 2015, plaintiff then filed a "MOTION TO DETERMINE THE RESIDENCES OF THE PARTIES FOR PURPOSES OF JURISDICTION" and thereafter a motion to enforce the registered Michigan orders. On 5 June 2015, defendant responded to plaintiff's motion to enforce with a motion to dismiss because North Carolina did not have personal jurisdiction over him. On 19 June 2015, plaintiff responded to defendant's motion to dismiss requesting it be denied due to waiver because of defendant's February 2015 written objection filed with the court and defendant's attorney's six court appearances on his behalf. Defendant had not raised a defense of a lack of personal jurisdiction in his objection or at the court appearances. On 26 June 2015, the court ultimately denied defendant's motion to dismiss based on lack of personal jurisdiction but concluded as a matter of law it did not have subject matter jurisdiction and dismissed Plaintiff's Motion to Enforce the registered judgment because the motion did not present "an issue ripe for the Court to intervene[.]"

On 21 July 2015, defendant moved for modification of custody, requesting that the children be primarily placed with him in South Dakota, and for contempt because plaintiff had not allowed him his full summer

visitation. On 24 November 2015, the court entered an interim child custody order concluding that North Carolina was the home state; there had been "a substantial change in circumstances affecting the welfare of the minor children" so it was appropriate to modify the last Michigan order; and it was in the best interest of the children for the parties to share legal custody with plaintiff having primary physical custody. On 8 February 2016, the court entered a custody order determining that North Carolina was the home state; there had been "a substantial change in circumstances affecting the welfare of the minor children" so it was appropriate to modify the last Michigan order; and it was in the best interest of the children for the parties to share legal custody with plaintiff having primary physical custody. Defendant appeals both the 24 November 2015 interim order and the 8 February 2016 custody order.

II. Subject Matter Jurisdiction

[1] Defendant first makes two arguments on appeal contending that North Carolina did not have subject matter jurisdiction to enter two custody orders. Oddly, it was defendant who filed for modification of custody in North Carolina; nonetheless, a party cannot confer subject matter jurisdiction on a court merely by requesting relief in it. *See In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) ("Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to object to the jurisdiction is immaterial. Because litigants cannot consent to jurisdiction not authorized by law, they may challenge jurisdiction over the subject matter at any stage of the proceedings, even after judgment." (citations, quotation marks, brackets, and ellipses omitted)).

> Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal. Subject-matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law.

McKoy v. McKoy, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citations and quotation marks omitted).

A. 26 June 2015 Order

Defendant first contends that because the trial court dismissed plaintiff's motion to enforce in its 26 June 2015 order due to the court

lacking subject matter jurisdiction, the court could not later exercise subject matter jurisdiction. Defendant's argument is entirely misplaced because the 26 June 2015 order did not determine that the court lacked subject matter jurisdiction over the entire case but rather that the court lacked subject matter jurisdiction over *only* the matters in the motion because the particular matter was not ripe. *See generally* Black's Law Dictionary 10th ed. (2014) (defining ripeness as "1. The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made. 2. The requirement that this state must exist before a court will decide a controversy"). That the court chose the term ripe actually indicates that it believed it would in the future have subject matter jurisdiction over the issue in the motion, enforcing the Michigan orders. Regardless, the trial court's initial denial of enforcement of the Michigan orders did not speak to the trial court's broader subject matter jurisdiction over the entire case, so this argument fails.

B. Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA")

Defendant next contends that under the UCCJEA "a court of this State may not modify a child-custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2)[.]" Defendant then notes that North Carolina General Statute § 50A-201 provides that a court can only exercise jurisdiction depending on the determination of the "home state" of the children. *See* N.C. Gen. Stat. § 50A-201 (2015). For North Carolina to be the home state, the children would have needed to live here with their mother "for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102 (2015). "Commencement means the filing of the first pleading in a proceeding." *Id.* (quotation marks omitted). Defendant contends that the first pleading was filed on 1 December 2014 when plaintiff filed her motion to register the child custody orders from Michigan and because at that time the children had only resided in North Carolina since 12 August 2014, for approximately three months, they had not resided here long enough for North Carolina to be the home state and ultimately exercise jurisdiction.

But defendant's view of when the proceeding commenced is in error. North Carolina General Statute § 50A-102(4) defines "child custody proceeding" as

> *a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue.* The term

> includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence in which the issue may appear. *The term does not include* a proceeding involving juvenile delinquency, contractual emancipation, or *enforcement* under Part 3 of this Article.

Id. (emphasis added). Plaintiff's motion to register the Michigan orders did not raise the issues of "legal custody, physical custody, or visitation[.]" *Id.* Her request was simply to register the Michigan orders in North Carolina so they could be enforced, in accordance with North Carolina General Statute § 50A-305. *See id.* North Carolina General Statute § 50A-102(4) specifically excludes a proceeding for enforcement under Part 3 of Article 2; North Carolina General Statute § 50A-305 is found in Part 3 of Article 2. *See generally* Chap. 50A *et. seq.* The first pleading regarding custody and visitation issues was filed by father on 21 July 2015, approximately 11 months after even defendant's alleged date the children began residing in this state. Because North Carolina followed the mandates of the UCCJEA it properly exercised subject matter jurisdiction, and this argument is overruled.[1]

III. Substantial Change of Circumstances

[2] Lastly, defendant contends that the trial court erred in determining there had been a substantial change of circumstances so it was appropriate to modify custody. Again, we note defendant himself filed for the modification of custody which alleged facts he deemed to be substantial changes justifying modification of custody. Defendant's motion acknowledged the prior Michigan order which had anticipated plaintiff's move to North Carolina and had even addressed where the children would attend school when they reached kindergarten age. In fact, the Michigan order entered in October 2013 set out a specific parenting schedule after the children reached school age, to be based upon the public school schedule in the county where the children resided at that time; it also addressed travel for visitation, including the option of air travel when the children are older.

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1. We note there is some issue on appeal regarding whether we may consider the addendum to the record which includes an order from the court in Michigan determining Michigan no longer has subject matter jurisdiction and an email from the district court judge presiding over this case in North Carolina, noting that she, the judge in Michigan, and a judge in South Dakota had all spoken and determined North Carolina was the appropriate state to exercise jurisdiction. We need not resolve whether the addendum should be considered by this Court as we have already determined North Carolina is the appropriate jurisdiction for this case; however, we wanted to note that no arguments have been made that any other state would have jurisdiction over this case.

Defendant's motion for modification was based upon several allegations of changes in circumstances, all negative for plaintiff, and positive for himself. Specifically, defendant alleged that plaintiff had violated various provisions of the Michigan custody orders and interfered with his parenting time and communication with the children; that plaintiff's behavior was "more erratic and unstable" such that she was unable to care for the children on her own; that plaintiff's living situation was "unsettled" including because she once told him she was considering moving to Wilmington but then decided to stay in Asheville; that plaintiff had no family support in Asheville since her mother lives in Michigan; and that plaintiff is more concerned with her career than with the children and has them spend too much time in the care of a babysitter. Defendant also alleged other "changes" which are actually circumstances that clearly existed, according to his own allegations, prior to the entry of the Michigan orders, such as that plaintiff has "a violent, flash temper and mood swings which has been documented by her assault on defendant when she was pregnant[.]" Defendant further alleged that the parties had been unable to agree on where the children should attend kindergarten, despite the prior Michigan consent orders, which provided that they would attend school in North Carolina; defendant stated he could no longer agree to the provisions of the Michigan orders due to the negative changes he alleged regarding plaintiff and her living situation.

We note that defendant does not challenge the ultimate custody provisions determining that plaintiff would have primary physical custody but *only* contends there was not a substantial change in circumstances justifying the modification.

Shipman v. Shipman explains,

> It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody. The party seeking to modify a custody order need not allege that the change in circumstances had an adverse effect on the child. While allegations concerning adversity are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.

. . . .

The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. . . .

When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges[.] Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.

In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of

> the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

357 N.C. 471, 473–75, 586 S.E.2d 250, 253–54 (2003) (citations and quotation marks omitted).

We need not delve far into the findings of fact to conclude there was a substantial change of circumstances affecting the children's welfare. In a well-organized, detailed, and comprehensive order, the trial court addressed defendant's allegations regarding plaintiff's instability and inability to care for the children, and ultimately rejected them. The order also addressed the alleged changes, both positive and negative, for both parties since entry of the last Michigan order. We will not address all of the findings of fact, but we will address one of the most important issues which led to the motions filed by both parties: the dispute over where the children would attend kindergarten. The trial court made the following findings which are not challenged on appeal:

> 31. The previous Order of the Michigan Court mandated that the minor children would begin kindergarten in the State of North Carolina.
>
> 32. The minor children were scheduled to begin kindergarten in August of 2015 at William W. Estes Elementary School.
>
> 33. The Defendant enrolled the minor children in kindergarten in the State of South Dakota and the Plaintiff enrolled the minor children in kindergarten in the State of North Carolina.
>
> 34. The Plaintiff did not consent to the Defendant enrolling the minor children in kindergarten in the State of South Dakota, nor was she notified by the Defendant.
>
> . . . .
>
> 36. The parties have shared visitation with the minor children in accordance with the three (3) prior Court Orders from the State of Michigan. However, both parties have had difficulty interpreting the visitation schedules as set forth in the former Orders of the Michigan Court.

37. The parties were in conflict regarding the interpretation of the visitation schedule for the month of August 2015. Plaintiff interpreted the previous Order to require the Defendant to return the children to the State of North Carolina to begin kindergarten on the Saturday two weeks-prior to the day the minor children were to begin kindergarten. That day was August 8, 2015.

38. The Defendant claims that he interpreted the previous Order to allow him the entire month of August 2015 as his visitation time with the children.

39. The Defendant did not return the children on August 8, 2015, rather, returned the minor children to the State of North Carolina on or about August 14, 2015.

Defendant does challenge finding of fact 35 which finds that duel enrolling the children in school "is a substantial change of circumstances affecting the minor children." Defendant argues "[t]here is an absence of any evidence on how the father's enrollment of the children in school where he resided . . . impacted the children in any way." Defendant seems to forget that the Michigan court order had already decreed that the children were to be enrolled in North Carolina, and that his own motion to modify was prompted by the kindergarten enrollment and alleges various violations of the same order by plaintiff as negative changes which impacted the children. It is clear from the next sentence in finding of fact 35 how the children were negatively impacted by the duel enrollments as the trial court found "[i]t is no longer appropriate for these two parents to share the education decision of where the children shall be enrolled." In other words, defendant's disregard for the prior Michigan order and trying to unilaterally move the children to South Dakota and his inability to work with plaintiff to resolve their school disagreement without extensive litigation indicated to the trial court that the parties cannot, for whatever reason, work together for the benefit of the children. The negative impact on the children is not from whether they attend this school or that school; the impact is from their parents' fighting with one another over important decisions all parents must make for their children. Parental conflict is not good for children. The trial court is not required to wait until the children have been damaged enough to receive a formal diagnosis of some mental or emotional disorder to intervene.

The trial court also addressed defendant's allegations of various violations of the orders by plaintiff and essentially rejected them. Although

the 2013 Michigan order had set out a parenting schedule in anticipation of the children starting school, the conflict that developed between the parents since 2013, exacerbated by defendant's unilateral enrollment of the children in school in South Dakota, supported the trial court's finding of a substantial change of circumstances requiring a modification of the custodial schedule in the hope of avoiding further parental conflict. As the actual specifics of the changes in the custodial schedule are not at issue on appeal, we need not review them. This argument is overruled.

IV. Conclusion

We conclude that North Carolina properly exercised subject matter jurisdiction and the trial court properly found a substantial change in circumstances affecting the minor children so modification of the prior custody order was in the best interest of the children; therefore, we affirm.

AFFIRMED.

Judges DILLON and MURPHY concur.

THELMA BONNER BOOTH, Widow and Administratrix of the Estate of HENRY HUNTER BOOTH, JR., Deceased-Employee, Plaintiff

v.

HACKNEY ACQUISITION COMPANY, f/k/a HACKNEY & SONS, INC., f/k/a HACKNEY & SONS (EAST), f/k/a J.A. HACKNEY & SONS, Employer, NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION on behalf of AMERICAN MUTUAL LIABILITY INSURANCE, Carrier, and on behalf of THE HOME INSURANCE COMPANY, Carrier, Defendants

No. COA17-274

Filed 7 November 2017

1. Appeal and Error—interlocutory orders and appeals—worker's compensation—Industrial Commission certification of constitutional question

The Court of Appeals had jurisdiction under N.C.G.S. § 97-86 in a workers' compensation case over plaintiff administratrix's appeal from an interlocutory order of the Industrial Commission certifying a constitutional question to the Court of Appeals.

2. Constitutional Law—Equal Protection—workers' compensation—latent health conditions—suspect class—fundamental right—minimum scrutiny—legitimate State interests

The bar date in N.C.G.S. § 58-48-35(a)(1) and the statute of repose in N.C.G.S. § 58-48-100(a) did not violate either the N.C. or U.S. constitutions, either facially or as applied to plaintiff in a workers' compensation case. Individuals with latent health conditions are not members of a suspect class, and access to a claim against the North Carolina Insurance Guaranty Association does not affect a fundamental right. The distinctions imposed by statute are subject to minimum scrutiny under the Equal Protection Clause and further legitimate State interests.

Appeal by Plaintiff from an Opinion and Award entered 7 December 2016 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 6 September 2017.

Wallace & Graham, P.A., by Edward L. Pauley, for Plaintiff-Appellant.

Nelson Mullins Riley & Scarborough LLP, by Christopher J. Blake and Joseph W. Eason, for Defendant-Appellee North Carolina Insurance Guaranty Association.

Cranfill Sumner & Hartzog LLP, by Theodore B. Smyth and Joseph C. Tanski, for amicus curiae National Conference of Insurance Guaranty Funds.

MURPHY, Judge.

Individuals with latent health conditions are not members of a suspect class, and access to a claim against the North Carolina Insurance Guaranty Association does not affect a fundamental right. The distinctions imposed by statute are subject to minimum scrutiny under the Equal Protection Clause and do not violate the North Carolina or United States Constitutions, as they further legitimate State interests.

Thelma Bonner Booth ("Plaintiff"), as the administratrix of the estate of Henry Hunter Booth, Jr. ("Booth"), appeals the Full North Carolina Industrial Commission's Opinion and Award certifying a constitutional question to this Court. On appeal, Plaintiff asserts the following arguments: (1) the "bar date" provision in N.C.G.S. § 58-48-35(a)(1) (2015) violates Plaintiff's constitutional rights to equal protection and due process; and (2) the statute of repose in N.C.G.S. § 58-48-100(a) (2015) deviates from the purposes of the Workers' Compensation Act and is also unconstitutional. After careful review, we hold both provisions

do not violate the North Carolina or United States Constitutions and remand to the Full Commission for further proceedings.

I. Background

Booth worked at Hackney Industries, Inc. from 1967 to 1989. From September 1988 to September 1990, Hackney was insured by the Home Insurance Company. On 13 June 2003, a court in New Hampshire filed an order of liquidation for Home Insurance Company and declared the company to be insolvent. The same court ordered all claims against the company to be filed with the "liquidator" by 13 June 2004, the bar date.

On 23 June 2008, Booth was diagnosed with lung cancer. On 27 April 2009, Booth passed away. On 16 November 2009, a doctor opined Booth "developed welding related conditions including lung fibrosis and adenocarcinoma of the lung which was caused and/or contributed to by his exposure to welding rod fumes."

On 1 December 2009, Plaintiff completed a Form 18 (Notice of Accident to Employer and Claim of Employee, Representative, or Dependent). On 17 June 2013, the North Carolina Insurance Guaranty Association ("Defendant") filed a Form 61 (Denial of Workers' Compensation Claim) for the Home Insurance Company, because Home Insurance was an insolvent insurance carrier. In the Form 61, Defendant denied that it owed any obligation regarding Plaintiff's claim because the claim was not proper under N.C.G.S. §§ 58-48-35(a)(1) and 58-48-1. On 20 October 2015, Defendant filed a motion to dismiss Plaintiff's claim, arguing the bar date and the statute of repose mandated dismissal of Plaintiff's claim against Defendant.[1]

On 2 December 2015, Deputy Commissioner Thomas H. Perlungher denied Defendant's motion to dismiss. On 5 January 2016, Defendant appealed to the Full Commission. On 7 December 2016, the Full Commission certified the following question to this Court, pursuant to N.C.G.S. § 97-86 (2015):

> Do the provisions of N.C. Gen. Stat. §§ 58-48-35(a)(1) and 58-48-100(a), as applied in workers' compensation cases involving occupational diseases which, due to the very nature of the disease, develop many years after the last injurious exposure, violate the guarantees of due process

1. Defendant also filed another motion to dismiss, but the arguments contained therein are not at issue in this appeal.

> and equal protection of law under Article I, Section 19 of the Constitution of the State of North Carolina and/or under the 14th Amendment to the United States Constitution to claimants who were injuriously exposed prior to the bar date but whose occupational disease did not develop until after the bar date and/or after the last date allowed by the statute of repose?

Plaintiff filed timely notice of appeal.

II. Jurisdiction

[1] Under N.C.G.S. § 97-86, "[t]he Industrial Commission . . . may certify questions of law to the Court of Appeals for decision and determination by the Court[,]" prior to entering a final opinion and award. *Id.* On 7 December 2016, the Commission certified a constitutional question to this Court, pursuant to section 97-86. Thus, we have jurisdiction over Plaintiff's appeal, even though the Opinion and Award from which Plaintiff appeals is interlocutory.

III. Standard of Review and Level of Scrutiny

This Court reviews alleged violations of constitutional rights de novo. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (citations omitted) ("[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated."). Plaintiff contends our Court should apply the highest level of scrutiny, strict scrutiny, and argues that the bar date and the statute of repose affect her fundamental right "to remedies provided by the Workers' Compensation Act[.]" However, the challenged provisions do not affect a fundamental right or a suspect class. *See Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 505, 616 S.E.2d 356, 362 (2005) (citation omitted). Therefore, the lowest level of scrutiny, minimum scrutiny, applies to the provisions in the workers' compensation scheme. *Id.* at 505, 616 S.E.2d at 362 (citation omitted). Under this level of scrutiny:

> "The constitutional safeguard (of equal protection) is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it."

Roberts v. Durham Cty. Hosp. Corp., 56 N.C. App. 533, 539, 289 S.E.2d 875, 879 (1982) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26, 6 L. Ed. 2d 393, 399 (1961)). "[I]t is only necessary to show that the classification created by the statute bears a rational relationship to or furthers some legitimate state interest." *Walters v. Blair*, 120 N.C. App. 398, 400, 462 S.E.2d 232, 234 (1995) (citation omitted). Thus, we now review the challenged provisions under minimum scrutiny.

IV. Analysis

[2] A review of the formation of the North Carolina Insurance Guaranty Association ("NCIGA") is pertinent to our analysis. In 1971, the NCIGA was created by statute, N.C.G.S. § 58-48-1 *et seq.*, to maintain accounts for the payment of various types of claims on behalf of insolvent insurers. 1971 N.C. Sess. Laws ch. 670. The purpose of the NCIGA is:

> to provide a mechanism for the payment of *covered claims* under certain insurance policies, to avoid excessive delay in payment, and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of such protection among insurers.

N.C.G.S. § 58-48-5 (2015) (emphasis added).

The NCIGA consists of "members", which are all insurance companies licensed to do business in the State. N.C.G.S. § 58-48-20(6) (2015). Prior to 1993, the NCIGA was only responsible for various types of insurance company insolvencies, but not workers' compensation. *See* 1991 N.C. Sess. Laws ch. 802. In 1992, the General Assembly enacted legislation amending the Insurance Guaranty Association Act and the Worker's Compensation Act to place workers' compensation claims within the scope and administration of NCIGA. *Id.* Starting on 1 January 1993, the NCIGA became responsible for workers' compensation claims involving insolvent carriers. *Id.* We now turn to Plaintiff's challenges to the bar date and the statute of repose.

A. N.C.G.S. § 58-48-35(a)(1) Bar Date

Plaintiff first argues the bar date provision in N.C.G.S. § 58-48-35(a)(1) violates her constitutional right to equal protection.[2] We disagree.

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2. In Plaintiff's brief, she offers only one paragraph for her argument that the bar date provision violates her fundamental right to due process. Plaintiff cites no case law in this paragraph. It is not our duty "to supplement an appellant's brief with legal authority[.]"

N.C.G.S. § 58-48-35(a)(1) states:

> In no event shall the Association be obligated to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises. Notwithstanding any other provision of this Article, *a covered claim shall not include any claim filed with the Association after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer.*

Id. (emphasis added). Thus, in this case, to be a "covered claim," the claim must have been filed against Defendant (as it stands in the place of the insolvent Home Insurance Company) by 13 June 2004, the date set by the New Hampshire court. All parties agree Plaintiff did not file her claim by 13 June 2004.

We conclude the bar date passes constitutional muster, as there is a legitimate State interest—indeed, several legitimate State interests—furthered by the distinction made in N.C.G.S. § 58-48-35(a)(1). As stated in Plaintiff's brief, the bar date "is a method to ensure that the NCIGA has the opportunity to recover any sums expended on covered claims. It is to ensure some measure of recovery from the bankruptcy estate solely for the benefit of the NCIGA."[3] Additionally, Defendant presents the following, *inter alia*, as legitimate policy reasons for the distinction, all of which we accept and conclude as individually sufficient for the statute to survive minimum scrutiny:

> 1. As a State that depends more heavily on foreign rather than domestic insurers for purposes of workers' compensation insurance, conforming to the bar date provision of the [National Association of Insurance Commissioners] Model [Post-Assessment Guaranty] Act promoted the State's and the public's interest in a more uniform,

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Eaton v. Campbell, 220 N.C. App. 521, 522, 725 S.E.2d 893, 894 (2012) (quotation marks and citations omitted). This argument was not properly presented to our Court and is "taken as abandoned." N.C.R. App. P. 28(b)(6) (2017) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated will be taken as abandoned.").

3. Our Court in *Payne* held the State's interest in finality failed to pass minimum scrutiny when the statutes treated claims for asbestosis harsher than other latent occupational diseases. 172 N.C. App. at 505-06, 616 S.E.2d at 362-63. However, the same issue is not at hand here. The bar provision does not set a different bar date for only some occupational diseases. Indeed, the bar date does not create a distinction between different diseases or injuries at all. The only "distinction" is between claims filed before the bar date and claims filed after the bar date.

> national approach to insolvencies of workers' compensation carriers;
>
> 2. As a State that finances the recovery of un-recouped assessments of the NCIGA via offsets against premium taxes pursuant to N.C. Gen. Stat. § 105-228.5A, the bar date provision promotes the interests of the State and the public by establishing a date on which future liabilities for claims, and hence tax credits, are capped;
>
> 3. Acting together with other provisions of the Guaranty Act, such as the "net worth" recovery rights under N.C. Gen. Stat. § 58-48-50(a1) and the "non-duplication of recovery" provisions of N.C. Gen. Stat. § 58-48-55, the bar date serves the State's and the public's interests by promoting the marshalling of the insolvent insurer's assets to finance the expedited payments and other protections provided with respect to the claims of "claimants" made against a "policyholder" or other insureds of the insolvent insurer;
>
> ….
>
> [4]. The bar date promotes the State's and the public's interest in reducing the risk of delay, suspension, or partial payment of "covered claims" that can result from exceeding the assessment capacity of the NCIGA during a period of multiple insolvencies or large workers' compensation insurer insolvencies.

Additionally, in its *amicus curiae* brief, the National Conference of Insurance Guaranty Funds identifies the following, *inter alia*, as legitimate reasons for the bar date:

> (1) promote fiscal integrity of NCIGA by limiting claims against NCIGA, thereby preserving NCIGA's limited resources for claimants and policyholders; (2) limit the burden on the public which provides funds for NCIGA; . . . ([3]) provide finality to the insurer liquidation process; and ([4]) preserve the assets of the insolvent insurer to provide funding to NCIGA.

Moreover, the State has an interest in preserving the integrity of the Guaranty Fund.

We further note "classifications are largely matters of legislative judgment." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 435, 302

S.E.2d 868, 877 (1983) (citation omitted). Indeed, "a court may not substitute its judgment of what is reasonable for that of the legislative body, particularly when the reasonableness of a particular classification is fairly debatable." *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 226, 258 S.E.2d 444, 456 (1979) (citations omitted). With these principles in mind, we conclude the bar date provision does not violate Plaintiff's constitutional right to equal protection.

B. N.C.G.S. § 58-48-100(a) Statute of Repose

Plaintiff next argues the statute of repose in N.C.G.S. § 58-48-100(a) is unconstitutional and deviates from the purpose of the Workers' Compensation Act. We disagree.

A statute of repose "constitutes a substantive definition of, rather than a procedural limitation on, rights." *Lamb*, 308 N.C. at 426, 302 S.E.2d at 872 (citing *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982)). As our State Supreme Court did in *Lamb*, we keep two principles in mind when reviewing the challenged statute of repose: First, "there is a presumption in favor of constitutionality; reasonable doubts must be resolved in favor of sustaining the act." *Id.* at 433, 302 S.E.2d at 876 (citations omitted). Second, "so long as an act is not forbidden, the wisdom of the enactment is exclusively a legislative decision." *Id.* at 433, 302 S.E.2d at 876 (citation omitted). *See also Rhyne v. K-Mart Corp.*, 358 N.C. 160, 170-71, 594 S.E.2d 1, 9 (2004) (citation omitted) (explaining it is within the power of the legislature to establish statutes of repose, as long as the statutes do not violate constitutional rights).

The challenged statute of repose states:

> Notwithstanding any other provision of law, a covered claim with respect to which settlement is not effected with the Association, or suit is not instituted against the insured of an insolvent insurer or the Association, within five years after the date of entry of the order by a court of competent jurisdiction determining the insurer to be insolvent, shall thenceforth be barred forever as a claim against the Association.

N.C.G.S. § 58-48-100(a).

Here, the insurer, Home Insurance Company, was declared to be insolvent on 13 June 2003. Thus, to not violate the statue of repose, Plaintiff's claim would have to have been filed by 13 June 2008. *Id.* However, Booth was diagnosed and passed away after the tolling of the statute of repose.

Plaintiff presents the same constitutional arguments under this analysis as she did for the bar date. As we held *supra*, the State has a legitimate interest in protecting the integrity of the Guaranty Fund, and the other interests listed above. These interests are furthered by the statute of repose. Accordingly, we hold the statute of repose is not in violation of the North Carolina or United States Constitutions.

Although Plaintiff asks us to determine whether this statute of repose "deviates from the purposes of the Act", we cannot answer that question in this interlocutory appeal.[4] The certified question to this Court under N.C.G.S. § 97-86 is limited to whether the bar date provision and the statute of repose violate either the North Carolina or United States Constitutions, not whether the statute of repose deviates from the purposes of the Act. Thus, we need not address that argument.

V. Conclusion

In conclusion, we hold the bar date in N.C.G.S. § 58-48-35(a)(1) and the statute of repose in N.C.G.S. § 58-48-100(a) do not violate either the North Carolina or United States Constitutions, either facially or as applied to Plaintiff. Accordingly, we remand to the Full Commission for further proceedings consistent with this opinion.

REMANDED.

Judges CALABRIA and ZACHARY concur.

4. In support of her arguments, Plaintiff cites to *Wilder v. Amatex Corp.*, 314 N.C. 550, 336 S.E.2d 66 (1985). In *Wilder*, our State Supreme Court analyzed a statute of repose to determine whether the statute covered claims arising out of disease, when it did not explicitly state so. *Id.* at 554-63, 336 S.E.2d at 68-73. *Wilder* did not involve a question of constitutionality of the statute. No party in the case at hand argues the statute of repose does not govern latent diseases, from which Booth allegedly suffered. Instead, the question before the Court is whether the statute is unconstitutional. Accordingly, contrary to Plaintiff's arguments, *Wilder* does not demand a different result.

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA, PLAINTIFF

v.

PHILLIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, DEFENDANTS

No. COA17-367

Filed 7 November 2017

Constitutional Law—State—Advice and Consent Amendment—senatorial confirmation of Governor's appointed statutory officers—separation of powers

A three-judge superior court panel did not err by entering summary judgment in favor of the General Assembly on the constitutionality of the Advice and Consent Amendment in Session Law 2016-126. The Governor did not meet the high burden to show beyond a reasonable doubt that the General Assembly is without authority to require senatorial confirmation of the Governor's appointed statutory officers. Further, he did not show beyond a reasonable doubt that the Advice and Consent Amendment violates the separation of powers clause of the Constitution of North Carolina.

Appeal by plaintiff from Memorandum of Order entered 17 March 2017 by a three-judge panel comprised of Judges L. Todd Burke, Jesse B. Caldwell, III, and Jeffery B. Foster, in Wake County Superior Court. Heard in the Court of Appeals 20 September 2017.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr., Eric M. David and Daniel F. E. Smith, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough LLP, by D. Martin Warf, Noah H. Huffstetler and Candace Friel, for defendant-appellees.

PER CURIAM.

Roy A. Cooper, III, in his official capacity as Governor of the State of North Carolina, appeals from an order of a three-judge superior court panel, which granted summary judgment in favor of Phillip E. Berger and Timothy K. Moore, in their official capacities, respectively, as President Pro Tempore of the North Carolina Senate and as Speaker of the North Carolina House of Representatives (collectively, "the General Assembly"). The order is affirmed.

I. Background

On 8 November 2016, a majority of North Carolina voters elected Roy A. Cooper, III as Governor, who took his oath of office and whose term commenced on 1 January 2017. On 16 December 2016, the General Assembly duly enacted Session Laws 2016-125 (Senate Bill 4) and 2016-126 (House Bill 17), which were signed into law by the current Governor, Patrick L. McCrory, and became effective immediately.

On 30 December 2016, Mr. Cooper, while continuing to serve as the duly elected Attorney General of North Carolina, and while the sitting Governor remained in office, filed a complaint in his capacity as "Governor-elect," sought a temporary restraining order, and a temporary injunction in the Wake County Superior Court, and asserted the statutory amendments set forth in Session Law 2016-125 were unconstitutional. On the same day, the trial court granted a temporary restraining order, enjoining the challenged portions of Session Law 2016-125 before they went into effect.

The Chief Justice of the North Carolina Supreme Court convened and assigned a three-judge superior court panel to hear the constitutional challenges to Session Law 2016-125. On 6 January 2017, the panel preliminarily enjoined the challenged portions of Session Law 2016-125, pending a final determination on the merits.

Governor Cooper filed an amendment to his complaint on 10 January 2017 and raised constitutional challenges to Part III of Session Law 2016-126 (the "Advice and Consent Amendment") and the portions of Sections 7 and 8 of Part I of Session Law 2016-126 codified at N.C. Gen. Stat. § 126-5(d)(2c) (the "Exempt Positions Amendments"). The superior court conducted a hearing on the merits of his claims on 7 March 2017.

On 17 March 2017, the trial court panel entered summary judgment in favor of the General Assembly and rejected the Governor's challenge to the Advice and Consent Amendment set forth in Session Law 2016-126. The panel found "[a]dvice and consent is an exclusive function of the legislative branch." The panel further found the executive appointees at issue "are the most important appointments a Governor makes, as they are appointed to lead the State's principal departments, said departments having been created by act of the legislative branch."

The panel further found:

> 6. A Legislature that has the authority to create executive agencies also has the authority to require legislative

advice and consent to fill the leadership roles in those agencies, absent constitutional limitations to the contrary.

7. No applicable constitutional limitation on such appointment power exists in our constitution.

8. "The will of the people [] is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people's elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution*." *Pope v. Easley*, 354 N.C. at 546, 556 S.E.2d at 267 (emphasis in original).

9. A statute "must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *Rowlette v. State*, 188 N.C. App. 712, 715, 656 S.E.2d 619, 621 (2008) (citations omitted).

10. The Plaintiff has made no evidentiary showing that the Advice and Consent provision will result in a violation of the separation of powers provision of the North Carolina Constitution.

The panel concluded although the Constitution is "silent as to advice and consent of Statutory officers . . . Article III, Section 5(8) does not prohibit the General Assembly from appointing statutory officers." The panel further concluded Article III, Section 5(8) does not, "beyond a reasonable doubt, restrict the General Assembly's advice and consent power as to statutory appointees;" it "permits advice and consent at the highest level of constitutional office but is not a limitation of advice and consent;" and it "does not limit the General Assembly to advice and consent on only constitutional officers." (Emphasis omitted).

The panel determined our Constitution "does not prohibit a law establishing senatorial advice and consent over the appointments of the Governor to the heads of principal state departments," and the Advice and Consent Amendment does not violate the separation of powers clause of our Constitution.

The Governor appeals the entry of summary judgment in favor of the General Assembly on the constitutionality of the Advice and Consent Amendment.

II. Jurisdiction

Jurisdiction lies from appeal of a final judgment of the superior court on the claims asserted in the Governor's amended complaint pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Issues

The Governor argues the trial court panel erred by granting summary judgment in favor of the General Assembly and rejecting his challenge to the Advice and Consent Amendment, and asserts the Advice and Consent Amendment violates the separation of powers clause of the Constitution of North Carolina. N.C. Const. art. I, § 6.

IV. Standard of Review

"We review a trial court's order granting or denying summary judgment *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." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citations and internal quotation marks omitted).

"We review constitutional questions *de novo*." *State ex. rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016) (citing *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001)).

"In exercising *de novo* review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond reasonable doubt." *Id.* (citations omitted).

> In other words, the constitutional violation must be plain and clear. To determine whether the violation is plain and clear, we look to the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents.

Id. (citations omitted).

The parties conceded at oral argument that all cabinet secretaries and other appointees nominated by the Governor, who are subject to the Advice and Consent Amendment, were approved by the Senate. As such, any asserted as-applied constitutional challenge to the Advice and Consent Amendment is moot. *See Town of Beech Mtn. v. Genesis Wildlife Sanctuary, Inc.*, __ N.C. App. __, __, 786 S.E.2d 335, 347 (2016), *aff'd*, __ N.C. App. __, 799 S.E.2d 611 (2017) ("The basic distinction is

that an as-applied challenge represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff's contention that a statute is incapable of constitutional application in any context.")

"[A] facial challenge to the constitutionality of an act, as plaintiffs have presented here, is the most difficult challenge to mount successfully." *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 288 (2015) (citation omitted). "We seldom uphold facial challenges because it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them." *Id.* (citation omitted).

The complaint was filed on 30 December 2016, prior to the date Governor Cooper took his oath of office. The General Assembly has not challenged the trial court's finding that "[t]he Governor has standing to raise the[se] arguments" as a real party in interest under N.C. Gen. Stat. § 1A-1, Rule 17 (2015). Presuming, *arguendo*, the Governor possessed standing to bring suit, while he continued to serve as the elected Attorney General, to challenge a duly enacted law of the General Assembly prior to his oath as Governor on 1 January 2017, we review the Governor's facial constitutional challenge to the Advice and Consent Amendment.

V. Advice and Consent Amendment

The Advice and Consent Amendment, as set forth in Session Law 2016-126, amended N.C. Gen. Stat. § 143B-9. This statute pertains to the Governor's appointments of the "head of each principal State department," and states:

> For each head of each principal State department covered by this subsection, the Governor shall notify the President of the Senate of the name of each person to be appointed, and the appointment shall be subject to senatorial advice and consent in conformance with Section 5(8) of Article III of the North Carolina Constitution unless (i) the senatorial advice and consent is expressly waived by an enactment of the General Assembly or (ii) a vacancy occurs when the General Assembly is not in regular session. Any person appointed to fill a vacancy when the General Assembly is not in regular session may serve without senatorial advice and consent for no longer than the earlier of the following:
>
> (1) The date on which the Senate adopts a simple resolution that specifically disapproves the person appointed.

> (2) The date on which the General Assembly shall adjourn pursuant to a joint resolution for a period longer than 30 days without the Senate adopting a simple resolution specifically approving the person appointed.

N.C. Sess. Law 2016-126.

Article III, Section 5(8) of the Constitution of North Carolina provides: "Appointments: The Governor shall nominate and by and *with the advice and consent* of a majority of the Senators appoint all officers whose appointments are not otherwise provided for." N.C. Const. art. III, § 5(8) (emphasis supplied).

The separation of powers clause of the Constitution of North Carolina declares that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. The separation of powers clause is violated "when one branch exercises power that the constitution vests exclusively in another branch" or "when the actions of one branch prevent another branch from performing its constitutional duties." *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256.

The Governor argues the Advice and Consent Amendment permits the Senate's review of and consent to his appointments of persons to serve as his immediate deputies, the cabinet secretaries. He asserts it violates the separation of powers clause by interfering with the Governor's faithful execution of the law and the executive power to select deputies, who will promote and implement the Governor's policies the voters elected him to pursue. *See* N.C. Const. art. III, § 5(4) (conferring upon the Governor the duty to "take care that the laws be faithfully executed").

The Governor further argues, presuming *arguendo* the General Assembly's power includes the power to exercise advice and consent over some executive officers, "the exercise of such a power over the Governor's cabinet secretaries goes too far." The Governor asserts the cabinet secretaries are not simply members of an executive branch commission or board. Rather, he asserts they possess significant authority as the most senior executive officials, who receive their appointments directly from the Governor.

Separation of powers issues are not analyzed within a vacuum or by an absolute bright line within a working government. *See United States v. Brainer*, 691 F.2d 691, 697 (4th Cir. 1982). "The perception of the separation of three branches of government as inviolable, however, is an ideal not only unattainable but undesirable. An overlap of powers

constitutes a check and preserves the tripartite balance, as two hundred years of constitutional commentary note." *In re Alamance Cty. Court Facilities*, 329 N.C. 84, 96, 405 S.E.2d 125, 131 (1991).

Asserted separation of powers violations are analyzed on a case-by-case basis with a flexible and pragmatic approach. *See McCrory*, 368 N.C. at 646, 781 S.E.2d at 257 (courts "cannot adopt a categorical rule that would resolve every separation of powers challenge to the legislative appointment of officers"). Disagreements between coordinate branches of government regarding overlaps and exercises of authority have and will continue to occur. *See Brainer*, 691 F.2d at 697.

The Governor relies heavily upon our Supreme Court's decision in *McCrory*, which involved a constitutional challenge to legislation which authorized the General Assembly to appoint a majority of the voting members to the Oil and Gas Commission, the Mining Commission, and the Coal Ash Management Commission. *Id.* at 636-37, 781 S.E.2d at 250-51.

The Court first determined whether the appointments clause in Article III, Section 5(8) prohibits the General Assembly from appointing statutory officers. *Id.* at 639, 781 S.E.2d at 252. Following a lengthy historical analysis of Article III, Section 5(8), the Court held that the appointments "clause gives the Governor the *exclusive authority* to appoint *constitutional officers* whose appointments are not otherwise provided for by the constitution. The appointments clause does not prohibit the General Assembly from appointing statutory officers to administrative commissions." *Id.* at 639-40, 781 S.E.2d at 252 (emphasis supplied).

The Court in *McCrory* next determined whether the challenged legislation violated the separation of powers clause by preventing the Governor from performing his constitutional duties. *Id.* at 644, 781 S.E.2d at 255. The Court analyzed whether the actions of the legislature "unreasonably disrupte[d] a core power of the executive." *Id.* at 645, 781 S.E.2d at 256. The Court determined the three commissions at issue possessed "final executive authority," and the "Governor must have enough control over them to perform his constitutional duty [under Article III, Section 5(4)]." *Id.* at 646, 781 S.E.2d at 256.

The Court held:

> [T]he challenged appointment provisions violate the separation of powers clause. When the General Assembly appoints executive officers that the Governor has little

> power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates. As a result, the Governor cannot take care that the laws are faithfully executed in that area. The separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself.

Id. at 647, 781 S.E.2d at 257.

In *McCrory*, the legislation authorized the General Assembly, not the Governor, to appoint the majority of members to three committees exercising "final executive authority[.]" *Id.* at 646, 781 S.E.2d at 256. That issue is not present here.

Session Law 2016-126 authorizes the Governor to appoint the cabinet secretaries, "subject to senatorial advice and consent in conformance with Section 5(8) of Article III of the North Carolina Constitution[.]" Under the holding in *McCrory*, the Governor does not have the exclusive authority to appoint "statutory officers to administrative commissions." *Id.* at 639-40, 781 S.E.2d at 252 (emphasis omitted).

Our Supreme Court has also held:

> [T]he inhibition on the legislative power to appoint to office is removed and the inherent power of the Governor to appoint is restricted to constitutional offices and where the Constitution itself so provides. Accordingly, it has since been the accepted view that, in all offices created by statute, including these directorates and others of like nature, the power of appointment, either original or to fill vacancies, is subject to legislative provision as expressed in a valid enactment.

State ex rel. Salisbury v. Croom, 167 N.C. 223, 226, 83 S.E. 354, 355 (1914) (citing *Cherry v. Burns*, 124 N.C. 761, 33 S.E. 136 (1899); *Cunningham v. Sprinkle*, 124 N.C. 638, 33 S.E. 138 (1899)).

"The Constitution of North Carolina is not a grant of power; rather, the power remains with the people and is exercised through the General Assembly, which functions as the arm of the electorate." *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891-92 (1961)). "An act of the people's elected representatives is thus an act of the people and is *presumed valid unless it conflicts with the Constitution*." *Id.* (emphasis supplied) (citing *McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891-92); *see also Lassiter v. Northampton Cty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), *aff'd*, 360 U.S. 45, 3 L. Ed. 2d 1072 (1959)).

VI. Conclusion

Article III, Section 5(8) of our Constitution confers upon the Governor the exclusive authority to appoint constitutional officers subject to limitations in Article III, Section 5(8). *See McCrory*, 368 N.C. at 639-40, 781 S.E.2d at 252. The three-judge superior court panel correctly held the Governor did not meet the high burden to show beyond a reasonable doubt the General Assembly is without authority to require senatorial confirmation of the Governor's appointed statutory officers. The Governor's facial constitutional challenge to the amendment to the statute fails.

The three-judge superior court also correctly held the Governor failed to show beyond a reasonable doubt that the Advice and Consent Amendment violates the separation of powers clause of the Constitution of North Carolina by hindering the faithful execution of his duties as Governor.

While a provision of the Constitution mandates separation of powers between the branches, N.C. Const. art. I, § 6, another provision also reserves to the Senate "the advice and consent" of the Governor's appointments of constitutional officers. N.C. Const. art III, § 5(8). If separation of powers does not prohibit or constrain the Senate from confirming officers created by the Constitution, separation of powers does not otherwise prohibit "advice and consent" being applied to gubernatorial appointees over agencies the General Assembly created, and which agencies can be amended or repealed by statute. "[A] constitution cannot violate itself." *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997).

"The Constitution of North Carolina is not a grant of power; rather, the power remains with the people and is exercised through the General Assembly, which functions as the arm of the electorate." *Pope*, 354 N.C. at 546, 556 S.E.2d at 267.

The order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Panel Consisting of: Elmore, Stroud, and Tyson, JJ.

COUNTY OF ONSLOW, STATE OF NORTH CAROLINA
v.
J.C., PETITIONER

No. COA17-207-2

Filed 7 November 2017

Appeal and Error—appealability—no statutory right of State to appeal expunction—writ of certiorari denied

Petitioner's motion to dismiss the State's appeal from an order granting a petition for expunction under N.C.G.S. § 15A-145.5 was granted where the State had no statutory right to appeal. The State's petition for writ of certiorari filed after the original opinion was denied.

Appeal by the State from order entered 8 August 2016 by Judge Mary Ann Tally in Onslow County Superior Court. Heard in the Court of Appeals 24 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General William P. Hart, Jr., for Appellant, the County of Onslow, State of North Carolina.

Yoder Law PLLC, by Jason Christopher Yoder, for the Petitioner-Appellee.

DILLON, Judge.

We filed the original opinion in this matter on 19 September 2017. We subsequently allowed the State's Petition for Rehearing on 11 October 2017 in order to clarify our original opinion. This opinion replaces the original opinion.

The State appeals from an order of the trial court finding J.C. ("Petitioner") to be eligible for (1) an expunction of a criminal charge to

which Petitioner pleaded guilty in 1987 and (2) an expunction of the dismissal of a criminal charge dismissed in exchange for Petitioner's guilty plea to the other offense. The trial court granted Petitioner's petitions for expunction pursuant to N.C. Gen. Stat. § 15A-145.5 (2015) and N.C. Gen. Stat. § 15A-146 (2015) and ordered that the offenses be removed from Petitioner's record.

On appeal, the State challenges only the portion of the trial court's order granting Petitioner's petition for expunction pursuant to N.C. Gen. Stat. § 15A-145.5, making no argument in its brief concerning the expunction pursuant to N.C. Gen. Stat. § 15A-146. We conclude that the State has no statutory right to appeal an order of expunction made pursuant to N.C. Gen. Stat. § 15A-145.5, and we hereby grant Petitioner's motion to dismiss the appeal.

"[A]n appeal can be taken only from such judgments and orders as are designated by the statute regulating the right of appeal." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); *see also State v. Harrell*, 279 N.C. 464, 183 S.E.2d 638 (1971) (holding that in general, the State cannot appeal from a judgment in favor of a defendant in a criminal proceeding in the absence of a statute clearly conferring that right).

Our Court has previously held that where the State fails to demonstrate its right to appeal, "no appeal can be taken, and our Court is without jurisdiction over the appeal." *State v. Bryan*, 230 N.C. App. 324, 329, 749 S.E.2d 900, 904 (2013). Here, the State argues that our Court has jurisdiction over this appeal pursuant to N.C. Gen. Stat. § 7A-27 (2015). However, we conclude that N.C. Gen. Stat. § 15A-1445 is the statute which determines our jurisdiction in this matter because the trial court's order of expunction pursuant to N.C. Gen. Stat. § 15A-145.5 is part of a criminal proceeding.

The Criminal Procedure Act is codified in Chapter 15A of our General Statutes. Our General Assembly has provided in that Act that "[r]elief from errors committed in criminal trials and proceedings . . . may be sought by . . . [a]ppeal, as provided in Article 91 [of the Act]." N.C. Gen. Stat. § 15A-1401 (2015). Article 91 of Chapter 15A contains N.C. Gen. Stat. § 15A-1445, which sets forth the circumstances where the State has the *right* to appellate review in criminal proceedings. *See* N.C. Gen. Stat. § 15A-1445 (2015).

We conclude that the trial court's order of expunction pursuant to N.C. Gen. Stat. § 15A-145.5 is part of a "criminal proceeding," and, therefore, N.C. Gen. Stat. § 15A-1445 – and not N.C. Gen. Stat. § 7A-27 –

is the relevant statute in determining the State's right to appeal in this case. Specifically, the General Assembly has chosen to include the expunction law as part of the Criminal Procedure Act, suggesting that it intended for expunction proceedings thereunder to be considered a "criminal proceeding." Further, the General Assembly has expressed in N.C. Gen. Stat. § 15A-145.5 that a petition filed thereunder "is a motion in the cause in the case wherein the petitioner was convicted." N.C. Gen. Stat. § 15A-145.5(c)(3).

Our Supreme Court has pointed out that the statute "which permits an appeal by the State in a criminal case is contained in [N.C. Gen. Stat. §] 15A-1445" and that this statute is to be "strictly construed." *State v. Elkerson*, 304 N.C. 658, 669-70, 285 S.E.2d 784, 791-92 (1982).

And because N.C. Gen. Stat. § 15A-1445 clearly does not include any reference to a right of the State to appeal from an order of expunction under N.C. Gen. Stat. § 15A-145.5, we are compelled to conclude that the General Assembly did not intend to bestow such a right at the time the statute was adopted. "It is for the legislative power, not for the courts, to consider whether th[e] [statute] should [] be extended" to include such a right. *Hodges v. Lipscomb*, 128 N.C. 57, 58, 38 S.E. 281, 282 (1901). And while we note that our court has, on several occasions, reviewed expunctions, we have obtained jurisdiction to do so pursuant to the granting of a petition submitted to our Court by the State for writ of *certiorari*. *See, e.g.*, *State v. Frazier*, 206 N.C. App. 306, 697 S.E.2d 467 (2010) (granting the State's petition for *certiorari*); *see also In re Robinson*, 172 N.C. App. 272, 615 S.E.2d 884 (2005); *In re Expungement for Kearney*, 174 N.C. App. 213, 620 S.E.2d 276 (2005); *In re Expungement for Spencer*, 140 N.C. App. 776, 538 S.E.2d 236 (2000).

The State filed a petition for *certiorari* in this matter only after we filed our original opinion. We have reviewed that petition and, in our discretion, deny the petition. Accordingly, the State's appeal is dismissed.

DISMISSED.

Judges HUNTER, JR., and ARROWOOD concur.

WILLIAM HAIRSTON, JR., PLAINTIFF
v.
ASHWELL BENNETT HARWARD, JR., DEFENDANT

No. COA16-570

Filed 7 November 2017

1. Setoff and Recoupment—credits and setoffs against tort judgment—settlement agreement with underinsured motorist provider—waiver of subrogation rights

The trial court did not err in a negligence action arising out of an automobile accident by allowing defendant's motion for credits and setoffs against a tort judgment for the $145,000.00 plaintiff received from unnamed defendant underinsured motorist ("UIM") provider under a settlement agreement where the UIM provider waived all rights to subrogation.

2. Discovery—motion for leave—post-verdict depositions—waiver of subrogation—irrelevant to jury's verdict

The trial court did not abuse its discretion in a negligence action arising out of an automobile accident by denying plaintiff's motion for leave to take post-verdict depositions of defendant's insurer and unnamed defendant underinsured motorist provider to determine the facts and circumstances concerning a waiver of subrogation where it was not relevant to the jury's verdict.

Judge HUNTER, JR., Robert N., dissenting.

Appeal by plaintiff from judgment entered 1 December 2015 by Judge Joseph N. Crosswhite in Superior Court, Davidson County. Heard in the Court of Appeals 30 November 2016.

Maynard & Harris, Attorneys at Law, PLLC, by C. Douglas Maynard, Jr., for plaintiff-appellant.

Davis and Hamrick, L.L.P., by Kent L. Hamrick and Ann C. Rowe, for defendant-appellee Ashwell Bennett Harward, Jr.

Burton, Sue & Anderson, LLP, by Stephanie W. Anderson, for unnamed defendant-appellee Erie Insurance Exchange.

Whitley Law Firm, by Ann C. Ochsner, and Martin & Jones, PLLC, by Huntington M. Willis, for North Carolina Advocates for Justice, amicus curiae.

Pinto Coates Kyre & Bowers, PLLC, by Deborah J. Bowers and Andrew G. Pinto, for North Carolina Association of Defense Attorneys, amicus curiae.

STROUD, Judge.

Plaintiff William Hairston, Jr. ("plaintiff") appeals from the trial court's judgment allowing defendant Ashwell Bennett Harward, Jr. ("defendant Harward")'s motion for credits and setoffs against the tort judgment for the money plaintiff received through its underinsured motorist ("UIM") provider, unnamed defendant Erie Insurance Exchange ("unnamed defendant Erie"). The trial court's judgment also found that unnamed defendant Erie waived its right to subrogation and had no further duty. On appeal, plaintiff argues that the trial court should not have allowed the credit and that the court abused its discretion by not permitting plaintiff to take depositions of defendant's insurance provider, State Farm, and unnamed defendant Erie representatives. We hold that the trial court did not err in allowing defendant Harward the credit against the judgment for unnamed defendant Erie's payment under the settlement agreement, since unnamed defendant Erie waived all rights to subrogation. We further hold that the trial court did not abuse its discretion by not allowing plaintiff to take the additional requested depositions.

Facts

Plaintiff filed a complaint on 27 July 2011 against defendant Harward seeking to recover for injuries plaintiff received in a car crash between plaintiff and defendant Harward. Plaintiff later amended his complaint seeking additional relief from two other defendants; those defendants were later dismissed without prejudice and are not parties to this appeal. Unnamed defendant Erie filed a notice of appearance on 17 April 2013. On 14 August 2014, a jury returned a verdict finding plaintiff was injured by defendant Harward's negligence and that he was entitled to recover $263,000.00 for his personal injuries.

On 15 September 2014, defendant Harward moved for setoffs and credits against the trial court's judgment. The trial court entered an order on 16 October 2014 reducing the judgment to $230,000.00 after finding that "[t]he parties agree that [defendant Harward] is entitled to setoffs or credits totaling $33,000.00 for the reasons set out in [defendant Harward's] September 15, 2014 Motion and that said setoffs or credits should be applied so that the judgment amount will be $230,000.00[.]" The court's order noted that the parties disagreed over whether defendant Harward should receive a credit for payment plaintiff received

-- following the jury verdict -- from unnamed defendant Erie, his underinsured motorist coverage ("UIM") provider.

Plaintiff filed a response to defendant's motion for setoffs and credits against the judgment on 17 September 2015. On 25 September 2015, unnamed defendant Erie's attorney filed an affidavit that included as "Exhibit 'A' " a settlement agreement between unnamed defendant Erie and plaintiff, entered on or about 3 October 2014. Under the settlement agreement, unnamed defendant Erie agreed to pay $145,000.00 in UIM coverage under plaintiff's policy. The affidavit noted:

> Following the verdict, Erie paid the remaining balance of $145,000.00 of its [UIM coverage] to the plaintiff in exchange for a Full and Final Release of All Claims . . ., which clearly releases Erie's right of reimbursement and does not require the plaintiff to hold any amounts recovered from the defendant in trust.

A hearing was held on defendant Harward's motion on 29 October 2015, and on 1 December 2015, the trial court entered its judgment, which contained these findings of fact:

> 1. Erie, Plaintiff's underinsured motorists ("UIM") carrier, waived its subrogation rights prior to the commencement of trial.
>
> 2. On September 11, 2014 counsel for Erie mailed directly to Plaintiff's counsel Erie's check for $145,000.00 which represented the remaining balance of Plaintiff's UIM coverage with Erie.
>
> 3. In exchange for said payment Plaintiff executed a Full and Final Release of All Claims against Erie which clearly showed that Erie waived any and all rights of reimbursement and Plaintiff was not required to hold any amounts recovered from Defendant in trust.
>
> 4. On October 9, 2014 State Farm, Defendant's liability carrier, mailed a check for $97,000.00 to Plaintiff's counsel.
>
> 5. North Carolina courts have adopted the common law principle that a plaintiff should not be permitted a double recovery for a single injury, Baity v. Brewer, 122 N.C. App. 645, 470 S.E.2d 836 (1996); Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643 (1987).

6. In Wood v. Nunnery, 222 N.C. App. 303, 730 S.E.2d 222 (2012) the Court of Appeals cited the UIM statute:

> In the event of payment, the underinsured motorist insurer shall be either: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, provided that the amount of the insurer's right by subrogation or assignment shall not exceed payments made to the claimant by the insurer. N.C. Gen. Stat. § 20-279.21(b)(4) (2011). 88 N.C. App. at 307, 730 S.E.2d at 225.

7. In Wood, unlike this case, the UIM carrier paid the money to the clerk and not to the plaintiff directly and did not waive its right of subrogation; therefore, the UIM carrier still retained the right of subrogation. Because the UIM carrier's subrogation right remained, the Defendant in Wood was not entitled to credit for payments made by the UIM carrier.

8. The Court has carefully considered Defendant's motion for credits and setoffs and is of the opinion and so finds, in its sound discretion, that Defendant's motion should be allowed; Defendant is entitled to a credit for the $97,000.00 paid by State Farm directly to Plaintiff and is further entitled to a credit for the $145,000.00 paid by Erie directly to Plaintiff.

9. Because Erie has waived its right to subrogation and reimbursement, the Court is of the opinion and does so find that Erie has no further duty in this matter.

10. Plaintiff's motion for leave to take further depositions has been carefully considered by the Court and the Court, in its sound discretion, is of the opinion and so finds that . . . the motion should be denied at this time.

11. Plaintiff's motions to strike the affidavits of Kent L. Hamrick and Stephanie W. Anderson have also been carefully considered by the Court and the Court, in its sound discretion, is of the opinion and so finds that the motions should be denied.

12. Counsel for Plaintiff argued that Plaintiff's UIM coverage is a collateral source and requested that the Court enter an order to that effect, but the Court is of the opinion that such is not necessary for the entry of this judgment.

The trial court then concluded:

1. This court concludes as a matter of law that the UIM carrier, Erie, has waived its right of subrogation, waived any right to reimbursement and paid the $145,000.00 it owed directly to the Plaintiff. Therefore, since no subrogation rights remain, the Defendant Harward is entitled to credit for the $145,000.00 payment made by the UIM carrier. To find otherwise would create a double recovery for the plaintiff which is disfavored by the common law of North Carolina.

2. Defendant Harward is also entitled to a credit for the $97,000.00 paid directly to Plaintiff by State Farm.

3. Because Erie has waived its rights of subrogation and reimbursement, it has no further duty in this matter.

4. Plaintiff's motion for leave to take post-verdict depositions is addressed to the discretion of the Court and the Court concludes that the motion is not supported by sufficient facts to be allowed.

5. Plaintiffs have not presented the Court with sufficient facts why the affidavits of Kent L. Hamrick and Stephanie W. Anderson should not be considered.

6. The Court makes no ruling on whether Plaintiff's UIM coverage is a collateral source as such issue would be more properly addressed by the Appellate Courts.

The trial court then ordered:

1. Defendant Harward's motion for credits and setoffs is allowed;

2. Plaintiff shall have and recover from Defendant Harward the sum of $46,527.12[1] with post-judgment interest

1. We have been unable to determine, based on the record on appeal, precisely how the trial court reached this sum as the remaining amount plaintiff could recover from

on said sum at the daily rate of $10.1977 from the date of the entry of this judgment until paid; In light of this Court's order of October 16, 2014, Plaintiff shall not be entitled to recover any pre-judgment interest on said sum;

3. Because Erie has waived its right to subrogation and reimbursement, it has no further duty in this matter;

4. All parties, named and unnamed, shall bear their own court costs, expenses and attorney's fees;

5. Plaintiff's motions to strike the affidavits of Kent L. Hamrick and Stephanie W. Anderson are, in the Court's discretion, denied.

6. Plaintiff's motion to take post-verdict depositions in the Court's discretion, denied at this time[.]

Plaintiff timely appealed to this Court.

Discussion

Plaintiff raises two issues on appeal: first, whether the trial court erred when it allowed defendant Harward to receive credit against the tort judgment for the money plaintiff received from his UIM provider, Erie; and second, whether the trial court abused its discretion when it denied plaintiff's motion for leave to take post-verdict depositions of defendant Erie and State Farm personnel. We find no error and no abuse of discretion with the trial court's judgment.

I. Defendant Harward's Credit for UIM Compensation Received

[1] Plaintiff first argues that "the trial court erred when it credited the tort judgment against [defendant] Harward with the money plaintiff received in contract from plaintiff's insurance carrier [UIM coverage]." (All caps and underlined in original). The trial court concluded in the present case that "since no subrogation rights remain, the Defendant Harward is entitled to credit for the $145,000.00 payment made by the UIM carrier [unnamed defendant Erie]."

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defendant Harward after all credits and setoffs were allowed. Defendant Harward paid plaintiff $46,669.92 in December 2015. Based on our math, it appears that plaintiff ultimately recovered more than $321,000.00 -- on a $263,000.00 jury verdict -- from multiple insurance companies and defendants. We realize that interest on the judgment would have increased the amount owed. But since no one has disputed the mathematical calculations on appeal -- other than regarding whether the $145,000 payment from unnamed defendant Erie should have been credited against the judgment -- we leave the trial court's calculations undisturbed.

> When we review an order from a non-jury trial, we are 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. Conclusions of law drawn by the trial court from its findings of fact are reviewable de novo on appeal.

Holloway v. Holloway, 221 N.C. App. 156, 164, 726 S.E.2d 198, 204 (2012) (citations and quotation marks omitted).

Plaintiff's brief begins with a discussion of the collateral source rule, and plaintiff argues that UIM benefits are a collateral source, so defendant Harward cannot reduce his tort liability for those benefits received from plaintiff's provider, unnamed defendant Erie.

> The purpose of the collateral source rule is *to exclude evidence of payments made to the plaintiff by sources other than the defendant when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff*. The policy behind the rule is to prevent a tortfeasor from reducing his own liability for damages by the amount of compensation the injured party receives from an independent source. This rule is punitive in nature, and is intended to prevent the tortfeasor from a windfall when a portion of the plaintiff's damages have been paid by a collateral source. In this [s]tate, and many others, the collateral source rule typically is applied only in actions arising under tort law.

Wilson v. Burch Farms, Inc., 176 N.C. App. 629, 638-39, 627 S.E.2d 249, 257 (2006) (citations, quotation marks, and brackets omitted) (emphasis added). *See also Badgett v. Davis*, 104 N.C. App. 760, 764, 411 S.E.2d 200, 203 (1991) ("In summary, the collateral source rule excludes evidence of payments made to the plaintiff by sources other than the defendant when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff."). But the collateral source rule is not relevant to the issue presented here, since there is no question regarding evidence presented at the trial. Rather, the issue before us is the proper sources of payment of the jury verdict and the allocation of the liability among defendant Harward's liability insurer (State Farm), plaintiff's underinsured carrier (unnamed defendant Erie), and defendant Harward.

The closest case to have touched on the issue in this case appears to be *Wood v. Nunnery*, 222 N.C. App. 303, 730 S.E.2d 222 (2012) ("*Wood I*")[2]. In *Wood I*, this Court found that the trial court had erred when it concluded that payments the plaintiff received from the defendant's insurer (State Farm) and plaintiff's UIM provider (Firemen's) "constituted satisfaction of the judgment entered against defendant." *Id.* at 305, 730 S.E.2d at 224. This Court concluded in *Wood* that the defendant was only entitled to a credit against the judgment for the amount paid by State Farm, the defendant's insurer, but not for the amount paid by Firemen's, plaintiff's UIM carrier. *Id.* at 308, 730 S.E.2d at 225-26. In so concluding, this Court noted the reason defendant could not receive a credit for Firemen's payment was Firemen's still had a statutory right of subrogation:

> Since Firemen's paid $202,627.58 into the office of the Clerk of Court for Forsyth County, and not to plaintiff directly, there would have been no "assignment" or subrogation receipt executed by plaintiff to Firemen's. However, under subsection (b) of [N.C. Gen. Stat. § 20-279.21 (2011)], Firemen's would be subrogated to plaintiff's right against defendant to the extent of its payment ($202,627.58). Because of this statutory right of subrogation, defendant cannot be entitled to a credit against the judgment for payments made by Firemen's as a UIM carrier. Since no party has raised the issue of whether Firemen's is estopped from seeking subrogation from defendant by adopting defendant's brief, we do not address that issue.

Id. at 307, 730 S.E.2d at 225.

Here, unnamed defendant Erie waived its right to subrogation in the settlement agreement with plaintiff, so the same argument would not apply. Unlike Firemen's in *Wood I*, unnamed defendant Erie is no longer a party and no longer has a right to subrogation, so the amount is final and will not change in the future. The issue of whether UIM coverage should be credited against payments made on a tort judgment when subrogation and the right of reimbursement have been waived is an issue this

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2. This Court issued a subsequent unpublished decision after *Wood I* was remanded to the trial court. *See Wood v. Nunnery*, 232 N.C. App. 523, 757 S.E.2d 526, 2014 WL 640884, 2014 N.C. App. Lexis 219 (2014) (unpublished) ("*Wood II*"). The North Carolina Supreme Court had the opportunity to review *Wood II*, but instead found discretionary review was improvidently allowed. *Wood v. Nunnery*, 368 N.C. 30, 771 S.E.2d 762 (2015) (*per curiam*).

Court has not explicitly addressed. But based on this Court's decision in *Wood I* and other prior decisions, we hold that the trial court did not err in this case when it allowed defendant Harward to credit unnamed defendant Erie's UIM payment towards the tort judgment amount.

Additional case law indicates that subrogation may be relevant to the payment of a judgment, as opposed to the evidence the jury can consider, because factoring in subrogation at that stage helps prevent a windfall profit. For example, in *Baity v. Brewer*, 122 N.C. App. 645, 646-47, 470 S.E.2d 836, 837-38 (1996), this Court found that the trial court erred when it denied a defendant -- defendant Poole -- credit for the settlement payment the plaintiff received from another defendant, defendant Brewer. This Court explained:

> Defendant Poole based her motion for credit not on any right of contribution under Chapter 1B but on the common-law principle that a plaintiff should not be permitted a double recovery for a single injury.
>
> In *Holland v. Southern Public Utilities Co.*, 208 N.C. 289, 180 S.E. 592 (1935), our Supreme Court stated that "any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage should be held for a credit on the total recovery in any action for the same injury or damage." *Id.* at 292, 180 S.E. at 593-94. . . . The rule in *Holland* is directly on point here and mandates reversal of the portion of the trial court's judgment denying Poole a credit.

Baity, 122 N.C. App. at 647, 470 S.E.2d at 837-38.

The amicus briefs and the parties have addressed public policy arguments at some length, including plaintiff's argument that if this Court finds the trial court's order was correct and its reasoning was allowed to remain, "it would foster collusion between liability and UIM carriers to reach secret waivers of subrogation forcing more cases to trial and depriving a plaintiff of his right to arbitrate under his UIM policy which is contingent of the offer of policy limits by the liability carrier." Plaintiff may or may not be right, but this Court is not at liberty to change the law. These same public policy arguments were raised in *Wood II*'s appeal to the Supreme Court, and rather than address them further, the Court dismissed the case *per curiam* by finding discretionary review was improvidently allowed. *Wood*, 368 N.C. at 30, 771 S.E.2d at 762. Thus, *Wood I* remains controlling law. And there was no secret waiver of subrogation in this case; unnamed defendant Erie's settlement agreement is

in the record on appeal and referenced in several documents presented to the trial court. We hold that unnamed defendant Erie's waiver of its right to subrogation was relevant and the trial court appropriately concluded that defendant Harward could use unnamed defendant Erie's payment to plaintiff as a credit against the jury verdict judgment.

II. Denial of Plaintiff's Motion for Leave to Take Post-Verdict Depositions

[2] Plaintiff also argues that the trial court erred when it denied plaintiff's motion to take depositions of State Farm and unnamed defendant Erie representatives. Specifically, plaintiff contends that "the trial court erred and abused its discretion when [it] refused to permit Plaintiff to take post-judgment depositions of State Farm and [unnamed defendant] Erie representatives to determine the facts and [c]ircumstances concerning the waiver of subrogation."

Plaintiff filed a motion on 29 October 2015 to strike the affidavit of unnamed defendant Erie's counsel and moved for leave of the trial court to take post-verdict depositions of "appropriate Erie and State Farm personnel and their agents to determine the facts and circumstances concerning the purported waiver of subrogation by Erie and including but not limited to whether State Farm agreed not to tender its policy limits in exchange for a waiver of subrogation by [unnamed defendant Erie] . . . ." The trial court concluded that "Plaintiff's motion to take post-verdict depositions is, in the Court's discretion, denied at this time[.]"

A motion to take a deposition is a discovery order, and "our review of a trial court's discovery order is quite deferential: the order will only be upset on appeal by a showing that the trial court abused its discretion." *Isom v. Bank of Am., N.A.*, 177 N.C. App. 406, 410, 628 S.E.2d 458, 461 (2006). "The abuse of discretion standard is intended to give great leeway to the trial court and a clear abuse of discretion must be shown." *Hill v. Hill*, 173 N.C. App. 309, 315, 622 S.E.2d 503, 508 (2005) (citation and quotation marks omitted).

Plaintiff claims that the waiver of subrogation was not disclosed until after the jury verdict in August 2014, but the waiver of subrogation was not relevant to the jury's verdict. The jury verdict simply found that plaintiff was injured by defendant Harward's negligence and set the amount of damages plaintiff could recover from defendant Harward. The waiver of subrogation was disclosed in affidavits before the trial court ruled on plaintiff's motion for post-verdict depositions. The majority of plaintiff's arguments on this issue suggest collusion and conspiracy between various insurance providers. Plaintiff once again argues that this Court should consider the public policy impact of such claims

of collusion or conspiracy, but as noted above, there is no legal remedy available here. Again, many of the same arguments were raised before our Supreme Court in the *Wood II* appeal, and the Supreme Court, issuing a *per curiam* decision, declined to address those issues further. *See Wood*, 368 N.C. at 30, 771 S.E.2d at 762. It is the role of the General Assembly to address any public policy implications for this sort of potential "collusion" between insurance companies. We therefore hold that the trial court did not abuse its discretion.

Conclusion

We conclude that the trial court did not err when it allowed defendant Harward to setoff and receive a credit against the tort judgment for the $145,000.00 payment plaintiff received from unnamed defendant Erie. We further find that the trial court did not abuse its discretion when it did not permit plaintiff to conduct depositions of defendant's insurer, State Farm, and unnamed defendant Erie's representatives.

AFFIRMED.

Judge DAVIS concur.

Judge HUNTER, JR. dissents in separate opinion.

HUNTER, JR., Robert N., Judge, dissenting in a separate opinion.

I respectfully dissent from the majority's holding the trial court did not err in crediting Plaintiff's judgment against Defendant with the UIM benefits Plaintiff received from unnamed Defendant Erie.

The majority concluded this Court's opinion in *Wood v. Nunnery*, 222 N.C. App. 303, 730 S.E.2d 222 (2012) is distinguishable from the instant case since unnamed Defendant Erie waived its right to subrogation. This distinction is not outcome determinative since Plaintiff's recovery in *Wood*, like the Plaintiffs' recovery in this case, is based on a jury verdict finding Defendant's negligence responsible for Plaintiff's injuries.

The language in *Wood* which the majority relies upon is *obiter dictum*:

> Since Firemen's paid $202,627.58 into the office of the Clerk of Court for Forsyth County, and not to plaintiff directly, there would have been no "assignment" or subrogation receipt executed by plaintiff to Firemen's. However, under subsection (b) of [N.C. Gen. Stat. § 20-279.21 (2011)], Firemen's would be subrogated to

> plaintiff's right against defendant to the extent of its payment ($202,627.58). Because of this statutory right of subrogation, defendant cannot be entitled to a credit against the judgment for payments made by Firemen's as a UIM carrier. Since no party has raised the issue of whether Firemen's is estopped from seeking subrogation from defendant by adopting defendant's brief, we do not address that issue.

Id. at 307, 730 S.E.2d at 225.

The facts in *Wood* are essentially identical to the case at bar. In *Wood* this Court recognized the trial court "conflated the concepts of the amounts owed by defendant as the tortfeasor" and the amount owed by the UIM:

> Plaintiff instituted this action against defendant, seeking monetary damages for personal injuries proximately caused by the negligence of defendant. . . . The trial court entered judgment against only defendant. This judgment was based upon defendant's negligence and was a tort recovery.
>
> The liability of [the UIM] is based in contract, not in tort.

Id. at 305-06, 730 S.E.2d at 224. Here, as in *Wood*, Defendant's tort liability is a separate entity from unnamed Defendant Erie's contractual obligation. Plaintiff contracted with unnamed Defendant Erie and purchased underinsured motorist coverage. Even though unnamed Defendant Erie is now released from its contractual liability to Plaintiff, this does not mean Defendant is released from the $263,000.00 judgment he owes Plaintiff.[1]

Additionally, N.C. Gen. Stat. § 20-279.21(b)(4) pertains to UIM coverage and is part of the Financial Responsibility Act of 1953. This statute provides for UIM coverage to apply when a Defendant's liability policy is exhausted. *Id.* As the consideration for the payment of policy limits, the injured party may execute a covenant not to enforce a judgment against a tortfeasor. *Id.* The effect of this allows a plaintiff to proceed against separate defendants, or to proceed with claims for benefits under the applicable UIM coverage. *Id.*

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1. Assume a person murders a man with a substantial life insurance policy. Under the majority's analysis, would the murderer would be entitled to a credit for the victim's life insurance proceeds?

The pertinent statutory provision provides:

> As consideration for payment of policy limits by a liability insurer on behalf of the owner, operator, or maintainer of an underinsured motor vehicle, a party injured by an underinsured motor vehicle may execute a contractual covenant not to enforce against the owner, operator, or maintainer of the vehicle any judgment that exceeds the policy limits. A covenant not to enforce judgment shall not preclude the injured party from pursuing available underinsured motorist benefits, unless the terms of the covenant expressly provide otherwise, and shall not preclude an insurer providing underinsured motorist coverage from pursuing any right of subrogation.

N.C. Gen. Stat. § 20-279.21(b)(4) (2016). This statute provides no language stating that a tortfeasor is entitled to a credit from a plaintiff's UIM insurer. There is also no language stating a tortfeasor has a right to avoid the enforcement of a judgment. Rather, this statute reveals the North Carolina public policy of an injured party's right to either enforce or not enforce a judgment against a tortfeasor: when the policy limits of the tortfeasor's liability insurer have been paid, an injured party may, at his option, covenant to forego his right to enforce a judgment under the statute.

Unnamed Defendant Erie waived its statutory right of recovery. This action only affects Erie. Unnamed Defendant Erie's agreement to waive subrogation from Plaintiff does not bar Plaintiff's right to seek satisfaction of the judgment against Defendant. Nothing under N.C. Gen. Stat. § 20-279.21(b)(4) provides Plaintiff with a "double recovery" in this case just because Erie abandoned its right to recovery. The fact Erie elected to not pursue its legal right to subrogation is immaterial to Plaintiff's right to have his judgment against Defendant satisfied by Defendant. To apply Plaintiff's UIM benefits as a credit against the judgment results in an improper windfall for Defendant.

The operative statue balances the interests of the tortfeasor, its liability insurer, the injured victim and the UIM insurer. Under N.C. Gen. Stat. § 20-279.21(b)(4) the liability insurer must seek resolution of the claim within its policy limits. Here, the liability carrier protects its insured and is released from any obligation to participate in the defense of the injured victim's claim. At the same time, the statute also provides opportunities for the UIM to recoup the payments made to its insured. This way the statute protects UIM's interests as well as the victim's

contractual rights. The UIM has the right of subrogation when it honors its contractual obligations towards its insured. It also fulfills the purpose of the UIM provision of the Financial Responsibility Act as it serves "to compensate innocent victims injured by financially irresponsible motorists." *Wilmoth v. State Farm Mut. Auto Ins. Co.*, 127 N.C. App. 260, 264, 488 S.E.2d 628, 631 (1997). If a tortfeasor receives credit for UIM payments, the statutory right of subrogation is meaningless, and this upsets the statutory balance among competing interests.

IN THE MATTER OF P.S.

IN THE MATTER OF L.T.

IN THE MATTER OF N.J.

IN THE MATTER OF R.J.

Nos. COA17-234, COA17-235, COA17-236, COA17-237

Filed 7 November 2017

1. Mental Illness—inpatient mental health treatment—voluntary readmission—failure to conduct hearing within 15 days of initial admission

The trial court did not err by denying respondent minors' motions to dismiss orders concurring in their voluntary readmissions to Strategic Behavioral Center (Strategic) for inpatient mental health treatment even though Strategic failed to conduct a hearing within fifteen days of their initial admissions as required by N.C.G.S. § 122C-224. Such hearings did take place upon their readmission, and our General Assembly has stated that it is State policy to encourage voluntary admissions to facilities.

2. Jurisdiction—subject matter jurisdiction—inpatient mental health treatment admission authorization forms—signature of legally responsible person required—presumptively valid signature

The trial court had subject matter jurisdiction to concur in three of four respondent minors' readmissions to inpatient mental health treatment where the court was permitted to treat the admission authorization forms as presumptively valid and sufficient to invoke the court's subject matter jurisdiction. However, the court did not

have subject matter jurisdiction over respondent minor whose form did not contain the signature of a legally responsible person as required by N.C.G.S. § 122C-221.

3. Mental Illness—inpatient mental health treatment—consent—no requirement to engage in colloquy or obtain written waiver

The trial court was not required to either engage in a colloquy with a minor to ensure that he was fully aware of his rights with regard to a hearing, or obtain a written waiver from the minor confirming that he understood the rights he was giving up by consenting to Strategic Behavioral Center's inpatient mental health treatment recommendation.

Appeal by respondents from orders entered 16 June 2016 by Judge Louis A. Trosch, Jr., in Mecklenburg County District Court. Heard in the Court of Appeals 22 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Josephine N. Tetteh and Milind Kumar Dongre, for the State.

Nelson Mullins Riley & Scarborough, LLP, by Ariel E. Harris and Fred M. Wood, Jr., for Strategic Behavioral Health.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz and Assistant Appellate Defender David W. Andrews, for respondents-appellants.

DAVIS, Judge.

P.S. ("Paul"),[1] L.T. ("Luke"), N.J. ("Natalie"), and R.J. ("Robert") (collectively, "Respondents") appeal from the trial court's 16 June 2016 orders concurring in their voluntary readmissions to Strategic Behavioral Center for inpatient mental health treatment. The primary issue in these four consolidated appeals is whether Respondents' readmissions to the facility were rendered unlawful due to the illegality of their *initial* admissions. In addition, we address various other arguments regarding the minors' readmissions, including (1) whether a trial court is required to conduct an initial jurisdictional inquiry at voluntary admission hearings to ensure the minor's admission authorization form was signed by a

1. Pseudonyms and initials are used throughout this opinion to protect the identities of the minor children and for ease of reading.

legally responsible person; (2) whether an admission authorization form may be based on verbal — rather than written — consent of the minor's parent or guardian; and (3) whether a specific procedure must be followed before a trial court can accept a minor's consent to the recommendation that he be admitted to a 24-hour inpatient facility. After a thorough review of the facts and applicable principles of law, we affirm in part and vacate in part.

Factual and Procedural Background

Respondents are four minor children who either suffer from mental illness or from substance abuse. At various times during the spring of 2016, they were admitted to a mental health facility in Charlotte operated by Strategic Behavioral Health ("Strategic"). In May 2016, Strategic conducted a self-audit during which it discovered that Respondents and five other minors had been improperly admitted to the facility without having received a hearing within fifteen days of their admissions as required by North Carolina law. After becoming aware of its error, Strategic discharged, reevaluated, and then readmitted Respondents beginning on 30 May 2016.

I. Luke

Luke grew up in a home where he was "neglected and abused[,]" his mother used drugs, and she once "burn[ed] him with a cigarette." He got into "trouble in school" and was "suspended many times for his behavior."

Luke was thirteen years old when he was first admitted to Strategic on or about 3 April 2016. After approximately two months without judicial review of his admission, he was discharged and readmitted to the facility on 3 June 2016.

II. Robert

Robert reported being raped by his uncle when he was 4 or 5 years old. He has a history of suicide attempts and has reported "being born addicted to cocaine." He was suspended from school "for fighting, lying, stealing, and touching females inappropriately." Robert's biological father died when he was young, and he has had no contact with his biological mother. After multiple unsuccessful placements in foster care, Robert's 18-year-old brother adopted him.

Robert was fourteen years old when he was first admitted to Strategic on or about 28 April 2016. After more than a month without judicial review of his admission, he was discharged and readmitted to the facility on 2 June 2016.

III. Paul

Paul displayed aggressive behavior in school, including multiple incidents during which he stabbed other students with pens and pencils. He also had "a history of suicidal ideation behavior such as cutting himself and hitting himself . . . ."

Paul was fifteen years old when he was first admitted to an inpatient facility in another city on or about 10 February 2016 and arrived at Strategic sometime in the spring of 2016. He was discharged and readmitted to Strategic on 30 May 2016.

IV. Natalie

Natalie has a history of angry outbursts and blackout spells, and her mother was concerned about her tendency to become violent toward other individuals in her home. Natalie was fourteen years old when she was first admitted to Strategic on or about 10 March 2016. After nearly three months without judicial review of her voluntary admission, she was discharged and readmitted to the facility on 31 May 2016.

* * *

On 14 June 2016, hearings were held in connection with the readmissions of each Respondent before the Honorable Louis A. Trosch, Jr. in Mecklenburg County District Court. The Council for Children's Rights ("CCR") was appointed to represent Respondents at their respective hearings. Strategic's attorneys, CCR attorneys, and the applicable clerks of court were all present at the hearings.

That same morning, CCR filed motions to dismiss in each of the four cases, asserting that Respondents' readmissions to Strategic violated both their procedural due process rights and applicable statutory provisions set out in Chapter 122C of the North Carolina General Statutes. The trial court consolidated the four motions for hearing. At the close of the arguments, the court denied Respondents' motions to dismiss.

The trial court then held separate hearings regarding the readmission of each Respondent. The court informed each minor that Strategic recommended he or she be readmitted to the facility "for up to 45 more days." The court then asked each of the Respondents whether they consented to the recommendation and informed them that if they disagreed with the recommendation, the court would hold a hearing on the issue.

Paul, Natalie, and Robert each stated that they disagreed with Strategic's recommendation. The court then proceeded to conduct

hearings in which the minors and their respective therapists testified. Following each hearing, the court concurred in the recommendation for readmission of the minor based on the testimony that had been presented.

Luke, conversely, consented to Strategic's recommendation for readmission. Therefore, the court adopted the recommendation as to him without conducting a full hearing.

Respondents filed notices of appeal on 24 June 2016. The four appeals were consolidated for oral argument.

Analysis

We review a trial court's order "to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citation, quotation marks, and brackets omitted), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). Findings of fact that are supported by competent evidence or are unchallenged by the appellant are binding on appeal. *In re A.B.*, __ N.C. App. __, __, 781 S.E.2d 685, 689, *disc. review denied*, 369 N.C. 182, 793 S.E.2d 695 (2016). "Such findings are . . . conclusive on appeal even though the evidence might support a finding to the contrary." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003). 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).

I. Motions to Dismiss

[1] Respondents first argue that the trial court erred in denying their motions to dismiss because Strategic failed to conduct a hearing within fifteen days of their initial admissions as required by N.C. Gen. Stat. § 122C-224. "Article 5 of Chapter 122C of the North Carolina General Statutes governs the procedures for admitting or committing persons into inpatient psychiatric facilities." *In re Wolfe*, __ N.C. App. __, 803 S.E.2d 649 (2017) (citation omitted). N.C. Gen. Stat. § 122C-224 states, in pertinent part, as follows:

> (a) When a minor is admitted to a 24-hour facility where the minor will be subjected to the same restrictions on his freedom of movement present in the State facilities for the mentally ill, or to similar restrictions, a hearing shall be held by the district court in the county in which the 24-hour facility is located within 15 days of the

> day that the minor is admitted to the facility. A continuance of not more than five days may be granted.

N.C. Gen. Stat. § 122C-224(a) (2015).[2]

As an initial matter, we observe that both the State and Strategic acknowledge that Respondents' statutory rights were violated during their initial admissions to Strategic based on its failure to schedule hearings as statutorily required. Respondents contend that because the hearing requirement contained in N.C. Gen. Stat. § 122C-224 was not followed in connection with their initial admissions, their subsequent readmissions to the facility were tainted by this error and, therefore, rendered unlawful.[3]

"This Court has held that a minor, facing commitment pursuant to the voluntary commitment statute, is entitled to due process protections." *In re A.N.B.*, 232 N.C. App. 406, 411, 754 S.E.2d 442, 447 (2014) (citation and quotation marks omitted). "[A] child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment and . . . the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment." *Id.* (citation and quotation marks omitted). We have made clear that "[d]ue process requires an inquiry by a 'neutral factfinder' to determine whether constitutionally adequate procedures are followed before a child is voluntarily committed based upon his guardian's affirmations." *Id.* at 412, 754 S.E.2d at 447 (citation omitted).

We are unable to accept Respondents' argument that the trial court erred in denying their motions to dismiss. While — as noted above — it is undisputed that Respondents were initially denied the hearings to which they were statutorily entitled, it is likewise undisputed that such hearings *did* take place upon their readmission as required by N.C. Gen. Stat. § 122C-224.

The statutory scheme contained in Chapter 122C governing such admissions attempts to balance the following interests: (1) the needs of a minor who is mentally ill and in need of treatment, *see In re Lynette H.*, 323 N.C. 598, 600, 374 S.E.2d 272, 273 (1988); (2) the rights of a parent or guardian, *see In re Long*, 25 N.C. App. 702, 706, 214 S.E.2d 626, 628, *cert. denied*, 288 N.C. 241, 217 S.E.2d 665 (1975); and (3) the minor's

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2. It is undisputed that Strategic is a 24-hour inpatient facility.

3. The extent to which civil remedies may be available to Respondents for the violation of their rights in connection with their initial admissions is not at issue in this appeal.

right to procedural due process, *see id.* at 707, 214 S.E.2d at 629. While the admission of a minor to a 24-hour facility obviously has a significant impact on the minor's rights, it is important to note that such admissions are not punitive in nature but rather designed to facilitate the minor's receipt of necessary treatment. Moreover, our General Assembly has stated that "[i]t is State policy to encourage voluntary admissions to facilities." N.C. Gen. Stat. § 122C-201 (2015).

Respondents' argument, if accepted, would result in the denial of treatment to the minors for some indeterminate period of time regardless of whether they were, in fact, genuinely in need of the treatment provided by Strategic. We do not believe the law requires such a result. *See In re Webber*, 201 N.C. App. 212, 222, 689 S.E.2d 468, 476 (2009) (holding that respondent could not challenge procedural deficiencies in his initial commitment order through appeal of his recommitment order), *cert. denied*, 364 N.C. 241, 699 S.E.2d 925 (2010). Therefore, we conclude that the trial court did not err in denying Respondents' motions to dismiss.

II. Subject Matter Jurisdiction

[2] Respondents next argue that the trial court lacked subject matter jurisdiction to concur in their readmissions to Strategic. Specifically, they contend that the jurisdiction of the trial court could not be invoked until such time as it made a determination that Respondents' admission authorization forms had been signed by legally authorized persons as mandated by statute.

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citation omitted). It is well established that "[s]ubject matter jurisdiction . . . is conferred upon the courts by either the North Carolina Constitution or by statute." *In re M.B.*, 179 N.C. App. 572, 574, 635 S.E.2d 8, 10 (2006) (citation and quotation marks omitted). "Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal." *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008) (citation omitted). Whether a court has jurisdiction is a question of law reviewable *de novo* on appeal. *In re K.U.-S.G.*, *D.L.L.G.*, *& P.T.D.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010) (citation omitted).

Our Supreme Court has held that "[w]here 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." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (citation and quotation marks omitted). "[F]or certain statutorily created causes of action, a trial court's subject-matter jurisdiction over the action does not fully vest unless the action is properly initiated." *In re Wolfe*, __ N.C. App. at __, 803 S.E.2d at 652 (citation omitted).

This Court recently addressed the issue of subject matter jurisdiction in the context of voluntary admissions of incompetent adults. In *In re Wolfe*, the respondent argued on appeal that the trial court had erred in concurring in his voluntary admission to an inpatient psychiatric facility. Specifically, he contended that the trial court lacked jurisdiction to concur in the admission because it never received a written and signed admission form as required by N.C. Gen. Stat. § 122C-232. *Id.* at __, 803 S.E.2d at 652. In our analysis, we recognized at the outset that "[i]n any case requiring [a] hearing [pursuant to N.C. Gen. Stat. § 122C-232] . . . the written application for voluntary admission shall serve as the initiating document for the hearing." *Id.* at __, 803 S.E.2d at 653. We then stated that

> [t]his limitation conditions subject-matter jurisdiction: a district court's N.C. Gen. Stat. § 122C-232 jurisdiction to concur in an incompetent adult's voluntary admission and order that he or she remain admitted for further inpatient treatment *does not vest absent the statutorily required written application for voluntary admission signed by the incompetent adult's legal guardian.*

Id. at __, 803 S.E.2d at 653 (emphasis added).

We determined that "the appellate record contain[ed] no written application for [the respondent's] voluntary admission signed by his guardian. Rather, as an amendment to [the] appellate record reflects, [his] application was not filed in the court file for this case, and the Buncombe County District Court calendared the hearing upon receipt of [the psychiatrist's] evaluation for admission." *Id.* at __, 803 S.E.2d at 653. Thus, we concluded as follows:

> Because a written and signed application for voluntary admission never initiated the hearing, the district court failed to comply with the requirements of N.C. Gen. Stat. § 122C-232(b). Because the district court never received this required application for voluntary admission, its subject-matter jurisdiction to concur in [the respondent]'s voluntary admission to Copestone and order he remain

> admitted for further inpatient psychiatric treatment never vested. The district court thus lacked authority to enter its voluntary admission order and it must be vacated.

Id. at __, 803 S.E.2d at 653.

N.C. Gen. Stat. § 122C-221 states, in pertinent part, that "the provisions of G.S. 122C-211 shall apply to admissions of minors under this Part." N.C. Gen. Stat. § 122C-221(a). N.C. Gen. Stat. § 122C-211(a) provides as follows:

> (a) Except as provided in subsections (b) through (f1) of this section, any individual, including a parent in a family unit, in need of treatment for mental illness or substance abuse may seek voluntary admission at any facility by presenting himself for evaluation to the facility. No physician's statement is necessary, but *a written application for evaluation or admission, signed by the individual seeking admission, is required.*

N.C. Gen. Stat. § 122C-211(a) (2015) (emphasis added). N.C. Gen. Stat. § 122C-221(a) states that " . . . in applying for admission to a facility, in consenting to medical treatment when consent is required, and in any other legal procedure under this Article, the legally responsible person shall act for the minor." N.C. Gen. Stat. § 122C-221(a). Thus, absent the filing of an admission authorization form for a minor in need of treatment signed by a legally responsible person as required by N.C. Gen. Stat. § 122C-221, the trial court's subject matter jurisdiction to concur in the minor's admission is not invoked.

We now turn to the facts of the four cases before us. Respondents essentially make two arguments as to why the trial court lacked subject matter jurisdiction in these cases: (1) the trial court failed to make an independent determination that the signatures on the forms admitting Paul, Luke, and Robert were from persons who possessed legal authority to voluntarily admit them; and (2) Natalie's form did not even purport to contain the signature of a legally responsible person and instead merely stated that Strategic had received verbal consent for her admission. We address each argument in turn.

A. Admission Authorization Forms for Paul, Luke, and Robert

Respondents assert that before the trial court's subject matter jurisdiction could be invoked in the cases of Paul, Luke, and Robert, it was required to make an independent assessment that their admission

authorization forms were actually signed by legally responsible persons as required by N.C. Gen. Stat. § 122C-221. We disagree.

As stated above, in order to admit a minor to an inpatient facility, "a written application for evaluation or admission, signed by the [legally responsible person] seeking admission, is required." N.C. Gen. Stat. § 122C-211(a); *see also* N.C. Gen. Stat. § 122C-221(a) (requiring a legally responsible person to sign on behalf of a minor).

However, the General Assembly has not expressly required that the trial court independently verify in each case that the admission authorization form was, in fact, signed by a legally responsible person. We decline to judicially impose such a requirement in the absence of legislative direction. Thus, in cases where an admission authorization form is filed that — on its face — purports to comply with N.C. Gen. Stat. § 122C-221(a), the trial court is entitled to presume that the form was, in fact, signed by a legally responsible person. However, this presumption can be rebutted by evidence to the contrary.

Here, the admission authorization forms for Paul, Luke, and Robert each contained a signature in the appropriate spot on Strategic's standard admission form indicating that the form had been signed by a parent or guardian. Therefore, the trial court was permitted to treat the forms as presumptively valid and sufficient to invoke the court's subject matter jurisdiction. Accordingly, we hold that the court possessed subject matter jurisdiction over the proceedings involving Paul, Luke, and Robert.

B. Admission Authorization Form for Natalie

We must next determine whether subject matter jurisdiction likewise existed with regard to Natalie's proceeding. Her appeal raises a different issue as her admission authorization form was *not* signed by a legally responsible person. Instead, the form unambiguously states that it was signed by a representative of Strategic based on the *verbal* authorization of Natalie's parent.

As previously discussed, the legislature has directed that a legally responsible person must sign the admission authorization form on behalf of the minor child in order for the child to be voluntarily admitted to a mental health facility. In the absence of such a signed form, the trial court cannot exercise its subject matter jurisdiction to concur in the minor's voluntary admission. *See Wolfe*, __ N.C. App. at __, 803 S.E.2d at 653.

At the bottom of Natalie's admission authorization form was a stamp containing the following words:

> Official Verbal Consent Received
> by Legal Guardian/Parent on this date:
> Strategic Behavioral Health – Charlotte, LLC

Next to this stamp, an individual named Laura Strother — presumably a representative of Strategic — wrote the words "consent obtained by [Natalie's mother]" above the line requiring the "Signature of Parent/Guardian." Ms. Strother also signed her own name above the line requiring the "Signature of Witness."

The admission authorization form contains ten paragraphs setting out various information about Strategic and the treatment to be administered to the minor upon admission. By initialing these paragraphs, the legally responsible person acknowledges that he or she has read and understood the information contained therein. However, Natalie's form did not contain any initials next to these paragraphs.

In arguing that this verbal consent by Natalie's parent was sufficient to satisfy N.C. Gen. Stat. § 122C-221, Strategic points to a provision in North Carolina's Uniform Commercial Code that permits certain written instruments to be signed by an agent or representative of a person sought to be held liable under the instrument. *See* N.C. Gen. Stat. § 25-3-401 (2015). However, the fact that the General Assembly has authorized an exception to the personal signature requirement with regard to negotiable instruments is irrelevant to the entirely unrelated issue of whether verbal authorization by a parent or guardian is sufficient to satisfy N.C. Gen. Stat. § 122C-221. Indeed, the absence of comparable language in § 122C-221 mandates the conclusion that the General Assembly did *not* intend for a signature purportedly based on a parent or guardian's verbal consent to be sufficient.

Therefore, because Natalie's form did not contain the signature of a legally responsible person, the trial court lacked subject matter jurisdiction to concur in her readmission to Strategic. Accordingly, we vacate the trial court's order readmitting her to the facility.[4]

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4. In its brief, the State argues that this issue was effectively waived by the failure of Natalie's attorney to challenge the trial court's jurisdiction at the hearing. However, it is well established that subject matter jurisdiction cannot be conferred by waiver. *See H.L.A.D.*, 184 N.C. App. at 385, 646 S.E.2d at 429.

III. Consent to Admission by Luke

[3] The final issue before us is whether compliance with a formalized procedure was necessary before the trial court was permitted to determine the voluntariness of Luke's consent to Strategic's recommendation that he be readmitted. At the 14 June 2016 hearing, the following exchange occurred:

> THE COURT: So, [Luke], let's see -- what are your recommendations . . . for [Luke]?
>
> [STRATEGIC'S ATTORNEY]: [Luke]'s recommendation is amended 45 days, Your Honor.
>
> THE COURT: All right. And, [Luke], you can either agree to that or you can disagree with that. If you agree with that, then I'm going to sign an order that says you can stay up to 45 days. You cannot stay longer than 45 days, but you could leave sooner than that. It really depends on how things go. Does that make sense to you?
>
> [LUKE]: Yes, sir.
>
> THE COURT: So are you agreeing with that or are you disagreeing with that?
>
> [LUKE]: I'll agree with that.
>
> THE COURT: All right. So I'm going to sign an order then that says that you agree and that it will be up to [your therapist] and your treatment team and how you're doing as to when you leave over those next 45 days. Okay.
>
> [LUKE'S ATTORNEY]: Your Honor, if I could have a minute with [Luke], because our last conversation he was contesting the recommendation.
>
> THE COURT: Sure.
>
> [LUKE'S ATTORNEY]: I just want to make sure that we're clear.
>
> [LUKE]: I agree.
>
> [LUKE'S ATTORNEY]: All right. We're consenting, Your Honor.

On appeal, Luke contends that in order to comport with due process requirements, the trial court was required to either (1) engage in a

colloquy with Luke to ensure that he was fully aware of his rights with regard to the hearing; or (2) obtain a written waiver from Luke confirming that he understood the rights he was giving up by consenting to Strategic's recommendation.

The General Assembly has not included within Chapter 122C a specific procedure to be utilized in cases where a minor consents to his voluntary admission to an inpatient facility. Here, the trial court did, in fact, engage in a colloquy — albeit a brief one — with Luke on this issue. While we acknowledge that the better practice would have been for the trial court to engage in a more detailed colloquy with him to ensure that Luke's consent was both voluntary and fully informed, we cannot say on these facts that its failure to do so constituted reversible error.

Moreover, the General Assembly has not seen fit to require a written waiver under these circumstances. Therefore, we once again decline Respondents' invitation to judicially impose requirements that are not actually contained in Chapter 122C. *See In re J.M.D.*, 210 N.C. App. 420, 427, 708 S.E.2d 167, 172 (2011) ("[N]either we nor the trial court can rewrite the statute which the General Assembly has given us."). Accordingly, we cannot say that Luke's due process rights were violated.[5]

Conclusion

For the reasons stated above, we affirm the trial court's orders concurring in the voluntary admissions of Paul, Luke, and Robert in 16 SPC 4047, 16 SPC 4126, and 16 SPC 4080 and vacate the order concurring in the voluntary admission of Natalie in 16 SPC 4081.

AFFIRMED IN PART; VACATED IN PART.

Judges BRYANT and INMAN concur.

5. We note that Luke does not actually argue on appeal that his decision to consent to Strategic's recommendation was involuntary or that he did not understand the consequences of his decision.

SCHNEIDER v. SCHNEIDER

[256 N.C. App. 228 (2017)]

ROBERT ALLEN SCHNEIDER, PLAINTIFF
v.
HOLLI M. SCHNEIDER, DEFENDANT

No. COA16-920

Filed 7 November 2017

Attorney Fees—child custody—misapprehension of trial court discretion—comparison of financial situations

The trial court erred in a child custody case by awarding $30,000 in attorney fees to plaintiff father where the trial court misapprehended its discretion to consider defendant wife's financial situation under N.C.G.S. § 50-13.6. The trial court was allowed, in its discretion, to consider the financial circumstances of the party ordered to pay and to compare the financial situations of the parties.

Appeal by defendant from order entered 23 March 2016 by Judge Christy T. Mann in District Court, Mecklenburg County. Heard in the Court of Appeals 23 February 2017.

Robert Allen Schneider, pro se, plaintiff-appellee.

Plumides, Romano, Johnson & Cacheris, PC, by Richard B. Johnson, for defendant-appellant.

STROUD, Judge.

Because the trial court may have misapprehended its ability to consider the financial circumstances of the defendant Mother in awarding attorney fees to plaintiff Father under North Carolina General Statute § 50-13.6, we reverse the order awarding attorney fees to Father and remand to the trial court for reconsideration of this issue.

I. Background

This case arises from a long and contentious custody case. After their separation, plaintiff-Father filed a complaint in 2013 against defendant-Mother with claims for emergency temporary custody, permanent custody, child support, equitable distribution, interim distribution, appointment for a guardian ad litem, and attorney fees. We need not go into great detail regarding the multiple claims here, but the custody dispute centered in large part around Mother's move to Mississippi with the children. Over the years the trial court entered several orders but the

only one at issue on appeal is from March of 2016, when the trial court ordered Mother to pay Father $30,000.00 for attorney fees pursuant to North Carolina General Statute § 50-13.6. Mother appeals.

II. Attorney Fees

Mother's only argument on appeal is that the court erred by awarding Father $30,000.00 in attorney fees.

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

N.C. Gen. Stat. § 50-13.6 (2015). "Whether these statutory requirements have been met is a question of law, reviewable on appeal. Only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney's fees awarded." *Doan v. Doan*, 156 N.C. App. 570, 575, 577 S.E.2d 146, 150 (2003) (citation and quotation marks omitted).

Mother first contends that the trial court "failed to make detailed findings of fact regarding [Father's] inability to defray the costs of the lawsuit" as is required under North Carolina General Statute § 50-13.6. *See* N.C. Gen. Stat. § 50-13.6. Mother cites to *Dixon v. Gordon*, wherein this Court reversed and remanded to the trial court because

> the only findings of fact were that father does not have sufficient funds with which to employ and pay legal counsel . . . to meet Mother on an equal basis. Although information regarding father's gross income and employment was present in the record in father's testimony, there are no findings in the trial court's order which detail this

> information. We believe that because the findings in this case contain little more than the bare statutory language, the order is insufficient to support an award of attorneys fees.

223 N.C. App. 365, 373, 734 S.E.2d 299, 305 (2012) (quotation marks, ellipses, brackets, and footnote omitted), and *Cox v. Cox*, wherein this Court also reversed and remanded the case because "the trial court concluded that plaintiff did not have sufficient assets with which to pay his attorneys' fees and that defendant did have the means to pay plaintiff's attorneys' fees. However, there were no findings about plaintiff's monthly income or expenses." 133 N.C. App. 221, 228, 515 S.E.2d 61, 66 (1999). However, unlike the cited cases, *contrast Dixon*, 223 N.C. App. at 373, 734 S.E.2d at 305; Cox, 133 N.C. App. at 228, 515 S.E. at 66, the trial court here did make "detailed findings of fact" including the following:

> 6. The Plaintiff/Father is an airplane pilot and is employed by Southwest Airlines. His annual income is approximately $134,000.00.
>
> . . . .
>
> 10. Plaintiff is the major financial support for the minor children due to Defendant's choice to stay home and help raise her stepchildren as well as stay home with her expected new born with her new husband.
>
> 11. Plaintiff was forced to borrow money from family and deplete his savings in order to pay for attorney fees to represent his interests in having his children returned to North Carolina.
>
> 12. Plaintiff's attorney fees overall were over $54,000.00 of which approximately $39,000.00 were charged for Ms. Sellers' attorney fees on custody of this matter for over 122 hours of work.
>
> 13. This does not include costs for appearing at this hearing or preparing the order.
>
> 14. Defendant incurred attorney fees of approximately $18,000.00 in the above case. These fees were paid with the proceeds which Defendant/Mother received from the domestic case.
>
> 15. The evidence presented at trial and this hearing demonstrate that Plaintiff has insufficient means to defray the costs of this suit and that these sums affect the

> means with which Plaintiff has to support his children's financial needs.

Mother's argument that the trial court made "only general findings" is simply inaccurate. This argument is without merit.

Next, as to three of the detailed findings of fact just mentioned -- 10, 11, and 15 -- Mother contends portions of them "are not supported by the evidence." Mother's main contention about the challenged findings of fact is that there was no evidence to support them and her brief implies, at the very least, that no evidence was presented but rather "counsel simply made arguments[.]" Mother's argument has two fatal flaws: first, the trial court did hold a hearing, at which it considered documentary exhibits, including financial affidavits from the parties, and Mother actually testified; the second flaw is that the trial court explicitly noted that the order was based not just on this hearing, but also on the evidence presented at the hearings regarding the other matters at issue. The order here specifically notes in its introduction that the trial court made this determination "after reviewing the file, evidence presented, and the fee affidavit of Plaintiff[.]" In addition, finding of fact 15 shows that the trial court considered all of the evidence presented at the prior hearings:

> 15. *The evidence presented at trial and this hearing* demonstrate that Plaintiff has insufficient means to defray the costs of this suit and that these sums affect the means with which Plaintiff has to support his children's financial needs.

(Emphasis added.) Although Mother challenges the latter part of this finding which states that "Plaintiff has insufficient means to defray the costs of this suit[,]" she does not dispute the sources of the evidence that the trial court considered. Additionally, it is clear from the order what the "evidence presented at trial" referred to, since the order also notes that "Custody and Child Support were resolved at trial and an order was entered on April 11, 2014. Associated attorney fee claims were held open for later resolution." The child custody and support order had extensive findings of fact and was not appealed.

Furthermore, at the beginning of the hearing on attorney fees, counsel recognized that the trial court would be considering evidence from the child custody and support hearing as well as that presented at this hearing as Father's attorney stated, with no objection or qualification from Mother's counsel,

> Your Honor, this is what we need in this situa -- in this case. Our evidence is already in the court file. It's never

> been closed out. The parties' equitable distribution affidavits are both in the court file. Plaintiff's was filed February 2014, and Defendant's was filed in March of 2014. Those are in the file. And along that same time period in the file you should see both of their financial affidavits respectively filed 2-28-2014 and 3-5-2014. We also have the order for permanent custody and child support, which was entered in April of 2014, Your Honor[,]

and the trial court responded, "Okay." Mother's argument that there was no evidence presented which could support the challenged portions of the three findings of fact is without merit.

Lastly, Mother contends the trial court made an error of law because it believed it could not compare the relative estates of the parties, and if the trial court had done this comparison, it would have determined that an award of attorney fees was not appropriate. Mother notes that the trial court stated, "the law doesn't – it's not -- it doesn't provide for me to consider how much money -- in this case, how much money . . . [mother]" makes. In fact, the trial court discussed its inability to make this comparison at some length at the hearing, but this is the substance of the trial court's statement of the law. Father makes no counter argument on appeal regarding this issue. We agree that from the trial court's rendition, it appeared to be under the impression that the *only* consideration was whether Father could pay his attorney fees, without any consideration of Mother's financial situation. We cannot discern from the order itself whether the trial court considered Mother's financial situation or in its discretion it simply declined to consider it. But a fair reading of the order is consistent with Mother's argument that the trial court misapprehended its discretion to consider her financial situation.

Our Supreme Court clarified the extent of the trial court's discretion to consider the estate of the party ordered to pay attorney fees in *Van Every v. McGuir*e:

> [W]hile the trial court should focus on the disposable income and estate of [the party requesting fees], it should not be placed in a straitjacket by prohibiting any comparison with [the other party's] estate, for example, in determining whether any necessary depletion of [the party requesting fees'] estate by paying her own expenses would be reasonable or unreasonable. Accordingly, the order of remand must be modified to remove these restrictions.

348 N.C. 58, 62, 497 S.E.2d 689, 691 (1998). In short, the trial court is not *required* to consider the financial circumstances of the party ordered to pay attorney fees under North Carolina General Statute § 50-13.6, but the trial court is *allowed*, in its discretion, to consider the financial circumstances of the party ordered to pay and to compare the financial situations of the parties. *See Van Every*, 348 N.C. at 62, 497 S.E.2d at 691.

We must therefore reverse and remand the order for the trial court to reconsider its discretionary award of attorney fees. In exercising its discretion, the trial court may decline to consider Mother's financial situation in light of all of the circumstances of the case *or* it may consider her financial situation and compare it to Father's situation. Since the trial court made thorough findings of fact in the order on appeal and those findings were fully supported by the evidence, there is no need for the trial court to receive additional evidence on remand or to make additional findings of fact before entering a new order, but the trial court may in its discretion receive additional evidence or make additional findings.

III. Conclusion

For the foregoing reasons, we reverse and remand.

REVERSED AND REMANDED.

Judges DILLON and MURPHY concur.

STATE OF NORTH CAROLINA
v.
JAMES GREGORY ARMISTEAD, DEFENDANT

No. COA17-323

Filed 7 November 2017

1. Constitutional Law—right to speedy trial—four-year delay between indictment and trial—Barker balancing test

A four-year delay between an indictment and trial in a driving while impaired case did not violate defendant's Sixth Amendment right to a speedy trial where the *Barker v. Wingo*, 407 U.S. 514 (1972), four-factor balancing test revealed that while the length of delay was unreasonable and the State acted negligently in its prosecution of defendant, defendant failed to adequately demonstrate a

clear assertion of his right and did not present evidence establishing actual substantial prejudice.

2. Motor Vehicles—driving while impaired—motion to dismiss—sufficiency of evidence—evidence of properly filed motion

The trial court erred in a driving while impaired case by denying defendant's motion to dismiss pursuant to N.C.G.S. § 15A-711 where defendant presented no evidence of a properly filed motion and the record revealed that if defendant filed anything, he did so with the wrong court.

Appeal by Defendant from judgment entered 25 May 2016 by Judge Marvin K. Blount, III, in Pitt County Superior Court. Heard in the Court of Appeals 19 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Michelle D. Denning, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant-Appellant.

INMAN, Judge.

James Gregory Armistead ("Defendant") appeals his conviction following a jury verdict finding him guilty of impaired driving with a finding of one aggravating factor. Defendant argues that he was denied his constitutional right to a speedy trial and that the trial court erred by denying his motion to dismiss pursuant to N.C. Gen. Stat. § 15A-711. After careful review, we hold that Defendant has failed to establish error.

Factual and Procedural History

The evidence at trial tended to show the following:

At around 1:30 a.m. on 3 September 2011, Defendant was arrested and cited for driving while impaired in Pitt County, North Carolina. At the Pitt County Detention Center, Defendant submitted a breath sample, which reported a blood alcohol concentration of 0.15. Defendant was released on bail at approximately 12:30 p.m. the same day.

On 19 January 2012, Defendant appeared in Pitt County District Court, was appointed counsel, and his case was continued to 22 March 2012. The case was continued again to 3 May 2012 to allow additional time for discovery.

On 1 May 2012, in an unrelated matter in Beaufort County, Defendant was sentenced to an active prison term of 108 to 139 months in the custody of the North Carolina Department of Adult Correction. Defendant began serving that sentence on the same day.

As a result of his incarceration, Defendant did not appear in Pitt County Superior Court on 3 May 2012. Neither Defendant's appointed counsel nor the prosecutor was aware that Defendant was incarcerated. The trial court issued an order for Defendant's arrest.

On or about 26 June 2012, Defendant contacted his prison case manager requesting a list of the case numbers for any pending charges against him as well as addresses for the Pitt County, Washington County, and Lenoir County Clerks of Court. Defendant's case manager responded with the case numbers and the addresses for the clerks of court in all three counties.

On 22 July 2012, Defendant sent letters to the Washington and Lenoir County Clerks of Court requesting resolution of the charges pending against him in those counties. The letter sent to Washington County, which referenced the case numbers of the pending charges, was file stamped with the clerk's office on 26 July 2012. The Lenoir County charges were dismissed on 23 August 2012 and the Washington County charge was dismissed on 1 October 2012.

On 21 September 2012, the prosecutor in Pitt County filed a dismissal of the driving while impaired charge with leave to prosecute the case later, citing Defendant's failure to appear for the 3 May 2012 hearing and the prosecutor's belief that Defendant could not readily be found.

On 15 October 2012 and 14 November 2012, respectively, Defendant sent mail to "CSC Greenville" and "Admin Off Cts," but prison records do not indicate the substance of the correspondence. On 29 November 2012, Defendant drafted, and had notarized, a letter captioned "Motion and Request for Dismissal." The letter, addressed to the presiding or resident judge of the Pitt County Superior Court, stated Defendant's case number as "11 CRS 57539" and requested dismissal of the case pursuant to N.C. Gen. Stat. § 15A-711.[1] Prison records indicate that Defendant sent another letter to "Admin Off Cts." on 30 November 2012, but again do not disclose the substance of the correspondence. There is no court

1. Defendant has included a copy of the letter in the record on appeal. The letter "S" in the case number inaccurately designated a charge pending in Superior Court; however, on the date of the letter, Defendant's charge was pending in Pitt County District Court.

record indicating that the clerk of court or district attorney in Pitt County received any of these letters.

On 13 August 2015, Defendant's prison case manager contacted the Pitt County District Attorney's Office to inquire about the driving while impaired charge and was informed that the charge remained pending and that Defendant would receive notice when the case was next set for a hearing.

On 10 November 2015, Defendant wrote another letter to the Pitt County Clerk of Court indicating that he had yet to receive a response regarding his motion to dismiss the pending charge, which Defendant correctly identified as case number "11CR57539." It was through this letter that Defendant's counsel learned of his incarceration and contacted the District Attorney's Office to re-calendar Defendant's case.

Defendant's case proceeded to trial on 28 January 2016 in Pitt County District Court. Defendant was convicted and sentenced as a Level 3 offender to an active term of six months in prison. Defendant appealed to the Pitt County Superior Court on the same day and was released on $1.00 secured bond.

Defendant moved to dismiss the case pursuant to N.C. Gen. Stat. § 15A-711 on 25 April 2016. A pre-trial hearing was set on 23 May 2016 to address Defendant's motion. The trial court denied Defendant's motion and the case proceeded to trial before a jury.

At trial, the State presented evidence of Defendant's impairment through the testimony of the arresting officer and the results of the Intoxalyzer test administered on the night of his arrest. The jury convicted Defendant on 25 May 2016 for driving while impaired and found one aggravating factor—that Defendant had an alcohol concentration of 0.15 or more at the time of the offense, or within a relevant time after the driving involved in the offense. Defendant gave timely notice of appeal.

Analysis

Defendant argues that the four-year delay between his indictment and trial violated his Sixth Amendment right to a speedy trial and that the trial court erred by denying his motion to dismiss pursuant to N.C. Gen. Stat. § 15A-711. We disagree.

I. Standard of Review

When the facts at issue are undisputed, whether a defendant's right to a speedy trial has been violated is a question of law reviewed *de novo*. *State v. Chaplin*, 122 N.C. App. 659, 664, 471 S.E.2d 653, 656 (1996). The

denial of a defendant's motion and request to dismiss pursuant to N.C. Gen. Stat. § 15A-711 is also reviewed *de novo*. *State v. Williamson*, 212 N.C. App. 393, 396, 711 S.E.2d 765, 768 (2011).

II. Speedy Trial Motion

[1] The right to a speedy trial is guaranteed to every person formally accused of a crime by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 18 of the North Carolina Constitution. *See State v. Spivey*, 357 N.C. 114, 118, 579 S.E.2d 251, 254 (2003). This right, however,

> is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not per se prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.

State v. McKoy, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978) (citing *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed.2d 101 (1972)).

In *Barker*, the United States Supreme Court established a balancing test to determine, on a case-by-case basis, whether a defendant's constitutional right to a speedy trial has been violated. *Barker*, 407 U.S. at 530, 33 L.Ed.2d at 116-17. *Barker* identified the following factors for courts to consider: (1) the length 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 116-117.

North Carolina courts, in applying the *Barker* balancing test, have noted that "[n]o single factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." *McKoy*, 294 N.C. at 140, 240 S.E.2d at 388. Rather, these factors "must be considered together with such other circumstances as may be relevant[,]" and courts must "engage in a difficult and sensitive balancing process . . . with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." *Id.* at 140, 240 S.E.2d at 388 (internal quotation marks and citations omitted).

With these principles in mind, we turn our consideration to the circumstances before us in this case.

A. Length of Delay

Our Court has recognized that "some delay is inherent and must be tolerated in any criminal trial[.]" *State v. Pippin*, 72 N.C. App. 387, 391-92, 324 S.E.2d 900, 904 (1985) (citation omitted). However, concurrent with this recognition is the principle that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 531, 33 L.Ed.2d at 117.

The United States Supreme Court in *Barker* explained that "[t]he length of the delay is to some extent a triggering mechanism[,]" and that "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id.* at 530, 33 L.Ed.2d at 116-17. The United States Supreme Court and our Courts have yet to define a period of time for which a delay will be deemed presumptively prejudicial, but

> [d]epending on the nature of the charges, the lower courts have generally found postaccusation delay "presumptively prejudicial" at least as it approaches one year. We note that, as the term is used in this threshold context, "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.

Doggett v. United States, 505 U.S. 647, 652 n. 1, 120 L.Ed.2d 520, 528 n. 1 (1992) (internal citations omitted); *see also State v. Hammonds*, 141 N.C. App. 152, 159, 541 S.E.2d 166, 173 (2000).

Here, Defendant was arrested and cited for driving while impaired on 3 September 2011; his trial did not commence until 1608 days—over four years—later. While this delay does not constitute a *per se* violation of Defendant's right to a speedy trial, it is sufficiently unreasonable to trigger a *Barker* inquiry. We therefore consider the remaining factors.

B. Reason for Delay

Under this second factor, a "defendant has the burden of showing that the delay was caused by the *neglect* or *willfulness* of the prosecution." *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255 (emphasis in original) (citation omitted). Only once a defendant has met his burden by making a *prima facie* showing that the delay was caused by negligence or willfulness "must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence." *Id.* at 119, 579 S.E.2d at 255 (citation omitted). The North Carolina Supreme Court has explained:

> [t]he constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case. . . . Neither a defendant nor the State can be protected from prejudice which is an incident of ordinary or reasonably necessary delay. *The proscription is against purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort.*

State v. Johnson, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969) (emphasis added) (internal citations omitted); *see also Spivey*, 357 N.C. at 119, 579 S.E.2d at 255.

The delay in bringing Defendant to trial in this case could have been avoided by reasonable effort. It is undisputed that on the date Defendant failed to appear in court and on the date four months later when the prosecutor removed the case from the docket, Defendant's location was readily ascertainable through a search of the Department of Public Safety's Offender Public Information website and through other online databases routinely used by prosecutors. We are persuaded that the State's failure to discover Defendant's whereabouts—in the State's own custody—resulted from the prosecutor's negligence by not checking readily available information. We therefore weigh the second *Barker* factor in favor of Defendant.

C. Assertion of Right

A defendant's assertion of his speedy trial right "is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right[,]" and "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 531-32, 33 L.Ed.2d at 117. This Court has given weight to both formal and informal assertions of a defendant's right to a speedy trial. *See, e.g.*, *Washington*, 192 N.C. App. at 291, 655 S.E.2d at 808 ("[W]hile [the] defendant's formal assertion of his right was not immediate, he did assert this right almost two years prior to the start of his trial. Further, [the] defendant began informally asserting his right" even earlier, and, "when considered together, these actions weigh in favor of [the] defendant."). However, an "assertion of the right, by itself, d[oes] not entitle [a defendant] to relief." *Spivey*, 357 N.C. at 121, 579 S.E.2d at 256 (citing *Barker*, 407 U.S. at 533, 33 L.Ed.2d at 118).

An affidavit filed by Defendant's trial counsel acknowledges that there was no record of receipt by the clerk's office of any communication from Defendant prior to 10 November 2015, more than three years after Defendant's case was removed from the court docket.

Defendant argues, however, that he asserted his right to a speedy trial four times, beginning with a letter he wrote to the Pitt County Clerk of Court on 11 June 2012, even before the State removed his case from the docket. Although Defendant testified about the letter in a hearing before the trial court, he was unable to produce a copy of this letter, and no such letter was found in the Clerk's file.

Defendant contends that he next asserted his speedy trial right on 29 November 2012 in a notarized letter, including a certificate of service, indicating that a copy of the letter was mailed to the District Attorney's Office in Pitt County. Although Defendant introduced a copy of the letter in evidence before the trial court, the document is not file stamped, contains no notary stamp, and no letter was found in the Clerk's file or in the District Attorney's Office. The letter was addressed to the presiding or resident superior court judge in Pitt County, was labeled as a "Motion and Request for Dismissal," and misidentifies Defendant's case number as "11-CRS-57539." On the date stated on the letter, Defendant's case was pending in district court and was numbered as "11-CR-57539." Defendant's addressing the letter to the superior court rather than the district court and identifying his case as CRS rather than CR could have contributed to the letter not reaching the court file.

Defendant's third contended assertion of his speedy trial right occurred when Defendant contacted his prison case manager on 13 August 2015, and as a result, the State received notice that Defendant was incarcerated. The State, however, argues that Defendant's inquiry to his case manager should not be considered as a prior assertion of his speedy trial right.

Defendant's final assertion—which the State argues was his only meaningful assertion—was a letter Defendant sent to the Pitt County Clerk of Court on 10 November 2015. This letter properly identified the case as 11-CR-57539 and requested an update regarding Defendant's previously mailed motion to dismiss. The State argues that even if this letter was an assertion, it was an improper *pro se* motion because Defendant was represented by counsel at the time and it should not be given the weight of a formal assertion of Defendant's right.

We conclude that Defendant's attempts to assert his speedy trial right through informal methods—absent any evidence that his assertions reached the proper court officials or the prosecutor until three years after Defendant first failed to appear in court—are neutral to our determination.

D. Prejudice to Defendant

In considering whether a defendant has been prejudiced by a delay, the United States Supreme Court has explained that "we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify[,]" and that "[w]hile such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay." *Doggett*, 505 U.S. at 655-56, 120 L.Ed.2d at 250 (internal citations omitted).

The North Carolina Supreme Court, following *Doggett*, adopted the reasoning in *Barker* that

> [t]he right to a speedy trial is designated: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Of these, the most serious is the last*, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."

State v. Webster, 337 N.C. 674, 680-81, 447 S.E.2d 349, 352 (1994) (emphasis in original) (quoting *Barker*, 407 U.S. at 532, 33 L.Ed.2d at 118). The North Carolina Supreme Court has held further that, when weighed against a legitimate reason for the State's delayed prosecution, a defendant must show "actual or substantial prejudice resulting from the delay" to establish a violation of his constitutional right to a speedy trial. *State v. Goldman*, 311 N.C. 338, 345, 317 S.E.2d 361, 365 (1984); *see also Spivey*, 357 N.C. at 122, 579 S.E.2d at 257 ("A defendant must show actual, substantial prejudice.") (citation omitted). General allegations of faded memory are insufficient to carry a defendant's burden of showing prejudice; rather, "[t]he defendant must show that the resulting lost evidence or testimony was significant and would have been beneficial to his defense." *State v. Marlow*, 310 N.C. 507, 521-22, 313 S.E.2d 532, 541 (1984).

Defendant argues that the pending charges prevented him from advancing in custody classification in prison, and as a result limited his accumulation of good time or gained time and access to prison programming options. The record, however, reveals that Defendant was released on bond on the same day he was charged with this impaired driving violation. Defendant was subsequently arrested and convicted for charges unrelated to the case at hand. The record indicates that during the time in which this case was pending and while he was serving time

for the unrelated convictions, Defendant received several infractions which could have similarly hindered his participation in certain prison programs. Defendant has presented no other evidence of unlawful or excessive pretrial incarceration related to this charge. While we take into consideration the pending charge's effect on Defendant's inability to advance in classification and the resulting limitations to activities during incarceration for a separate conviction, such an assertion without evidence of precisely how the pending charges affected Defendant's classification is insufficient alone to show actual, substantial prejudice.

Defendant also argues that his brother could have been an exculpatory witness had the case been tried earlier, but that the delay resulted in his brother's inability to remember the specific events of 3 September 2011. As discussed above, a mere faded memory—without more—is insufficient to establish a showing of prejudice. Here, Defendant has not presented any evidence or argument as to how the resulting lost testimony was significant to his defense. At trial, the State's evidence was in the form of testimony by the arresting officer and the results of the Intoxalyzer test. Defendant has not shown, nor can we imagine, how the faded memory of Defendant's brother deprived him of an available defense. Accordingly, we weigh this factor in favor of the State.

After balancing the four factors set forth above, we hold that Defendant's constitutional right to a speedy trial has not been violated. While the length of delay was unreasonable and the State acted negligently in its prosecution of Defendant, Defendant has failed to adequately demonstrate a clear assertion of his right and has not presented evidence establishing actual, substantial prejudice. Accordingly, we overrule Defendant's argument.

III. Motion to Dismiss

[2] N.C. Gen. Stat. § 15A-711 "has sometimes been characterized as a 'speedy trial' statute." *State v. Doisey*, 162 N.C. App. 447, 450, 590 S.E.2d 886, 889 (2004). However, such a categorization misconstrues the statute's intended purpose, which is not to guarantee that an incarcerated defendant receive a trial within a specific time frame, but rather to require a prosecutor to make a written request for the "temporary release of the defendant to the custody of an appropriate law-enforcement officer who must produce him at the trial" within six months of the defendant's written request. N.C. Gen. Stat. § 15A-711 (2015). N.C. Gen. Stat. § 15A-711 provides in pertinent part:

> (a) When a criminal defendant is confined in a penal or other institution under the control of the State . . . and his

> presence is required for trial, the prosecutor may make written request to the custodian of the institution for temporary release of the defendant to the custody of an appropriate law-enforcement officer who must produce him at the trial. The period of the temporary release may not exceed 60 days. The request of the prosecutor is sufficient authorization for the release, and must be honored, except as otherwise provided in this section.
>
> . . .
>
> (c) A defendant who is confined in an institution in this State pursuant to a criminal proceeding and who has other criminal charges pending against him may, *by written request filed with the clerk of the court where the other charges are pending*, require the prosecutor prosecuting such charges to proceed pursuant to this section. A copy of the request must be served upon the prosecutor in the manner provided by the Rules of Civil Procedure, G.S. 1A-1, Rule 5(b). If the prosecutor does not proceed pursuant to subsection (a) within six months from the date the request is filed with the clerk, the charges must be dismissed.

(emphasis added). The North Carolina Supreme Court has held that "failure to serve a section 15A-711(c) motion on the prosecutor as required by the statute bars relief for a defendant." *State v. Pickens*, 346 N.C. 628, 648, 488 S.E.2d 162, 173 (1997) (citation omitted).

Defendant argues that his letters sent on 11 June 2012 and 29 November 2012 were properly filed written requests sufficient to satisfy the requirements under N.C. Gen. Stat. § 15A-711(c). In criminal cases a defendant may present evidence other than a file stamp to establish if a motion has been properly filed. *See* N.C. Gen. Stat. § 15A-101.1(7)(a) (2015) ("Filing is complete when the original document is received in the office where the document is to be filed"); *see also State v. Moore*, 148 N.C. App. 568, 570, 559 S.E.2d 565, 566 (2002) ("In the absence of a file stamped motion *or any other evidence of the motion's timely filing* . . . .") (emphasis added) (citation omitted).

Here, Defendant presented no evidence of a properly filed motion. The Pitt County Clerk's file for Defendant's DWI charge does not contain any file stamped motion or letters from Defendant. A review of the 29 November 2012 letter reveals that the letter was addressed to the superior court judges and that Defendant placed the incorrect file

number on the motion—Defendant placed a superior court file number when, at the time, the charge was pending before the district court. Apart from Defendant's own testimony, there is no other evidence in the record supporting the conclusion that Defendant properly filed a written request with the Pitt County Clerk of Court. The record reveals that if Defendant filed anything, he did so with the wrong court. We are bound by precedent and must affirm the trial court's denial of Defendant's motion.

Conclusion

For the foregoing reasons, we hold that Defendant's right to a speedy trial was not violated despite the lengthy delay, and that the trial court did not err in denying his motion to dismiss pursuant to N.C. Gen. Stat. § 15A-711.

AFFIRMED.

Judges BRYANT and DAVIS concur.

STATE OF NORTH CAROLINA
v.
THOMAS EVERRETTE, JR.

No. COA17-88

Filed 7 November 2017

False Pretenses—obtaining property by false pretenses—unspecified amount of credit—unidentified loan or credit card—sufficiency of particular description

The trial court lacked jurisdiction to enter judgment in an obtaining property by false pretenses under N.C.G.S. § 14-100 case where the indictments charging defendant with obtaining an unspecified amount of "credit" secured through the issuance of an unidentified "loan" or "credit card" was not a sufficiently particular description of what he allegedly obtained.

Appeal by defendant from judgments entered 16 August 2016 by Judge Wayland J. Sermons, Jr. in Martin County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Keith Clayton, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for defendant-appellant.

ELMORE, Judge.

Defendant Thomas Everrette, Jr. appeals from judgments entered after a jury convicted him of three counts of obtaining property by false pretenses under N.C. Gen. Stat. § 14-100. This case presents the issue of whether obtaining-property-by-false-pretenses indictments charging a defendant with obtaining an unspecified amount of "credit" secured through the issuance of an unidentified "loan" or "credit card," is a sufficiently particular description of what he allegedly obtained, such that it conferred jurisdiction upon the trial court to enter judgments against him. Because we conclude this vague language fails to describe what was obtained with sufficient particularity, as required to enable a defendant adequately to prepare a defense, we hold the indictments failed to vest the trial court with jurisdiction. Accordingly, we vacate defendant's convictions and arrest the resulting judgments.

I. Background

In June 2013, defendant joined Weyco Community Credit Union ("Weyco"). On 25 June, defendant applied for a collateralized loan from Weyco. As part of the loan application process, defendant completed a "verification of employment" form indicating that Bail American Surety, LLC ("Bail American") was his employer, and listing its physical address and telephone number. On 27 June, defendant applied for a secured vehicle loan of $14,399.00 to buy a Suzuki motorcycle ("Motorcycle Loan"), as well as a credit card with a credit limit of $2,000.00 ("Credit Card"). These applications listed Bail American as defendant's employer and were approved by a Weyco loan officer that same day. On 3 July, defendant applied for and obtained another secured vehicle loan of $56,976.00 to buy a Dodge truck ("Truck Loan"). This application did not list defendant's employment information.

On 31 July, defendant submitted his first payment on the Motorcycle Loan via a $281.95 check draft, which was later returned for insufficient funds. On 2 August, defendant submitted his first payment of $891.27 on the Truck Loan. On 30 August, defendant made his second payment on the Motorcycle Loan. But because defendant had defaulted on his first Motorcycle Loan payment, and since the Motorcycle Loan and

Truck Loan (collectively, the "Vehicle Loans") were cross-collateralized, defendant was in default on both loans.

Sometime after Weyco issued defendant the Vehicle Loans and Credit Card, Bank Branch and Trust's ("BB&T") fraud department alerted a Weyco representative that an unusual transaction had gone through Weyco's BB&T checking account. BB&T faxed Weyco a copy of the check from that transaction, and defendant's name was typewritten on the upper-left corner of the check. BB&T's alert prompted a Weyco loan officer supervisor, Gay Roberson, to investigate.

Roberson attempted to verify defendant's employment information by calling the telephone number listed for Bail American on defendant's Motorcycle Loan and Credit Card applications. The number returned a different company. After Roberson's internet search for the company name proved fruitless, she discovered the physical address listed for Bail American belonged to a different business. Roberson eventually contacted law enforcement.

Detective Sergeant Gene Bullock of the Williamston Police Department searched the North Carolina Secretary of State's records to locate the entity, Bail American, and was unsuccessful. But Sergeant Bullock found records of an entity named "Everette's Bail Bonding, Inc.," formed in 2000 and dissolved in 2005, as well as an entity named "Thomas Everette, Jr., LLC," formed in 2011 and dissolved in 2014, at some point after Weyco had issued defendant the Vehicle Loans and Credit Card. Defendant was later arrested and charged.

On 30 March 2015, a grand jury of Martin County indicted defendant for three counts of obtaining property by false pretenses under N.C. Gen. Stat. § 14-100. The indictment for the first count, arising from Weyco's issuance of the Credit Card, charged that defendant "obtain[ed] credit, from Weyco" and alleged that "this property was obtained by means of giving false employment information on an application for a credit card so as to qualify for said credit care [sic] which was issued to him based upon the false information." The indictments for the second and third counts, arising from the Vehicle Loans, were identical save for the offense dates, and charged that defendant "obtain[ed] credit, from Weyco" and that "this property was obtained by means of giving false information on an application for a loan so as to qualify for said loan which loan was made to defendant."

At trial, Roberson testified that BB&T's potential fraud alert prompted her to investigate defendant's employment. Over defendant's objection, the State admitted into evidence the fax from BB&T, a screenshot of

the image of the check containing defendant's name typewritten in its upper-left corner. Handwritten under the check's image was "BB&T Ck fraud." At the close of the State's evidence, defendant unsuccessfully moved to dismiss the charges. He argued the State failed to present sufficient evidence he misrepresented his employment information, in light of the evidence he elicited on cross-examination indicating that the two entities he previously owned, Everette's Bail Bonding, Inc. and Thomas Everette, Jr., LLC, did business as Bail American.

Defendant represented himself *pro se* with standby counsel. He called his brother, Mr. James Joyner, and asked him about defendant's prior work history as a bail bondsman and his efforts to make timely loan payments. Joyner testified that defendant had worked as a bail bondsman for most of his life, that defendant used "Bail American" or "Bail American Bail Bondsman" on business cards and advertisements, and that Joyner helped defendant make loan payments when needed.

On cross-examination, the State asked Joyner how long he knew defendant to be a bail bondsman; Joyner replied: "[B]asically, all his adult life." The State asked whether defendant was a licensed bail bondsman; Joyner replied: "[A]s far as I know." Then the State asked, over defendant's objection, whether Joyner knew defendant had previously been convicted for impersonating a bail bondsman; Joyner replied: "Did I know that he was impersonating a bail bondsman? No. I don't know about that impersonating." The State inquired no further. At the close of his evidence, defendant renewed his motions to dismiss the charges for insufficient evidence, which were again denied.

On 16 August 2016, the jury found defendant guilty on all three charges of obtaining property by false pretenses. The trial court entered three judgments against defendant, imposing three consecutive active sentences of fifteen to twenty-seven months in prison. Defendant appeals.

II. Alleged Errors

On appeal, defendant contends the trial court (1) lacked jurisdiction to enter judgments against him because the indictments were facially invalid, arguing they failed to specify the property obtained with reasonable certainty. Defendant also contends the trial court erred by (2) denying his motion to dismiss the third charge arising from the Truck Loan application due to a fatal variance between that indictment and the trial evidence. Specifically, he argues that indictment alleged he misrepresented his employment information on the Truck Loan application, when trial evidence showed the application contained no employment information. Defendant also asserts the trial court erred by (3) admitting

over objection the State's question to Joyner about his knowledge of defendant's prior impersonating-a-bail- bondsman conviction, and (4) admitting allegedly inadmissible hearsay evidence arising from the suspicious BB&T transaction that suggested defendant participated in an unrelated bank fraud. Because we hold the indictments were insufficient and therefore warrant vacating defendant's convictions and arresting the resulting judgments, resolving defendant's first alleged error disposes of his entire appeal, and we thus decline to address his remaining arguments. *See, e.g.*, *State v. Downing*, 313 N.C. 164, 165, 326 S.E.2d 256, 257 (1985) (vacating larceny conviction for fatal variance between indictment and trial evidence and, therefore, declining to address the defendant's double-jeopardy argument related to the larceny conviction).

III. Sufficiency of Indictments

A. Arguments

Defendant contends the trial court lacked jurisdiction to enter judgments against him because the indictments were facially invalid on the ground that they failed to describe with reasonable certainty the things he allegedly obtained. He argues the Vehicle Loan application indictments, which merely described the property obtained as "a loan" and "a loan," but failed to specify what was loaned (e.g. money or another valuable), or the property he obtained with those loans, were insufficient to sustain the charges. He also contends the Credit Card application indictment, which merely described the property as "a credit card," but failed to identify that card, its value, or what property he obtained using that card, similarly was insufficient to sustain the charge. Defendant relies primarily on our Supreme Court's decisions in *State v. Smith*, 219 N.C. 400, 14 S.E.2d 36 (1941), and *State v. Jones*, 367 N.C. 299, 758 S.E.2d 345 (2014), to support his argument.

The State retorts that each indictment was valid. It argues these indictments should not be quashed based on such technicalities, and because the indictments describe the dates of the offenses, the name of the victim, and the things obtained by the terms generally used to describe them (i.e. credit card and loan), the indictments sufficiently apprised defendant of the charges against him and were specific enough to allow him to prepare a defense. The State further contends that defendant's reliance on *Smith* and *Jones* is misplaced in light of this Court's decision in *State v. Ricks*, ___ N.C. App. ___, 781 S.E.2d 637 (2016).

B. Discussion

"[A] valid indictment is necessary to confer jurisdiction upon the trial court." *State v. Murrell*, ___ N.C. ___, ___, ___ S.E.2d ___, ___, No.

233PA16, slip op. at 9 (Sept. 29, 2017) (citing *State v. Morgan*, 226 N.C. 414, 415, 38 S.E.2d 166, 167 (1946); *State v. Synder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996)). "A defendant can challenge the facial validity of an indictment at any time, and a conviction based on an invalid indictment must be vacated." *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (citing *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17–18 (1966)). We review *de novo* the sufficiency of an indictment to sustain a conviction. *See*, *e.g.*, *State v. Barker*, 240 N.C. App. 224, 228, 770 S.E.2d 142, 146 (2015) (citing *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009)).

"An indictment must contain 'a plain and concise factual statement in each count which, . . . asserts facts supporting every element of a criminal offense . . . with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation.' " *State v. Jones*, 367 N.C. 299, 306, 758 S.E.2d. 345, 350–51 (2014) (quoting *State v. Cronin*, 299 N.C. 229, 234, 262 S.E.2d 277, 281 (1980)). Specificity in an indictment is required to ensure it:

> (1) "apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense"; (2) "protect[s] him from subsequent prosecution for the same offense"; and (3) "enable[s] the court to know what judgment to pronounce in the event of conviction."

Murrell, slip op. at 9-10 (quoting *State v. Coker*, 312 N.C. 432, 434–35, 323 S.E.2d 343, 346 (1984)).

The elements of the crime of obtaining property by false pretenses follow:

> (1) "knowingly and designedly by means of any kind of false pretense"; (2) "obtain[ing] or attempt[ing] to obtain from any person . . . any money, goods, property, services, chose in action, or other thing of value"; (3) "with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value."

Jones, 367 N.C. at 307, 758 S.E.2d at 351 (quoting N.C. Gen. Stat. § 14-100(a) (2013)).

An indictment is generally sufficient when the charge tracks the governing statute. *State v. Palmer*, 293 N.C. 633, 637–38, 239 S.E.2d 406, 409–10 (1977). But where a statute uses generic terms, the indictment must descend to particulars. *See*, *e.g.*, *Jones*, 367 N.C. at 307–08, 758 S.E.2d at 351. Thus, in an obtaining-property-by-false-pretenses

indictment, "the thing obtained . . . must be described with reasonable certainty, and by the name or term usually employed to describe it." *Id.* at 307, 758 S.E.2d at 351 (citing *State v. Gibson*, 169 N.C. 380, 383, 169 N.C. 318, 320, 85 S.E. 7, 8 (1915)). An indictment "simply describing the property obtained as 'money,' *State v. Reese*, 83 N.C. 637, 640 (1880), or 'goods and things of value,' *State v. Smith*, 219 N.C. 400, 14 S.E.2d 36 (1941), is insufficient to allege the crime of obtaining property by false pretenses." *Jones*, 367 N.C. at 307, 758 S.E.2d at 351. Nor is an indictment merely describing the property as "services." *Id.* at 307–08, 758 S.E.2d at 351.

In *Jones*, our Supreme Court was presented with an issue related to the sufficiency of obtaining-property-by-false-pretenses indictments and specifically addressed the adequacy of their descriptions of things allegedly obtained. 367 N.C. at 306–07, 758 S.E.2d at 350–51. Despite those indictments identifying the offense dates, the victim, and the stolen credit card used to acquire the automobile services and parts the State sought to prove the defendant fraudulently obtained, our Supreme Court held those indictments invalid because their property description of " 'services' from Tire Kingdom and Maaco" was insufficiently particular. *Id.* at 307–08, 758 S.E.2d at 351.

Relying on authority from its prior decisions in *Reese*, 83 N.C. at 639–40 (holding indictment insufficient where it alleged "money" was obtained but did not "describe[it] at least by the amount, as for instance so many dollars and cents"), and *Smith*, 219 N.C. at 401–02, 14 S.E.2d at 36–37 (holding indictment insufficient where it alleged "goods and things of value" were obtained but failed to specify that it was money or describe its amount), the *Jones* Court concluded that "[l]ike the terms 'money' or 'goods and things of value,' the term 'services' [did] not describe with reasonable certainty the property obtained by false pretenses." 367 N.C. at 307–08, 758 S.E.2d at 351. The *Jones* Court reasoned further that " 'services' is not the name or term usually employed to adequately describe the tires, rims, wiper blades, tire and rim installation, wheel alignment, and break services Jones allegedly obtained from Tire Kingdom, or the paint materials and service, body supplies and labor, and 'sublet/towing' services Jones obtained from Maaco." *Id.* at 308, 758 S.E.2d at 351.

Here, the Vehicle Loan application indictments were identical save for the offense dates and alleged that defendant:

> unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud *obtain credit*, from Weyco Community Credit Union, by means

> of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: *this property was obtained by means of giving false employment information on an application for a loan so to qualify for said loan which loan was made to defendant.*

(Emphasis added.) The Credit Card application indictment alleged that defendant:

> unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud *obtain credit*, from Weyco Community Credit Union, by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: *this property was obtained by means of giving false employment information on an application for a credit card so to qualify for said credit care [sic] which was issued to him based upon the false information.*

(Emphasis added.)

Applying *Reese*, *Smith*, and *Jones*, we hold that indictments charging a defendant with obtaining "credit" of an unspecified amount, secured through two unidentified "loan[s]" and a "credit card" are too vague and uncertain to describe with reasonable certainty what was allegedly obtained, and thus are insufficient to charge the crime of obtaining property by false pretenses. "Credit" is a term less specific than money, and the principle that monetary value must at a minimum be described in an obtaining-property-by-false-pretenses indictment extends logically to our conclusion that credit value must also be described to provide more reasonable certainty of the thing allegedly obtained in order to enable a defendant adequately to mount a defense. Moreover, although the indictments alleged defendant obtained that credit through "loan[s]" and a "credit card," they lacked basic identifying information, such as the particular loans, their value, or what was loaned; the particular credit card, its value, or what was obtained using that credit card.

Nonetheless, the State argues that the indictments here contain the requisite elements of N.C. Gen. Stat. § 14-100 as defined by our Supreme Court in *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980); that "[f]urther, the indictments specify the dates of the offenses and the victim of the alleged crimes (Weyco), as well as the things obtained by Defendant using the name or term usually employed to describe them (e.g., 'credit card' and 'loan')" and thus were sufficient to provide

defendant with notice of the charges against him and were specific enough to allow him to prepare a defense; and that defendant's lack-of-specificity argument is foreclosed by this Court's decision in *Ricks*. We disagree.

First, even if the indictments charged in broad terms the elements of N.C. Gen. Stat. § 14-100 as defined in *Cronin*, this is no cure for their lack of particularity of the things allegedly obtained. Further, our Supreme Court in 2014 addressed the sufficiency of an obtaining-property-by-false-pretenses indictment and, as mentioned above, listed the elements of N.C. Gen. Stat. § 14-100(a) as follows:

> (1) "knowingly and designedly by means of any kind of false pretense"; (2) "obtain[ing] or attempt[ing] to obtain from any person . . . any money, goods, property, services, chose in action, or other thing of value"; (3) "with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value."

Jones, 367 N.C. at 307, 758 S.E.2d at 351 (quoting N.C. Gen. Stat. § 14-100(a) (2013)). Thus, the State's reliance on our Supreme Court's 1980 description of these elements in *Cronin* is misplaced and, nonetheless, its argument is unconvincing. Indeed, *Cronin* illustrates a more sufficient indictment.

In *Cronin*, the defendant "obtained a loan of $5,704.54 by representing to the bank that the security given was a new mobile home with a value of $10,850.00, when in fact it was a fire-damaged mobile home having a value of $2,620.00." 299 N.C. at 242, 262 S.E.2d at 285. That indictment specifically alleged the defendant obtained from the bank "currency of the United States in the value of Five Thousand Seven Hundred and 54/100 Dollars ($5,704.54) . . . ." *Id.* at 234, 262 S.E.2d at 281. Here, contrarily, the State attempted to charge defendant with obtaining from Weyco secured vehicle loans of $14,399.00 and $56,976.00, but the indictments merely alleged he obtained an unspecified amount of "credit" by being issued "loan[s]" of unspecified values.

Second, the *Jones* Court held the indictments invalid for failing to specify with sufficient particularity the things obtained, despite those indictments specifically identifying the offense dates, the victims, and the stolen credit card used to obtain the automobile services and parts. Additionally, even if "loan" and "credit card" are terms generally used to describe how one secures credit, defendant was indicted for "obtaining credit" and, as stated above, all three indictments lacked the most basic identifying information with respect to the loans and credit card.

Third, the State's reliance on *Ricks* is unpersuasive. Despite the *Jones* Court relying on established precedent that an indictment alleging money was obtained must specify its amount, the *Ricks* panel held that an indictment merely describing an unspecified "quantity of U.S. Currency" was sufficient. ___ N.C. App. at ___, 781 S.E.2d at 645. As mentioned above, "credit" is a description less specific than "money" and lesser still than "U.S. Currency." Further, as defendant argues, merely describing "a loan" without specifying whether it was a loan of real property, personal property, or currency, is also less specific than describing "U.S. Currency."

Additionally, immediately before oral argument, the State submitted as additional authority this Court's decision in *State v. Buchanan*, ___ N.C. App. ___, ___ S.E.2d ___, No. 16-697 (Jun. 6, 2017), to support its position that, because obtaining "credit" is a thing of value sufficient to sustain an obtaining-property-by-false-pretenses conviction, the indictments returned against defendant were valid. The State's reliance on *Buchanan* is misplaced.

In *Buchanan*, the defendant was convicted of obtaining property by false pretenses after allegedly misrepresenting to his bank that his girlfriend fraudulently signed and cashed, *inter alia*, a $600 check drawn on his account, which resulted in the bank placing $600 of provisional credit into his bank account. *Id.*, slip op. at 1–2. Although no evidence showed the defendant "attempted to withdraw, spend, or otherwise access the $600," *id.*, slip op. at 2, we held the "provisional credit placed in Defendant's [bank] account was a 'thing of value' sufficient to sustain his conviction," *id.*, slip op. at 4–5. We reasoned that "[t]he provisional credit was the equivalent of money being placed in his account, to which he had access, at least temporarily. Access to money for a period of time, even if it eventually has to be paid back, is a 'thing of value.' " *Id.*, slip op. at 5.

Buchanan is inapplicable because that panel was presented with an issue of whether the trial evidence was sufficient to convict the defendant and not whether the indictment was sufficient to charge the defendant. *Id.*, slip op. at 3. Indeed, that indictment specifically charged the defendant with "obtain[ing] *$600* from his bank . . . ." *Id.*, slip op. at 2 (emphasis added). Further, provisional credit placed into a bank account is a valuable more akin to a deposit of money, and unlike the revolving line of credit secured through a credit card or the secured vehicle loans at issue here.

Because the State sought to prove that defendant obtained by false pretenses a $14,399 secured vehicle loan for the purchase of a Suzuki

motorcycle and a $56,736 secured vehicle loan for the purchase of a Dodge truck, the indictments should have, at a minimum, identified these particular loans, described what was loaned, and specified what actual value defendant obtained from those loans. Because the State sought also to prove that defendant obtained the Credit Card by false pretenses, that indictment should have, at a minimum, identified the particular credit card and its account number, its value, and described what defendant obtained using that credit.

In summary, defendant was indicted for obtaining an unspecified amount of credit secured through an unidentified credit card and two unidentified loans of unspecified values. The principle that when an indictment alleges "money" was obtained, it must at least be described in "so many dollars and cents" extends logically and soundly here. Indictments alleging that "credit" was obtained must at a minimum specify the value of that credit. And despite these indictments alleging that this credit was secured through the issuance of "loan[s]" and a "credit card," these vague descriptions fail to describe with reasonably certainty the things allegedly obtained. The indictments are thus insufficiently particular to sustain charges of obtaining property by false pretenses. In light of our disposition, we decline to address defendant's remaining arguments. *See*, *e.g.*, *Downing*, 313 N.C. at 165, 326 S.E.2d at 257.

IV. Conclusion

An indictment charging a defendant with obtaining property by false pretenses under N.C. Gen. Stat. § 14-100 needs to describe what was allegedly obtained with more particularity than "credit" of unknown value secured through being issued an unidentified "loan" or "credit card." Absent greater specificity, such an indictment violates one of its core purposes to "apprise the defendant of the charge against him with enough certainty to enable him to prepare his defense." *Murrell*, slip op. at 9-10 (citation and quotation marks omitted). Because these indictments failed to describe what was obtained with sufficient particularity, they failed to vest the trial court with jurisdiction to try defendant on charges of obtaining property by false pretenses. We thus vacate defendant's three obtaining property-by-false-pretenses convictions and arrest the resulting judgments.

VACATED.

Judges DIETZ and ARROWOOD concur.

STATE v. FAULK

[256 N.C. App. 255 (2017)]

STATE OF NORTH CAROLINA
v.
TIFFANY FAULK, DEFENDANT

No. COA17-194

Filed 7 November 2017

1. Homicide—first-degree murder—malice—premeditation—deliberation—failure to give jury instruction—duress not a defense

The trial court did not commit plain error by failing to instruct the jury on the defense of duress for a charge of first-degree murder on the basis of malice, premeditation, and deliberation where duress was not a defense to this charge.

2. Evidence—photographs—victim's injuries—crime scene—relevancy—probative value—corroboration—illustration—premeditation and deliberation

The trial court did not abuse its discretion in a first-degree murder and robbery with a dangerous weapon case by allowing into evidence numerous photographs depicting the victim's injuries and the crime scene, where the photographs were relevant and probative to corroborate defendant's statements, illustrated the medical examiner's testimony, and tended to support a finding of premeditation and deliberation. The trial court's decision was not so arbitrary that it could not have been supported by reason.

3. Evidence—motion to suppress—failure to make findings of fact not erroneous—conclusions of law needed

The trial court did not err in a first-degree murder and robbery case by denying defendant's motions to suppress, even though it failed to make findings of fact to support its ruling, since the evidence related to the rulings was undisputed. However, the case was remanded to the trial court to make proper conclusions of law regarding its decision to deny defendant's motions to suppress.

Appeal by Defendant from judgment entered 4 August 2016 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 22 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Richard L. Harrison, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for Defendant-Appellant.

INMAN, Judge.

When the evidence relevant to a defendant's motion to suppress is undisputed, a trial court denying the motion need not make findings of fact, but it must explain its rationale. Failure to do so precludes meaningful appellate review and requires remand.

Tiffany Faulk ("Defendant") appeals from a judgment following a jury verdict finding her guilty of first degree murder on the basis of malice, premeditation and deliberation. Defendant argues that: (1) the trial court committed plain error by failing to instruct the jury on the defense of duress; (2) the trial court abused its discretion by allowing into evidence photographs depicting the victim's injuries and the crime scene; and (3) the trial court erred by denying her motions to suppress other evidence. After careful review, we remand to the trial court to make the necessary conclusions of law regarding Defendant's motions to suppress.

Factual and Procedural History

The evidence at trial tended to show the following:

On 6 November 2010, Defendant and Kenneth Gore ("Gore") were staying with a friend in the Berry Court Apartments in Chadbourn, North Carolina. On occasion, and twice on 6 November 2010, Defendant would knock on Ms. Bonnie Fowler's door to use her phone. Ms. Fowler, a 77-year-old woman, lived alone in the apartment next door to where Defendant and Gore were staying, and would oblige Defendant's request to make calls.

At some point in the late afternoon or early evening of 6 November 2010, Ms. Fowler was attacked in her kitchen. She suffered repeated blows to the head and multiple stab wounds, and died as a result of her injuries. Security footage from the apartment complex showed Ms. Fowler's car leaving the parking lot that same evening at approximately 8:13 p.m.

The next day, 7 November 2010, around 9:00 a.m., Ms. Fowler's daughter arrived at her mother's apartment to pick her mother up for church. When Ms. Fowler did not answer her door, her daughter retrieved an extra key and let herself into Ms. Fowler's apartment. Upon entering, Ms. Fowler's daughter found the apartment ransacked and her mother's body in the kitchen; she immediately called 9-1-1.

Police arrived and secured the crime scene. Detectives found several bloody footprints in the kitchen. Police also found a hammer in one of the closets, which later tested positive for the presence of Ms. Fowler's blood. The medical examiner documented numerous injuries, which included several defensive wounds and stab wounds. The medical examiner concluded that the cause of death was from multiple stab wounds to Ms. Fowler's chest.

On 9 November 2010, the North Carolina State Bureau of Investigation (the "SBI") contacted the Maryland State Police regarding Defendant's and Gore's outstanding arrest warrants in connection with Ms. Fowler's death. The SBI provided Maryland police with copies of the arrest warrants and a description of the homicide and apparent theft of Ms. Fowler's car. Maryland police contacted Defendant's sister, who was living in Baltimore. Defendant's sister took police to a row house in Baltimore where Defendant and Gore were staying.

Maryland police converged on the row house, and as officers knocked on the front door, Gore fled out the back door where he was immediately apprehended by police. Gore told police that Defendant was upstairs, and two officers entered the row house, performed a protective sweep, and arrested Defendant. The officers secured the house while a search warrant was obtained. While the officers were waiting for the warrant, the owner of the house arrived.

Once the warrant was issued, the owner of the row house led police to items identified as belonging to Defendant and Gore. The police recovered various items from the basement, including the following: clothing, a steak knife, a pair of Jordan tennis shoes, a pair of Adidas tennis shoes, a cell phone, and a pill bottle with Ms. Fowler's name on it. Crime lab results from the items revealed that the two pairs of shoes were consistent with the shoes that made the bloody shoeprints in Ms. Fowler's apartment. The Adidas tennis shoes also tested positive for Ms. Fowler's DNA.

On 17 November 2010, Defendant provided police with a voluntary statement concerning the events leading up to her arrest. During the interview, Defendant told police that she had used Ms. Fowler's phone twice on 6 November 2010, witnessed Gore stab Ms. Fowler while Ms. Fowler was bleeding on the kitchen floor, and drove Ms. Fowler's car to Baltimore with Gore. Defendant explained that she had not attempted to flee from Gore because she was afraid of how he would react.

Defendant was indicted on 10 February 2011 for one count of first degree murder and on 6 October 2011 for one count of robbery with

a dangerous weapon. A hearing was held on 25 July 2016 to address Defendant's various pre-trial motions, including three motions to suppress—the first filed in August 2013 and the second two filed on 5 and 14 July 2016.

At the outset of the hearing, Defendant's counsel withdrew the August 2013 motion to suppress. Defendant's counsel proceeded to argue the motions filed on 5 and 14 July 2016, which sought to exclude evidence obtained from the Baltimore row house following Defendant's arrest and pursuant to a search warrant and Defendant's statement to police. The trial court denied the motions, announcing from the bench that "the State has met its burden, proven by a preponderance of the evidence; that the challenged evidence is admissible." The trial court then instructed the prosecutor to draft a written order disposing of the motions to suppress, stating that "there's no conflict as to the testimony and the evidence presented." The trial court then asked whether there was "[a]nything else we need to address from the defense in regards to those motions?" Defense counsel responded, "No, sir."

At trial, Defendant's counsel properly objected to each item of evidence which the motions to suppress sought to exclude. Following presentation of the evidence, the trial court instructed the jury on first degree murder on the basis of premeditation and deliberation, armed robbery, and felony murder based on armed robbery. The trial court also instructed the jury on duress as a defense to the armed robbery and first degree murder on the basis of felony murder charges.

The jury returned a verdict finding Defendant guilty of first degree murder on the basis of premeditation and deliberation and guilty of robbery with a dangerous weapon. The trial court imposed a mandatory life prison sentence without the possibility of parole for the first degree murder conviction and 73 to 97 months in prison for the robbery with a dangerous weapon conviction.

Defendant entered a notice of appeal in open court.

Analysis

I. Jury Instructions

[1] Defendant first argues that the trial court committed plain error by failing to instruct the jury on duress as a defense to the charge of first degree murder on the basis of premeditation and deliberation. We disagree.

Both parties assert plain error as the proper standard of review on appeal because Defendant's counsel failed to renew his request for a

duress instruction as a defense for premeditation and deliberation. However, our Supreme Court's decision in *Wall v. Stout*, 310 N.C. 184, 189, 311 S.E.2d 571, 574 (1984), suggests that a defendant properly preserves a jury instructional issue when "a request to alter an instruction has been submitted and the trial judge has considered and refused the request." Here, Defendant's initial request for a duress instruction, coupled with the trial court's subsequent refusal, would appear to satisfy the issue of preservation. However, as discussed below, Defendant has failed to demonstrate that the trial court erred, and is therefore unsuccessful under either a plain error or *de novo* review.

The North Carolina Supreme Court has held that "duress is not a defense to murder in North Carolina." *State v. Cheek*, 351 N.C. 48, 61, 520 S.E.2d 545, 553 (1999). Our Court, relying on the decision in *Cheek*, has held further that a trial court does not commit plain error by failing to instruct a jury on the defense of duress for a charge of first degree murder on the basis of premeditation and deliberation. *State v. Clodfelter*, 203 N.C. App. 60, 68, 691 S.E.2d 22, 27 (2010) (overruling the defendant's argument that the trial court committed plain error because "[d]uress is not a defense to first degree murder[,]" and the jury found the defendant guilty "on the basis of premeditation and deliberation").

Notwithstanding established precedent, Defendant cites *State v. Gibson*, 333 N.C. 29, 424 S.E.2d 95 (1992), *overruled on other grounds by State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993), and *State v. Grant*, 178 N.C. App. 565, 632 S.E.2d 258 (2006), in support of her contention that duress may be used as a permissible defense to first degree murder on the basis of premeditation and deliberation. However, a close reading of these decisions reveals that neither reaches the issue of whether it is proper for a trial court to instruct on the defense of duress; rather, the decisions address whether—when a defendant attacks the intent element of premeditation and deliberation by arguing duress at the commission of the crime—the State may properly submit evidence of a defendant's prior bad acts under Rule 404(b) of the North Carolina Rules of Evidence. *Gibson*, 333 N.C. at 42-43, 424 S.E.2d at 103; *Grant*, 178 N.C. App. at 578, 632 S.E.2d at 268. Both decisions resolved this issue in favor of the State. *Gibson*, 333 N.C. at 42-43, 424 S.E.2d at 103 (holding that statements made by the defendant regarding prior crimes were admissible "under the exception in . . . Rule 404(b) for evidence tending to prove some aspect of the State's case other than character or propensity to commit the crimes at issue"); *Grant*, 178 N.C. App. at 578, 632 S.E.2d at 268 (holding that "evidence that [the] defendant robbed drug dealers and hit a drug dealer during a robbery was clearly relevant

to refute [the] defendant's contention that he shot the victim without premeditation and deliberation").

Gibson and *Grant* are inapposite to the case before us, because Defendant is challenging the trial court's failure to charge the jury with the defense of duress on the charge of first degree murder on the basis of premeditation and deliberation, not the admissibility of evidence under Rule 404(b). As discussed above, the issue here was determined by *Clodfelter* where we held, as we do today, that a trial court does not commit plain error by failing to instruct on the defense of duress on a charge of first degree murder on the basis of premeditation and deliberation. *Clodfelter*, 203 N.C. App. at 68, 691 S.E.2d at 27. Accordingly, we overrule Defendant's argument.

II. Photographic Evidence

[2] Defendant next argues that the trial court abused its discretion by admitting repetitious photographs of the victim and crime scene that unfairly prejudiced her—an error for which Defendant now seeks a new trial. We disagree.

The determination of whether to admit photographic evidence "lies within the sound discretion of the trial court, and the 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. Goode*, 350 N.C. 247, 258, 512 S.E.2d 414, 421 (1999) (citation omitted). In making this determination, a trial court must weigh the probative value of the photographs against the danger of unfair prejudice to the defendant. N.C. Gen. Stat. § 8C-1, Rule 403 (2015); *State v. Hennis*, 323 N.C. 279, 283, 372 S.E.2d 523, 526 (1988). In homicide cases, photographs of the victim "may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526 (citations omitted).

The North Carolina Supreme Court has explained:

> The test for excess is not formulaic: there is no bright line indicating at what point the number of crime scene or autopsy photographs becomes too great. The trial court's task is rather to examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation. What a photograph depicts, its level of detail and scale,

> whether it is color or black and white, a slide or a print, where and how it is projected or presented, the scope and clarity of the testimony it accompanies—these are all factors the trial court must examine in determining the illustrative value of photographic evidence and in weighing its use by the state against its tendency to prejudice the jury.

Id. at 285, 372 S.E.2d at 527 (citation omitted). The Court in *Hennis* further noted that "photographs of the victim's body may be used to illustrate testimony as to the cause of death[.] Photographs may also be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree, and for this reason such evidence is not precluded by a defendant's stipulation as to the cause of death." *Id.* at 284, 372 S.E.2d at 526 (citations omitted). "Photographs depicting [t]he condition of the victim's body, the nature of the wounds, and evidence that the murder was done in a brutal fashion [provide the] circumstances from which premeditation and deliberation can be inferred." *State v. Hyde*, 352 N.C. 37, 54, 530 S.E.2d 281, 293 (2000) (alterations in original) (internal quotation marks and citations omitted). Ultimately, "[t]he large number of photographs, in itself, is not determinative." *State v. Goode*, 350 N.C. 247, 259, 512 S.E.2d 414, 421 (1999).

Here, the trial court allowed the State to introduce approximately twenty photographs. These photographs depicted various angles and details of the crime scene. They depicted the victim's location and her injuries. The photographs corroborated Defendant's statement to officers that the victim was attacked in her kitchen, suffered a head injury, and was stabbed multiple times. The autopsy photographs illustrated the testimony of the medical examiner who described the injures as consistent with multiple and particular weapons, the defensive characteristics of some injuries, and the deliberate and persistent nature of the attack. We conclude that the photographs were relevant and had probative value.

We now review whether any unfair prejudice to Defendant outweighed the probative value of the photographs. We acknowledge that "the admission of an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors." *State v. Mercer*, 275 N.C. 108, 120, 165 S.E.2d 328, 337 (1969) (citation omitted), *overruled on other grounds by State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975). However, we also

note that "[t]his determination is within the sound discretion of the trial court[.]" *Goode*, 350 N.C. at 258, 512 S.E.2d at 421 (citation omitted).

Having reviewed the photographs and determined their relevancy and probative value—that they corroborate Defendant's statements, illustrate the medical examiner's testimony, and tend to support a finding of premeditation and deliberation—we cannot conclude that the trial court's decision was so arbitrary that it could not have been supported by reason. Accordingly, we overrule Defendant's argument.

III. Motions to Suppress

[3] Defendant's final argument is that the trial court erred by denying her motions to suppress evidence and her statements to police because they were tainted by an illegal arrest and search warrant.[1] Because the trial court failed to provide its rationale for denying the motions at the hearing and its written order lacks adequate conclusions of law, we are unable to engage in meaningful appellate review with regard to this issue.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted). Where, as here, the trial court's findings of fact are not challenged on appeal, "they are deemed to be supported by competent evidence and are binding on appeal." *Id.* at 168, 712 S.E.2d at 878 (citation omitted). Conclusions of law, however, are reviewed *de novo*. *See State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citations omitted).

When ruling on a motion to suppress following a hearing, "[t]he judge must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2015). While this statute has been interpreted by the North Carolina Supreme Court to require findings of fact "only when there is a material conflict in the evidence[,]" *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015), our Court has explained that "it is still the trial court's responsibility to make the

1. Defendant asserts in her brief before this Court that she appeals the trial court's denial of three motions to suppress. However, the record reveals that Defendant withdrew her initial motion to suppress, which was filed in August 2013. Accordingly, we only address Defendant's appeal as to the two motions filed in July 2016.

conclusions of law." *State v. McFarland*, 234 N.C. App. 274, 284, 758 S.E.2d 457, 465 (2014).

"Generally, a conclusion of law requires 'the exercise of judgment' in making a determination, 'or the application of legal principles' to the facts found." *State v. McFarland*, 234 N.C. App. at 284, 758 S.E.2d at 465 (quoting *Sheffer v. Rardin*, 208 N.C. App. 620, 624, 704 S.E.2d 32, 35 (2010)). When a trial court fails to make all the necessary determinations, *i.e.*, findings of fact resolving disputed issues of fact and conclusions of law applying the legal principles to the facts found, "[r]emand is necessary because it is the trial court that is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, *and*, *then based upon those findings*, *render a legal decision*, *in the first instance*, as to whether or not a constitutional violation of some kind has occurred." *State v. Baskins*, __ N.C. App. __, __, 786 S.E.2d 94, 99 (2016) (emphasis added) (internal quotation marks and citation omitted); *see also State v. Salina*s, 366 N.C. 119, 124, 729 S.E.2d 63, 67 (2012) (holding that remand was necessary for additional findings of fact that resolved the conflicts in evidence).

In *Baskins*, this Court reviewed a similar order denying a defendant's motion to suppress. __ N.C. App. at __, 786 S.E.2d at 99-100. The trial court's order contained the following sole conclusion of law regarding the validity of a traffic stop:

> The temporary detention of a motorist upon probable cause to believe he has violated a traffic law (such as operating a vehicle with expired registration and inspection) is not inconsistent with the Fourth Amendment's prohibition against unreasonable searches and seizures, even if a reasonable officer would not have stopped the motorist for the violation. [citation omitted] [Detective] O'Hal was justified in stopping [the] Defendant[s'] vehicle.

Id. at __, 786 S.E.2d at 99 (alterations in original). Our Court noted that the conclusion "does not specifically state that the stop was justified based upon any specific violation of a traffic law." *Id.* at __, 786 S.E.2d at 100. We explained that "[a]lthough we can imagine how the facts as found by the trial court would likely fit into the legal standards recited in the section of the order which is identified as 'conclusions of law,' based upon the trial court's denial of the motion, it is still the trial court's responsibility to make the conclusions of law." *Id.* at __, 786 S.E.2d at 100. We held that the conclusion did not reflect the necessary exercise of judgment or application of legal principles, and remanded the matter

back to the trial court to make additional findings of fact and conclusions of law. *Id.* at __, 786 S.E.2d at 99-100.

As in *Baskins*, the trial court here did not provide its rationale during the hearing and the trial court's order lacks adequate conclusions of law applying necessary legal principles to the facts presented. The written order's sole conclusion of law states:

> That [N.C. Gen. Stat. §] 15A-401(E) was not applicable to the arrest of Tiffany Faulk in the State of Maryland and the arrest and subsequent search was not in violation of the Fourth and Fourteenth Amendments of the United States Constitution, therefore, the motion to suppress filed by the Defendant in this matter on July 5, 2016 is hereby denied.

This conclusion does not provide the trial court's rationale regarding why Defendant's warrantless arrest while in a private home—an act that was held unconstitutional by the United States Supreme Court in *Payton v. New York*, 445 U.S. 573, 63 L.Ed.2d 639 (1980)—did not violate Defendant's Fourth and Fourteenth Amendments rights. While the undisputed evidence and facts found by the trial court support the denial of the motion, the order lacks any conclusion applying legal principles to those facts, *i.e.*, it omits an appropriate determination in the first instance. Therefore, we must remand this matter to the trial court to provide adequate conclusions of law to support its denial of the 5 July 2016 motion to suppress evidence obtained as the result of Defendant's warrantless arrest.

The trial court's written order does not address the 14 July 2016 motion to suppress evidence obtained pursuant to the search warrant. It is apparent from the trial transcript that defense counsel understood the trial court's announcement, that "the challenged evidence is admissible," amounted to a denial of that motion. However, neither the trial court's cursory explanation of its ruling nor the written order provides a rationale for this denial. Accordingly, we must remand the denial of the 14 July 2016 motion to suppress to the trial court to make necessary conclusions of law relevant to the challenged search warrant.

Defendant also argues that the trial court's ruling was inadequate because the findings of fact in the written order do not relate to the search warrant and therefore cannot support a conclusion denying the 14 July 2016 motion. However, the absence of factual findings alone is not error because "only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be

resolved by explicit factual findings that show the basis for the trial court's ruling." *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. "When there is no conflict in the evidence, the trial court's findings can be inferred from its decision." *Id.* at 312, 776 S.E.2d at 674. The North Carolina Supreme Court has noted that while "[a] written determination setting forth the findings and conclusions is not necessary, [] it is the better practice." *Id.* at 312, 776 S.E.2d at 674 (citing *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012)). Because the evidence relevant to the search warrant was undisputed, the trial court was not required to make findings of fact to support its denial of the 14 July 2016 motion; we hold Defendant's argument on this issue is without merit.

Even though findings of fact are not required, the trial court's failure to provide its rationale from the bench, coupled with the omission of any mention of the motion challenging the search warrant, precludes meaningful appellate review of that ruling. It is the trial court's duty to apply legal principles to the facts, even when they are undisputed. We therefore hold that the trial court erred by failing to either provide its rationale from the bench or make the necessary conclusions of law in its written order addressing both of Defendant's motions to suppress.

"Where there is prejudicial error in the trial court involving an issue or matter not fully determined by that court, the reviewing court may remand the cause to the trial court for appropriate proceedings to determine the issue or matter without ordering a new trial." *State v. Neal*, 210 N.C. App. 645, 656, 709 S.E.2d 463, 470 (2011) (internal quotation marks and citations omitted).

> If the trial court determines that the motion to suppress was properly denied, then [the] defendant would not be entitled to a new trial because there would have been no error in the admission of the evidence, and his convictions would stand. If, however, the court determines that the motion to suppress should have been granted, [the] defendant would be entitled to a new trial.

Id. at 656-57, 709 S.E.2d at 470-71. Having held that Defendant has shown no other prejudicial error in her trial, we conclude that the trial court's failure to make adequate conclusions of law to support its denial of Defendant's motions to suppress does not require that we order a new trial. *See McFarland*, 234 N.C. App. at 284, 758 S.E.2d at 465. Accordingly, we remand this matter to the trial court to make necessary conclusions of law concerning Defendant's motions to suppress.

Conclusion

For the foregoing reasons, we hold that the trial court did not err by failing to instruct the jury on duress as a defense to first degree murder on the basis of premeditation and deliberation. We also hold that the trial court did not abuse its discretion by admitting the photographs depicting the crime scene and the victim's injuries. Finally, we hold that the trial court did not err in failing to make findings of fact to support its ruling because the evidence related to the rulings was undisputed. Nevertheless, we remand this case to the trial court to make proper conclusions of law regarding its decision to deny Defendant's motions to suppress. If, on remand, the trial court decides to make additional findings of fact, it has the discretion to do so.

NO ERROR IN PART, REMANDED IN PART.

Judges BRYANT and DAVIS concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
ROBERT LEVON JONES, DEFENDANT

No. COA17-193

Filed 7 November 2017

1. Collateral Estoppel and Res Judicata—pawn shop receipt—circumstantial evidence of guilt

The trial court did not err in an assault and robbery case by concluding that a pawn shop ticket was not barred by the doctrine of collateral estoppel where the pawn shop receipt was not introduced as evidence of a prior bad act, but instead as circumstantial evidence of defendant's guilt. Further, defendant did not challenge its general admissibility or argue that the pawn shop ticket should have been excluded under N.C. R. Evid. Rule 403.

2. Evidence—pawn shop receipt—robbery with dangerous weapon—doctrine of recent possession

Even assuming arguendo that defendant accurately characterized the result of a prior trial of obtaining property under false pretenses as an acquittal, the trial court did not err in a misdemeanor assault inflicting serious injury and robbery with a dangerous

weapon case by allowing the State to introduce a pawn shop receipt at trial showing that defendant pawned jewelry soon after a jewelry store was robbed. The receipt was introduced as evidence of defendant's guilt of robbery with a dangerous weapon pursuant to the doctrine of recent possession.

Appeal by defendant from judgments entered 23 September 2016 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 6 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, for the State.

Anne Bleyman for defendant-appellant.

ZACHARY, Judge.

Robert Levon Jones (defendant) appeals from judgments entered upon his convictions of misdemeanor assault inflicting serious injury and robbery with a dangerous weapon. On appeal, defendant argues that his convictions were obtained "based upon evidence that was unfairly prejudicial and [was] admitted in violation of the principle[s] of double jeopardy [and] collateral estoppel." We have carefully considered defendant's argument in light of the record on appeal and the applicable law, and conclude that defendant is not entitled to relief on the basis of this argument.

Factual and Procedural Background

On 9 December 2013, defendant was indicted for the offenses of armed robbery and felony assault with a deadly weapon inflicting serious injury. The charges against defendant were tried before the trial court and a jury beginning on 19 September 2016. Defendant did not testify or present evidence at trial. The State's evidence is summarized, in relevant part, as follows.

James Kelly testified that he was 69 years old and owned the Small Luxuries jewelry store in High Point, North Carolina. A Biscuitville restaurant was located approximately 150 to 200 yards from his store. On 27 March 2013, Mr. Kelly noticed a gold car without a license plate in the parking lot, with two African-American men in the car. At approximately 10:00 a.m., "three black men" entered the store wearing hooded sweatshirts. The men, all of whom were armed with handguns, hit Mr. Kelly on the head with metal objects that he assumed were their

weapons. The men fled from the store after stealing jewelry that Mr. Kelly estimated to have a value of $30,000. Some of the stolen jewelry was later returned by the police. Mr. Kelly was treated for injuries sustained in the robbery, including stitches over one eye and a fractured skull. When law enforcement officers showed Mr. Kelly a photographic lineup, he was unable to identify any of the men who had robbed his store.

Emily Kelley testified that on 27 March 2013 she worked at the Biscuitville restaurant near Mr. Kelly's store. Law enforcement officers questioned her shortly after the jewelry store was robbed, and she told them that three African-American men had eaten at Biscuitville that morning, and that one of the men had paid with a debit card. At trial Ms. Kelley testified that she did not recognize defendant. John Griffiths, the regional vice-president for Wood Forest National Bank, identified bank documents showing a transaction in defendant's checking account for a purchase at Biscuitville on 27 or 28 March 2013.

Kristy Riojas testified that on 27 March 2013 she worked at a pawn shop named Got Gold, that purchased gold, silver, and jewelry. Ms. Riojas described the general business practices of Got Gold as follows:

> [MS. RIOJAS]: So, a customer would come in and show us what they wanted to sell. We would test it, make sure if it was real silver, gold. We would then weigh it, give them a price. If they accepted the price, we would ask for their ID, make a photocopy of it, write down the description of the gold that was sold, ask for their signature. And then we would just put the - the jewelry in a Ziploc bag and staple it onto the paper and file it. And then we would then put it in the computer, send it off to the police department.

Ms. Riojas identified a receipt, which was introduced over defendant's objection, for a transaction that took place on 27 March 2013, in which a customer sold coins and jewelry. This exhibit included a list of the pawned items and a copy of a driver's license issued to defendant.

High Point Police Detective Eric Berrier identified a stolen property receipt that the Police Department provided to Got Gold upon seizure of stolen property. Winston-Salem Police Detective Richard Workman testified that in 2013 he investigated crimes involving pawn shops and dealers in precious metals. On 28 March 2013, Detective Workman reviewed a sales receipt from Got Gold and noted certain items of jewelry that had been sold, including a coin stolen from Small Luxuries. High Point Police Detective Christopher Walainin testified that he took a statement from Mr. Kelly that generally corroborated Mr. Kelly's trial

testimony. An officer with the K-9 unit used a dog to trace a trail of jewelry on the ground between the jewelry store and Biscuitville.

On 23 September 2016, the jury returned verdicts finding defendant guilty of robbery with a dangerous weapon and of misdemeanor assault inflicting serious injury. The trial court sentenced defendant to a term of 75 days' imprisonment for assault inflicting serious injury, and a consecutive sentence of 73 to 100 months' imprisonment for robbery with a dangerous weapon. Defendant gave notice of appeal in open court.

Collateral Estoppel

[1] As discussed above, Ms. Riojas testified without objection concerning the general business practices of Got Gold, including the pawn shop's practice of requiring a seller to sign a form listing the items for sale and providing a copy of an ID, such as a driver's license. On appeal, defendant argues that the trial court committed reversible error by admitting into evidence, over his objection, a receipt showing that defendant pawned jewelry at Got Gold soon after Small Luxuries was robbed. The receipt contained an itemized list of the items defendant pawned, a copy of defendant's driver's license, and defendant's signature. We conclude that this argument lacks merit.

" 'When a defendant objects to the admission of evidence, we consider, whether the evidence was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence.' " *State v. Thompson*, __ N.C. App. __, __, 792 S.E.2d 177, 180-81 (2016) (quoting *State v. Blackwell*, 207 N.C. App. 255, 257, 699 S.E.2d 474, 475 (2010)), *disc. rev. denied*, __ N.C. __, 795 S.E.2d 366 (2017). In this case, defendant argues that the pawnshop ticket was not admissible, on the grounds that prior to the trial of this matter, defendant was acquitted by a Forsyth County jury on a charge of obtaining property by false pretenses, based on defendant's pawning the jewelry at Got Gold. Defendant contends that upon his acquittal of the charge of obtaining property by false pretenses, the State was collaterally estopped from introducing the pawn shop receipt at his Guilford County trial for armed robbery and felony assault, in order to show that defendant was in possession of items stolen from the jewelry store shortly after the robbery. "Whether the doctrine of collateral estoppel is applicable and bars a specific claim or issue is a question of law subject to *de novo* review." *Powers v. Tatum*, 196 N.C. App. 639, 642, 676 S.E.2d 89, 92 (2009) (citing *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, 657 S.E.2d 55, 61 (2008)).

The doctrine of collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final

judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443, 25 L. Ed. 2d 469, 475 (1970). "In *Benton v. Maryland*, 395 U.S. 784, [23 L. Ed. 2d 707 (1969)] the Court held that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment." *Ashe*, 397 U.S. at 437, 25 L. Ed. 2d at 471. In *Ashe*, "[t]he doctrine of collateral estoppel was held to be a part of the constitutional guarantee against double jeopardy[.]" *State v. Edwards*, 310 N.C. 142, 145, 310 S.E.2d 610, 613 (1984) (citing *Ashe*).

The legal implications of a criminal defendant's acquittal of a charge have been considered in a variety of procedural contexts. In *Ashe*:

> The [Supreme] Court was asked to determine whether the State may prosecute a defendant a second time for armed robbery where the jury at defendant's first trial found the State did not meet its burden of proof on the issue of identifying defendant as one of the perpetrators. In *Ashe*, the Court held that prior acquittal of an essential issue precludes the State, on double jeopardy grounds, from trying defendant on that issue again[.] . . . "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."

State v. Adams, 347 N.C. 48, 60-61, 490 S.E.2d 220, 226 (1997) (quoting *Ashe*, 397 U.S. at 443, 25 L. Ed. 2d at 475). *Ashe* thus addressed the issue of whether a defendant who was acquitted of an offense could be prosecuted for a related crime. *See also*, *e.g.*, *Edwards*, 310 N.C. at 145, 310 S.E.2d at 612-13 (addressing defendant's argument that "his acquittal on the larceny charge in the first trial determined matters of fact in his favor so as to collaterally estop the State from now proving him guilty of breaking or entering with the intent to commit larceny.").

In the present case, defendant does not dispute that he could be prosecuted for the robbery of the jewelry store, notwithstanding his acquittal of obtaining property by false pretenses, a charge based on defendant's pawning items taken in the robbery. Instead, the present case raises the issue of the admissibility of evidence in a criminal trial where the same evidence was also pertinent to an earlier trial in which the defendant was acquitted. This issue has also been analyzed in several contexts. In *State v. Scott*, 331 N.C. 39, 413 S.E.2d 787 (1992), our Supreme Court held that:

> [The issue is] whether the State may introduce in a subsequent criminal trial evidence of a prior alleged offense for which defendant had been tried and acquitted in an earlier trial. We hold that where the probative value of such evidence depends upon defendant's having in fact committed the prior alleged offense, his acquittal of the offense in an earlier trial so divests the evidence of probative value that, as a matter of law, it cannot outweigh the tendency of such evidence unfairly to prejudice the defendant. Such evidence is thus barred by N.C. R. Evid. 403.

Scott, 331 N.C. at 41, 413 S.E.2d at 788. *Scott* was thus based upon analysis of N.C. R. Evid., Rule 403, which provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Other cases have addressed the admissibility of evidence related to an offense of which the defendant was acquitted as evidence of the defendant's prior bad acts, pursuant to N.C. R. Evid. Rule 404(b) (2015). *See State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990).

In this case, the pawn shop receipt was not introduced as evidence of a prior bad act, but as circumstantial evidence of defendant's guilt; in addition, defendant does not challenge its general admissibility or argue that the pawn shop ticket should have been excluded under N.C. R. Evid. Rule 403. Defendant instead argues that its admission was barred by the doctrine of collateral estoppel. In *State v. Bell*, 164 N.C. App. 83, 594 S.E.2d 824 (2004), we held that:

> [T]his issue is governed by *Dowling v. United States*, 493 U.S. 342, 107 L. Ed. 2d 708 . . . (1990). In *Dowling*, the United States Supreme Court noted: . . . "The issue is the inadmissibility of [evidence relating to an alleged crime that the defendant had previously been acquitted of committing]." *Id.* at 347, 107 L. Ed. 2d at 717[.] . . . [T]he Court held that evidence is inadmissible under the Double Jeopardy Clause only when it falls within the scope of the collateral estoppel doctrine. That doctrine provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 347, 107 L. Ed. 2d at 717[.] . . . "The determinative factor is not the introduction of the same evidence [as offered in the first trial,] but rather whether it is absolutely necessary to defendant's conviction [in the second trial] that the

> second jury find against defendant on an issue upon which the first jury found in his favor."

Bell, 164 N.C. App. at 89-90, 594 S.E.2d at 828 (quoting *Edwards* at 145, 310 S.E.2d at 613) (alterations in original). We will next consider whether the trial court erred by allowing the State to introduce the pawn shop receipt, applying the principles discussed above.

Analysis

[2] Preliminarily, we note that the State argues on appeal that defendant failed to preserve for appellate review the issue of whether his acquittal of obtaining property by false pretenses barred admission of the pawn shop ticket, on the grounds that defendant failed to produce documentation of his earlier acquittal. We note that at trial defendant repeatedly stated that he had been acquitted of obtaining property by false pretenses, and that the prosecutor did not dispute defendant's assertion. We also observe that this Court could take judicial notice of the proceedings of defendant's trial for obtaining property by false pretenses. We conclude that it is unnecessary to do so because, assuming *arguendo* that defendant has accurately characterized the result of the prior trial as an acquittal, the trial court did not err by allowing the State to introduce the pawn shop ticket in the instant case.

The pawnshop receipt was introduced as evidence of defendant's guilt of robbery with a dangerous weapon pursuant to the doctrine of recent possession:

> The doctrine of recent possession allows the jury to infer that the possessor of recently stolen property is guilty of taking it. The doctrine of recent possession applies where the State proves (1) that the property was stolen; (2) that the defendant had possession of the stolen property, which means that he was aware of its presence and, either by himself or collectively with others, had both the power and intent to control its disposition or use; and (3) that defendant's possession of the stolen property occurred so soon after it was stolen and under such circumstances that it is unlikely he obtained possession honestly.

State v. Mohamed, 205 N.C. App. 470, 489, 696 S.E.2d 724, 738 (2010) (citation omitted). Defendant does not dispute that the State produced evidence that defendant pawned stolen jewelry shortly after the robbery. Defendant contends, however, that his acquittal of the offense of obtaining property by false pretenses established that he had been "acquitted of being the perpetrator in the pawning." We disagree.

Our Supreme Court "has previously set out the elements of obtaining property by false pretenses: '(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.' " *State v. Parker*, 354 N.C. 268, 283-84, 553 S.E.2d 885, 897 (2001) (quoting *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980)). "An essential element of the offense is that the defendant acted knowingly with the intent to cheat or defraud. Moreover, the false pretense need not come through spoken words, but instead may be by act or conduct." *Parker*, 354 N.C. at 284, 553 S.E.2d at 897 (citations omitted). Evidence that a defendant knowingly pawned stolen goods is sufficient to support a conviction for obtaining property by false pretenses, with the false representation being the defendant's representation that he owned, or was entitled to dispose of, the property being pawned. *State v. Parker*, 146 N.C. App. 715, 719, 555 S.E.2d 609, 612 (2001).

The burden of establishing that an issue is barred by collateral estoppel is on the party relying thereon. *Bluebird*, 188 N.C. App. at 678, 657 S.E.2d at 61. In order for collateral estoppel to apply, a party must establish the following:

> (1) [T]he issues must be the same as those involved in the prior action, (2) the issues must have been raised and actually litigated in the prior action, (3) the issues must have been material and relevant to the disposition of the prior action, and (4) the determination of the issues in the prior action must have been necessary and essential to the resulting judgment.

State v. Summers, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (citation omitted). In this case, we conclude that defendant cannot establish that his acquittal of obtaining property by false pretenses represented a determination by the jury that he was not in possession of stolen property shortly after it was taken.

The doctrine of recent possession allows a jury to infer a defendant's guilt based upon the defendant's bare possession of stolen goods shortly after a robbery; there is no requirement that the defendant make a false representation about the goods, attempt to obtain something of value, or deceive another party about the defendant's ownership of the stolen items. We conclude that the offense of obtaining property by false pretenses has only one element in common with the doctrine of recent possession -- that the property in the defendant's possession was stolen.

It is true that the basis of defendant's acquittal of obtaining property by false pretenses might have been the jury's determination that the State had failed to prove beyond a reasonable doubt that the goods pawned by the defendant were stolen. However, the jury may also have acquitted defendant based on insufficient evidence that (1) the defendant knew that the items were stolen, (2) the defendant misrepresented his ownership or dominion over the pawned items, (3) the defendant intended to mislead the employees of the pawn shop, (4) the pawn shop employee was in fact deceived by the defendant (as opposed to being complicit in the sale of stolen property); or that (5) the defendant was paid for pawning the items.

In the context of whether a subsequent prosecution is barred by a defendant's prior acquittal of a related offense, our Supreme Court has stated:

> Under the doctrine of collateral estoppel, an *issue* of ultimate fact, once determined by a valid and final judgment, cannot again be litigated between the same parties in any future lawsuit. Subsequent prosecution is barred only if the jury could not rationally have based its verdict on an issue other than the one the defendant seeks to foreclose.

Edwards at 145, 310 S.E.2d at 613. (emphasis in original). We conclude, upon comparison of the elements of a charge of obtaining property by false pretenses and the doctrine of recent possession, that defendant has failed to show that his acquittal of the crime of obtaining property by false pretenses necessarily required the jury to find that there was insufficient evidence that defendant possessed stolen property. Moreover, in a prosecution for obtaining property by false pretenses, the jury is not required to determine whether the defendant possessed stolen property shortly after it was taken from its owner. As a result, defendant's acquittal of the charge of obtaining property by false pretenses did not bar the State from introducing evidence of the pawn shop ticket, in order to show defendant's recent possession of items stolen in the robbery.

Conclusion

Thus, for the reasons discussed above, we conclude that the trial court did not err by allowing the State to introduce a pawn shop receipt at trial. As this is defendant's only appellate argument, we further conclude that defendant had a fair trial, free of reversible error.

NO ERROR.

Judges CALABRIA and MURPHY concur.

STATE v. MALONE

[256 N.C. App. 275 (2017)]

STATE OF NORTH CAROLINA
v.
BRANDON MALONE, DEFENDANT

No. COA16-1290

Filed 7 November 2017

Identification of Defendants—pretrial identification procedures—impermissibly suggestive—substantial likelihood of misidentification

The trial court erred in an first-degree murder case by concluding pretrial identification procedures were not impermissibly suggestive where the District Attorney's office created a substantial likelihood of irreparable misidentification by showing witnesses defendant's interview, photos of defendant and another man together after the other man had already been convicted, and defendant in-person exiting a police car. It could not be said that the error was harmless beyond a reasonable doubt.

Judge DILLON dissenting.

Appeal by Defendant from judgments entered 7 April 2016 by Judge James K. Roberson in Alamance County Superior Court. Heard in the Court of Appeals 7 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Jess D. Mekeel, for the State.

Office of the Appellate Defender, by Assistant Appellate Defender Paul M. Green and Appellate Defender Glenn Gerding, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Brandon Malone ("Defendant") appeals following a jury verdict convicting him of first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. Following the verdicts, the trial court imposed concurrent sentences of life imprisonment without parole for murder and 83 to 112 months imprisonment for assault. On appeal, Defendant contends the trial court erred in allowing eyewitness testimony in violation of the North Carolina Eyewitness Identification Reform Act of 2007 ("EIRA") and due process of law. After review we find the court erred to the prejudice of Defendant and order a new trial.

I. Factual and Procedural Background

On 5 November 2012, an Alamance County Grand Jury indicted Defendant for first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. On 12 March 2016, Defendant filed a written motion to suppress eyewitness identification evidence. In his written motion, Defendant argued the State subjected two eyewitnesses, Claudia Lopez and Cindy Alvarez, to an impermissibly suggestive identification procedure when they were "put in a location where [Defendant] could not see [them] and asked to watch him walk from the transport vehicle to the [c]ourthouse for hearings in his case. He was handcuffed and alone, with no co-defendants or other prisoners and he was dressed in a jail jumpsuit." Defendant contends this constituted an impermissible, single-person show-up of Defendant. Therefore, Defendant argued their in-court identification of Defendant, as well as any discussion of what occurred during the show-up, should be suppressed as irreparably tainted. On 14 March 2016, the Alamance County Superior Court called Defendant's case for trial and began a voir dire hearing on Defendant's pre-trial motion to suppress.

In defense of the motion the State called Claudia Salas Lopez. Lopez is an eyewitness to the murder of Kevette Jones. On 23 October 2012, Lopez sat on the front porch of Jones's house, approximately ten feet away him, when he was shot. While on the stand, she recalled two men were involved in the shooting. The shooter wore a white t-shirt, had shoulder length hair, and exited the passenger side of a blue vehicle; the other man drove the vehicle, spoke to Jones, and had an eyebrow piercing.

The day after the shooting Lopez gave the following description of the two men to detectives. She stated one of the black males is tall with braids and wore a hat, and the other man is shorter, but she could not then remember any of his distinguishing features. She told the detectives one of the men had his hand in his pocket, but she could not remember which one. She testified when she first spoke to the detectives she was in a state of shock from having witnessed her good friend get shot.

During a second interview on 25 October, Lopez stated one of the men wore dark pants, a black and white plaid shirt, and had shoulder length dreadlocks. The only description she gave of the second suspect was he had shorter hair. Lopez further testified "I never really paid much attention to [Defendant's] face because the whole time he was standing in front of us he just had his hand in his pocket."

On 25 October Detective Kevin King of the Burlington Police Department prepared a photographic lineup for Lopez. He selected

Defendant's photograph from the police department's database, along with seven other subjects having the same general description. The same day another officer administered the line-up to Lopez, showing her each of the eight photographs one at a time. Upon viewing Defendant's photograph, Lopez did not identify him. However, when shown the eight photographs a second time, Lopez paused on Defendant's picture for a longer period of time than the other pictures. She stated the picture looked like him, but she was not sure. Because Lopez was not confident in her identification, the administering officer did not consider her remarks to be a positive identification.

The photograph of Defendant which was used in the line-up was taken approximately a year and a half prior to the date of the offense. In the photo Defendant had a hairstyle described as plats which were pulled back; however, a more recent photograph showed Defendant's hair in "dreadlocks that come down the side."

Lopez had no further contact with anyone from the court system, including the District Attorney's office, for approximately three and a half years. Then, a few weeks before trial Iris Smith, a legal assistant with the Alamance County District Attorney's office, contacted her to arrange a meeting in order to "talk about coming in to testify." Smith told Lopez a hearing related to this case would take place on 29 February 2016. Lopez and Alvarez met Smith on that day and Smith showed them photographs of Defendant and Marquis Spence—who had already been convicted for his role in the shooting. Smith also showed them a surveillance video, taken from a security camera outside a house on the street where the incident occurred; as well as part of Defendant's recorded interview with police officers.[1] While they were watching Defendant's interview, Alvarez stood near a window and happened to see Defendant exiting a police car. Alvarez directed Lopez's attention outside, and Lopez also watched Defendant exit the police car. He was wearing an orange jumpsuit, in handcuffs, and escorted by an officer.

Lopez stated her testimony regarding Jones's shooting is based on her memory of the events of 23 October 2012, and not on the photographs Smith showed her. Lopez made an in-court identification of Defendant as the man who "shot the gun." This identification was the first time she positively identified Defendant as the shooter.

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1. During voir dire, none of the witnesses testified as to the contents of the surveillance video.

Next, the State called Cindy Alvarez. Alvarez testified she is also an eyewitness to the shooting. She and Lopez were on the front porch of Jones's house when two men arrived in a blue car. Alvarez recalled the men began to ask Jones questions and "one of the guys pulled out a gun and then just started shooting him." Alvarez was approximately four feet away from the shooter.

When the police arrived, Alvarez gave officers a description of the two men involved in the shooting. She stated one of the men wore a blue ball cap and the other was quiet, had dark dreadlocks to his shoulders, and had dark freckles. She did not know the heights of the men because she took off running as soon as the shooting began. However, the same day she told an officer the shooter was taller than the driver. When the Defense counsel questioned her regarding the relative heights of the two men she stated "I don't know how tall [either] of them are. I was on the top of the front porch so . . . I was shaken up that day so I couldn't really tell . . . who was taller." Alvarez conceded Defendant does not have dark freckles and she stated "I wasn't really paying attention like seeing if he had freckles or not. I was just . . . I know it was him. I just remember I messed up on the freckles."

The day after the shooting officers showed Alvarez two different photo arrays. In the first line-up she identified Spence, not Defendant, as the shooter. She stated she was 80% sure photo number six, which was Spence, was the shooter, but she would be 100% sure if he had long dreadlocks. On cross-examination defense counsel asked Alvarez whether her identification of Spence as the shooter was "an accurate portrayal of what happened," to which Alvarez responded "I mean, yes. But at that time when I did this, . . . I was shocked. . . . Like, it had just happened so I couldn't really . . . say which one it was because my head was just everywhere. I was just [emotional] . . . ." For the second array, which included a photograph of Defendant, Alvarez stated number seven—which was not Defendant's photograph—looked like the suspect. She stated she was not sure, because at the time of the incident she was focused on the shooter, again implying she believed Spence to be the man who shot Jones.

The State showed Alvarez a photograph of Defendant which Alvarez testified she saw on the Internet a week or two after the shooting. She testified the picture looked more like Defendant as she recalled from the day of the shooting, than the photos used in the array, because his hair was different. She stated when she first saw the photograph on the Internet she was certain it was the man who shot Jones. Alvarez made an in-court identification of Defendant.

Alvarez further confirmed Lopez's testimony regarding the 29 February meeting with Smith. Lopez had previously asked Smith to keep her "informed of what's going to be happening in the courts" so Smith told her about the hearing taking place on 29 February, and Alvarez decided to go. As soon as Smith showed Lopez and Alvarez the updated photographs of Defendant, Alvarez instantly knew it was the shooter.

Alvarez asked Smith to view the video of Defendant's interview with officers. She stated:

> [W]e didn't even watch it . . . five minutes because when that happened I was standing up. And I looked out the window and that's when I saw him. And then I was, like, that's him, that's the guy that shot Kevette. And then after that, I told [Smith] I was, . . . leaving, and then [Claudia and I] both decided just to leave . . . . We didn't stay to hear, . . . the court or anything.

She confirmed Lopez's testimony regarding watching Defendant exit the police car in handcuffs and a jumpsuit. Alvarez stated no one told them the hearing taking place was for the shooter, Smith did not indicate who was in the photograph, nor did she suggest the man getting out of the car was the shooter. Smith did not pose any questions regarding an identification of the man exiting the car, or the man in the photographs.

The State then called Iris Smith. Smith testified she asked Lopez and Alvarez to come to the courthouse on 29 February to give them a copy of their interviews to review for trial, and to show them updated pictures of Defendant and Spence. Smith stated:

> I gave [Lopez and Alvarez] copies of their interviews and told them that [the District Attorney] wanted them to review their interviews that they had given with the police. And I pulled . . . some updated pictures, which the girls had already seen . . . on Facebook. . . .

When Smith showed Alvarez the first picture, Alvarez pointed directly to Defendant's picture and exclaimed "that's him, that's the shooter, that's the one that shot Kevette." Smith stated she only played the video of Defendant's interview with officers for approximately two or three minutes. Smith "couldn't get [the video] to work at first and then when [she] did get it to work . . . he wasn't really saying anything." She confirmed both witnesses' testimony regarding seeing Defendant get out of the police car. Smith stated when Alvarez or Lopez spoke about the pictures, or viewed Defendant in person, they were not prompted

in anyway and Smith did not ask them questions about whether they recognized Defendant.[2]

Defendant offered no evidence and the court heard the parties on the motion to suppress. Defendant argued the District Attorney's office conducted impermissibly suggestive identification procedures which created a substantial likelihood of irreparable misidentification by showing Lopez and Alvarez Defendant's interview, photos of Defendant and Spence together after Spence had already been convicted, and Defendant in-person, exiting the police car. After hearing both parties on the motion, the trial court found the following facts.

> On [23 October] 2012, Anthony Kevette Jones was shot and killed at his residence. Claudia Lopez and Cindy Alvarez were at the scene of the shooting on Mr. Jones'[s] front porch, along with Mr. Jones.
>
> A blue car arrived at the scene. There were two black males in the car. The two males came into the area where Mr. Jones was located. The driver of the blue car spoke to Mr. Jones and essentially did most or all of the talking on behalf of the two males. The other male person, the passenger in the blue car, pulled a gun and shot Mr. Jones. That led to his death.
>
> That Claudia Lopez was ten feet away from Mr. Jones when he was shot. That Cindy Alvarez was four feet from the shooter when Mr. Jones was shot. [Lopez] and [Alvarez] each gave some description of the two males giving some information about clothing. [Lopez] also described that the shooter had on a white T-shirt with shoulder length hair and the speaker had [a] body piercing.
>
> On [25 October] 2012, the Burlington Police Department conducted an identification procedure with [Lopez] and with [Alvarez]. Those procedures involved photographic arrays, sometimes referred to by the officer as photo line-ups.

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2. The State also called Jerry Garner, a private investigator who served a subpoena on Alvarez on 9 March. Upon serving the subpoena he learned someone had shown Alvarez several other photographs, in addition to the photo arrays. Alvarez also told him the District Attorney had requested she and Lopez attend the 29 February meeting at the courthouse to confirm her identification of Defendant. Additionally, Alvarez told him "she went to the door of the courtroom and looked through the glass and looked into the courtroom while [Defendant] was inside the courtroom."

In one array the Burlington Police Department used a photo of Marquis Spence, who's a charged co-defendant in . . . connection with this matter. So [they] used a photo of Marquis Spence and seven fillers. Filler being seven folks who are not involved or have been excluded from involvement in the incident under investigation.

In the other array the Burlington Police Department used a photo of [Defendant] and seven fillers. The Burlington Police Department did not use a current photo of . . . [D]efendant as reflected the current photo being introduced into evidence as State's Exhibit No. 3. In part, because the background in the photo was different from others and that there was some concern about that causing . . . [D]efendant's photo to stand out in the array.

Further, Marquis Spence's current photo showed him with an eyebrow body piercing and Burlington Police Department made the decision to attempt to locate a photo without such piercing being in the photo so as not to cause Marquis Spence's photo to stand out.

In . . . [D]efendant's current photo he had an unusual expression on his face as interpreted by the officer that the Burlington Police Department thought might make it stand out.

The Burlington Police Department instead used an older photo of . . . [D]efendant obtained from the Division of Adult Correction website. In the photo that the Burlington police used . . . [D]efendant's hairstyle, which the officer characterized as being plats, was different from the hairstyle in the current photo, which the officer characterized as dreadlocks. So the older photo had plats. Current photo dreadlocks.

[Lopez] identified [number four] Marquis Spence in the array involving that co-defendant.

At [the] hearing she referred to that identified person as the male who did the talking. She reported her level of confidence on that identification as an eight on a scale of one to ten.

On the second array, [Lopez] indicated that [number six], which was . . . [D]efendant, looked like him but she was

not sure and she initialed that she had not -- did not have a positive [identification].

[Alvarez] [identified] [number six], . . . which was Marquis Spence. She indicated she had an 80% level of confidence and 100% if he had long dreads, and added that . . . looked like the one that shot Kevette. So she identified Marquis Spence in that connection.

[Alvarez] in the second array identified [number seven]. This is the array that in which . . . [D]efendant's photo was located. [She] [i]dentified [number seven] who is an individual named Danny Lee Johnson whose photo was included as a filler. But she indicated that she was not sure. She noted she focused on the shooter because he had his hands in his pocket the whole time.

[Lopez] and [Alvarez] each saw photos of . . . [D]efendant and Marquis Spence in the online newspaper. These photos were not among those that were shown to each of them by the Burlington Police Department in the arrays. No law enforcement officer showed either [Lopez] or [Alvarez] anymore photos other than the ones shown during the course of the arrays.

. . . [W]hen [Alvarez] saw the online newspaper photos of . . . [D]efendant and Marquis Spence, she thought to herself that these photos showed how they looked on the day of the shooting.

Further, she thought that the photo of [D]efendant was of the person who shot Kevette.

[Lopez] and [Alvarez] each went several years without contact from the District Attorney's office or contacting the District Attorney's office or without any further interaction with law enforcement in connection with all these events.

Each had contact with Iris Smith, victim witness legal assistant with the Alamance County District Attorney's office in February of 2016 as trial date approached.

. . . [Lopez] and [Alvarez] each knew that there was going to be a hearing in this case on [29 February] 2016, at the Alamance County Historic Courthouse. Neither knew . . .

whether . . . [D]efendant would be present at the hearing. Iris Smith arranged to meet with each on [29 February] in the furtherance of her trial preparation duties. Because Smith was at the Historic Courthouse attending to grand jury matters, she advised [Lopez] and [Alvarez] . . . to meet her at the District Attorney's office in that building.

Smith gave . . . [Lopez] and [Alvarez], a copy of her respective statement to officers and showed them photos she had obtained of . . . [D]efendant and Marquis Spence off of the Internet.

Up to the point when Smith downloaded the Internet photos, the only photos in the [District Attorney]'s file were the ones used in the photo arrays done by the Burlington Police Department some years earlier.

The . . . photos shown by Smith on [29 February] were the same photos that each [Lopez] and [Alvarez] had already seen in the online newspaper some time earlier.

Smith also began showing each a video of . . . [D]efendant's statement to law enforcement officers. [Lopez] was seated at the time. [Alvarez] was standing near the window of the room in which they were meeting.

[Alvarez] then stated, there he is, the one who shot Kevette. [Lopez] and Smith got up and went over to the window. At that time . . . [D]efendant was exiting alone from a patrol unit parked adjacent to the Historic Courthouse, accompanied by a law enforcement officer, dressed in an orange jumpsuit and in handcuffs.

[Lopez] testified in court that she believed that [D]efendant was the person who shot Kevette and based on the events at the scene of the shooting and not the viewing of the photos at the District Attorney's office on [29 February] or the viewing of . . . [D]efendant exiting the law enforcement unit on that day or the statement that [Alvarez] made about . . . [D]efendant as he exited the unit.

[Alvarez] testified in court that her identification of . . . [D]efendant was based on the events surrounding the shooting and not on the [29 February] 2016, events in the [District Attorney's] office.

> Neither [Lopez] nor [Alvarez] knew . . . [D]efendant nor Marquis Spence prior to the date of the shooting. Assistant District Attorney Alex Dawson, the [prosecutor] in this case, was not present during the meeting on [29 February] 2016, at the Historic Courthouse.
>
> Counsel are in near agreement, . . . that the amount of time that [Alvarez] and [Lopez] were in a position to observe the two males and the shooting was from 75 to 90 seconds. So I took that matter as not being in dispute . . . .

Turning to whether the witnesses' in-court identifications of Defendant were reliable and of independent origin, the trial court found the following.

> One of the first factors [in determining whether an identification is of independent origin] is the opportunity to view the crime. The [c]ourt finds that the time that [Lopez] and [Alvarez] had to view the two males and the shooting was a short period of time from 75 to 90 seconds.
>
> The [c]ourt does find that the event was a startling event, one that would claim your attention or cause you to pay no attention and flee from the situation.
>
> That . . . Lopez was within ten feet of the shooter on the porch where Mr. Jones was shot and when he was shot and . . . Alvarez was four feet from Mr. Jones when he was shot. That's the opportunity to view. They were all on the porch together.
>
> [As to] [t]he degree of attention[,] [t]he [c]ourt finds that the two indicated that they were paying attention to the two males that came up and to Mr. Jones. The event was a startling event, one that would cause the event to stand out in their minds; that they gave a general description of clothing, hair and body piercing and the car and indication of who was driving the vehicle and who was the passenger in the vehicle.
>
> As to the accuracy of prior description . . . Lopez described the shooter as having shoulder length hair. . . . [D]efendant had shoulder length hair at or around the time of the shooting. At the arrays of the Burlington Police Department [Lopez] identified Marquis Spence as the main talker. . . . also being the driver of the vehicle. And [she] was not

> sure about . . . [D]efendant as the shooter and did not make a positive [identification]. She did linger over . . . [D]efendant's photo during the course of the array.
>
> [Alvarez] identified Marquis Spence as the shooter and did not pick . . . [D]efendant as the other person [instead] picking a completely unassociated individual.
>
> [As to] [t]he level of certainty demonstrated at the confrontation, . . . [Alvarez] and [Lopez] had seen these photos before so they were not new photos. . . . Alvarez had recognized the photos as the two males as they looked at or around the time of the shooting.
>
> . . . [Lopez] and [Alvarez] each recognized . . . [D]efendant as he exited the law enforcement unit. Both appeared confident in their identifications during that event. . . .
>
> [In regard to] [t]he length of time between [the] crime and [the] confrontation[,] [t]here [were] approximately three and a half years between the shooting and the [29 February] event. . . .

The trial court considered these findings and concluded the "showing of the photos, the video, and seeing . . . [D]efendant in person at the . . . [c]ourthouse on [29 February 2016], was not impermissibly suggestive." The court also concluded "based on the testimony of the two witnesses . . . in the courtroom, that those identifications are of independent origin."

The case then proceeded to trial and the State called Callen Burnette. Burnette testified at the time of the incident she lived in Durham with her friends Arianna McCray and Lakreisha Shoffner. She initially met Defendant and Spence approximately one month before the shooting and saw them again on three or four occasions prior to the shooting. On two occasions they ordered pizza together, played video games, and watched television. On one occasion they spent at least an hour to an hour and a half together at McCray's house. On another occasion Defendant and Spence visited McCray's house to drop off marijuana. Burnette never saw Defendant and Spence separately and stated "[e]very time I [saw] them they were together."

On the date of the incident Burnette rode with Defendant and Spence from Durham to Burlington because she had arranged a deal for Defendant and Spence to purchase marijuana from her friend Jared Alston. Spence and Defendant met Burnette and Shoffner at McCray's

house. Spence arrived driving a blue vehicle and Defendant was in the passenger seat. They all left in the blue car and stopped at a gas station to pick up McCray.

When McCray arrived Burnette and Shoffner got into McCray's vehicle. Spence and Defendant then followed McCray's car to Jones's house on Avon Avenue. When they arrived McCray introduced Alston to Defendant and Spence, then Alston got into McCray's car. Both vehicles left Avon Avenue and the group went to Creekside Apartments. When they arrived Alston exited McCray's car and got into Spence's car. Momentarily, he returned to McCray's car and stated he would be back in five minutes. After approximately fifteen minutes passed, Defendant looked into McCray's car and asked where Alston was. Burnette then got out of the car and walked around the apartment complex looking for Alston. After forty-five minutes to an hour passed without finding him, Defendant and Spence left stating they were going back to Raleigh to make some money.

Burnette, McCray, and Shoffner drove to Alston's house but did not find him. They then returned to Jones's house. When they arrived there were several people in the yard and on the front porch. Shoffner got out of the car and spoke with Tabias Sellers, then quickly ran back to the car and they left.

A few days later Burnette spoke with a detective and completed a photo line-up. She identified Spence as the driver with 100% confidence; however she did not identify Defendant and she stated she was not sure which man was the shooter. She described the appearance of the two men, stating Spence had dreadlocks braided back, to right under his jaw bone, and Defendant had short plats.

The State showed Burnette the photo arrays and mug shots of Defendant and Spence. Burnette recognized the mug shots from seeing them in the news. She testified the mug shot of Defendant showed his hair in plats, hanging down, as she remembered it on the day of the incident. However, Defendant's photo used in the line-up portrayed a different style—short braids which were straight back. She also stated the photo used in the line-up appeared to be an older photo of Defendant.

The State then called Lakreisha Shoffner. Shoffner confirmed Burnette's testimony concerning the occasions when they spent time with Defendant and Spence. At the time of the incident Shoffner was "get[ting] to know [Defendant] a little bit more than a friend" and was building a dating relationship with him. Shoffner also confirmed Burnette's testimony regarding the events which took place on the day

of the shooting. When they arrived at Creekside Apartments, Shoffner watched Alston get out of McCray's vehicle and into Spence's car and "saw [Defendant] hand [Alston] money from out of the glove box." Alston then emerged from the car with the money and did not return.

Shoffner testified when they returned to Jones's house "[she] saw everyone still standing outside as if nothing ever occurred." When she got out of the car she asked where Alston was "[a]nd then [she] was informed . . . to not come up to the house." She saw Jones's feet hanging out of the side of a vehicle as others were trying to transport him to the hospital. She also saw a man with blood on his shirt. She testified "[s]o then I just put two and two together, you know, to leave." A few days later officers administered a photo line-up to Shoffner. She positively identified Spence with 100% confidence and positively identified Defendant with a confidence level of 8.59 out of ten.

The State then called Arianna McCray. McCray testified she met Defendant and Spence in the summer of 2012 "[a]nd they started liking . . . me and . . . [Shoffner] and we had started to build a friendship. . . ." She testified she thought the two men were brothers and she had never seen the two separately. She confirmed the testimony of Shoffner and Burnette concerning the events of 23 October.

Officers administered a photo line-up to McCray on 25 October 2012. She identified Spence with a confidence level of 100% and identified Defendant with confidence level of 80%. She stated she was only 80% sure because the picture of Defendant in the line-up showed him with a different hairstyle and he looked younger in the picture.

The State next called Claudia Lopez. Lopez testified on 23 October, she and Alvarez were at Jones's house, sitting on the porch when two men arrived in a blue car, blocking the driveway. The men approached the front porch and asked Jones where Alston was, claiming Alston "had [run] off with some . . . money." Jones replied he did not know, "[t]he last time I saw him he left with you guys." The driver then asked for Alston's phone number, and Jones said he did not have it. The driver responded "that's your man, what do you mean you don't have his number." Then Micah White, who was also on the porch stated "we don't have his number. He's always calling from different phones." At that point the shorter of the two men said "b***s***" and the shooting began.

While the conversation was going on Lopez noticed the shorter man was holding his right pocket as if he had a gun in it and "[i]t looked like he had his finger on the trigger." "Right after he said [b***s***], he pulled a gun out of his . . . pocket and started shooting." She heard four or five shots then the men ran towards their car.

From the time the men got out of their car until the time they ran back to their car after the shooting, only a minute or two had elapsed. Lopez stated one of the men was "slightly taller and the other one was just a little bit shorter wearing a white t-shirt." The taller man drove the vehicle and did the talking; he had his hair braided back and had an eyebrow piercing. The shorter man was the passenger. The shooter wore a white t-shirt and his hair "was loose with little braids . . . up to his shoulders." The State showed Lopez a photograph, which Lopez identified as the shooter. She also recognized the picture of Spence, who she identified as the talker and the taller of the two men. Lopez made an in-court identification of Defendant as the shooter. Defense counsel objected to this identification, but the court overruled the objection.

The State next called Cindy Alvarez. Alvarez confirmed Lopez's testimony regarding the events on 23 October. She testified one of the men wore a white long-sleeved shirt and the other wore a blue hooded coat. She also testified the passenger kept his hands in his pocket, where she could see the tip of a gun. After noticing the gun, she told Lopez they needed to leave. Lopez asked the driver to move, to which he replied "he would move when he finished." Then "[t]he passenger . . . turned around and looked at the . . . driver . . . the driver turned around and looked at the passenger . . . and, . . . nodded his head and that's when . . . the passenger started shooting." Alvarez identified Defendant in court as the shooter. The defense counsel objected, but the court overruled Defendant's objection.

Brad Mills, a former detective with the Burlington Police Department, also testified. Mills interviewed Alvarez following the incident, and stated she was very emotional during the interview. Alvarez told him the driver was the one who did the talking, was approximately five feet six inches tall, and wore a blue ball cap. She described the shooter as the quiet one, with dark shoulder length dreadlocks, a muscular build and slightly taller than the driver. However, during her voir dire testimony she stated she did not know the heights of the suspects because she took off running as soon as the shooting began.

The State also called Micah White. White is an eyewitness to the shooting. White stated the taller man did the talking and the shorter one had a gun in his pocket. However, Officer Megan Coggins testified she interviewed Micah White immediately after police were called to the scene of the incident and White stated the shorter black male spoke and the taller black male was the shooter. On 25 October 2012, officers administered a photo line-up to White and he did not positively identify either Defendant or Spence.

The State then called Officer Steven Reed with the Burlington Police Department.[3] Officer Reed investigated the murder of Jones and interviewed Defendant as a suspect. Defendant claimed he was not in Burlington at the relevant time and he did not know where Burlington was, nor did he know Alston or Jones. Defendant was arrested at Spence's house and the blue vehicle was parked outside. Defendant claimed he had never been in that vehicle nor did he recall ever seeing it.

The State's final witness was Tabias Sellars. Sellars testified the day of the shooting he was at Jones's house and was at the front door ready to leave when he saw a blue car arrive and two men approach the house. He testified the man who spoke was the driver; he was tall, light skinned, and had dreadlocks. The driver said "[y]our boy [Alston] just beat me out of $1,200" and he asked where Alston was. Sellars described the shooter as the one who did not speak. On cross examination Defense counsel elicited testimony concerning a plea agreement Sellers offered to make in exchange for testifying in this case.[4]

At the close of all the evidence Defendant moved to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury and the charge of first-degree murder. The court denied both motions.

II. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "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).

Although Defendant did not preserve his EIRA claim for appellate review, he requests that we review this issue for plain error. Because

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3. The State called Dana Quirindongo as an expert in firearms identification, including the identification and examination of bullets, firearms and casings. Quirindongo works in the North Carolina State Crime Laboratory in the firearms unit. She testified in her opinion State's Exhibits 34, 35, and 36 were all bullets shot from a caliber between .38 or .357 and in her opinion all three of the projectiles were fired from the same firearm.

4. The State recalled Detective King who testified the Durham police department executed a search warrant of Spence's house. A blue Hyundai elantra was located outside the home and the officers found a container of six .38 caliber unfired bullets.

we find error in Defendant's due process claim we need not address Defendant's EIRA argument.

III. Analysis

On appeal, Defendant argues the legal assistant's 29 February meeting with Lopez and Alvarez constituted an identification procedure which violated due process of law and the EIRA. Defendant contends the trial court erred in denying his motion to suppress the eyewitness identification. Specifically, he challenges the trial court's finding that Lopez made a confident identification of Defendant on 29 February. Defendant also challenges the trial court's conclusion the identification procedures were not impermissibly suggestive, and the identifications had an independent origin. We find Defendant's argument to be persuasive.

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). To determine whether identification procedures violate due process, North Carolina courts apply a two-part inquiry. *State v. Fowler*, 353 N.C. 599, 617, 548 S.E.2d 684, 698 (2001).

> 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.

State v. Hannah, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984) (citations omitted). "The test under the first inquiry is 'whether the totality of the circumstances reveals a pretrial procedure so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice.' " *Fowler*, 353 N.C. at 617, 548 S.E.2d at 698 (quoting *Hannah*, 312 N.C. at 290, 322 S.E.2d at 151).

The second inquiry requires a determination of whether the identification procedures created a substantial likelihood of irreparable misidentification. "Whether there is a substantial likelihood of misidentification depends upon the totality of the circumstances." *State v. Pigott*, 320 N.C. 96, 99, 357 S.E.2d 631, 633 (1987). "Even when a pre-trial procedure is found to be unreliable, in-court identification of

independent origin is admissible." *State v. Garner*, 136 N.C. App. 1, 11-12, 523 S.E.2d 689, 697 (1999). Our courts consider the following factors when determining whether an identification is of independent origin and sufficiently reliable:

> 1) [t]he opportunity of the witness to view the criminal at the time of the crime;
>
> 2) the witness' degree of attention;
>
> 3) the accuracy of the witness' prior description;
>
> 4) the level of certainty demonstrated at the confrontation; and
>
> 5) the time between the crime and the confrontation.

Pigott, 320 N.C. at 99-100, 357 S.E.2d 631, 634. These factors must then be weighed against "the corrupting effect of the suggestive procedure itself." *Id.* at 100, 357 S.E.2d at 634.

Defendant first contends the trial court erred in concluding the pretrial identification procedures were not impermissibly suggestive. Defendant argues:

> Sandwiching a viewing of the perpetrators committing the homicide in between viewings of [Defendant's] photograph and his police interrogation was extremely suggestive and improper, affecting not only their identification of [Defendant], but their memories of the style and color of clothing worn by the perpetrators, and any other details visible in the video.

After careful *de novo* review of the trial court's conclusion of law, we agree.

The evidence admitted at trial demonstrates after the shooting neither Lopez nor Alvarez were able to give detailed descriptions of Defendant or positively identify Defendant. Then, nearly three and a half years later and approximately two weeks prior to trial, the witnesses met with Smith, viewed a video of Defendant's interview, surveillance footage of the incident, and more recent photographs of Defendant. It is likely the witnesses would assume Smith showed them the photographs and videos because the individuals portrayed therein were suspected of being guilty.

Although neither the video interview nor the surveillance footage were admitted during the suppression hearing, we reviewed this evidence in order to determine the suggestive nature of the identification

procedures. The surveillance video does not present a view of Jones's front porch, therefore there is no footage of the actual murder. However, Jones's driveway is clearly visible, and two men can be seen fleeing the yard and entering a dark vehicle. One of the men is wearing a noticeably white shirt. Defendant's interview with officers clearly shows him wearing a white shirt and ball cap. Even watching only a minute of the footage would allow the witnesses ample opportunity to view Defendant's features, searing his image into their memory before trial.

We must also consider whether the pretrial identification procedure "was so suggestive that there is a substantial likelihood of irreparable misidentification" or whether the in-court identification was of independent origin. *Pigott*, 320 N.C. at 99, 357 S.E.2d at 633; *Garner*, 136 N.C. App. at 11-12, 523 S.E.2d at 697. In reviewing the trial court's factual findings regarding this issue, we determine several of those findings were not supported by competent evidence.

First, the trial court found both witnesses paid attention to Defendant at the scene; this finding is not supported by the evidence. Although the trial court correctly found the witnesses had 75 to 90 seconds to view the suspects, it was a startling event which *may* have caused them to pay close attention, and the witnesses were in close proximity to the shooter, the trial court ignored the witnesses' own testimony indicating they in fact had not paid attention to Defendant. Lopez testified "I never really paid much attention to [Defendant's] face because the whole time he was standing in front of us he just had his hand in his pocket." And although Alvarez testified she "pa[id] attention to [Defendant] the minute he got out of the car[,]" the day after the incident she identified Spence as the shooter and was unable to identify Defendant in the line-up. We find the evidence clearly shows a *lack of attention* to Defendant.

The trial court also considered the accuracy of the witnesses' description at the time of the incident. Here, neither witness gave a detailed description of Defendant. When Lopez spoke with detectives the night of the shooting she described Defendant as shorter than the other man, wearing a white t-shirt, and the passenger of the vehicle. She stated she could not remember any of his features, admitting she did not pay attention to Defendant's face. Alvarez initially described Defendant as quiet, and having dark dreadlocks to his shoulders and dark freckles. Yet, she admitted at trial Defendant does not have dark freckles. Furthermore, neither eyewitness positively identified Defendant in a photo line-up administered only two days after the shooting.

The trial court found both Lopez and Alvarez recognized Defendant on 29 February when he exited the police car. However, the State

concedes this finding is inaccurate as only Alvarez identified Defendant at that time. There is no evidence in the record to demonstrate Lopez made any such identification of Defendant during the meeting on 29 February. In fact, Lopez testified during the voir dire hearing her in-court identification was the first clear identification she had made of Defendant.

Finally, the trial court considered the length of time between the crime and the confrontation and noted nearly three and a half years passed between the date of the incident and the identification procedures of 29 February.

Considering these facts we determine they do not support the trial court's conclusion the witnesses' in-court identifications of Defendant were of independent origin. The short amount of time the witnesses had to view Defendant, their inability to positively identify Defendant two days after the incident, and their inconsistent descriptions demonstrate it is improbable that three and a half years later they could positively identify Defendant with accuracy absent the intervention by the District Attorney's office. Thus, we conclude the identification procedures of 29 February were impermissibly suggestive and were not of independent origin. Therefore, they violated Defendant's due process rights.

We do not find evidence in the record which supports Defendant's argument Smith subjected Lopez and Alvarez to an impermissible show-up procedure. A "show-up" is a procedure "whereby a suspect is shown singularly to a witness . . . for the purposes of identification." *State v. Harrison*, 169 N.C. App. 257, 262, 610 S.E.2d 407, 412 (2005). Both the United States Supreme Court and the North Carolina Supreme Court "have criticized the 'practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup." *State v. Oliver*, 302 N.C. 28, 44-45, 274 S.E.2d 183, 194 (1981) (quoting *Stovall v. Denno*, 388 U.S. 293, 302, 18 L. Ed. 2d 1199, 1206 (1967)). Show-ups "may be inherently suggestive because the witness would likely assume that the police had brought [him] to view persons whom they suspected might be the guilty parties." *State v. Oliver*, 302 N.C. at 45, 274 S.E.2d at 194 (internal citations omitted) (alterations in original). Nevertheless, "pre-trial show-up identifications are not *per se* violative of a defendant's due process rights." *State v. Watkins*, 218 N.C. App. 94, 105, 720 S.E.2d 844, 851 (2012) (internal citations omitted). The EIRA restricts the manner in which state, county and local law enforcement officers may conduct show-ups. N.C. Gen. Stat. § 15A-284.52(c1) (2015). The statute provides:

> (1) A show-up may only be conducted when a suspect matching the description of the perpetrator is located in

> close proximity in time and place to the crime, or there is reasonable belief that the perpetrator has changed his or her appearance in close time to the crime, and only if there are circumstances that require the immediate display of a suspect to an eyewitness.
>
> (2) A show-up shall only be performed using a live suspect and shall not be conducted with a photograph.
>
> (3) Investigators shall photograph a suspect at the time and place of the show-up to preserve a record of the appearance of the suspect at the time of the show-up procedure.

There is no evidence in the record to support Defendant's argument the witnesses looking outside the courthouse window at the exact moment Defendant exited a police car was a coordinated act by the District Attorney's office to have the witnesses view Defendant in-person. Although the circumstances seem suspicious, we cannot determine the District Attorney's office conducted an impermissible show-up. Nonetheless, the witnesses viewing the photographs, surveillance footage, and Defendant's interview did constitute impermissible identification procedures.

Defendant also contends the identification procedures violated several requirements of the EIRA. The State alleges the EIRA is inapplicable in this case as the identification procedures were conducted by a legal assistant, not a law enforcement officer, and the plain language of the EIRA applies only to law enforcement officers. We find the State's argument is without merit. We address this argument only to state the EIRA was enacted "to protect [d]ue [p]rocess rights during identification procedures." *State v. Gamble*, ___ N.C. App. ___, ___, 777 S.E.2d 158, 163 (2015). Therefore, as a general matter, to protect the due process rights of defendants, all eyewitness identification procedures should comply with the requirements of the EIRA.

Because we find the procedures violated the due process rights of Defendant, we must next decide whether the error was prejudicial.

> (a) 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. . . .

> (b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. . . .

N.C. Gen. Stat. § 15A-1443. A constitutional right is involved, thus, Defendant is prejudiced unless admission of the testimony was harmless beyond a reasonable doubt.

We cannot determine the admission of the identification testimony was harmless beyond a reasonable doubt. The only eyewitnesses to the murder who testified at trial were Lopez, Alvarez, Sellars, and White. None of these eyewitnesses positively identified Defendant as the shooter immediately after the incident. White never made a positive identification. Sellars identified Defendant's mug-shot, but did not make an in-court identification and Defendant contends Sellars' testimony was not credible. Lopez and Alvarez made in-court identifications of Defendant only after they were subject to the pretrial identification procedures conducted by the District Attorney's office. The only witnesses who positively identified Defendant in a photo line-up ~~-S~~hoffner and McCray ~~-w~~ere not present at the scene at the time Jones was murdered. Much of the remaining testimony as to who the shooter was is contradictory. Thus, we cannot say the court's error was harmless beyond a reasonable doubt.

The dissenting opinion asserts any error committed by the trial court was harmless. However, as noted above, because Defendant's due process rights are implicated, any error is deemed prejudicial unless the Court finds such error was harmless beyond a reasonable doubt. The dissenting opinion may be correct under the ordinary prejudicial error standard. However, under the heightened standard, which we must apply, we cannot say the error was harmless beyond a reasonable doubt.

IV. Conclusion

In sum, after careful review we hold the error is prejudicial and award Defendant a new trial.

PREJUDICIAL ERROR AND NEW TRIAL.

Judge ARROWOOD concurs.

Judge DILLON dissents in a separate opinion.

DILLON, Judge, dissenting.

Defendant was convicted of murder. On appeal, he argues that the trial court erred in allowing two eyewitnesses – Ms. Alvarez and Ms. Lopez – to offer testimony in court identifying Defendant as the shooter. Defendant contends that their testimonies were tainted by an unnecessarily suggestive pre-trial identification procedure by the prosecutor. Specifically, shortly before trial, the prosecutor met with Ms. Alvarez and Ms. Lopez and showed them a picture and video of Defendant, purportedly to aid their trial testimony. For the reasons stated below, I believe that Judge Roberson properly admitted the testimony of Ms. Alvarez, and that if it was error to admit Ms. Lopez's in-court identification, such error was harmless beyond a reasonable doubt. Therefore, my vote is "no reversible error."

Regarding Ms. Alvarez's testimony, assuming that her meeting with the prosecutor was impermissibly suggestive, Judge Roberson's findings show that Ms. Alvarez's in-court identification was of an origin *independent* from her meeting with the prosecutor. For example, evidence showed that Ms. Alvarez stood close to Defendant during the shooting and focused her attention on him, and she testified that she was sure that the shooter was Defendant – long before her meeting with the prosecutor – after seeing a picture of Defendant on the news shortly after the shooting. *See State v. Fisher*, 321 N.C. 19, 24, 361 S.E.2d 551, 554 (1987) (noting that a witness identification based on a newspaper photo does "not result from state action [and therefore does] not violate defendant's due process rights").

Regarding Ms. Lopez's testimony, I believe that any error committed in admitting her in-court identification was harmless beyond a reasonable doubt because the other overwhelming evidence showed that Defendant and his friend, Marquis Spence, were the two people who arrived in the blue car at the victim's house and participated in the shooting of the victim. Specifically, the overwhelming evidence shows as follows:

Several witnesses confirmed that two hours before the shooting, it was Defendant and Mr. Spence who arrived at the victim's house in Mr. Spence's distinctive blue car to pick up Skip (a friend of the victim's) to go to a nearby location to conduct a drug transaction; shortly thereafter, Defendant and Mr. Spence were seen leaving the nearby location *alone* in the blue car after Skip left the location with their $1,200, but had failed to return with the drugs; and Defendant and Mr. Spence left the nearby

location shortly before two men arrived at the victim's house in a blue car looking for Skip, complaining that Skip had just run off with their $1,200.

Ms. Alvarez, who witnessed the shooting but did not know Defendant, positively identified Defendant as the shooter in court.

The victim himself, as evidenced by the testimony of Ms. Lopez, identified Defendant as a participant in his murder. The victim had seen Defendant and Mr. Spence pick up Skip from his house a few hours before two men came to his house and killed him. Ms. Lopez testified that the victim exclaimed that the two men who arrived up two hours later were *the same two men* who had come earlier to pick up Skip. Specifically, Ms. Lopez stated that when the two men arrived in the blue car looking for Skip and their $1,200, the victim told the two men that the last time he saw Skip, "he had left with *you guys*." (Emphasis added.)

Another witness to the shooting who had seen Skip leave earlier with Mr. Spence and Defendant testified that when the two men pulled up two hours later looking for Skip, he "told *them* . . . [w]herever *you* took him to, that's where you need to back trace him."

Other witnesses testified that Defendant and Mr. Spence were neighbors in Durham, spent a lot of time together, and were together at Mr. Spence's house with the blue car out front when they were arrested.

Defendant did not testify at trial.

Based on the evidence, the jury determined that the same two men who arrived at the victim's house in a blue car to pick up Skip to pay him $1,200 for drugs were the same two men who returned to the victim's house a few hours later in a blue car looking for Skip and complaining to the victim that Skip had taken their $1,200. I conclude that even if Ms. Lopez had not been allowed to identify Defendant in court, it is beyond a reasonable doubt that the jury still would have convicted Defendant based on all the other evidence. Her in-court identification merely corroborated the other evidence offered by the State. And if Ms. Lopez had not met with the prosecutor before the trial, there is no indication that Ms. Lopez would have testified that Defendant was not the shooter. Indeed, when she was shown a photo line-up by the police shortly after the shooting, she selected Defendant's photograph as identifying one of the two individuals involved in the victim's death, though she indicated that she was not sure.

STATE OF NORTH CAROLINA
v.
GLENN WARREN MAYO, JR., DEFENDANT

No. COA17-340

Filed 7 November 2017

1. Motor Vehicles—habitual impaired driving—three prior convictions—different court dates not required

The trial court had jurisdiction over a habitual impaired driving charge where the State was not required under N.C.G.S. § 20-138.5 to allege three prior convictions of impaired driving from different court dates.

2. Probation and Parole—probation revocation—habitual impaired driving—valid conviction

The trial court did not abuse its discretion in a habitual impaired driving case by revoking defendant's probation where the habitual impaired driving charge was a valid conviction.

Appeal by Defendant from judgments entered 26 October 2016 by Judge Tanya T. Wallace in Johnston County Superior Court. Heard in the Court of Appeals 3 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Colin A. Justice, for the State.

Robinson, Bradshaw & Hinson, P.A., by Erik R. Zimmerman, for Defendant-Appellant.

MURPHY, Judge.

The Habitual Impaired Driving Act requires the State to allege three prior convictions of impaired driving. Unlike other statutes, the Act does not require the three prior convictions to be from different court dates. We hold, in accordance with our case law and the differences between this Act and other habitual statutes, the State is not required to allege three prior convictions of impaired driving from different court dates.

Glenn Warren Mayo, Jr. ("Defendant") appeals from judgments convicting him of habitual impaired driving and revoking his probation. On appeal, Defendant argues: (1) the indictment for habitual impaired

driving is facially invalid because two of the underlying impairment convictions are from the same court date; and (2) the trial court relied on an invalid conviction in revoking Defendant's probation. After careful review, we reject Defendant's arguments and conclude he received a fair trial, free from error.

I. Background

On 1 November 2015, Sergeant T.L. Avery of the Selma Police Department arrested Defendant for impaired driving and driving while license revoked. On 2 November 2015, Defendant's probation officer filed a probation violation report. In the report, the officer alleged Defendant violated probation by driving while not being properly licensed and being under the influence of alcohol on 1 November 2015.

On 7 December 2015, Defendant was indicted for habitual impaired driving. In support of the habitual impaired driving charge, the State alleged Defendant had been convicted of the following charges: First, 15CRS000837, driving while impaired on 26 November 2012. Defendant was convicted of this charge on 30 September 2015 in Johnston County Superior Court. Second, 12CR213930, driving while impaired on 22 June 2012. Defendant was convicted of this charge on 20 December 2012 in Wake County District Court. Third, 12CR213589, driving while impaired on 18 June 2012. Defendant was convicted of this charge on 20 December 2012 in Wake County District Court. Defendant also stipulated to his three prior convictions for driving while impaired. On 1 February 2016, Defendant was indicted for being a habitual felon. On 26 February 2016, Defendant's probation officer filed another probation violation report. In the report, the officer alleged Defendant violated probation because he "has not been hooked up" to an alcohol consumption monitoring system. (all caps in original).

On 24 and 25 October 2016, Defendant's case came to trial. On 25 October 2016, the jury found Defendant guilty of driving while impaired. The trial court adjudicated Defendant as a habitual impaired driver, in accordance with N.C.G.S. § 20-138.5 (2015). Defendant pled guilty to being a habitual felon. The trial court also revoked Defendant's probation in 15CRS837, a prior driving while impaired conviction, based on two violation reports and Defendant being "found guilty of habitual impaired driving on 10/25/2016-15CRS56170." (all caps in original). On 27 October 2016, Defendant's probation officer completed another probation violation report, alleging Defendant violated probation by committing a criminal offense. Defendant filed timely notice of appeal.

II. Standard of Review

"This Court reviews challenges to the sufficiency of an indictment using a *de novo* standard of review. 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. Pendergraft*, 238 N.C. App. 516, 521, 767 S.E.2d 674, 679 (2014) (internal citations and quotation marks omitted).

We review a trial court's revocation of probation for abuse of discretion. *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (quoting *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960)) (" 'The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion.' "). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

III. Analysis

Defendant presents two arguments: (1) the habitual impaired driving indictment is invalid because two of the underlying convictions were obtained on the same court date; and (2) the trial court erred in revoking his probation because it relied on Defendant's habitual impaired driving conviction. We address these arguments in turn.

A. Habitual Impaired Driving Indictment

[1] Defendant first argues the trial court lacked jurisdiction over the habitual impaired driving charge because two of the underlying convictions are from the same court date. Defendant contends N.C.G.S. § 20-138.5, the statute governing habitual impaired driving, is ambiguous because "[i]t does not explain how to determine whether a defendant has been convicted of three or more offenses involving impaired driving, and does not directly address whether multiple convictions from the same date may be considered when making that determination." Defendant analogizes this statute to N.C.G.S. § 14-7.1 (2015) (Persons defined as habitual felons) and N.C.G.S. § 15A-1340.14(d) (2015) (Prior record level for felony sentencing). Defendant argues the *in pari materia* statutory construction canon requires our Court to read into the statute a rule regarding convictions obtained in one court week because the other "similar" statutes have a specific rule for the timing of multiple convictions. We disagree.

"If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented

according to the plain meaning of its terms." *State v. Watterson*, 198 N.C. App. 500, 505, 679 S.E.2d 897, 900 (2009) (brackets, quotation marks, and citation omitted). "Thus, in effectuating legislative intent, it is the duty of the courts to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *Id.* at 505, 679 S.E.2d at 900 (citing *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009)).

If a statute is ambiguous, our Court must determine the legislature's intent. *In re Hall*, 238 N.C. App. 322, 324, 768 S.E.2d 39, 42 (2014). In discerning the intent of the legislature " 'statutes *in pari materia* should be construed together and harmonized whenever possible. *In pari materia* is defined as upon the same matter or subject.' " *Id.* at 324-325, 768 S.E.2d at 42 (quoting *In re Borden*, 216 N.C. App. 579, 581, 718 S.E.2d 683, 685 (2011)). "Portions of the same statute dealing with the same subject matter are 'to be considered and interpreted as a whole, and in such case it is the accepted principle of statutory construction that every part of the law shall be given effect if this can be done by any fair and reasonable intendment . . . .' " *Huntington Props., LLC v. Currituck Cty.*, 153 N.C. App. 218, 224, 569 S.E.2d 695, 700 (2002) (quoting *In re Hickerson*, 235 N.C. 716, 721, 71 S.E.2d 129, 132 (1952)).

N.C.G.S. § 20-138.5 governs habitual impaired driving and states:

> (a) A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 10-4.01(24a) within 10 years of the date of this offense.

Id.

In *State v. Allen*, 164 N.C. App. 665, 596 S.E.2d 261 (2004), our Court addressed the consideration of prior convictions for habitual impaired driving. In *Allen*, defendant argued the habitual impaired driving statute must be applied similarly to habitual felon statutes. *Id.* at 672, 596 S.E.2d at 265. The Habitual Felon Act "prevents the use of multiple offenses consolidated for judgment as more than one predicate offense." *Id.* at 672, 596 S.E.2d at 265. Defendant alleged "it is reasonable to infer that the legislature intended similar structural limitations" in the habitual impaired driving statutes. *Id.* at 672, 596 S.E.2d at 265. We explicitly held "the determination of what qualifies as a predicate conviction is carried out differently under the Habitual Impaired Driving statute and the Habitual Felon Act." *Id.* at 672, 596 S.E.2d at 265.

While not binding precedent, we are persuaded by Judge, now Justice, Ervin's unpublished opinion in *State v. Stanley*, No. COA10-554, 2011 WL 705131 (unpublished) (N.C. Ct. App. Mar. 1, 2011), where this Court addressed this issue. In *Stanley*, defendant argued the indictment charging him with habitual impaired driving was fatally defective because two of the three prior convictions had been obtained during a single day of court. *Id.* at *1-*2. This Court first determined defendant had no right to appeal. *Id.* at *3. Then, the Court turned to whether defendant's petition for a writ of *certiorari* should be granted. *Id.* at *3. Relying on *Allen*, this Court dismissed defendant's petition for a writ of *certiorari*, concluding defendant's argument and appeal had no merit. *Id.* at *3.

N.C.G.S. § 20-138.5 contains no requirement regarding the timing of the three prior impaired driving convictions, except that they occurred within the ten years prior to the current driving while impaired charge. We decline "to insert words not used." *Watterson*, 198 N.C. App. at 505, 679 S.E.2d at 900 (citation omitted). While the *in pari materia* canon requires this Court to harmonize statutes dealing with the same subject, our Court has already ruled that "the determination of what qualifies as a predicate conviction is carried out differently under the Habitual Impaired Driving statute and the Habitual Felon Act." *Allen*, 164 N.C. App. at 672, 596 S.E.2d at 265. We hold Defendant has failed to show error in his habitual impaired driving indictment.

B. Probation Revocation

[2] Defendant next argues the trial court abused its discretion in revoking Defendant's probation. Defendant contends the trial court relied on an invalid conviction—the habitual impaired driving conviction—because the indictment for the charge is invalid. We disagree. As stated *supra*, the habitual impaired driving indictment is valid. Accordingly, the trial court did not abuse its discretion in revoking his probation in 15CRS837, and this argument is without merit. Accordingly, we hold the trial court did not err in revoking Defendant's probation.

IV. Conclusion

For the reasons stated above, we hold Defendant received a fair trial, free from error.

NO ERROR.

Judges BRYANT and ARROWOOD concur.

STATE v. McPHAUL

[256 N.C. App. 303 (2017)]

STATE OF NORTH CAROLINA
v.
JUAN FORONTE McPHAUL

No. COA16-924

Filed 7 November 2017

1. Search and Seizure—motion to suppress—probable cause—search warrant affidavit—confidential informant—independent corroboration—potential destruction of evidence

The trial court did not err in an assault and robbery of a pizza delivery guy case by denying defendant's motion to suppress evidence where a search warrant affidavit demonstrated probable cause establishing that the information provided by a confidential informant could be and was independently corroborated by the police. It further established the urgent need to obtain a search warrant before critical evidence might be destroyed.

2. Evidence—expert witness—latent fingerprints—failure to demonstrate application of principles and methods—not prejudicial error

Although the trial court abused its discretion in an assault and robbery of a pizza delivery guy case by allowing the State's expert witness to testify that latent fingerprints found on the victim's truck and on evidence seized during the search of a residence matched defendant's known fingerprint impressions where the expert failed to demonstrate that she applied the principles and methods reliably to the facts of the case as required by N.C.G.S. § 8C-1, Rule 702(a)(3), it was not prejudicial error in light of all the evidence pointing to defendant's guilt.

3. Assault—assault with a deadly weapon with intent to kill inflicting serious injury—assault inflicting serious bodily injury—same underlying conduct for both offenses

The trial court erred in an assault and robbery of a pizza delivery guy case by entering judgments and imposing sentences for assault with a deadly weapon with intent to kill inflicting serious injury and assault inflicting serious bodily injury where the same underlying conduct formed the basis for both offenses.

Appeal by defendant from judgments entered 2 October 2015 by Judge James M. Webb in Hoke County Superior Court. Heard in the Court of Appeals 22 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General William P. Hart, Jr., for the State.

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

CALABRIA, Judge.

Juan Foronte McPhaul ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of attempted first degree murder; assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"); robbery with a dangerous weapon; conspiracy to commit robbery with a dangerous weapon; and assault inflicting serious bodily injury. After careful review, we conclude that defendant received a fair trial, free from prejudicial error. However, because the trial court was not authorized to enter judgments and sentence defendant for two assaults based on the same underlying conduct, we vacate the trial court's assault inflicting serious bodily injury judgment in 13 CRS 954.

I. Background

Late in the evening on 3 August 2012, Domino's Pizza driver Tyler Lloyd ("Lloyd") delivered two pizzas and a box of chicken wings to a residence on O'Bannon Drive in Raeford, North Carolina. When Lloyd arrived, a man waiting on the porch of the residence told Lloyd that his cousin had placed the delivery order and would return momentarily to pay for the food. As Lloyd returned to his truck to wait, a second, larger man approached him from the yard. The men engaged in small talk beside Lloyd's truck while Lloyd waited for payment.

After five minutes passed, Lloyd said that he needed to return to Domino's. The larger man offered to pay for the pizzas. However, when Lloyd reached into his truck for the food, he was hit on the head from behind and fell to the ground. When Lloyd attempted to stand, the larger man hit him in the right shin with a metal baseball bat, and Lloyd fell back to the ground. As Lloyd extended his arm to protect himself from another blow, the bat connected with his hand and struck him hard in the face. Lloyd blacked out. When he regained consciousness, Lloyd discovered the men, the food, and his cell phone were gone. Since he could not call law enforcement, Lloyd attempted to drive back to Domino's. Shortly after he started driving, however, Lloyd began to feel as though he might lose consciousness again, and he pulled over.

When Lloyd failed to return to Domino's, at 12:34 a.m. on 4 August 2012, his manager called the Hoke County Sheriff's Department ("HCSD")

to report the missing driver. Lloyd's manager provided the O'Bannon Drive address as the destination for his last delivery, and HCSD deputies canvassed the area. Although they did not find Lloyd, on the pavement, they discovered a pile of loose change; a 2011 Hoke County High School class ring; a Domino's Pizza delivery sticker; and a large pool of reddish-brown liquid that appeared to be fresh blood. The deputies contacted Detective Sergeant Donald E. Schwab, Jr. ("Detective Schwab") to request assistance with the investigation.

At around 1:30 a.m. on 4 August 2012, HCSD deputies found Lloyd sitting in his truck, approximately one-quarter mile away from the O'Bannon Drive residence. Lloyd was very disoriented and was bleeding from severe lacerations to his head and right leg. When Detective Schwab arrived, Lloyd told him that two black males with dreadlocks, wearing black clothing, had stolen his cell phone and pizzas and beaten him with a metal baseball bat. Lloyd told Detective Schwab that one of the men was "larger framed" and the other man was "smaller framed [and] shorter." Emergency Medical Services subsequently arrived and transported Lloyd to the hospital, where he received emergency brain surgery for his injuries.

At 3:45 a.m. on 4 August 2012, HCSD Captain John Kivett ("Captain Kivett") interviewed the Domino's manager regarding the details of the O'Bannon Drive delivery order. Subsequently, the manager obtained a printout confirming that the order was placed online. Domino's captured and provided the IP address to investigators.

At approximately 4:00 a.m. on 4 August 2012, investigators conducted a canine track from the yard at the O'Bannon Drive residence. After tracking through a hole in the fence, the canine followed a dirt path into the adjacent neighborhood of Puppy Creek Mobile Home Park, where the canine lost the track at the nearby intersection of Springer Drive and Dalmatian Drive. That afternoon, investigators traced the IP address provided by Domino's to a residence on Springer Drive in the Puppy Creek Mobile Home Park.

At 8:15 p.m. on 4 August 2012, Captain Kivett met with a confidential source of information ("CSI"). The CSI told Captain Kivett that at approximately 11:30 p.m. on 3 August 2012, he observed two men, wearing black shirts and blue jeans, running from the intersection of Springer Drive and Dalmatian Drive, heading toward 217 Springer Drive. The CSI described one of the men he saw as "a tall large frame black male [with] long dreadlocks," and the other as "a short slim black male with dreadlocks." In addition, one man was holding a cell phone, and the other man was carrying what appeared to be a large duffle bag, similar

to the type used for pizza delivery. The larger man entered 217 Springer Drive through the front door, but the CSI lost sight of the smaller man when he disappeared behind another residence.

At approximately 9:00 p.m. on 4 August 2012, Captain Kivett investigated the Springer Drive residence associated with the IP address used for the Domino's order. None of the occupants matched Lloyd's description of his assailants. However, Captain Kivett determined that the home's wireless connection was unsecured and accessible to any wireless device within range.

With all of this information, Detective Schwab applied for a warrant for 217 Springer Drive, based upon probable cause that a search of the residence would yield evidence of Lloyd's assault. At 11:05 p.m. on 4 August 2012, HCSD obtained a search warrant for 217 Springer Drive. In executing the search warrant, HCSD seized two Domino's pizza boxes; a Domino's chicken wing box; printed Domino's delivery labels bearing the O'Bannon Drive address; a black OtterBox cell phone cover; a large black t-shirt; and various forms of identification establishing defendant as a resident of 217 Springer Drive. In addition, HCSD discovered an aluminum baseball bat underneath the residence next door.

On 7 August 2012, HCSD arrested defendant and charged him with attempted first degree murder, AWDWIKISI, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. On 2 December 2013, a Hoke County grand jury returned bills of indictment formally charging defendant with these offenses, as well as assault inflicting serious bodily injury. Prior to trial, defendant filed a motion to suppress all evidence obtained from the search of his residence, claiming that the warrant lacked probable cause. Following an evidentiary hearing, the trial court denied defendant's motion.

On 29 September 2015, a jury trial commenced in Hoke County Criminal Superior Court. Defendant moved to dismiss all charges at the close of the State's evidence and at the close of all of the evidence. The trial court denied both motions. On 2 October 2015, the jury returned verdicts finding defendant guilty of all charges. The trial court ordered defendant to serve the following consecutive sentences in the custody of the North Carolina Division of Adult Correction: 238-298 months for attempted first degree murder; 88-118 months for AWDWIKISI; and 97-129 months for robbery with a dangerous weapon. In addition, the trial court imposed concurrent sentences of 38-58 months for conspiracy to commit robbery with a dangerous weapon and 25-39 months for assault inflicting serious bodily injury. Defendant appeals.

II. Analysis

A. Denial of Defendant's Motion to Suppress

[1] Defendant first challenges the trial court's denial of his motion to suppress, contending that the search warrant affidavit failed to establish the existence of probable cause. We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). We review the trial court's conclusions of law *de novo*. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

The protection against unreasonable searches and seizures is ingrained within our federal and state constitutions. *See* U.S. Const. amend. IV (protecting "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and providing that "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"); N.C. Const. Art. I sec. 20 (prohibiting the issuance of "[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").

In light of these provisions, courts "have expressed a strong preference for searches conducted pursuant to a warrant." *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015) (citations and internal quotation marks omitted). Pursuant to N.C. Gen. Stat. § 15A-244 (2015), all search warrant applications must be made in writing upon oath or affirmation and must contain:

> (1) The name and title of the applicant; and
>
> (2) A statement that there is probable cause to believe that items subject to seizure under [N.C. Gen. Stat. §] 15A-242 may be found in or upon a designated or described place, vehicle, or person; and
>
> (3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits

> particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and
>
> (4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

The facts set forth in the affidavit "must be such that a reasonably discreet and prudent person would rely upon them before they will be held to provide probable cause justifying the issuance of a search warrant." *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984).

"The 'common-sense, practical question' of whether probable cause exists must be determined by applying a 'totality of the circumstances' test." *State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593, 597 (2014) (quoting *Illinois v. Gate*s, 462 U.S. 213, 230, 76 L. Ed. 2d 527, 543 (1983)). In making this determination,

> [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at 664, 766 S.E.2d at 598 (citation omitted). The "standard for determining probable cause is flexible, permitting the magistrate to draw reasonable inferences from the evidence in the affidavit supporting the application for the warrant . . . ." *McKinney*, 368 N.C. at 164, 775 S.E.2d at 824-25 (internal citations and quotation marks omitted). The "evidence is viewed from the perspective of a police officer with the affiant's training and experience, and the commonsense judgments reached by officers in light of that training and specialized experience[.]" *Id.* at 164-65, 775 S.E.2d at 825 (citations omitted).

A magistrate's probable cause determination is accorded great deference, and "after-the-fact scrutiny should not take the form of a *de novo* review." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258. "Instead, a reviewing court is responsible for ensuring that the issuing magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *McKinney*, 368 N.C. at 165, 775 S.E.2d at 825 (quoting *Gates*, 462 U.S. at 238-39, 76 L. Ed. 2d at 548 (alterations in original)). Nevertheless,

"[b]ecause its duty in ruling on a motion to suppress based upon an alleged lack of probable cause for a search warrant involves an evaluation of the judicial officer's decision to issue the warrant, the trial court should consider only the information before the issuing officer." *State v. Brown*, __ N.C. App. __, __, 787 S.E.2d 81, 85 (2016).

On appeal, defendant argues that the warrant lacked probable cause because the CSI's statement provided the only basis to believe that evidence might be found at 217 Springer Drive, and the supporting affidavit failed to establish the unnamed CSI's reliability. We disagree.

"When probable cause is based on an informant's tip a totality of the circumstances test is used to weigh the reliability or unreliability of the informant." *State v. Green*, 194 N.C. App. 623, 627, 670 S.E.2d 635, 638, *aff'd per curiam*, 363 N.C. 620, 683 S.E.2d 208 (2009). Courts consider several factors in assessing reliability, including: "(1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police." *Id.* (citation omitted).

In the instant case, Detective Schwab's affidavit included the following details concerning the CSI:

> On August 4, 2012 at approximately 8:15 PM Captain John Kivett met with a confidential source of information hereafter referred to as CSI. The CSI provided information indicating that on August 3, 2012 at approximately 11:30 PM he witnessed two black males, wearing black shirts, and blue jeans running from near the intersection of Springer Drive and Dalmatian Drive Raeford North Carolina heading toward 217 Springer Drive Raeford North Carolina. He described one of the black males as a tall large frame black male long dreadlocks and the other was a short slim black male with dreadlocks. One of the black males was carrying what appeared to him as a large duffel [sic] bag and the other black male was carrying what appeared to him as a cell phone in his hand. The smaller framed black male disappeared from his sight behind [another Springer Drive residence]. The CSI witnessed the larger framed black male walking inside the front door of 217 Springer Drive Raeford North Carolina.

At the suppression hearing, the trial court considered additional evidence concerning the CSI's identity, address, and source of information. Captain Kivett testified that he interviewed the CSI after the individual

heard about Lloyd's assault and volunteered information to HCSD. Detective Schwab testified that he did not include the CSI's identity in the affidavit because the individual feared retaliation and requested anonymity.

In the suppression order, the trial court found that Detective Schwab identified the informant as a CSI in the affidavit "to protect the security and welfare" of the individual. However, this information was not before the magistrate, and "it is error for a reviewing court to 'rely[ ] upon facts elicited at the [suppression] hearing that [go] beyond the four corners of the warrant.' " *Brown*, __ N.C. App. at __, 787 S.E.2d at 85 (alterations in original) (quoting *Benters*, 367 N.C. at 673, 766 S.E.2d at 603); *see also id.* at __, 787 S.E.2d at 87 (holding that the trial court erred in considering the detective's suppression "hearing testimony about what he intended the affidavit to mean—evidence outside the four corners of the affidavit and not recorded contemporaneously with the magistrate's consideration of the application—in determining whether a substantial basis existed for the magistrate's finding of probable cause"). Nevertheless, we conclude that defendant was not prejudiced by the trial court's error, because the affidavit contained sufficient information from which the magistrate could reasonably infer that the CSI was reliable. *McKinney*, 368 N.C. at 165, 775 S.E.2d at 824-25.

"[A]n officer may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." *Id.* (citation and quotation marks omitted). Here, the affidavit indicates that the CSI's statement corroborated significant matters previously known to HCSD, including the general time and location of the offenses; Lloyd's physical description of his assailants; and the suspects' possession of items similar in appearance to those stolen from Lloyd. The affidavit, therefore, demonstrated the CSI's reliability because it established that "information provided by the informant *could be and was independently corroborated by the police*." *Green*, 194 N.C. App. at 627, 670 S.E.2d at 638 (emphasis added). Although defendant complains that the trial court did not specifically find that the CSI was reliable, he concedes that the court found that the CSI's information was

> independently corroborated by the statement of the victim[,] by the results of the dog track[,] and by the results of the investigation of the internet IP address used to place an order with Domino's Pizza, as well as the close proximity of [the Springer Drive residence associated with the IP address provided by Domino's] to 217 Springer Drive, the place which is the subject of the application for the issuance of a search warrant.

This finding is supported by competent evidence, and therefore, is conclusively binding on appeal. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

Defendant asserts that the instant case is analogous to *State v. Benters*, 367 N.C. 660, 766 S.E.2d 593 (2014). In *Benters*, a detective met with a "confidential and reliable source" who informed him about the existence, location, and owner of an alleged indoor marijuana growing operation. *Id.* at 662, 766 S.E.2d at 596. Following an investigation, officers obtained and executed a search warrant for the property, where they seized 55 marijuana plants, various growing supplies, multiple firearms, and $1,540 in cash. *Id.* at 663, 766 S.E.2d at 597. After the defendant successfully moved to suppress the evidence, the State appealed, and a divided panel of this Court affirmed. *See generally State v. Benters*, 231 N.C. App. 295, 750 S.E.2d 584 (2013).

Our Supreme Court affirmed the State's appeal. In assessing the sufficiency of the affidavit, the Court held that the detective's source was an anonymous informant, notwithstanding the affiant's description of the individual as a "confidential and reliable source of information." *Benters*, 367 N.C. at 669, 766 S.E.2d at 600. The Court explained that because the informant's "tip, as averred, amount[ed] to little more than a conclusory rumor," the State was "not entitled to any great reliance on it[, and] the officers' corroborative investigation" was required to "carry more of the State's burden to demonstrate probable cause." *Id.* The Court ultimately concluded that under the totality of the circumstances,

> the officers' verification of mundane information, Detective Hastings's statements regarding defendant's utility records, and the officers' observations of defendant's gardening supplies are not sufficiently corroborative of the anonymous tip or otherwise sufficient to establish probable cause, notwithstanding the officers' professional training and experience. Furthermore, the material allegations set forth in the affidavit are uniformly conclusory and fail to provide a substantial basis from which the magistrate could determine that probable cause existed.

Id. at 673, 766 S.E.2d at 603.

The instant case is distinguishable. Unlike *Benters*, where an informant's conclusory and uncorroborated tip *initiated* the criminal investigation, *see id.* at 669, 766 S.E.2d at 600, here, HCSD's independent investigation was already well underway when Captain Kivett met with the CSI. More importantly, the information corroborated by HCSD was neither "mundane," *id.* at 673, 766 S.E.2d at 603, nor "qualitatively

and quantitatively deficient," *id.* at 661, 766 S.E.2d at 595. Rather, the CSI's statement was independently corroborated by essential portions of HCSD's existing investigation, including the results of the dog track; Lloyd's description of the suspects and the stolen items; and the proximity of 217 Springer Drive to the residence associated with the IP address provided by Domino's.

Moreover, although the CSI provided the only evidence pointing law enforcement to 217 Springer Drive, "such a citizen complaint is not necessarily reviewed in isolation." *McKinney*, 368 N.C. at 165, 775 S.E.2d at 825 (upholding a search warrant where the supporting affidavit demonstrated that "[t]he officer's direct observations were . . . consistent with the citizen's information"). Here, the affidavit indicates that after speaking with the CSI, Captain Kivett investigated the Springer Drive residence associated with the IP address provided by Domino's. Although none of the residents matched Lloyd's description of his attackers, Captain Kivett discovered that the wireless routing system was unsecured, and therefore, "anybody in the immediate area would be able to use the internet service."

In addition, the affidavit alleges that "[t]here is more than a fair probability the pizza boxes will still be inside or on the curtilage of 217 Springer Drive . . . [because t]rash services have not collected trash from this residence since the offense occurred." This statement demonstrates the officers' urgent need to obtain a search warrant before crucial evidence might be lost, particularly given that the offenses, investigation, and warrant application all occurred within 24 hours. *See id.* at 164, 775 S.E.2d at 824 ("Recognizing that affidavits attached to search warrants are normally drafted by nonlawyers in the haste of a criminal investigation, courts are reluctant to scrutinize them in a hypertechnical, rather than a commonsense, manner[.]" (citations and internal quotation marks and ellipsis omitted)).

We hold that based on the totality of the circumstances, the affidavit provided a substantial basis for the reviewing magistrate to conclude that probable cause existed to justify issuing a search warrant for 217 Springer Drive. The affidavit contained sufficient facts demonstrating the reliability of the CSI's information, most of which was previously and independently corroborated by HCSD's own thorough investigation. Furthermore, the affidavit provided a detailed, chronological summary of HCSD's rapidly unfolding investigation and established the urgent need to obtain a search warrant before critical evidence might be destroyed.

The trial court's findings of fact are supported by competent evidence and, in turn, support the court's conclusion that Detective Schwab's

affidavit provided a substantial basis for the magistrate to determine that probable cause existed. Therefore, we conclude that the trial court did not err by denying defendant's motion to suppress.

B. Latent Fingerprint Testimony

[2] Defendant next argues that the trial court erred by allowing the State's expert witness to testify that latent fingerprints found on Lloyd's truck and on evidence seized during the search of 217 Springer Drive matched defendant's known fingerprint impressions. We agree.

We review a trial court's ruling on the admissibility of expert testimony for abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). "[A] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* (citation omitted).

In 2011, the General Assembly amended N.C.R. Evid. 702 to adopt "the federal standard for the admission of expert witness testimony articulated in the *Daubert* line of cases." *Id.* at 884, 787 S.E.2d at 5. Pursuant to amended N.C. Gen. Stat. § 8C-1, Rule 702(a),

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

Subsections (1)-(3) compose the three-pronged reliability test which is new to the amended rule. *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9. "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test." *Id.* The primary focus should be "the reliability of the witness's principles and methodology, not . . . the conclusions that they generate[.]" *Id.* (citations and quotation marks omitted). "However, conclusions and methodology are not entirely distinct from

one another[.]" *Id.* Accordingly, "when a trial court concludes that there is simply too great an analytical gap between the data and the opinion proffered, the court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Id.*

In the instant case, Trudy Wood ("Wood"), the State's witness, testified that she has worked as a latent fingerprint examiner for the Fayetteville Police Department since December 2007. According to Wood, each unique fingerprint contains distinguishing characteristics called "minutia," or "Galton points." Wood testified that it is possible to identify the source of a latent print by comparing the latent print with an individual's "known impressions" and evaluating similarities between the prints' minutia points.

Defendant did not object to the State's tender of Wood as an expert in fingerprint identification. However, defendant repeatedly objected to the foundation for Wood's opinion testimony and its admission pursuant to Rule 702(a). Defendant renews those challenges on appeal.

Wood explained the examination procedure that she uses in determining whether a latent fingerprint matches a particular individual's known impressions. First, Wood identifies the latent print's pattern type and determines whether the print was formed by a finger or a palm. If the print contains sufficient identifiable minutia points, Wood compares the print against the individual's known impressions. She performs the examination under an optic camera, which allows her to enlarge the minutia points and view the prints side by side. Wood explained how she uses this procedure to ultimately conclude whether the prints were formed by the same individual:

> [THE STATE:] But when you have a print, you cannot tell right off the bat which of the four fingers it would be or maybe the thumb as well. How do you reach a conclusion as to a finger? How do you arrive at that finger for comparison?
>
> [WOOD:] Again, it depends on the pattern type. If the latent print is a swirl, then on the known print of the individual, I'm only looking at the swirls, if he has arches and swirls, but my latent is a swirl. I'm not going to look at the arches of his fingers. I'm going to look at the swirls because I'm comparing the swirl pattern to another swirl pattern.
>
> . . .

> [THE STATE:] At what point are you able to – when you're looking at two prints side by side, are you able to make an identification that they match?
>
> [WOOD:] When I believe there's enough sufficient characteristics and sequence of the similarities.
>
> Q. Can there be an identification if any portion of a fingerprint does not match the latent?
>
> A. If the similarity can be explained, a lot of times when a latent print is lifted, you have distortion which basically can be as simply as someone's hand moving when they're touching an item. If that can be explained, then an identification can still be rendered.
>
> Q. As you prepare and conduct a side-by-side comparison, are you likewise able to exclude certain fingerprints, known impressions as a contributor to the latent print?
>
> A. Yes, we can. We have identification, we have exclusion and we have inconclusive, are the three terms that we use.

Wood testified that she uses the same examination technique as is commonly used in the field of latent print identification, and she employed this procedure while conducting her examination in this case. However, when Wood testified to her ultimate conclusions, she was unable to establish that she reliably applied the procedure to the facts of this case:

> [THE STATE:] As to State's 35-A in Item 113, can you again demonstrate to the Jury the comparison between 35-A and 113?
>
> [WOOD:] State's Exhibit 35-A is a latent print from the driver's door and it contains the left index finger of a fingerprint card bearing the name of [defendant].
>
> Q. And upon what is that conclusion based?
>
> A. My training and experience.
>
> Q. In looking at the individual minutia with those two fingerprints; is that correct?
>
> A. That's correct, the process I explained earlier.
>
> . . .

> [THE STATE:] Item 109-A and 113, can you again demonstrate to the Jury what comparison those impressions are based on your examination?
>
> [WOOD:] State's Exhibit 109-A from the Domino's chicken wing box, letter A, is identified as the right middle finger compared to the fingerprint card bearing the name of [defendant].
>
> Q. Is your conclusion, again, based upon the same procedure you described to the Jury?
>
> A. That's correct.
>
> Q. Looking for the striated minutia in that fingerprint and that latent print?
>
> A. That's correct.

Pursuant to Rule 702(a)(3), this testimony is insufficient. To satisfy Rule 702's three-pronged reliability test, an expert witness must be able to explain not only the abstract methodology underlying the witness's opinion, but also that the witness reliably applied that methodology to the facts of the case. Wood previously testified that during an examination, she compares the pattern type and minutia points of the latent print and known impressions until she is satisfied that there are "sufficient characteristics and sequence of the similarities" to conclude that the prints match. However, Wood provided no such detail in testifying how she arrived at her actual conclusions *in this case*. Without further explanation for her conclusions, Wood implicitly asked the jury to accept her expert opinion that the prints matched. Since Wood failed to demonstrate that she "applied the principles and methods reliably to the facts of the case," as required by Rule 702(a)(3), we hold that the trial court abused its discretion by admitting this testimony.

Nevertheless, "[a]n error is not prejudicial unless there is a reasonable probability that, had the error in question not been committed, a different result would have been reached at trial." *State v. Babich*, __ N.C. App. __, __, 797 S.E.2d 359, 364 (2017). Defendant contends that absent Wood's testimony, there was a reasonable probability that the jury would have found him not guilty, because Lloyd could not identify defendant as his attacker, and the fingerprint testimony was the only evidence that tied defendant to the actual crime scene. We disagree.

The State presented abundant additional evidence to assist the jury, including: HCSD's seizure, during the lawful search of defendant's home,

of items matching the description of Lloyd's stolen property; the aluminum bat discovered underneath an immediately adjacent residence; the close proximity between defendant's residence and the unsecured wireless network used to place the Domino's order; and the similarity between the descriptions of the suspects that Lloyd and the CSI independently provided to HCSD. Although Lloyd was unable to positively identify defendant as one of his attackers, defendant's booking photograph was admitted into evidence, and Detective Schwab testified that it was "a fair and accurate depiction" of defendant's appearance on the date of his arrest. In light of all of the evidence pointing to defendant's guilt, we conclude that he was not prejudiced by the erroneous admission of Wood's expert testimony. *See id.* at __, 797 S.E.2d at 365 (holding that the defendant was not prejudiced by the trial court's erroneous admission of testimony from the State's expert in retrograde extrapolation, because "even without the challenged expert testimony, there [wa]s no reasonable possibility that the jury would have reached a different result").

C. Assault Convictions

[3] Defendant's final argument is that the trial court erred by entering judgments and imposing sentences for AWDWIKISI and assault inflicting serious bodily injury, because the same underlying conduct formed the basis for both offenses. We agree.

"[W]hen a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Jamison*, 234 N.C. App. 231, 237, 758 S.E.2d 666, 671 (2014) (citation omitted). We review issues of statutory construction *de novo*. *Id.* at 238, 758 S.E.2d at 671.

In North Carolina, assault inflicting serious bodily injury and AWDWIKISI are statutory crimes. "Unless the conduct is covered under some other provision of law providing greater punishment," a person who commits assault inflicting serious bodily injury is guilty of a Class F felony. N.C. Gen. Stat. § 14-32.4(a). We have held that the inclusion of this prefatory clause indicates "that the legislature intended that § 14-32.4 apply only in the absence of other applicable provisions." *State v. Ezell*, 159 N.C. App. 103, 109, 582 S.E.2d 679, 684 (2003). Pursuant to N.C. Gen. Stat. § 14-32(a), "[a]ny person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury" is guilty of a Class C felony.

Furthermore, "[i]n order for a defendant to be charged with multiple counts of assault, there must be multiple assaults." *State v. McCoy*, 174

N.C. App. 105, 115, 620 S.E.2d 863, 871 (2005). "This requires evidence of a distinct interruption in the original assault followed by a second assault." *Id.* (citation and quotation marks omitted).

In the instant case, defendant's convictions for AWDWIKISI and assault inflicting serious bodily injury are based on the same underlying conduct, to wit: the 3 August 2012 assault of Tyler Lloyd. There is no evidence of a "distinct interruption" in the assault. *Id.*

According to the plain language in N.C. Gen. Stat. § 14-32.4(a), the trial court was not authorized to enter judgment and sentence defendant for assault inflicting serious bodily injury, because AWDWIKISI imposes greater punishment for the same conduct. *See State v. Davis*, 364 N.C. 297, 306, 698 S.E.2d 65, 70 (2010) (vacating the trial court's judgments for felony death by vehicle and felony serious injury by vehicle, because the court was not authorized to impose sentences for those offenses when the defendant's convictions for second degree murder and assault with a deadly weapon inflicting serious injury "impose greater punishment for the same conduct"). Therefore, we vacate the trial court's judgment in 13 CRS 954 entered upon the jury's verdict finding defendant guilty of assault inflicting serious bodily injury.

III. Conclusion

Based on the totality of the circumstances, Detective Schwab's warrant application and supporting affidavit provided a substantial basis for the magistrate to conclude that probable cause existed to justify issuing a warrant authorizing a search of 217 Springer Drive. Although the trial court erred by admitting testimony from the State's expert in fingerprint identification, defendant was not prejudiced by the error. Because defendant's conduct was "covered under some other provision of law providing greater punishment," the trial court was not authorized to impose punishment for assault inflicting serious bodily injury, and therefore, we vacate the trial court's judgment in 13 CRS 954.

NO PREJUDICIAL ERROR IN PART; VACATED IN PART.

Judges STROUD and TYSON concur.

STATE v. PARKER

[256 N.C. App. 319 (2017)]

STATE OF NORTH CAROLINA
v.
BYRON JEROME PARKER

No. COA17-108

Filed 7 November 2017

Search and Seizure—motion to suppress—cocaine—unreasonable detention—voluntariness

The trial court erred in a possession of cocaine case by denying defendant's motion to suppress the contraband found on his person where the trial court's findings of fact did not support the conclusion that defendant's consent to search his person, given during a period of unreasonable detention, was voluntary. Retaining defendant's driver's license beyond the point of satisfying the initial purpose of the detention of de-escalating a conflict between defendant and his neighbor, checking defendant's identification, and verifying he had no outstanding warrants, was unreasonable.

Appeal by defendant from order entered 18 July 2016 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 22 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

BRYANT, Judge.

Where the trial court's findings of fact do not support its conclusion that defendant was legally seized at the time he consented to a search of his person, we reverse the trial court order denying defendant's motion to suppress the contraband found on his person and remand so that the judgment against him can be vacated.

On 21 April 2014, defendant Byron Jerome Parker was indicted for possession of cocaine. On 29 June 2016, defendant moved to suppress any evidence obtained as a result of an unlawful search and seizure. The matter came on for a hearing on 7 July 2016 in Guilford County Superior Court, the Honorable Susan Bray, Judge presiding.

The evidence admitted during the hearing tended to show that on 29 January 2014, Greensboro Police Department Officers Matthew Sletten and Travis Cole were conducting surveillance "on a known drug house" located at 7 Pipers Glen Court in Greensboro based on complaints of drug activity, drug use, and prostitution. In the previous month, heroin had been found at the house and four individuals were arrested. At approximately 4:25 p.m., the officers noted a man, defendant, leave the residence in a blue truck and then return twenty minutes later. Defendant parked his truck in the driveway of 7 Pipers Glen Court, exited his vehicle, and walked toward a woman salting the driveway of a nearby residence. Officer Sletten observed defendant and the woman yelling at each other, with defendant asking, "Why are you taking pictures of me?" Believing that the confrontation was going to escalate into a physical altercation, the officers exited their surveillance vehicle and separated defendant and the woman. Officer Sletten spoke with defendant, asked for his identification, and checked his record, verifying that defendant had no pending warrants. Officer Sletten then asked defendant if he had any narcotics on him. Defendant responded that he did not. At Officer Sletten's request, defendant consented to a search of his person and his vehicle. Pursuant to the search, Officer Sletten discovered "small off-white rocks" in defendant's pants pocket. He arrested defendant for possession of cocaine.

At the hearing on the motion to suppress, Officer Sletten testified that after defendant provided his driver's license and it was determined he had no outstanding warrants, Officer Sletten continued to talk with defendant but did not immediately return his driver's license. Prior to the discovery of the off-white rocks, defendant was not under arrest. A video of the incident taken from the vantage of Officer Cole's body camera was also admitted into evidence. Officer Sletten testified that from the moment he exited his vehicle and searched defendant, ten minutes transpired. At the close of the evidence, defendant again moved to suppress evidence obtained as a result of the search. Defendant argued that he was seized and unlawfully detained when Officer Sletten requested defendant's identification and did not return it, but instead asked for consent to search. After hearing the evidence and the arguments of counsel, the trial court orally denied defendant's motion to suppress and on 18 July entered a written order to that effect.

Preserving his right to appeal the order denying his motion to suppress, defendant entered a guilty plea to the charge of felony possession of cocaine. Defendant was sentenced to an active term of 8 to 19 months. The sentence was suspended, and defendant was placed on supervised

probation for a term of 18 months. Defendant appeals the order denying his motion to suppress.

On appeal, defendant argues that the trial court erred by denying his motion to suppress. Defendant contends that his stop was unconstitutional and that in its order denying his motion to suppress, the trial court committed reversible error by making unsupported findings of fact and conclusions of law. We agree.

> In reviewing the denial of a motion to suppress our Court
>
> > is strictly limited to a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law. If so, the trial court's conclusions of law are binding on appeal. If there is a conflict between the State's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal.
>
> *State v. Veazey*, 201 N.C. App. 398, 400, 689 S.E.2d 530, 532 (2009), *disc. review denied*, 363 N.C. 811, 692 S.E.2d 876 (2010). The trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found. We review the trial court's conclusions of law *de novo*.

State v. Brown, 217 N.C. App. 566, 571, 720 S.E.2d 446, 450 (2011) (citations omitted).

In its order denying defendant's motion to suppress, the trial court made the following findings of fact and conclusion of law:

1. On January 29, 2104 [sic], Greensboro Police Officers ML Sletten and Travis Cole were conducting surveillance of a known drug house at 7 Pipers Glen Court.
2. There had been numerous complaints from a neighbor about drug use, drug activity and prostitution at 7 Pipers Glen. The GPD had previously conducted a search of the property with consent of the owner and located heroin and [drug] paraphernalia. That search,

about a month prior to the date in this case, resulted in 4 arrests.

3. The neighbor who initiated the complaints had documented activity at 7 Pipers Glen by taking photographs of people coming and going from the residence, recording license tags, vehicle descriptions and the like.
4. This neighbor had contacted Officer Sletten after the first search and let him know problems were ongoing, so Officers Sletten and [Cole] set up the surveillance in an undercover vehicle with tinted windows.
5. Officers Sletten and [Cole] began surveillance around noon, parking at the bottom of the cul de sac. Around 4:25pm, Officer [Cole] observed Defendant Byron Jerome Parker leave the residence of 7 Pipers Glen in a blue pickup truck. He returned twenty minutes later at 4:45pm.
6. When Defendant Parker returned to the residence, he backed his truck into the driveway. He got out and approached the complaining neighbor, who was salting the driveway at her own house.
7. Officers Sletten and Cole saw [defendant] Parker throw his arms up and yell at the neighbor.
8. Officer Sletten rolled the window down in his car and heard Defendant Parker ask neighbor why she was taking pictures of him. . . .
9. As Officer Sletten observed Defendant Parker and the neighbor continue to approach each other, he and Officer Cole decided to break their surveillance and deescalate the situation before it turned physical. Sletten was concerned the verbal altercation would turn into a physical fight. [Defendant] Parker and the neighbor were within 6–8 feet of each other.
10. Officers Sletten and Cole exited their unmarked vehicle. Both officers were in uniform. It was daylight outside. They approached [defendant] Parker and the neighbor, [sic] separated them. Officer Cole spoke with the neighbor, and Officer Sletten talked with Defendant Parker.
11. Officer Sletten told [defendant] Parker that they had received drug complaints (verified in the past) and

located narcotics at the 7 Pipers Glen address. Officer Sletten asked [defendant] Parker for his ID, ran it and checked for warrants.

12. There were no outstanding warrants for Defendant Parker.
13. Officer Sletten asked [defendant] Parker if he had any narcotics on him or in his vehicle and asked for consent to search both. [Defendant] Parker gave consent.
14. Officer Sletten located small off-white rocks of what appeared to be cocaine in Parker's pants pocket and arrested him for possession of cocaine.
15. Officer Sletten kept [defendant] Parker's ID from [the] time he asked for it until he arrested him for possession of cocaine.

Officers Sletten and Cole were in the course of investigating and deescalating a potential altercation between Defendant Parker and the Pipers Glen neighbor. In viewing the totality of the circumstances, it was entirely appropriate for Officers Sletten and Cole to separate the two, check [defendant] Parker's ID and ask for consent to search. . . .

The Court concludes, then, as a matter of law, that there was no illegal seizure, no fruits of a poisonous tree, and that the Motion to Suppress should be denied.

On appeal, defendant specifically challenges finding of fact 10 and the trial court's conclusory statement that "Officers Sletten and Cole were in the course of investigating and de-escalating a potential altercation between Defendant Parker and the Pipers Glen neighbor." Defendant contends that according to the video of the incident, Officer Cole exited his police vehicle and spoke with the homeowner of 7 Pipers Glen Court—the residence under surveillance—and then assisted Officer Sletten in searching defendant. Defendant further contends that the circumstance which gave rise to the officers' intervention—the altercation—quickly evaporated when the officers intervened: defendant stopped arguing and became "very compliant." Therefore, it was only after the de-escalation of the conflict between defendant and the neighbor that Officer Sletten obtained defendant's identification, determined that defendant had no outstanding warrants, and asked defendant for consent to search. Defendant argues that "[Officer] Sletten did not have reasonable suspicion to detain [defendant] at any point, but certainly

not beyond the point where concern regarding a potential altercation had evaporated[.] [Defendant]'s consent to search was obtained during an unlawful seizure."

We note that Officer Sletten testified during the suppression hearing that "[w]e intervened to prevent a fight. We approached the two, separated them. My partner talked to the main complainant while I talked to [defendant]." Therefore, there is evidence to support the trial court's finding of fact number 10. *See Brown*, 217 N.C. App. at 571, 720 S.E.2d at 450. Furthermore, even presuming defendant's assertion is true—that Officer Cole spoke to the homeowner of 7 Pipers Glen Court, the residence under surveillance, rather than the neighbor who was arguing with defendant—the conflict is immaterial, as there is no dispute that Officer Sletten separated defendant from the neighbor in order to de-escalate the argument. And whether Officer Cole held a conversation with the neighbor is irrelevant to the determination of whether defendant was seized illegally.

Defendant's main argument appears to be that when Officer Sletten failed to return defendant's identification after finding no outstanding warrants and after the initial reason for the detention was satisfied, he instead requested defendant's consent to search, the seizure was unlawful, and defendant's consent was not voluntarily given. We agree.

"[A] municipal law enforcement officer acting within his territorial jurisdiction is considered a peace officer who possesses 'all of the powers invested in law enforcement officers by statute or common law.' " *State v. Gaines*, 332 N.C. 461, 472, 421 S.E.2d 569, 574 (1992) (quoting N.C. Gen. Stat. § 160A–285 (1987)).

> Our United States Supreme Court has held that law enforcement officers do not violate the Fourth Amendment's prohibition against unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. Even when police officers have no reason to suspect that a person is engaged in criminal behavior, they may "pose questions, ask for identification, and request consent to search . . . provided they do not induce cooperation by coercive means."

State v. Isenhour, 194 N.C. App. 539, 542, 670 S.E.2d 264, 267 (2008) (alteration in original) (citations omitted) (quoting *United States v. Drayton*, 536 U.S. 194, 201, 153 L.Ed.2d 242, 251 (2002)). "Once the original purpose of the stop has been addressed, there must be grounds

which provide a reasonable and articulable suspicion in order to justify further delay." *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998) (citing *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889 (1968)). "In determining whether the further detention was reasonable, the court must consider the totality of the circumstances." *State v. Hernandez*, 170 N.C. App. 299, 308, 612 S.E.2d 420, 426 (2005) (citation omitted).

In *State v. Myles*, a divided panel of this Court held that the defendant's consent to search his vehicle was given involuntarily where it was obtained during an "improper" detention. 188 N.C. App. 42, 51, 654 S.E.2d 752, 758, *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008). As a result, the trial court's order denying the defendant's motion to suppress contraband discovered during the search was reversed, and the defendant's conviction vacated. *Id.* at 51–52, 654 S.E.2d at 758. The matter evolved during a traffic stop by a law enforcement officer who observed a vehicle weaving within its lane. *Id.* at 43, 654 S.E.2d at 753. At the beginning of the stop, the law enforcement officer identified himself to the driver and passenger (the defendant), identified the reason for the stop, asked for the driver's identification and vehicle registration, and learned that the vehicle was a rental. *Id*. The officer issued a warning but then asked the driver to step out of the vehicle and accompany the law enforcement officer to his patrol vehicle, where the officer would write a warning ticket. *Id.* Before they reached the officer's patrol vehicle, the officer frisked the driver but did not find any weapons or contraband. *Id.* The officer also did not detect the odor of alcohol. *Id.* However, the driver's heartbeat was unusually fast and he began "sweating profusely," despite the cool temperature. *Id.* at 43–44, 654 S.E.2d at 753–54. Once in the patrol vehicle, the officer asked the driver about his travel plans. The officer then exited the vehicle in order to speak with the driver's passenger—the defendant—who was still seated in the rental car. *Id.* at 43, 654 S.E.2d at 754. After listening to the defendant answer similar questions about travel plans, the officer stated that he was suspicious of their stories and called a K-9 unit for assistance. *Id.* at 44, 654 S.E.2d at 754. The defendant, who had rented the vehicle, gave the K-9 officers permission to search the vehicle; marijuana was discovered in the trunk. *Id.* at 44, 654 S.E.2d at 754. The defendant was charged with trafficking in marijuana. *Id.*

In a pretrial motion, the defendant moved to suppress the evidence, but his motion was denied. He then entered a guilty plea, preserving his right to appeal the suppression order. On appeal, this Court noted that during the suppression hearing the law enforcement officer testified that after issuing the warning ticket, he "considered the traffic stop

'completed' because he had 'completed all [of his] enforcement action of the traffic stop.' " *Id.* at 45, 654 S.E.2d at 755. However, the driver "was not free to leave because [the officer] felt 'there was more to the traffic stop than just failure to maintain a lane.' " *Id.* at 46, 654 S.E.2d at 755. This Court reasoned that "in order to justify [the law enforcement officer]'s further detention of [the] defendant, [the officer] must have had [the] defendant's consent or 'grounds which provide a reasonable and articulable suspicion in order to justify further delay' *before* he questioned [the] defendant." *Id.* at 45, 654 S.E.2d at 755 (citing *Falana*, 129 N.C. App. at 816, 501 S.E.2d at 360). Upon review, a majority of this Court held that the record provided insufficient evidence to support a reasonable suspicion warranting the defendant's continued detention after the warning ticket was issued.

> In order for [the law enforcement officer] to lawfully detain [the] defendant, [the officer]'s suspicion must be based solely on information obtained during the lawful detention of [the driver] up to the point that the purpose of the stop has been fulfilled. . . . Since [the officer]'s continued detention of [the] defendant was unconstitutional, [the] defendant's consent to the search of his car was involuntary.

Id. at 51, 654 S.E.2d at 758 (citing *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 134 (1999); *State v. Kincaid*, 147 N.C. App. 94, 94, 555 S.E.2d 294, 294 (2001)); *see also State v. Pearson*, 348 N.C. 272, 498 S.E.2d 599 (1998) (holding the defendant's nervousness along with inconsistent statements made by the defendant and the vehicle passenger did not give rise to a reasonable suspicion of criminal activity). This Court reversed the trial court order denying the defendant's motion to suppress contraband discovered during the search of his vehicle and vacated his conviction. *Id.* at 51–52, 654 S.E.2d at 758.

Although the instant case does not involve a traffic stop, the reasoning in *Myles* and cases discussed herein are applicable where, as here, the initial reason for the stop or detention has been satisfied but law enforcement prolongs the detention. In *Kincaid*, this Court quoted *United States v. Elliott*, 107 F.3d 810 (10th Cir. 1997), for the proposition "that . . . federal courts 'have consistently concluded that an officer must return a driver's documentation before a detention can end.' " *Kincaid*, 147 N.C. App. at 99, 555 S.E.2d at 298 (quoting *Elliott*, 107 F.3d at 814); *see also State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009) ("Generally, an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's

license and registration."). The *Kincaid* Court also found guidance in *State v. Morocco*, 99 N.C. App. 421, 393 S.E.2d 545 (1990), in which the encounter under review was deemed consensual where the law enforcement officer completed the citation and relinquished the defendant's license before requesting permission to search. *Kincaid*, 147 N.C. App. at 99–100, 555 S.E.2d at 299 (discussing *Morocco*, 99 N.C. App. 421, 393 S.E.2d 545).

Here, the trial court found that Officers Sletten and Cole exited their police vehicle when they observed an escalating altercation between defendant and a neighbor of the residence under surveillance. The officers separated the two. Officer Sletten asked defendant for his identification, "ran it[,] and checked for warrants." After de-escalating the potential altercation and finding no outstanding warrants, Officer Sletten failed to return defendant's identification before pursuing an inquiry into defendant's possession of narcotics. In its order, the trial court noted that, based on the totality of the circumstances, it was "entirely appropriate for [the] officers [] to separate the two, check [defendant's] . . . ID and ask for consent to search," and concluded defendant's seizure was thus not illegal.

Interestingly, the trial court's findings of fact make clear the officers were in the vicinity due to complaints about a "drug house," but the encounter between defendant and law enforcement began distinctly as a result of a potential altercation between defendant and a neighbor. The trial court's order fails to provide findings of fact which would give rise to a reasonable, articulable suspicion that defendant was otherwise subject to detention. Absent a reasonable and articulable suspicion to justify further delay,[1] retaining defendant's driver's license beyond the point of satisfying the purpose of the initial detention—de-escalating the conflict, checking defendant's identification, and verifying he had no outstanding warrants—was unreasonable. *See Falana*, 129 N.C. App. at 816, 501 S.E.2d at 360 ("Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further [detention]."). Thus, defendant's consent to search his person, given during the period of unreasonable detention, was not voluntary. *See Myles*, 188 N.C. App. at 51, 654 S.E.2d at 758. Therefore, defendant's search was conducted

1. The trial court noted in finding of fact 15 that Officer Sletten kept defendant's identification until after defendant was arrested. However, neither the officers nor the trial court indicated that defendant's mere presence—including his leaving and returning to the drug house—gave rise to a reasonable and articulable suspicion to detain him further.

in violation of his rights under the Fourth Amendment to the United States Constitution. Accordingly, we reverse the trial court's order denying defendant's motion to suppress and remand this matter so that the judgment against him may be vacated.

REVERSED AND REMANDED.

Judges DAVIS and INMAN concur.

STATE OF NORTH CAROLINA
v.
ISRAEL JOHN ROGERS

No. COA17-271

Filed 7 November 2017

1. Appeal and Error—appealability—guilty plea—writ of certiorari—appellate rules—Rule of Appellate Procedure 21—Rule 2

Where no procedural mechanism existed under Rule of Appellate Procedure 21 to issue a discretionary writ of certiorari to review a trial court's judgment entered upon defendant's guilty plea in a breaking or entering a motor vehicle, resisting a public officer, and habitual felon case, the Court of Appeals exercised its discretion to invoke Rule of Appellate Procedure 2 to address the merits of defendant's appeal.

2. Appeal and Error—appealability—denial of pro se motion to dismiss—no prejudicial error

Assuming arguendo that the trial court erred in a breaking or entering a motor vehicle, resisting a public officer, and habitual felon case by advising defendant that he had the right to appeal a court's denial of his pro se motion to dismiss for lack of jurisdiction after entering an *Alford* plea, defendant failed to show prejudicial error where the trial court also advised him that pleading guilty would place limitations on his right to appeal. Further, defendant presented no argument to negate the authority of the trial court to exercise personal and subject matter jurisdiction over him.

Appeal by defendant from judgments entered 22 September 2016 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 5 September 2017.

Attorney General Joshua H. Stein, Assistant Attorney General Joseph L. Hyde, for the State.

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

BRYANT, Judge.

Where no procedural mechanism exists under Rule 21 to issue the discretionary writ of certiorari to review the trial court's judgment entered upon defendant's guilty plea, we exercise our discretion to invoke Rule 2 to suspend the rules and address the merits of defendant's appeal. Assuming *arguendo* the trial court erred in advising defendant that he had a right to appeal the court's denial of his *pro se* motion to dismiss, we hold defendant has failed to establish prejudicial error.

On 2 January 2015 around 4:30 a.m., Blair Mincey observed defendant Israel John Rogers and another person breaking into her Honda Accord and called the Wilmington Police Department. An officer responded and observed defendant breaking into another vehicle, a GMC Yukon. Defendant fled. After a short chase, defendant was apprehended and placed under arrest.

Defendant was indicted for two counts of breaking or entering a motor vehicle, one count of resisting a public officer, and for having attained habitual felon status. Subsequently, defendant "was sent up to Butner for an evaluation to see if he was competent to stand trial[.]" On 10 August 2016, the forensic psychiatrist who examined defendant reported that he believed defendant to be capable of proceeding.

Defendant's cases came on for trial during the 19 September 2016 session of New Hanover County Superior Court, the Honorable Jay D. Hockenbury, Judge presiding. Defendant asked his attorney to file a motion to dismiss for lack of subject matter jurisdiction, but his attorney refused as she "felt the motions were frivolous and without merit[.]"[1] At defendant's request, his attorney filed a motion to withdraw.

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1. Defendant's jurisdictional argument appears to be based on defendant's perceived status of himself as a "sovereign citizen." "[S]o-called 'sovereign citizens' are individuals who believe they are not subject to courts' jurisdiction[.] . . . [C]ourts repeatedly have been confronted with sovereign citizens' attempts to delay judicial proceedings, and summarily have rejected their legal theories as frivolous.' " *State v. Faulkner*, ___ N.C. App. ___, ___, 792 S.E.2d 836, 842 (2016) (alterations in original) (quoting *United States v. Davis*, 586 Fed. App'x 534, 537 (11th Cir. 2014)).

When defendant's case was called, the court addressed defendant directly, informing defendant that he would be permitted to file his motion to dismiss for lack of jurisdiction and put it in the record. The court also advised defendant that his attorney, as an officer of the court, believed his "motions [were] frivolous and it would be a waste of the Court's time for her to spend time to make a formal motion to dismiss based on subject matter, or that the Court has no jurisdiction over [defendant], and therefore, she is not going to file those motions." The trial court advised defendant he could give his attorney any documents that he wanted filed, and then denied defense counsel's motion to withdraw.

The trial court received four handwritten documents from defendant. Defendant was allowed to "make any arguments that he want[ed] to make for the record," and defendant did so. The trial court declared the documents provided no basis for dismissing the charges and denied defendant's *pro se* motion to dismiss. The State then offered a plea to defendant, which provided that he would plead guilty to all the charges, the offenses would be consolidated for judgment, and a sentence of twenty-three to forty months would be imposed.

After a break, defendant personally addressed the court again, stating he had additional motions to make based on previously filed documents. Defendant said he wanted to make an additional motion concerning the "legitimacy of the claims brung [sic] against [him] before [he] could take the plea." The trial court responded by stating that

> I made my ruling denying your motion to dismiss on those two grounds [(lack of subject matter jurisdiction and lack of in personam jurisdiction)]. So it's all in the record, and *when this case is over with you have the right to appeal my ruling*, and this is part of the - - part of the file that I'm sure will be looked at by someone as part of the appellate process.

(Emphasis added). Thereafter, defendant chose to accept the State's plea offer, and the trial court proceeded to conduct a plea colloquy with defendant—who entered an Alford plea—and to hear a factual basis for the plea from the State. The plea colloquy included the following: "THE COURT: Do you understand following a plea of guilty there are limitations on your right to appeal? DEFENDANT: Yes, Sir." Then, the trial court advised defendant of the maximum possible punishment—176 months plus 60 days.

The trial court accepted defendant's *Alford* plea and ordered it recorded, finding that it was "the informed choice of the defendant, and the plea [was] made freely, voluntarily, and understandingly." The trial court sentenced defendant in accordance with the terms of his plea. Thereafter, defendant purported to file written notice of appeal on 28 September 2016. Subsequently, defendant filed a petition for writ of certiorari to this Court on 15 May 2017, and the State filed a motion to dismiss the appeal on 23 May 2017.

Jurisdiction

[1] As an initial matter, we must determine whether this appeal is properly before this Court.

1. Appeal as of Right

The State has filed a motion to dismiss on the basis that, per state statute, a defendant who pleads guilty generally does not have a right to appeal. N.C. Gen. Stat. § 15A-1444(e) (2015); *see State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002) (noting that a criminal defendant's right to appeal is purely a creation of state statute). We agree.

> Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, *the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court*, but he may petition the appellate division for review by writ of certiorari.

N.C.G.S. § 15A-1444(e) (emphasis added). Further, a defendant who pleads guilty does not have a right to appeal whether the trial court erred in determining his guilty plea was knowing and voluntary, *State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987); *State v. Santos*, 210 N.C. App. 448, 450, 708 S.E.2d 208, 210 (2011), nor does he have a right to appeal whether the trial court erred in denying his motion to dismiss, *State v. Shepley*, 237 N.C. App. 174, 177, 764 S.E.2d 658, 660 (2014). Defendant concedes that he is not entitled to an appeal *as of right*, acknowledging that "[a]ppellate review is contingent upon this Court granting [his] petition for writ of certiorari as to one, or both, of these issues." Thus, defendant's appeal is subject to dismissal. *See State v. Demaio*, 216 N.C. App. 558, 561, 716 S.E.2d 863, 865 (2011) ("A 'defendant is not entitled *as a matter of right* to appellate review of

his contention that the trial court improperly accepted his guilty plea.' " (emphasis added) (quoting *Bolinger*, 320 N.C. at 601, 359 S.E.2d at 462).

2. Petition for Writ of Certiorari

Defendant, however, has filed a petition for writ of certiorari. Pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, this Court may, in its discretion, issue a writ of certiorari if one of the following circumstances applies: "when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief." N.C. R. App. P. 21(a)(1) (2017). "A petition for the writ must show merit or that error was probably committed below." *State v. Rouson*, 226 N.C. App. 562, 563–64, 741 S.E.2d 470, 471 (2013) (quoting *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)) (denying the defendant's petition for writ of certiorari where the defendant failed to bring forth a meritorious argument or reveal error in the trial court's denial of his motion to suppress and in the acceptance of his guilty pleas).

"[O]ur Supreme Court has held that when a trial court improperly accepts a guilty plea, the defendant 'may obtain appellate review of this issue only upon grant of a writ of certiorari.' " *Demaio*, 216 N.C. App. at 562, 716 S.E.2d at 866 (citation omitted) (quoting *Bolinger*, 320 N.C. at 601, 359 S.E.2d at 462). The State, in response to defendant's petition, argues that the writ should not issue in this case; the State asserts that, even assuming the trial court erred in advising defendant he could appeal the denial of his motion to dismiss, defendant has failed to show how his decision to plead guilty was based on this advice, or that it otherwise invalidated his plea where defendant averred that he entered the plea of his own free will, fully understanding what he was doing. The State nevertheless acknowledges that Rule 21 does not restrict this Court's *jurisdiction* to review a trial court's judgment or order by certiorari. *See State v. Stubbs*, 368 N.C. 40, 44, 770 S.E.2d 74, 76 (2015) ("[W]hile Rule 21 might appear at first glance to limit the jurisdiction of the Court of Appeals, the Rules cannot take away jurisdiction given to that court by the General Assembly in accordance with the North Carolina Constitution.").

Indeed, although recent Supreme Court decisions demonstrate that this Court has jurisdiction to grant certiorari on grounds not explicitly set forth in Rule 21, *see, e.g.*, *State v. Thomsen*, 369 N.C. 22, 26–27, 789 S.E.2d 639, 642–43 (2016); *Stubbs*, 368 N.C. at 43–44, 770 S.E.2d at 76,

this Court's jurisprudence is far from clear in terms of whether this Court has the authority to grant certiorari to consider the validity of guilty pleas. *See State v. Biddix*, ___ N.C. App. ___, ___, 780 S.E.2d 863, 866–67 (2015) (discussing Appellate Rule 21).

In *State v. Ledbetter* (*Ledbetter III*), ___ N.C. App. ___, 794 S.E.2d 551 (per curiam), *stay granted*, ___ N.C. ___, 794 S.E.2d 527 (2016), this Court, on remand from the Supreme Court of North Carolina, was tasked with reconsidering this Court's earlier dismissal of the defendant's appeal, *see State v. Ledbetter* (*Ledbetter I*), ___ N.C. App. ___, 779 S.E.2d 164 (2015), *rev. allowed and remanded by* 369 N.C. 79, 793 S.E.2d 216 (*Ledbetter II)*—in light of *Stubbs* and *Thomsen* (which both addressed "the appellate courts' jurisdiction to issue the writ of certiorari upon the State's petition, where statutorily authorized, after the trial court granted both defendants' MAR[,]" *Ledbetter III*, ___ N.C. App. at ___, 794 S.E.2d at 554)—in order to review the defendant's petition for writ of certiorari seeking review of her motion to dismiss, made prior to entry of her guilty plea to DWI, *see Ledbetter III*, ___ N.C. App. at ___, 794 S.E.2d at 553. In so doing, this Court in *Ledbetter III* framed the issue and concluded as follows:

> The issue in the present case does not pertain to the existence of appellate *jurisdiction* under the statutes. Rather, the issue pertains to the "govern[ing] procedure" and processes available to properly exercise our jurisdiction and guide our discretion of whether to issue a writ of certiorari, following a defendant's guilty plea. N.C. Rule App. P. Rule 1(b) (2016). Defendant's petition, purportedly under N.C. Gen. Stat. § 15A-1444(e), does not invoke any of the three grounds set forth in Appellate Rule 21 to guide this Court's discretion to issue the writ under this Rule to review her guilty plea.
>
> We are without a procedural basis to do so, without invoking Rule 2 to suspend the Rules. . . .
>
> . . . .
>
> Under the current language of Appellate Rule 21, no procedural mechanism exists under that Rule to issue the discretionary writ of certiorari to review the trial court's judgment entered upon Defendant's guilty plea under N.C. Gen. Stat. § 15A-1444(e), without further exercising our discretion to invoke Rule 2 to suspend the Rules. . . .

. . . .

> This Court's jurisdiction to hear and consider issues raised by a party is often broader, but not necessarily synonymous, with the procedural framework under our appellate rules. The appellate rules are replete with circumstances in which this Court possesses jurisdiction, but the rules procedurally do not allow appellate review without invoking Rule 2. . . .
>
> . . . .
>
> Although the statute provides jurisdiction, this Court is without a procedural process under either Rule 1 or 21 to issue the discretionary writ under these facts, other than by invoking Rule 2.
>
> In the further exercise of our discretion under the facts before us, we decline to invoke Rule 2 to suspend the requirements of the appellate rules to issue the writ of certiorari.

Id. at ___, 794 S.E.2d at 554–55 (citations omitted); *see State v. Perry*, No. COA16-862, 2017 WL 1650125, **2–3 (N.C. Ct. App. May 2, 2017) (unpublished) (relying on *Ledbetter III*, invoking Rule 2 in order to review the defendant's argument that the trial court erred in accepting his guilty plea because it failed to inform him of the minimum sentence of his convictions, and finding that the defendant failed to establish that his guilty plea was accepted in violation of statute or that he was prejudiced thereby). *But see State v. Jones*, ___ N.C. App. ___, ___, 802 S.E.2d 518, 523 (2017) ("We have examined both *Biddix* and *Ledbetter* and conclude that these cases fail to follow the binding precedent established by *Stubbs*, and as a result, do not control the outcome in the present case. In this case, as in *Stubbs*, although defendant has a statutory right to apply for a writ of certiorari to obtain review of his sentence, Appellate Rule 21 does not include this circumstance [(defendant's appeal of the sentencing proceeding conducted upon his entry of a guilty plea)] among its enumerated bases for issuance of the writ. We find the present case to be functionally and analytically indistinguishable from that of *Stubbs* and hold that, pursuant to the opinion of our Supreme Court in *Stubbs*, this Court has jurisdiction to grant defendant's petition for a writ of certiorari. In the exercise of our discretion, we choose to grant [the defendant's] petition.").

Notably, while the facts in the instant case seem to more closely parallel those at issue in *Ledbetter*—a motion to dismiss is denied, the

defendant enters a guilty plea, the defendant appeals and files a petition for writ of certiorari for review of the trial court's denial of the motion to dismiss—*Ledbetter* did not contend with (and neither did *Jones*, for that matter) the additional wrinkle in the analysis facing this Court in the instant case—defendant's argument that his guilty plea is invalid based on the trial court's assurance that defendant could appeal its denial of his motion to dismiss.

There appear to be three alternatives available to this Court in order to satisfactorily address the issues currently before us: (1) follow the reasoning in *Jones*, which in turn relies on the reasoning in *Stubbs*, and grant defendant's petition for writ of certiorari; (2) follow the reasoning in *Ledbetter*, deny defendant's petition for writ of certiorari, and decline to invoke Rule 2; or (3) follow the reasoning in *Ledbetter*, but invoke Rule 2 to review the validity of defendant's guilty plea. Complicating the matter is the fact that our appellate courts have also held that when a trial court improperly accepts a guilty plea, the defendant "may obtain appellate review of this issue only upon grant of a writ of certiorari[,]" *see Demaio*, 216 N.C. App. at 562, 716 S.E.2d at 866 (citation omitted) (quoting *Bolinger*, 320 N.C. at 601, 359 S.E.2d at 462), and neither *Stubbs*, *Ledbetter*, nor *Jones* addresses this precise and narrow issue in discussing Appellate Rule 21. Additionally, the general rule that we are bound by the prior opinions of this Court which have decided the "same issue," *see In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), is not helpful in the instant case where *Jones* dismissed *Ledbetter III* (and *Biddix*) as they "fail[ed] to follow the binding precedent established by *Stubbs*," a North Carolina Supreme Court case, and, as a result, this Court in *Jones* concluded those cases did not control. ___ N.C. App. at ___, 802 S.E.2d at 523.

However, where the facts in *Ledbetter* are arguably more analogous (and applicable) to those in the instant case, *compare Ledbetter III*, ___ N.C. App. at ___, 794 S.E.2d at 553 (involving the defendant's attempt to appeal the *denial of a motion to dismiss* followed by entry of a guilty plea), *with Jones*, ___ N.C. App. at ___, 802 S.E.2d at 520 (involving the "defendant's right to seek the issuance of a writ of certiorari in order to obtain appellate review of the *sentencing proceeding* conducted upon his entry of a plea of guilty" (emphasis added)), we conclude that no procedural mechanism exists under Rule 21 to issue the discretionary writ of certiorari to review the trial court's judgment entered upon defendant's guilty plea, but also exercise our discretion to invoke Rule 2 to suspend the Rules and address the merits of defendant's appeal. N.C. R. App. P. 2 (2017) ("To prevent manifest injustice to a party, or to expedite decision in the public interest, 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 upon application of a party or upon its own initiative . . . ."); *see Ledbetter III*, ___ N.C. App. at ___, 794 S.E.2d at 555 (citations omitted); *see also Perry*, 2017 WL 1650125, at *2.

Ordinarily, this Court invokes Rule 2 "[t]o prevent manifest injustice," *see* N.C. R. App. P. 2 (2017); here, we invoke Rule 2 to "expedite decision in the public interest," that is, to reach the merits in order to caution the trial court as it advises litigants—especially *pro se* litigants or litigants submitting *pro se* filings—on their right to appeal, to make sure no plea is entered with the expectation of a right to appeal where no right exists.

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[2] Defendant contends his *Alford* plea was not entered voluntarily or intelligently because the trial court erroneously advised him that he had the right to appeal the court's denial of his *pro se* motion to dismiss. Assuming *arguendo* the trial court erred, we find this error harmless for the reasons stated herein.

Pursuant to N.C. Gen. Stat. § 15A-1022, "a superior court judge may not accept a plea of guilty or no contest from [a] defendant without first addressing him personally and[,]" among other things "[d]etermining that he understands the nature of the charge" and "[i]nforming him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced . . . ." *Id.* § 15A-1022(a)(2), (6) (2015). The guilty plea must be "entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court." *State v. Smith*, 352 N.C. 531, 550–51, 532 S.E.2d 773, 786 (2000) (quoting *Brady v. United States*, 397 U.S. 742, 755, 25 L. Ed. 2d 747, 760 (1960)).

In the instant case, defendant agreed to plead guilty pursuant to the plea agreement, the trial court advised him of the maximum possible punishment, *see* N.C.G.S. § 15A-1022(a)(6), and defendant averred that he entered the plea of his own free will, *see id.* at § 15A-1022(a)(2). It is also true that the trial court told defendant that he would have the right to appeal the ruling denying his *pro se* motion to dismiss. However, the trial court also advised defendant—and defendant indicated he understood—that pleading guilty would place limitations on his right to appeal, contradicting its earlier statement that defendant would "have the right to appeal [the trial court's] ruling."

Accordingly, we agree with defendant that the trial court erroneously advised him that he had the right to appeal the denial of his *pro se*

motion to dismiss after entering an *Alford* plea. However, having granted review of this issue pursuant to Rule 2, we hold that any error by the trial court is harmless.

"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). Questions of subject matter jurisdiction are reviewed *de novo*. *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007).

"Subject-matter jurisdiction 'involves the authority of a court to adjudicate the type of controversy presented by the action before it.' " *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (quoting *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (2001)). "Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law." *Id.* (citation omitted).

"The superior court has exclusive, original jurisdiction over *all criminal actions* not assigned to the district court division by this Article . . . ." N.C. Gen. Stat. § 7A-271 (2015) (emphasis added). "In criminal cases, a valid indictment gives the trial court its subject matter jurisdiction over the case." *In re M.S.*, 199 N.C. App. 260, 262 n.2, 681 S.E.2d 441, 443 n.2 (citing *In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004)).

On his motion to dismiss for lack of subject matter jurisdiction and lack of personal jurisdiction, defendant made the following argument, in pertinent part:

> The reason why I say they have lack of jurisdiction, because at the time I was born, I was born a natural -- a natural born American sovereign citizen. All right? I never contracted at the time of birth with a birth certificate or Social Security number.
>
> . . . .
>
> . . . I am convinced that they have lack of jurisdiction, I never contracted with the U.S. I never had anything in my name. The United States is a corporation. All right. The United States do not own me. They did not make me. I was birthed by my mother, who mated with my father. . . .
>
> . . . .

> And the reason why I say lack of jurisdiction is that common use of this term "persons" does not include the sovereign and statute employed with ordinary not be construed with do so. Title 1, United States Code, Section 1, Note 12, *United States v. United Mine Workers* on 330 U.S. 258, apostrophe, 91 L.Ed 884. They said this is a form of diplomatic immunity. While you are not excused for the consequences of any legitimate crimes when you may . . . .
>
> . . . .
>
> . . . -- legitimate crimes when you may commit against real parties and which you call (unintelligible) to another citizen as a sovereign, you cannot be forced to comply with arbitrary administrative regulations imposed by Congress on federal citizens. All right.
>
> . . . .
>
> Then once the prosecutors can prove that I contracted with the State willingly and intelligently, with full disclosure of the facts, then we can move on to the next step, talking about the charges brung [sic] against the persons. . . .
>
> THE COURT: All right. For those reasons you don't feel that the State of North Carolina has jurisdiction over you to try the case; is that right, Mr. Rogers?
>
> THE DEFENDANT: Yes, sir[.]

Defendant's argument failed to present a coherent, legally recognized challenge to the trial court's jurisdiction. For example, defendant did not challenge the validity of the indictments in the instant case, which, if defective or invalid, would deprive the trial court of jurisdiction to enter judgment. *See In re M.S.*, 199 N.C. App. at 262 n.2, 681 S.E.2d at 443 n.2 ("[A] facially invalid indictment deprives the trial court of jurisdiction to enter judgment in a criminal case." (quoting *State v. McKoy*, 196 N.C. App. 650, 654, 675 S.E.2d 406, 410 (2009))). Here, defendant presents no argument that negates the authority of the trial court to exercise personal and subject matter jurisdiction over defendant in the instant case. Defendant's argument is overruled.

NO PREJUDICIAL ERROR.

Judges DAVIS and INMAN concur.

STATE OF NORTH CAROLINA
v.
JASON LEE SAWYERS

No. COA16-1296

Filed 7 November 2017

1. Motor Vehicles—reckless driving—driving while impaired—motion to dismiss—sufficiency of evidence—driver—corpus delicti rule—confession

The trial court did not err by denying defendant's motion to dismiss the charges of reckless driving and driving while impaired based on alleged insufficient evidence that he was the driver. The corpus delicti rule was satisfied where the State presented sufficient evidence to establish that the car accident resulted from reckless and impaired driving, and thus, the State could use defendant's confession to prove his identity as the perpetrator.

2. Drugs—possession of marijuana paraphernalia—motion to dismiss—brass pipe—constructive possession

The trial court did not err by denying defendant's motion to dismiss the charge of possession of marijuana paraphernalia where sufficient incriminating circumstances existed for the jury to find that defendant constructively possessed a brass pipe. Defendant was driving the pertinent car immediately before the accident, an officer discovered the pipe on the driver's side floorboard of the vehicle and detected an odor of marijuana in the pipe, and defendant admitted the marijuana found on his person belonged to him.

Appeal by defendant from judgments entered 28 July 2016 by Judge Eric C. Morgan in Stokes County Superior Court. Heard in the Court of Appeals 16 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Ronald D. Williams, II, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

CALABRIA, Judge.

Jason Lee Sawyers ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of driving while impaired, driving

while license revoked, reckless driving, possession of up to one-half ounce of marijuana, and possession of marijuana paraphernalia. After careful review, we conclude that defendant received a fair trial, free from error.

I. Background

At approximately 5:30 p.m. on 11 February 2015, defendant and his girlfriend, Martha Goff ("Goff"), were driving southbound on Old Highway 52 in King, North Carolina. They were traveling at a high rate of speed in Goff's Dodge Charger, and the driver lost control of the car through a sharp curve. After swerving several times, the car spun off the road, hit a tree, and landed in a ditch. Volunteer firefighter William Tedder ("Tedder") heard the "horrendous" crash from a nearby cemetery where he was working, and he immediately reported to the scene. Several other drivers who witnessed the accident also pulled over, provided assistance, and called law enforcement.

Approximately five minutes after defendant's car landed in a ditch, Sergeant Kevin Crane ("Sergeant Crane") of the King Police Department arrived. Sergeant Crane discovered that the Charger was severely damaged: the passenger's side door would not open, and one of the front wheels was missing. Defendant, seated in the driver's seat, appeared very fidgety and nervous while speaking with Tedder. Goff was seated in the passenger's seat. Sergeant Crane detected an odor of alcohol emanating from the vehicle.

Emergency Medical Services arrived and examined defendant and Goff to determine whether they sustained injuries. Meanwhile, Sergeant Crane investigated the vehicle. Goff's purse was on the passenger's side floorboard, and some of its contents had scattered on the floor during the crash. Sergeant Crane discovered a brass pipe laying on the driver's side floorboard, near the base of the seat. When he inspected the pipe, he detected an odor of marijuana on it. Based on his training and experience, Sergeant Crane concluded that the brass pipe was drug paraphernalia.

Defendant and Goff were seated in the ambulance when Trooper Kevin Johnson ("Trooper Johnson") of the North Carolina Highway Patrol arrived at approximately 5:46 p.m. Sergeant Crane gave the brass pipe to Trooper Johnson, and Tedder advised that defendant had been behind the wheel when Tedder first arrived to the scene. After investigating the Charger, Trooper Johnson approached the ambulance to interview defendant and Goff.

At first, defendant denied driving, but upon further questioning, he admitted that he was the driver. However, defendant denied that he had been drinking prior to the accident. When Trooper Johnson asked defendant to produce his driver's license, defendant provided an identification card and admitted that his license was revoked. Trooper Johnson subsequently conducted a pat-down search of defendant and discovered a pill bottle containing a small amount of marijuana in his right front pocket.

Trooper Johnson detected a strong odor of alcohol on defendant's breath and noticed that defendant's eyes were red and glassy, and his speech was slurred. Based on these indicators, Trooper Johnson opined that defendant was appreciably impaired. Trooper Johnson began administering a field sobriety test, but defendant admitted that he was intoxicated and refused to cooperate. Consequently, Trooper Johnson arrested defendant for driving while impaired.

On 4 January 2016, defendant was indicted by a grand jury in Stokes County Superior Court for habitual impaired driving; driving while license revoked; reckless driving; possession of up to one-half ounce of marijuana; and possession of marijuana paraphernalia. A jury trial commenced on 25 July 2016. At the close of the State's evidence, defendant moved to dismiss all charges for insufficient evidence. Defendant argued that in order to satisfy the driving element of these offenses, the State must prove that the vehicle was actually "moving and running," and here, the evidence merely showed that the defendant was "sitting in the passenger seat of a wrecked car[.]" After allowing the State to respond, the trial court denied defendant's motion. Defendant subsequently presented evidence but did not testify. Defendant renewed his motion for dismissal at the close of all evidence, and the trial court denied the motion as to all charges.

On 28 July 2016, the jury returned verdicts finding defendant guilty of all charges. At sentencing, defendant stipulated to his prior convictions and status as a habitual impaired driver. For habitual impaired driving, the trial court sentenced defendant to 17-30 months in the custody of the North Carolina Division of Adult Correction. The trial court also imposed a 120-day suspended sentence for driving while license revoked, and a 60-day suspended sentence for the consolidated offenses of reckless driving, possession of marijuana, and possession of marijuana paraphernalia. Defendant appeals.

II. Analysis

On appeal, defendant contends that the trial court erred in denying his motion to dismiss the charges of: (1) reckless driving and driving while impaired; and (2) possession of marijuana paraphernalia.

We review the trial court's denial of a defendant's motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). In reviewing a defendant's motion to dismiss, the question for the trial court "is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

"[T]he 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). Accordingly, "the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. The defendant's evidence that does not conflict may be used to explain or clarify the evidence offered by the State." *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (citations and quotation marks omitted).

A. Driving Offenses

[1] Defendant first challenges the trial court's denial of his motion to dismiss under the *corpus delicti* rule. Specifically, defendant contends that the State presented insufficient evidence to establish that he was driving the car. We disagree.

The *corpus delicti* rule requires that there be corroborative evidence, independent of a defendant's extrajudicial confession, which tends to prove the commission of the charged offense. *State v. Parker*, 315 N.C. 222, 231, 337 S.E.2d 487, 491 (1985). "It is well established in this jurisdiction that a naked, uncorroborated, extrajudicial confession is not sufficient to support a criminal conviction." *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 880 (1986). Accordingly, "[w]hen the State relies upon a defendant's extrajudicial confession, we apply the *corpus delicti* rule to guard against the possibility that a defendant will be

convicted of a crime that has not been committed." *State v. Cox*, 367 N.C. 147, 151, 749 S.E.2d 271, 275 (2013) (citation and quotation marks omitted). "This inquiry is preliminary to consideration of whether the State presented sufficient evidence to survive the motion to dismiss." *Id.*

In North Carolina, there are two approaches to the *corpus delicti* rule. *Id.* at 153, 749 S.E.2d at 276. According to the traditional approach, the State's independent evidence must " 'touch or concern the *corpus delicti*'—literally, the body of the crime, such as the dead body in a murder case." *Id.* at 151, 749 S.E.2d at 275 (brackets omitted) (quoting *Parker*, 315 N.C. at 229, 337 S.E.2d at 491). However, "the corroborative evidence need not in any manner tend to show that the defendant was the guilty party." *Id.* at 152, 749 S.E.2d at 275 (citation and internal quotation marks and ellipsis omitted). Rather, once "the State presents evidence tending to establish that the injury or harm constituting the crime occurred and was caused by criminal activity, then the *corpus delicti* rule is satisfied and the State may use the defendant's confession to prove his identity as the perpetrator." *Id.*

However, the traditional approach to the *corpus delicti* rule has limitations. Indeed, "a strict application . . . is nearly impossible in those instances where the defendant has been charged with a crime that does not involve a tangible *corpus delicti* such as is present in homicide (the dead body), arson (the burned building) and robbery (missing property)." *Parker*, 315 N.C. at 232, 337 S.E.2d at 493 (providing "certain 'attempt' crimes, conspiracy and income tax evasion" as examples of crimes that involve no isolated, tangible injury). Acknowledging this shortcoming, in *State v. Parker*, our Supreme Court adopted a second approach to the *corpus delicti* rule, which applies in non-capital cases:

> [W]hen the State relies upon the defendant's confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.

Id. at 236, 337 S.E.2d at 495. The Court emphasized, however, that "when independent proof of loss or injury is lacking, there must be *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession. Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice." *Id.*

Significantly, the *Parker* rule did not supersede our traditional approach. *Cox*, 367 N.C. at 153, 749 S.E.2d at 276. "Rather, the State may now satisfy the *corpus delicti* rule under the traditional formulation or under the *Parker* formulation." *Id.*

On appeal, defendant contends that the State failed to present sufficient corroborative evidence, independent of his extrajudicial confession to Trooper Johnson, identifying defendant as the driver of the Charger. We disagree. Defendant's argument demonstrates a common misunderstanding of the *corpus delicti* rule. As previously explained, the rule "guard[s] against the possibility that a defendant will be convicted of a crime that has not been committed." *Id.* at 151, 749 S.E.2d at 275. Significantly, however, "a confession identifying *who committed the crime* is not subject to the *corpus delicti* rule." *State v. Ballard*, __ N.C. App. __, __, 781 S.E.2d 75, 78 (2015) (emphasis added) (citing *Parker*, 315 N.C. at 231, 337 S.E.2d at 492-93), *disc. review denied*, 368 N.C. 763, 782 S.E.2d 514 (2016).

In the instant case, the State presented substantial evidence to establish that the cause of the car accident was criminal activity, i.e. reckless and impaired driving. Three witnesses testified that immediately before the crash, the Charger's driver was speeding and driving in an unsafe manner on a curvy section of Highway 52. Sergeant Crane testified that when he arrived to the scene of the accident, he detected an odor of alcohol emanating from both of the vehicle's occupants. While it may have been unclear at that time whether defendant or Goff was the driver, the *corpus delicti* rule merely "requires the State to present evidence tending to show that the crime in question occurred. The rule does not require the State to logically exclude every possibility that the defendant did not commit the crime." *Cox*, 367 N.C. at 152, 749 S.E.2d at 275. Here, the State presented sufficient evidence to establish that the car accident resulted from reckless and impaired driving. Therefore, "the *corpus delicti* rule is satisfied and the State may use the defendant's confession to prove his identity as the perpetrator." *Id.*

Moreover, two motorists who stopped to assist after the accident testified that they witnessed defendant exiting from the driver's side of the vehicle mere "seconds" after the crash occurred. In addition, Tedder testified that when he arrived to the scene, defendant was exiting the Charger on the driver's side, and Goff was reclined in the passenger's seat. Sergeant Crane subsequently recovered Goff's purse from the passenger's side floorboard. This independent evidence both supports the trustworthiness of defendant's confession, *Parker*, 315 N.C. at 236, 337 S.E.2d at 495, and defeats his challenge to the sufficiency of the evidence on appeal. *Cox*, 367 N.C. at 155, 749 S.E.2d at 277.

Defendant argues that the State failed to rebut Goff's testimony that *she* was driving the Charger prior to the accident. However, on a motion to dismiss, the trial court disregards the defendant's evidence "unless it is favorable to the State or does not conflict with the State's evidence." *Scott*, 356 N.C. at 596, 573 S.E.2d at 869. Goff's testimony clearly conflicts with the State's evidence. Accordingly, the trial court properly disregarded this evidence upon review of defendant's motion to dismiss. This argument is overruled.

B. Possession of Marijuana Paraphernalia

[2] Defendant next asserts that the State failed to present substantial evidence that defendant constructively possessed the marijuana pipe. We disagree.

In North Carolina,

> [i]t is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repackage, store, contain, or conceal marijuana or to inject, ingest, inhale, or otherwise introduce marijuana into the body.

N.C. Gen. Stat. § 90-113.22A(a) (2015). "Drug paraphernalia" means "all equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act[.]" N.C. Gen. Stat. § 90-113.21(a). While the statutory definition specifically includes metal pipes and other objects used "for ingesting, inhaling, or otherwise introducing marijuana . . . into the body," N.C. Gen. Stat. § 90-113.21(a)(12), "all . . . relevant evidence . . . may be considered" in determining whether an item constitutes drug paraphernalia. N.C. Gen. Stat. § 90-113.21(b).

To prove a violation of N.C. Gen. Stat. § 90-113.22A, the State must establish that the defendant possessed drug paraphernalia with the intent to use it in connection with a controlled substance. *See State v. Hedgecoe*, 106 N.C. App. 157, 164, 415 S.E.2d 777, 781 (1992). Possession may be actual or constructive. *State v. Garrett*, __ N.C. App. __, __, 783 S.E.2d 780, 784 (2016). "A defendant has constructive possession of contraband where, while not having actual possession, he has the intent and capability to maintain control and dominion over it." *Id.* (citation and internal quotation marks omitted). When the defendant does not have exclusive control over the premises where the contraband is found,

"the State must show other incriminating circumstances sufficient for the jury to find [the] defendant had constructive possession." *Id.* (citation omitted). "Whether sufficient incriminating circumstances exist to support a finding of constructive possession is a fact-specific inquiry dependent upon the totality of the circumstances in each case." *Id.*

Here, although defendant did not have exclusive possession of the Charger, sufficient incriminating circumstances existed for the jury to find that defendant constructively possessed the brass pipe. The State presented substantial evidence that defendant was driving the Charger immediately before the accident. Sergeant Crane discovered the pipe on the driver's side floorboard of the vehicle, and he detected an odor of marijuana in the pipe. Furthermore, when Trooper Johnson discovered a small amount of marijuana on defendant's person, defendant admitted that the contraband belonged to him. *See* N.C. Gen. Stat. § 90-113.21(b)(4)-(5) (providing that "[t]he proximity of the object to a controlled substance" and "[t]he existence of any residue of a controlled substance on the object" are relevant considerations in determining whether an object is drug paraphernalia). The jury could reasonably infer from these circumstances that defendant constructively possessed the pipe and intended to use it to smoke the marijuana that he actually possessed. Such evidence was more than sufficient for the trial court to deny defendant's motion to dismiss.

III. Conclusion

Because the State's evidence established that the accident was caused by reckless and impaired driving, the *corpus delicti* rule was satisfied, and defendant's confession provided substantial evidence that he was the driver. *Cox*, 367 N.C. at 155, 749 S.E.2d at 277. Furthermore, there were sufficient incriminating circumstances to support a jury finding that defendant constructively possessed the brass pipe, an object of drug paraphernalia pursuant to N.C. Gen. Stat. § 90-113.21. For these reasons, we hold that the trial court did not err by denying defendant's motion to dismiss.

NO ERROR.

Judges BRYANT and STROUD concur.

STATE v. SIMMONS

[256 N.C. App. 347 (2017)]

STATE OF NORTH CAROLINA
v.
STACY ALLEN SIMMONS

No. COA17-155

Filed 7 November 2017

Indictment and Information—amendment—drug trafficking—referenced substance changed from heroin to opiates—substantial alteration of charges

The trial court erred by permitting the State to amend a drug trafficking indictment by changing the referenced substance from heroin to opiates where the effect of the amendment was to substantially alter the trafficking charges in violation of N.C.G.S. § 15A-923. The fact that the amendment occurred before the trial began did not change the fact that the amendment was impermissible.

Appeal by defendant from judgments entered 14 July 2016 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas O. Lawton III, for the State.

W. Michael Spivey for defendant-appellant.

DAVIS, Judge.

The issue in this case is whether the trial court erred by allowing the State at the beginning of trial to amend the indictment charging the defendant with trafficking in heroin and instead charge him with trafficking in opiates. Stacy Allen Simmons ("Defendant") appeals from his convictions for possession of marijuana, possession of cocaine, trafficking in opiates by transportation, and trafficking in opiates by possession. Because we conclude that the State's actions constituted a substantial alteration of the indictment that is not permitted under our law, we vacate Defendant's convictions for trafficking in opiates by transportation and by possession.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: On 26 November 2014, Officer Adam Thompson, along with

five other officers of the Charlotte-Mecklenburg Police Department, was patrolling the area of the Greenleafe Inn in Charlotte, North Carolina. The Greenleafe Inn was known to the officers as a "crime hotspot" where drug-related arrests had been made in the past.

In the parking lot, Officer Thompson observed a man sitting in the passenger seat of a white utility van with its engine and lights turned off. He suspected the man may have been waiting to buy or sell drugs. Officer Thompson approached the van, and the occupant of the vehicle stated that his name was John Turner. After Officer Scottie Carson noticed a crossbow on the floor of the vehicle, Officer Thompson asked Turner to exit the van. As he did so, Turner wiped a white substance from his pants that Officer Thompson suspected was cocaine.

The officers searched Turner and the vehicle and found a plastic wrapper containing heroin residue in his pocket. They also discovered inside the van 32 syringes, 0.5 grams of heroin, and a spoon containing heroin residue. Turner told the officers he was a heroin addict and was waiting on his dealer to arrive. He identified Defendant as his heroin dealer and said that Defendant would be driving either a black Lexus or a silver Kia minivan. Turner further informed the officers that they would find heroin in a "Hide-A-Key" box under the hood of Defendant's vehicle.

Officer Thompson then waited with Turner in his motel room for Defendant to arrive. Eventually, a silver Kia minivan drove into the parking lot and parked across from Turner's room. Defendant exited the vehicle with a young child in his arms and approached Turner's room. Officer Thompson opened the door as Defendant prepared to knock, and Defendant immediately turned and began walking away. Officer Thompson ordered him to stop, and Defendant complied. Officer Thompson proceeded to search Defendant but did not find any contraband. Officers Thompson and Carson then asked Defendant if there was any heroin concealed on the child. After an initial denial, Defendant admitted having placed a packet of heroin in the child's pants.

Defendant was arrested, and Officers Todd Zielinski and Jonathan Brito conducted a search of the Kia. On the passenger side of the vehicle, they found two digital scales, a partially smoked marijuana "blunt," and $800 in cash. Under the hood was a black "Hide-A-Key" box containing "balloons" of heroin as well as a pill bottle containing marijuana, crack cocaine, and 17 hydrocodone pills. The officers also found a revolver wrapped in a sock under the hood. Testing conducted by a forensic chemist revealed that the hydrocodone weighed 4.62 grams, the heroin recovered from the child's pants weighed 0.84 grams, and the heroin found under the hood of the Kia weighed 3.77 grams.

On 8 December 2014, Defendant was indicted by a grand jury on charges of misdemeanor child abuse, possession of a firearm by a felon, possession of marijuana, possession with intent to sell or deliver ("PWISD") cocaine, PWISD heroin, trafficking in heroin by transportation, trafficking in heroin by possession, possession of drug paraphernalia, maintaining a vehicle or dwelling for the purpose of using controlled substances, and possession of a Schedule III controlled substance. On 5 July 2016, a hearing was held before the Honorable Robert C. Ervin in Mecklenburg County Superior Court to address various pre-trial matters. At the hearing, the State announced that it was dismissing five of the charges. As a result, the charges remaining against Defendant were possession of a firearm by a felon, possession of marijuana, PWISD cocaine, trafficking in heroin by transportation, and trafficking in heroin by possession.

At that point in the proceedings, Defendant's counsel informed the court that Defendant "intend[ed] to admit to the heroin that was found in the pants leg of the daughter." The prosecutor then stated the following:

> [PROSECUTOR]: Your Honor, I did have one thing, and I apologize that I didn't mention it yet. Quite frankly, I wasn't anticipating doing this, but based on what I've been hearing from the defense, I think it's appropriate. The state would move to amend the trafficking indictments. They right now read possession of heroin. I think the more appropriate word should be opiate or opiates. . . . Defendant has been on notice that in addition to heroin that was seized from the vehicle, there was also hydrocodone that was seized from the vehicle, as he was charged with that. That is one of the charges that's been dismissed this morning but doesn't change the nature of the offense. Defendant has a lab result that includes the hydrocodone, includes the different bags of heroin that were weighed. They all are the same exact, or treated exactly the same under the law, and so we'd be moving to amend the indictments just to change the word heroin to opiates[.]

Defendant objected to the State's motion to amend the indictment. However, the trial court granted the State's motion and allowed the amendment.

Defendant's trial began that same morning. On 11 July 2016, the jury convicted Defendant of possession of marijuana, possession of cocaine, trafficking in opiates by transportation, and trafficking in opiates by

possession. Defendant was found not guilty of possession of a firearm by a felon.

The trial court consolidated the trafficking convictions and sentenced Defendant to 70 to 93 months imprisonment. The trial court also consolidated his convictions for possession of marijuana and cocaine and sentenced him to a term of 8 to 19 months imprisonment to be served consecutively to the trafficking sentence. The court then suspended the sentence for the possession convictions, and Defendant was placed on 36 months of supervised probation. Defendant gave oral notice of appeal.

Analysis

Defendant's sole argument on appeal is that the trial court erred by permitting the State to amend his drug trafficking indictment by changing the substance referenced therein from "heroin" to "opiates[.]" He contends that the effect of the amendment was to substantially alter the trafficking charges in violation of N.C. Gen. Stat. § 15A-923.

The statute proscribing trafficking in opiates provides, in pertinent part, as follows:

> Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate . . . including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as 'trafficking in opium or heroin' and if the quantity of such controlled substance or mixture involved:
>
> a. Is four grams or more, but less than 14 grams, such person shall be punished as a class F felon . . .

N.C. Gen. Stat. § 90-95(h)(4) (2015).

While heroin is specifically mentioned in the statutory language, hydrocodone is also a covered substance under N.C. Gen. Stat. § 90-95(h)(4) as an opium derivative. *State v. Johnson*, 214 N.C. App. 436, 441, 714 S.E.2d 502, 506, *disc. review denied*, 365 N.C. 362, 718 S.E.2d 393 (2011). All opiates in a person's possession may be aggregated to reach the statutory weight threshold of four grams. *See State v. Hazel*, 226 N.C. App. 336, 347, 739 S.E.2d 196, 202-03 (holding that heroin found on defendant's person could be combined with heroin found in defendant's apartment to support trafficking conviction under N.C. Gen. Stat. § 90-95(h)(4)), *appeal dismissed and disc. review denied*, 367 N.C. 219, 747 S.E.2d 582 (2013).

It is well established that "[a] felony conviction must be supported by a valid indictment which sets forth each essential element of the crime charged." *State v. LePage*, 204 N.C. App. 37, 49, 693 S.E.2d 157, 165 (2010) (citation omitted). An indictment that "fails to state some essential and necessary element of the offense" is fatally defective. *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (citation and quotation marks omitted), *disc. review improvidently allowed*, 349 N.C. 289, 507 S.E.2d 38 (1998). Where an indictment is fatally defective, the superior court lacks subject matter jurisdiction over the case. *State v. Justice*, 219 N.C. App. 642, 643, 723 S.E.2d 798, 800 (2012) (citation omitted).

We review the trial court's granting of a motion to amend an indictment *de novo*. *State v. Avent*, 222 N.C. App. 147, 148, 729 S.E.2d 708, 710 (citation omitted), *writ of supersedeas denied and disc. review denied*, 366 N.C. 411, 736 S.E.2d 176 (2012). N.C. Gen. Stat. § 15A-923 provides that "[a] bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2015). "Our Supreme Court has interpreted the term 'amendment' under N.C.G.S. § 15A-923(e) to mean any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. De la Sancha Cobos*, 211 N.C. App. 536, 541, 711 S.E.2d 464, 468 (2011) (citation and quotation marks omitted). In determining whether an amendment amounts to a substantial alteration, courts "must consider the multiple purposes served by indictments." *State v. Silas*, 360 N.C. 377, 380, 627 S.E.2d 604, 606 (2006) (citation omitted). These purposes are as follows:

> (1) to provide certainty so as to identify the offense, (2) to protect the accused from twice being put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of guilty or *nolo contendere*, to pronounce sentence according to the rights of the case.

State v. Foster, 10 N.C. App. 141, 142-43, 177 S.E.2d 756, 757 (1970) (citation omitted).

In *Silas*, our Supreme Court held that where an indictment alleges one theory of an offense, the State may not later amend the indictment to allege a different theory. *Silas*, 360 N.C. at 382, 627 S.E.2d at 607. In *Silas*, the defendant was initially indicted for felonious breaking and entering with the intent to commit murder. *Id.* at 379, 627 S.E.2d at 606. After the close of all the evidence, the indictment was amended to change the felony the defendant allegedly intended to commit from murder to assault with a deadly weapon. *Id.* The Court held that the

amendment was impermissible because "the indictment served as notice to defendant apprising him of the State's theory of the offense." *Id.* at 382, 627 S.E.2d at 608. As a result, "[t]he subsequent alteration prejudiced defendant as he relied upon the allegations in the original indictment to his detriment in preparing his case upon the assumption the prosecution would proceed upon a theory the defendant intended to commit murder." *Id.*

Similarly, in *State v. Frazier*, __ N.C. App. __, 795 S.E.2d 654, *disc. review denied*, __ N.C. __, 799 S.E.2d 51 (2017), this Court held that an amendment to an indictment that allowed the jury to convict the defendant of negligent child abuse under a theory not alleged in the original indictment was impermissible. *Id.* at __, 795 S.E.2d at 656-57. The initial indictment alleged that the defendant committed child abuse by negligently failing to treat her child's chest and facial wounds. *Id.* at __, 795 S.E.2d at 656. During trial, however, the State was permitted to amend the child abuse indictment to allege that the defendant failed to provide a safe environment for her child. *Id.* at __, 795 S.E.2d at 656. We held that "[u]nder this new theory, the jury could convict based on a finding that Defendant's failure to provide a safe living environment was the cause of her child's wounds in the first instance, irrespective of whether she attempted to treat the wounds after they had been inflicted." *Id.* at __, 795 S.E.2d at 656-57. Thus, we concluded that the amendment in *Frazier* constituted a substantial alteration of the indictment. *Id.* at __, 795 S.E.2d at 656.

In the present case, Defendant argues that broadening the scope of his indictment to include additional substances by changing "heroin" to "opiates" was a substantial alteration and thus an impermissible amendment of the indictment. We agree.

It is well established that "amending an indictment by adding an essential element is substantially altering the indictment." *De la Sancha Cobos*, 211 N.C. App. at 541, 711 S.E.2d at 468 (quotation marks and brackets omitted). This Court has held that "the identity of the controlled substance that defendant allegedly possessed is considered to be an essential element which must be alleged properly in the indictment." *State v. Stith*, __ N.C. App. __, __, 787 S.E.2d 40, 44 (2016) (citation and quotation marks omitted), *aff'd per curiam*, __ N.C. __, 796 S.E.2d 784 (2017).

In *State v. Ledwell*, 171 N.C. App. 328, 614 S.E.2d 412, *disc. review denied*, 360 N.C. 73, 622 S.E.2d 624 (2005), we held that an indictment alleging possession of methylenedioxyamphetamine was facially invalid for failing to allege a substance listed under Schedule I of the North

Carolina Controlled Substances Act. *Id.* at 333, 614 S.E.2d at 415. We ruled that while "3, 4-methylenedioxyamphetamine" was a substance listed under Schedule I, the absence of the correct numerical prefix in the indictment rendered it fatally flawed. *Id.* at 332-33, 614 S.E.2d at 414-15 (citation omitted). This Court explained that "we cannot regard this defect as a mere technicality, for the chemical and legal definition of these substances is itself technical and requires precision." *Id.* at 332, 614 S.E.2d at 415 (citation omitted); *see also State v. Ahmadi-Turshizi*, 175 N.C. App. 783, 785-86, 625 S.E.2d 604, 605-06 (noting "Schedule I of the North Carolina Controlled Substances Act . . . identifies a long list of controlled substances by their specific chemical names" and holding that indictment alleging possession, sale, and delivery of methylenedioxymethamphetamine was defective for "fail[ing] to include '3, 4' [prefix] as required"), *writ of supersedeas denied and disc. review denied*, 369 N.C. 484, 631 S.E.2d 133 (2006).

Similarly, in *LePage*, we held that an indictment charging the defendant with contaminating food or drink with a controlled substance was fatally defective because it identified the alleged controlled substance as "benzodiazepines" rather than "Clonazepam." 204 N.C. App. at 54, 693 S.E.2d at 168. In explaining the importance of the distinction, we stated as follows:

> The term 'benzodiazepine' describes a class of drug which encompasses a number of individual drugs. There is not a drug called simply 'benzodiazepine;' rather, there exist several drugs, including Clonazepam . . . all of which fall within the class of benzodiazepines. . . . In essence, Clonazepam is a benzodiazepine. However, not all benzodiazepines are Clonazepam.

Id. at 52-53, 693 S.E.2d at 167. Thus, in assessing the validity of an indictment, the distinction between a specific controlled substance and the category of controlled substances to which it belongs is a critical one.

In *State v. Williams*, 242 N.C. App. 361, 774 S.E.2d 880 (2015), this Court held that where an indictment for possession with intent to manufacture, sell, or deliver a Schedule I substance failed to allege possession of a substance classified under Schedule I, the indictment could not be amended to properly allege possession of a Schedule I substance. *Id.* at 368, 774 S.E.2d at 885. In that case, the original indictment alleged that the defendant possessed methylethcathinone. *Id.* at 363-64, 774 S.E.2d at 883. We noted that, although methylethcathinone was not a Schedule I substance, 4-methylethcathinone was, in fact, listed under Schedule I and

the indictment was amended prior to trial to add the prefix "4-" to the substance named therein. *Id.* We held that because "the amendment effectively added an essential element that was previously absent, it constituted a substantial alteration and, as a result, was legally impermissible." *Id.* at 368, 774 S.E.2d at 885-86 (citation omitted).

Here, the State broadened the scope of Defendant's original indictment to allege that he had trafficked in "opiates," a category of controlled substances, rather than "heroin," a specific controlled substance. It did so for the purpose of bringing an additional controlled substance — hydrocodone — within the ambit of the indictment. Although heroin is an opiate, not all opiates are heroin. Therefore, when the original indictment was amended to include hydrocodone, a new substance was effectively alleged in the indictment. *See Ahmadi-Turshizi*, 175 N.C. App. at 784-85, 625 S.E.2d at 605 ("[T]he identity of the controlled substance that defendant allegedly possessed is . . . an essential element which must be alleged properly in the indictment." (citation omitted)).

Our holding is consistent with the proposition that a critical purpose served by the indictment requirement is to "enable the accused to prepare for trial." *Foster*, 10 N.C. App. at 142, 177 S.E.2d at 757 (citation omitted). In this case, the State moved to amend the indictment on the morning of trial. Until then, Defendant had justifiably relied upon the original indictment in preparing his defense. This concern was expressed by Defendant's attorney in his objection to the State's motion to amend the indictment:

> [DEFENDANT'S COUNSEL]: Well, your Honor, it's been our understanding all along that the heroin charge – the trafficking in heroin – had to do specifically with the 3.7 as well as the .84 grams that was seized. The hydrocodone was charged separately, and we had no knowledge that this would be included in – or the state would try to include this in the trafficking amount. At this point this is the first I'm hearing of this.

Notably, the State sought to amend the indictment only after Defendant informed the trial court of his intention to admit to possessing some, but not all, of the heroin that was found by the officers during the 26 November 2014 incident. The logical inference from this sequence of events is that upon learning of Defendant's trial strategy on the morning of trial, the State sought to thwart that strategy by broadening the scope of the indictment. In essence, the State was permitted to change the rules of the game just as the players were taking the field.

The State argues that because the amendment to the indictment at issue here occurred before trial, Defendant was not prejudiced in his ability to prepare a defense. We rejected a similar argument in *De la Sancha Cobos*. There, the indictment alleging conspiracy to traffic in cocaine was amended "[a]t the beginning of the trial before the jury was empaneled" to specify the amount of cocaine. *De la Sancha Cobos*, 211 N.C. App. at 538, 711 S.E.2d at 466. In that case, this Court ruled that "[b]ecause we have previously held that the weight of cocaine is an essential element of the offense of conspiracy to traffic in cocaine, we conclude that amending an indictment by adding an essential element is substantially altering the indictment." *Id.* at 541, 711 S.E.2d at 468 (quotation marks and brackets omitted). Thus, the fact that the amendment here occurred before trial had actually begun does not change our determination that the amendment was impermissible.

Therefore, the trial court erred in allowing the State to amend Defendant's indictment. Accordingly, the convictions at issue must be vacated.

Conclusion

For the reasons stated above, we vacate Defendant's convictions for trafficking in opiates by transportation and trafficking in opiates by possession and remand for resentencing.

VACATED IN PART AND REMANDED.

Judges BRYANT and INMAN concur.

STATE OF NORTH CAROLINA
v.
ANTHONY JAMES SQUIREWELL II

No. COA17-497

Filed 7 November 2017

1. Evidence—state trooper testimony—results of chemical analysis—breath test—certification and procedures—foundation for admission

The trial court did not err in an impaired driving case by allowing a state trooper to testify about the results of a chemical analysis of defendant's breath test where the trooper's testimony—that he was certified to conduct chemical analysis by the Department of Human Resources and that he performed the chemical analysis according to its procedures—was adequate to lay the necessary foundation for its admission.

2. Motor Vehicles—possession of open container of alcohol—motion to dismiss—sufficiency of evidence—incriminating circumstances

The trial court did not err by denying defendant's motion to dismiss a possession of an open container of alcohol charge under N.C.G.S. § 20-138.7(a1) where, viewed in the light most favorable to the State, there were sufficient incriminating circumstances to support a reasonable inference that an open container of beer near the console area of the vehicle that defendant was driving belonged to him.

Appeal by defendant from judgments entered 15 November 2016 by Judge Edwin G. Wilson, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 3 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Christine Wright, for the State.

Charlotte Gail Blake for defendant.

ARROWOOD, Judge.

Anthony James Squirewell II ("defendant") appeals from judgments entered upon his convictions for habitual impaired driving, speeding,

possessing an open container of alcohol in the passenger area of a motor vehicle, resisting a public officer, and driving while license revoked for impaired driving. For the following reasons, we find no error in defendant's trial below.

I. Background

As a result of a traffic stop just after noon on 20 May 2014, defendant received North Carolina Uniform Citations for driving while impaired, speeding, providing false identifying information to the State Highway Patrol, driving while license revoked, consuming alcohol in the passenger area of a motor vehicle, and resisting a public officer. On 2 March 2015, a Forsyth County Grand Jury indicted defendant on charges of habitual impaired driving, speeding, driving while license revoked for impaired driving, possessing an open container of alcohol in the passenger area of a motor vehicle, and resisting a public officer.

Prior to the case coming on for trial, defendant entered a guilty plea to driving while license revoked for impaired driving. The remaining charges were then tried before a jury in Forsyth County Superior Court beginning 14 November 2016, the Honorable Edwin G. Wilson, Jr., Judge presiding. On 15 November 2016, the jury returned verdicts finding defendant guilty of the remaining charges. The trial court consolidated the offenses for which the jury convicted defendant and entered judgment sentencing defendant to a term of 21 to 35 months imprisonment. The trial court entered a separate judgment sentencing defendant to a consecutive term of 120 days imprisonment for his guilty plea to driving while license revoked for impaired driving. Defendant timely appealed.

II. Discussion

Defendant raises the following two issues on appeal: whether the trial court erred by (1) allowing testimony to be admitted into evidence concerning the results of the chemical analysis of his breath test; and (2) denying his motion to dismiss the open container charge.

A. Results of Chemical Analysis

[1] Defendant first contends the trial court erred in allowing a state trooper to testify about the results of the chemical analysis of his breath test because the State failed to provide an adequate foundation for the testimony. The trial court allowed the testimony into evidence at trial over defendant's objection.

N.C. Gen. Stat. § 20-139.1 provides that "a person's alcohol concentration or the presence of any other impairing substance in the person's

body as shown by a chemical analysis is admissible in evidence." N.C. Gen. Stat. § 20-139.1(a) (2015). Yet, "[b]ecause so much weight and deference is given to a chemical analysis test, it is necessary that a proper foundation be laid before admitting evidence as to the outcome of a chemical analysis test in a driving while impaired case." *State v. Roach*, 145 N.C. App. 159, 161-62, 548 S.E.2d 841, 844 (2001).

> A chemical analysis of the breath . . . is admissible in any court or administrative hearing or proceeding if it meets both of the following requirements:
>
> (1) It is performed in accordance with the rules of the Department of Health and Human Services.
>
> (2) The person performing the analysis had, at the time of the analysis, a current permit issued by the Department of Health and Human Services authorizing the person to perform a test of the breath using the type of instrument employed.

N.C. Gen. Stat. § 20-139.1(b). "In order to satisfy the second of these requirements, it is not obligatory that a copy of the necessary permit be introduced into evidence." *State v. Franks*, 87 N.C. App. 265, 267, 360 S.E.2d 473, 474 (1987) (citing *State v. Powell*, 10 N.C. App. 726, 179 S.E.2d 785, *aff'd*, 279 N.C. 608, 184 S.E.2d 243 (1971)). The second requirement is satisfied

> (1) by stipulation between the defendant and the State that the individual who administers the test holds a valid permit issued by the Department of Human Resources; or (2) by offering the permit of the individual who administers the test into evidence and in the event of conviction from which an appeal is taken, by bringing forward the exhibit as a part of the record on appeal; or (3) by presenting any other evidence which shows that the individual who administered the test holds a valid permit issued by the Department of Human Resources.

State v. Mullis, 38 N.C. App. 40, 41, 247 S.E.2d 265, 266 (1978).

In this case, there was no stipulation and the State did not offer a permit into evidence. The State instead sought to provide a foundation for the results from the chemical analysis of defendant's breath test through the following testimony of the state trooper who performed the chemical analysis:

Q. . . . Now, are you a certified chemical analyst?

A. Yes, sir.

Q. What is that?

A. That's a person that has been deemed properly, that's done the procedures and has been certified by the Department of Human Resources to perform chemical breath analysis.

Q. Using the ECIR2?

A. Yes, sir.

Defendant contends this testimony was insufficient to lay a proper foundation for the trooper's testimony because there is no indication that the trooper was certified at the time he administered the chemical analysis test to defendant. Defendant cites only this Court's decisions in *State v. Franks*, 87 N.C. App. 265, 360 S.E.2d 473 (1987), and *State v. Roach*, 145 N.C. App. 159, 548 S.E.2d 841 (2001). In both *Franks* and *Roach*, this Court granted the defendants new trials because the State failed to provide an adequate foundation for the admission of breath analysis results. Upon review, we are not convinced the trial court erred in the present case, which is easily distinguished from *Franks* and *Roach*.

In *Franks*, in order to establish the necessary foundation for an officer's testimony regarding the results of the defendant's chemical analysis, the State elicited testimony from the officer that he had a certificate to operate a particular breathalyzer test on the day he conducted the chemical analysis on the defendant. 87 N.C. App. at 267, 360 S.E.2d at 474-75. The State then sought to introduce a permit. *Id.* at 267, 360 S.E.2d at 475. Because the permit showed that it was not issued until after the officer administered the test to the defendant, the trial court sustained the defense's objection to the admission of the permit. *Id.* The State then sought to elicit testimony from the officer to clarify that he did in fact have a permit issued by the North Carolina Department of Human Resources at the time he conducted the defendant's breath analysis. *Id.* at 268, 360 S.E.2d at 475. The defense again objected on grounds that the best evidence would be the permit itself. *Id.* Although the trial court overruled the defense's objection, the record did not reflect that the officer ever answered the State's question. *Id.* Thus, this Court held the trial court erred in admitting the chemical analysis results because the record evidence showed only that the officer had a certificate to operate the particular breathalyzer instrument at the relevant time; it did not show who issued the certificate. *Id.*

In *Roach*, the State introduced evidence of appreciable impairment and the results of a chemical analysis of the defendant's breath test to support a driving while impaired charge. 145 N.C. App. at 159-60, 548 S.E.2d at 842-43. The only evidence in *Roach* regarding the trooper's qualifications to conduct the chemical analysis was the trooper's testimony that he had trained on the particular breathalyzer device used for the defendant's chemical analysis. *Id.* at 160, 548 S.E.2d at 843. On appeal, the State admitted that "[the trooper] did not testify at trial that he possessed a permit issued by the Department of Health and Human Services," but urged this Court to "overrule the *Franks* holding as 'too narrow and unduly formalistic for today's world.' " *Id.* at 161, 548 S.E.2d at 843-44. This Court recognized it could not overrule *Franks*, *see In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), and instead held the trial court erred in allowing results of the chemical analysis into evidence because the State failed to lay a sufficient foundation. *Roach*, 145 N.C. App. at 161-62, 548 S.E.2d at 844. Furthermore, although there was evidence of appreciable impairment that also supported the jury verdict in *Roach*, this Court held that "[i]t is prejudicial error for the court to allow the arresting officer who administered a chemical analysis to testify as to the results of that analysis, even when there was other sufficient evidence in the record to support a guilty verdict." *Id.* at 162, 548 S.E.2d at 844.

As detailed above, the state trooper in this case testified that he was certified by the Department of Human Resources to perform chemical breath analysis using the ECIR2 machine. The trooper further testified that defendant's breath analysis was conducted on the ECIR2 machine and that he set up the ECIR2 machine in preparation for defendant's test according to the procedures established by the Department. The trooper then testified further about those specific procedures and that he followed the procedures in this instance. The trooper stated that the machine worked properly and produced a result for defendant's breath test. Although the trooper did not explicitly state that he had a Department issued permit to conduct chemical analysis on the day he conducted defendant's breath test, which is certainly best practice, we hold the trooper's testimony that he was certified to conduct chemical analysis by the Department and that he performed the chemical analysis according to the Department's procedures was adequate in this case to lay the necessary foundation for the admission of chemical analysis results. *See State v. Eubanks*, 283 N.C. 556, 563, 196 S.E.2d 706, 710-11 (1973) (upholding the admission of chemical analysis results where the officer testified that he attended breathalyzer operator's school, that he had a certificate issued by the North Carolina State Board of Health to

perform chemical analysis of the breath, and that he followed rules and regulations he received when he was certified on this particular occasion).

B. Possession of an Open Container

[2] Defendant also contends the trial court erred in denying his motion to dismiss the open container charge because there was insufficient evidence that the open container belonged to him.

" '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). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "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).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citation, quotation marks, and emphasis omitted). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

The offense of possessing an open container of alcohol is defined in N.C. Gen. Stat. § 20-138.7(a1). That section provides that "[n]o person shall possess an alcoholic beverage other than in the unopened

manufacturer's original container, or consume an alcoholic beverage, in the passenger area of a motor vehicle while the motor vehicle is on a highway or the right-of-way of a highway. . . ." N.C. Gen. Stat. § 20-138.7(a1) (2015).

In the present case, the evidence was that there was an open beer can "near the console area of the vehicle[]" that defendant was driving when he was pulled over. There were two passengers in the vehicle with defendant, one in the front passenger seat and one in the back seat. The question on appeal is whether there is evidence defendant possessed the open beer can.

This Court has explained that

> [p]ossession of any item may be actual or constructive. Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition.

State v. Alston, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citations omitted), *superseded in part on other grounds by statute as stated in State v. Gaither*, 161 N.C. App. 96, 104, 587 S.E.2d 505, 510 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004). "[C]onstructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury." *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001), *affirmed*, 356 N.C. 141, 567 S.E.2d 137 (2002) (quotation marks, citation, and emphasis omitted). "In car cases, . . . [a]n inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the vehicle where the [item] was found." *State v. Best*, 214 N.C. App. 39, 46-47, 713 S.E.2d 556, 562 (quotation marks and citations omitted), *disc. rev. denied*, 365 N.C. 361, 718 S.E.2d 397 (2011). But, "[w]hen . . . the defendant [does] not have exclusive control of the location where [the item] is found, constructive possession of the [item] may not be inferred without other incriminating circumstances." *State v. Clark*, 159 N.C. App. 520, 525, 583 S.E.2d 680, 683 (2003) (quotation marks and citation omitted).

There was no evidence in this case that defendant ever had actual possession of the open can of beer. Moreover, because there were two passengers in the vehicle with defendant, defendant did not have exclusive control of the console area. Thus, there must be other incriminating circumstances to infer defendant had constructive possession of the

open beer can. Defendant contends there were no such circumstances in this case. We disagree.

Besides the evidence that there was an open can of beer near the console area of the vehicle defendant was driving, which was visible to the state trooper upon his approach to the driver's side of the vehicle, the evidence also showed that defendant initially provided the state trooper a false name, defendant's eyes were red and glassy, there was a strong odor of alcohol coming from the vehicle, and defendant's speech was slurred. The state trooper further testified that he had defendant come back to his patrol car for further questioning. At that time, the trooper noticed an odor of alcohol on defendant's breath and defendant admitted that he had consumed a beer that morning. In fact, defendant told the trooper "that he had had tequila the night before and had freshened it up with a beer that morning."

We hold this evidence, when viewed in the light most favorable to the State, provided sufficient other incriminating circumstances to support a reasonable inference that the open container of beer belonged to defendant. Thus, it was proper for the trial court to deny defendant's motion to dismiss the open container charge and allow the jury to determine defendant's guilt.

III. Conclusion

For the reasons discussed, we hold defendant received a fair trial free of error.

NO ERROR.

Judges BRYANT and MURPHY concur.

STATE v. STIMPSON

[256 N.C. App. 364 (2017)]

STATE OF NORTH CAROLINA
v.
ANTONIO LAMAR STIMPSON

No. COA17-226

Filed 7 November 2017

Conspiracy—robbery with firearm—multiple victims and crimes of pure opportunity—number of conspiracies a question for jury

The trial court did not err by denying defendant's motions to dismiss four of five counts of conspiracy to commit robbery with a firearm where the victims and crimes committed arose by pure opportunity, and the victims and property stolen were not connected. Further, the question of whether multiple agreements constitute a single conspiracy or multiple conspiracies is a question of fact for the jury.

Judge ELMORE dissenting.

Appeal by defendant from judgments entered 28 April 2016 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 23 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General David P. Brenskelle, for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for defendant-appellant.

TYSON, Judge.

Antonio Lamar Stimpson ("Defendant") appeals from judgments entered after a jury convicted him of discharging a firearm into an occupied property, discharging a firearm into an occupied vehicle, five counts of conspiracy to commit robbery with a firearm, six counts of robbery with a firearm, and two counts of attempted robbery with a firearm. Defendant has abandoned his appeal on all convictions and judgments, except for four of the five conspiracy convictions. We find no error in any of Defendant's convictions and judgments.

I. Factual Background

A. The Crimes

1. Smith

In the early morning hours of 22 March 2014, Debra Smith left a hair salon on Summit Avenue in Greensboro and entered her vehicle. A dark colored Jeep Cherokee vehicle swiftly pulled up and blocked her from leaving. Ms. Smith testified she saw two men exit the Jeep, with one man carrying a pump shotgun. The men wore masks and dark clothing. Ms. Smith was ordered to exit her vehicle and instructed to "give us your money."

Ms. Smith testified she was "scared for her life" when a gunshot was fired near her head. She fell onto the pavement as she exited from her vehicle. Ms. Smith told the men she did not have any money. One of the men with a shotgun began to taunt her. The other man stated, "Come on, man, take the vehicle" and the men got into Ms. Smith's car and drove it away.

2. Eban and Nie

On the same morning at about 5:45 a.m., Kler Eban was watching from the front door of his home on Sunrise Valley Road in Greensboro, as his wife walked to her car to leave for work. He saw three men walk past his house. Mr. Eban testified the men returned and two went behind his wife's car and one came toward the door of his house and shouted at him to open the door. Mr. Eban testified the men's faces were covered. One of the men pointed a gun wrapped in cloth at Mr. Eban.

Mr. Eban heard a gunshot and attempted to get out of the door to assist his wife. Mr. Eban's wife, Lieu Nie, testified a red Jeep was parked behind her car. The men had shot at her through the driver's side window while she was sitting in the driver's seat.

Two shots were also fired in Mr. Eban's direction. Ms. Nie crawled over the front seat and escaped through the rear door. The robbers entered Ms. Nie's car and stole a shopping bag of new cooking utensils. Mr. Eban testified one of the men got into the Jeep and two of them got into his wife's car and drove it away.

3. Nareau

Around 6:30 a.m., John Nareau drove his car into a parking space at his workplace on Norwalk Street in Greensboro. As he exited his vehicle, a male got in front of him and raised what appeared to be a

sawed-off shot gun. Mr. Nareau was told "don't try anything. There's two in the back." Mr. Nareau testified the man wore a mask and demanded his wallet and cellphone. After handing over his wallet and phone, Mr. Nareau ran away and watched the men get into a dark colored Jeep and drive away.

4. Tomlin, White, Wilkerson, and Mork

At a little before 7:00 a.m. on the same date, four friends, Elizabeth Tomlin, Brinson White, Clair Wilkerson and Wesley Mork, were loading luggage in the trunk of their rental car, when three men yelled at them "to turn around, mother f—ker;" and "get down mother f—ker." Ms. Tomlin saw the men exit from a red Jeep parked 30-40 feet away. The men wore masks and dark clothing and carried guns. One of the guns appeared to be a sawed-off shotgun. The two women were chased by one man, while Mr. Carter and Mr. Mork were detained on the ground by the other two men from the Jeep. Mr. Mork's wallet and cash were stolen and cash was stolen from Mr. Carter.

During the pursuit, Ms. Tomlin's and Ms. Wilkerson's bags were taken. One of the attackers yelled "get in the car and take the car." The keys to the rental car were not in the vehicle, so all three men ran back to the Jeep and left.

5. Holland

Nicholas Holland was the final victim of the related crimes that occurred that morning. As Mr. Holland left his residence on Tremont Street in Greensboro, he noticed two males walk past the house. Mr. Holland observed a Jeep vehicle quickly pull up in front of his house. A masked male with a handgun demanded, "Give me what you have." Mr. Holland offered his brief case and car keys and attempted to run away. One of the men chased him until the same Jeep pulled up and the man climbed inside. The Jeep sped away.

B. Investigations

In response to the robberies, Greensboro Police Detective Devin Allis received a dispatch with a description of the dark colored Jeep Cherokee being involved. Detective Allis pursued the Jeep and apprehended the driver, Aaron Spivey, after a chase. Mr. Spivey was arrested with Mr. Mork's wallet in his possession.

After Spivey's arrest, officers located Defendant and LeMarcus McKinnon walking in a nearby area. Defendant and McKinnon ran as the officers approached and had identified themselves. Defendant was

apprehended by Lieutenant Larry Patterson. When arrested, Defendant was wearing a dark colored T-shirt, dark blue jeans and grey sneakers. He had cash, Mr. Nareau's cellphone and the keys to Ms. Nie's car in his possession.

When interviewed by police, Defendant initially denied any involvement in the robberies. Eventually Defendant admitted he had been present in the dark Jeep Cherokee with Spivey and McKinnon. Defendant stated he and McKinnon were cousins and were "tight." Defendant acknowledged he had met Spivey the previous week. Defendant also told police he had handled one of the guns a few days before the robberies.

Defendant told police officers he had been a passenger in the Jeep and witnessed the robberies perpetrated by the others. Defendant admitted driving the Jeep from the scene of the robbery of Ms. Nie and to later meeting Spivey and McKinnon for the subsequent robberies.

Officers recovered three pair of gloves, a blue toboggan, a black and grey bandana and a black headband or neckwarmer from inside the passenger area of the Jeep Cherokee. The handbags and briefcase belonging to the various victims were also recovered from inside the Jeep.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015) and N.C. Gen. Stat. § 15A-1444(a) (2015).

III. Issue

Defendant asserts the trial court erred by failing to dismiss four of the conspiracy charges and argues the State's evidence supported only a single charge.

IV. Standard of Review

"We review the trial court's denial of a motion to dismiss *de novo*." *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010). Under a *de novo* standard of review, this Court "considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.*

In ruling on a motion to dismiss for insufficiency of the evidence,

> the trial court *must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor*. All evidence, competent or incompetent, must be considered. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. . . .

> [S]o long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence. The test for sufficiency of the evidence is the same whether the evidence is direct, circumstantial or both.

State v. Bradshaw, 366 N.C. 90, 92-93, 728 S.E.2d 345, 347 (2012) (emphasis supplied) (internal citations and quotation marks omitted).

V. Analysis

A. State's evidence

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act . . . ." *State v. Massey*, 76 N.C. App. 660, 661, 334 S.E.2d 71, 72 (1985). The agreement to commit the unlawful act may be established by circumstantial evidence. *State v. Brewton*, 173 N.C. App. 323, 327-28, 618 S.E.2d 850, 854-55 (2005).

A conspiracy ordinarily "ends with the attainment of its criminal objectives . . . ." *State v. Tirado*, 358 N.C. 551, 577, 599 S.E.2d 515, 533 (2004), *cert. denied sub nom*, *Queen v. N.C.*, 544 U.S. 909, 161 L. Ed. 2d 286 (2005) (citation omitted). "The question of whether multiple agreements constitute a single conspiracy or multiple conspiracies is a question of fact for the jury." *Id.* (citation omitted).

The State alleged Defendant, Mr. Spivey and Mr. McKinnon conspired to commit the robberies of Ms. Smith, Ms. Lie, Mr. Nareau, Ms. Tomlin, Ms. Wilkerson, Mr. Mork and Mr. Holland. The State proceeded on five indictments alleging each incident as a separate conspiracy. The State did not offer the testimony of Spivey or McKinnon, Defendant's alleged co-conspirators. The only witnesses called by the State were the victims of the robberies and the police officers involved in the investigation of the crimes.

We all agree the evidence supports the conclusion that Defendant, Spivey and McKinnon conspired to commit the robberies. The State's evidence showed Defendant and his compatriots were all wearing dark clothing. Implements indicating planning in advance and to assist committing robberies were recovered from inside the Jeep: head and face coverings, gloves, and weapons.

Defendant testified concerning his relationship with McKinnon, his cousin, and that he had met Spivey the week prior to the crimes, and had handled a shotgun used in the robberies a few days before the

robberies and admitted being present inside the Jeep Cherokee when the crimes occurred. All three men had been together on the afternoon of 21 March 2014. Defendant testified he, Spivey and McKinnon had been drinking and taking drugs together during the evening before and into the morning of the robberies and that all three men had headed out and traveled together in the early morning hours in the Jeep.

B. Single Conspiracy Cases

Defendant argues all of the above facts present only evidence of a single conspiracy to commit robberies on the morning of 22 March 2014. Defendant asserts *State v. Medlin*, 86 N.C. App. 114, 357 S.E.2d 174 (1987) and the cases which follow it, control the outcome of his case. *See State v. Fink*, 92 N.C. App. 523, 375 S.E.2d 303 (1989); *State v. Wilson*, 106 N.C. App. 342, 416 S.E.2d 603 (1992) and *State v. Griffin*, 112 N.C. App. 838, 437 S.E.2d 390 (1993). We address each in turn.

1. *State v. Medlin*

In *Medlin*, the defendant and two others were charged with break-ins and thefts of seven retail stores over the period of four months. *Medlin*, 86 N.C. App. at 115, 357 S.E.2d at 175. Defendant-Medlin operated a thrift store where co-conspirators Cox and Williams would "hang out." *Id.* at 118, 357 S.E.2d at 177. Cox and Williams testified the break-ins were Medlin's idea. The State's evidence showed all the break-ins occurred in essentially the same manner: Cox and Williams would break a store window, climb through the hole and carry away items. The defendant would drive his truck to the stores to assist the others in carrying away the stolen goods. The participants met after the break-ins to divide the stolen items and to discuss the next break-in. *Id.* at 122, 357 S.E.2d at 179. For each of the break-ins, the defendant was charged and convicted under separate indictments for conspiring with Cox and Williams to commit the ten felonious break-ins. *Id.* at 121, 357 S.E.2d at 178.

This Court recognized "[w]hen the evidence shows a series of agreements or acts constituting a *single* conspiracy, a defendant cannot be prosecuted on multiple conspiracy indictments consistent with the constitutional prohibition against double jeopardy." *Id.* (emphasis in original) (citing *United States v. Kissel*, 218 U.S. 601, 54 L. Ed. 1168 (1910)). While the offense "is complete upon the formation of the unlawful agreement, the offense continues until the conspiracy comes to fruition . . . ." *Id.* at 122, 357 S.E.2d at 179.

While there is no simple test for determining whether there was one conspiracy or multiple conspiracies, the Court acknowledged several

factors impact the determination of the number of conspiracies, including: "time intervals, participants, objectives, and number of meetings." *Id.*; *see also Tirado*, 358 N.C. at 577, 599 S.E.2d at 533 ("The nature of the agreement or agreements, the objectives of the conspiracies, the time interval between them, the number of participants, and the number of meetings are all factors that may be considered.").

2. *State v. Fink*

In *Fink*, the conspiracies charged had occurred within hours of each other. *Fink*, 92 N.C. App. at 533, 375 S.E.2d at 309. The participants in the first conspiracy alleged were the defendant-Fink, his brothers, and one of their "select" customers; the participants in the second conspiracy alleged were Fink and his brothers. *Id.* A panel of this Court found that while "the amount of cocaine varied in the first and second alleged conspiracies, the objective was the same: to traffic in cocaine." *Id.* Furthermore at trial, the State argued "there was a '*continuing conspiracy*' among the defendants." *Id.* This Court recognized a single conspiracy is not necessarily "transformed into multiple conspiracies simply because . . . the same acts in furtherance of it occur over a period of time." *Id.* at 532, 375 S.E.2d at 309. The Court in *Fink* held evidence showed there was only one "mutual, implied understanding among the brothers to commit the unlawful act of trafficking in cocaine." *Id.* at 530, 375 S.E.2d at 308.

3. *State v. Wilson*

In *State v. Wilson*, 106 N.C. App. 342, 344, 416 S.E.2d 603, 604 (1992), "a series of robberies occurred in and around Durham during a two week period in December 1988." One of the participants in the robberies in *Wilson* was a witness for the State. He testified that a few days before their first robbery, "defendant told him that cash money . . . was what it was all about and the onliest [sic] way to get cash money was in armed robberies." *Id.* at 346, 416 S.E.2d at 605. The co-conspirator also testified that once they started committing the robberies, the men did not want to stop "robbing places." *Id.*

This Court found the facts of *Wilson* "to be legally indistinguishable from *Medlin*" and stated, "evidence that a common scheme of a single conspiracy to commit armed robberies to acquire cash existed." *Id.* at 346, 416 S.E.2d at 605.

4. *State v. Griffin*

This Court also reached a similar conclusion in *State v. Griffin*, 112 N.C. App. 838, 437 S.E.2d 390 (1993). In *Griffin*, the State failed to

prove more than one conspiracy, where the offenses occurred over a one month period, the indictments alleged the defendant had conspired with the same participants for each conspiracy count and with the same objective. *Id.* at 841, 437 S.E.2d at 392.

Furthermore, "the State presented no evidence concerning the number of meetings which took place between [the] defendant and the other participants." *Id.* "[W]hen the State elects to charge separate conspiracies, it must prove not only the existence of at least two agreements, but also that they were separate." *Id.* at 840, 437 S.E.2d at 392; *see also State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E.2d 893, 902 (vacating defendant's additional conspiracy counts where multiple overt acts arising from a single agreement to sell large amounts of cocaine do not permit prosecutions for multiple conspiracies), *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984).

Here, Defendant argues none of the other perpetrators testified at trial and the State offered no direct evidence of any planning or conversations before or between each event. The State offered no testimony concerning any discussions between the co-participants before, during or after each robbery. Defendant argues the State's evidence was sufficient to allow the jury to infer only a single conspiracy had occurred based upon the implements found in the Jeep, the victims' belongings found on all of the culprits, and Defendant's own statements that he had met up with the co-conspirators before their crime spree began. We disagree.

C. Multiple Conspiracies

The State asserts the facts before us are distinguishable from the line of cases above. Unlike the facts in *State v. Medlin*, no evidence shows any meeting took place between Defendant and the other two robbers subsequent to any of the robberies to plan additional robberies in furtherance of any prior agreement to engage in as many crimes as possible, only that the three men were drinking and doing drugs together the evening and morning before the crimes were committed. There was no evidence that the Defendant and his co-conspirators conspired to engage in as many robberies as they could. They agreed and engaged in random robberies as the opportunities appeared before them.

The dissenting judge asserts the State "impliedly" admits it did not prove five separate agreements. We disagree. On brief, the State acknowledges there was no proof of any meeting about or discussion between Defendant and the other perpetrators *to plan to commit a series of robberies*. Evidence was offered by the State and by Defendant of

meetings and interactions with Defendant and the other conspirators, before and between each robbery, but no evidence of the conversations.

The facts in *Wilson* are also dissimilar to the instant case. No evidence shows any meeting being held between Defendant and the other robbers prior to the robberies to discuss or plan the robberies, or the specific property to be stolen during the course of the robberies. Unlike the facts in *Fink* and *Griffin*, there is no evidence of a meeting between Defendant and the other two perpetrators to devise a single plan to engage in a series of robberies.

The dissent finds Defendant's case to be most similar to *Medlin*. However the State's evidence showed defendant-Medlin initiated the idea and suggested to his co-conspirators the plan to break in and steal the televisions and radios that he could sell in his thrift store. *Medlin*, 86 N.C. App. at 119, 357 S.E.2d at 177. The multiple break-ins were part of a single plan to steal merchandise to be sold at Medlin's thrift store. *Id.* at 122, 357 S.E.2d at 179. Here, the crimes were ones of opportunity, where differing victims were accosted and items were stolen from them as Defendant and his co-conspirators happened to come upon them.

No evidence limits Defendant as engaged in a one-time, pre-planned and organized, ongoing and continuing conspiracy to engage in robbery and the other crimes. In particular, the random nature and happenstance of the robberies and related crimes here do not indicate a one-time, pre-planned conspiracy. The victims and property stolen were not connected. The victims and crimes committed arose at random and by pure opportunity. Each of the series of crimes on the various victims was committed and completed before Defendant and his co-conspirators moved on and happened upon and mutually agreed to rob and commit other crimes on their next targets and victims of opportunity. Defendant's argument is overruled.

1. *State v. Roberts*

In *State v. Roberts*, 176 N.C. App. 159, 625 S.E.2d 846 (2006), the defendant was convicted of two counts of conspiring to commit first degree burglary and robbery with a dangerous weapon for burglaries and robberies which occurred on two consecutive nights. On the first night, the defendant and others discussed "robbing someone." *Id.* at 161, 625 S.E.2d at 848. The conspirators then burglarized and robbed two separate victims. *Id.* On the second night, the defendant took an active part in another burglary and robbery of different victims, but there was no testimony that the agreement of the first night covered the acts of the second. *Id.*

This Court determined the State had shown separate conspiracies where the defendant and two men agreed to rob someone and nothing else showed subsequent similar criminal acts were committed as part of their initial agreement. *Id.* at 167, 625 S.E.2d 852. Viewed in the light most favorable to the State, sufficient evidence was presented to allow the jury to find the defendant was involved in two separate conspiracies. *Id.*

2. *State v. Glisson*

A recent case before this Court addressed the defendant's argument that he had engaged in a single conspiracy to complete three separate transactions. *State v. Glisson*, __ N.C. App. __, 796 S.E.2d 124 (2017). In *Glisson*, the defendant sold oxycodone to an undercover police officer in three separate controlled drug transactions with each transaction being a month or more apart. *Id.* at. __, 796 S.E.2d at 126. No evidence was offered to suggest that the defendant planned the transactions as a series. An informant or the police initiated each sale. *Id* at. __, 796 S.E.2d at 129.

This Court held "evidence was sufficient to support a reasonable inference that the defendant planned each transaction in response to separate, individual requests by the buyers . . . ." *Id.* "While the objectives of each [crime] may have been similar, the agreed upon amount differed and none of the transactions contemplated future transactions." *Id.*

Considering the totality of the circumstances in the present case, and reviewing the evidence in the light most favorable to the State, sufficient evidence supports a reasonable inference for the jury to consider and conclude that Defendant was involved in five separate conspiracies to commit armed robbery.

While the dissenting opinion sets forth our same standard of review on motions to dismiss, it appears to ignore its application to the motion to dismiss in the case before us. "In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals." *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985) (citations omitted) *review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986). "The question of whether multiple agreements constitute a single conspiracy or multiple conspiracies is a question of fact for the jury." *Tirado*, N.C. App. at 577, 599 S.E.2d at 533 (citation omitted). The trial court did not err by denying Defendant's motion to dismiss and properly submitted all five conspiracy counts to the jury.

VI. Conclusion

In a motion to dismiss, the trial court must consider the evidence of multiple conspiracies in the light most favorable to the State and give the State every reasonable inference to be draw from the evidence presented. *Bradshaw*, 366 N.C. at 92-93, 728 S.E.2d at 347. We find no error in Defendant's convictions or the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judge STROUD concurs.

Judge ELMORE dissents with separate opinion.

ELMORE, Judge, dissenting.

I respectfully disagree with the majority's decision to affirm the trial court's denial of defendant's motions to dismiss four of the five counts of conspiracy to commit robbery with a firearm. The State failed to present substantial evidence of multiple agreements between defendant and his co-conspirators as required to prove more than one conspiracy. Applying the four factors from *State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E.2d 893, 902 (1984), the State only proved that defendant engaged in one conspiracy. Accordingly, I respectfully dissent.

I. Standard of Review

A trial court's denial of a motion to dismiss is accorded *de novo* review. *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010). A trial court properly denies a defendant's motion to dismiss if "there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Whether evidence is substantial "is a question of law for the court and is reviewed *de novo*. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Glisson*, ___ N.C. App. ¬¬-___, ___, 796 S.E.2d 124, 127-28 (2017) (internal citations and quotation marks omitted). On a motion to dismiss, a trial court must consider the evidence in a light most favorable to the State. *State v. Stone*, 323 N.C. 447, 451, 373 S.E.2d 430, 433 (1988). A motion to dismiss is properly denied when the evidence gives rise to a reasonable inference of guilt and is properly allowed when the evidence only raises a suspicion or conjecture as to the defendant's guilt. *Id.* at 452, 373 S.E.2d at 433.

II. Criminal Conspiracy

"A criminal conspiracy is an agreement between two or more people to do an unlawful act . . . . [T]o prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (internal citation omitted). When the State charges a defendant with two or more conspiracies, "it must prove not only the existence of *at least two agreements* but also that they were *separate*." *State v. Griffin*, 112 N.C. App. 838, 840, 437 S.E.2d 390, 392 (1993) (emphasis added). "A single conspiracy may, and often does, consist of a series of different offenses." *Id.* at 841, 437 S.E.2d at 392. However, a series of different offenses "arising from a single agreement [does] not permit prosecutions for multiple conspiracies." *Rozier*, 69 N.C. App. at 52, 316 S.E.2d at 902; *see also State v. Howell*, 169 N.C. App. 741, 749, 611 S.E.2d 200, 205-06 (2005) (arresting judgment for one of two drug conspiracy convictions when there was only evidence of "*one* agreement or mutual understanding" and multiple overt acts (emphasis added)). Such prosecutions are inconsistent with the constitutional prohibition against double jeopardy. *State v. Medlin*, 86 N.C. App. 114, 121, 357 S.E.2d 174, 178 (1987) (citing *United States v. Kissel*, 218 U.S. 601, 31 S. Ct. 124, 54 L. Ed. 1168 (1910)). "It is the number of separate agreements, rather than the number of substantive offenses agreed upon, which determines the number of conspiracies." *State v. Worthington*, 84 N.C. App. 150, 163, 352 S.E.2d 695, 703, *disc. rev. denied*, 319 N.C. 677, 356 S.E.2d 785 (1987) (citations omitted).

Nevertheless, it is difficult to determine whether a single or multiple conspiracies are involved in a particular case. This Court in *Rozier* established four factors to consider when determining whether a defendant has committed single or multiple conspiracies. 69 N.C. App. at 52, 316 S.E.2d at 902. Those factors are (1) the time intervals between the crimes, (2) the specific participants involved, (3) the conspiracy's objectives, and (4) the number of meetings among the participants. *Id.* On appeal, defendant argues that applying the *Rozier* factors to his case reveals a single conspiracy, not five. I agree. To support his argument, defendant cites to four decisions from this Court that applied the *Rozier* factors and found a single conspiracy.

III. Summary of *Rozier* Cases

A. *State v. Medlin*

In *State v. Medlin*, the State's evidence showed that the defendant participated in ten break-ins of retail stores across Durham from May

to August of 1985. 86 N.C. App. at 121, 357 S.E.2d at 178. The robberies were conducted in a similar manner; various electronics were stolen from each location and the defendant and his co-conspirator, Walter Cox, participated in all ten robberies while a third co-conspirator participated in three. *Id.* at 117–21, 357 S.E.2d at 176-78. Cox testified that he and the defendant would meet after each break-in to plan the next one. *Id.* at 122, 357 S.E.2d at 179. The defendant was convicted of seven counts of conspiracy to break or enter and appealed the judgment, arguing that the State's evidence showed only "a single scheme or plan to commit an ongoing series of felonious breakings or enterings." *Id.* at 121, 357 S.E.2d at 178.

The *Medlin* panel, applying the *Rozier* factors, "[found] ample evidence of a single conspiracy." *Id.* at 122, 357 S.E.2d at 179. The panel first determined the break-ins were conducted over a short time period of four months, "some within ten days of each other." *Id.* Second, these crimes were committed by the same three participants, despite the third co-conspirator not being present for some of the robberies. *Id.* Third, the participants had the common objective to steal televisions and radios from Durham retail stores. *Id.* Finally, the panel considered the number of meetings among the participants. Although the defendant met with his co-conspirators generally after each break-in, the purpose of the meetings was to "divide the spoils and discuss the next break-in." *Id.* The panel summarized the fourth *Rozier* factor as follows:

> The gist of the meetings was to plan subsequent break-ins in furtherance of the original unlawful agreement made sometime before the first break-in. We are hard pressed to find facts more clearly telling of an ongoing series of acts in furtherance of a single conspiracy to break or enter. Rather than show ten separate conspiracies to break or enter on ten separate occasions as the State contends, these facts show one unlawful agreement to break or enter as many times as the participants could get away with.

Id. Accordingly, the *Medlin* panel vacated the defendant's seven conspiracy convictions and remanded for entry of a judgment on one conspiracy conviction, with instructions to resentence the defendant on this single conspiracy conviction. *Id.* at 123, 357 S.E.2d at 179.

B. *State v. Wilson*

In *State v. Wilson*, the State's evidence showed the defendant participated in a series of residential and retail robberies that occurred in Durham over two weeks in December 1988. 106 N.C. App. 342, 344, 416 S.E.2d 603, 604 (1992). The robberies were similar in nature and either two or three perpetrators in ski masks committed each one. *Id.* The defendant was convicted of, *inter alia*, four counts of conspiracy to commit armed robbery. *Id.* at 345, 416 S.E.2d at 604. The defendant appealed the judgment, arguing that three of the conspiracy convictions should be vacated because the evidence only supported one conspiracy. *Id.*

On appeal, the *Wilson* panel concluded the facts were "legally indistinguishable" from *Medlin*. *Id.* at 346, 416 S.E.2d at 605. Applying the *Rozier* factors, the panel first determined that the time period for these robberies was a mere two weeks — even shorter than in *Medlin*. *Id.* Second, the participants were generally the same in each robbery. *Id.* "The fact that in two of the robberies the conspirators solicited the assistance of a third man is inconsequential." *Id.*; *see, e.g.*, *State v. Overton*, 60 N.C. App. 1, 13, 298 S.E.2d 695, 702–03 (1982), *disc. rev. denied*, 307 N.C. 580, 299 S.E.2d 652 (1983). Third, there was a common objective based on the similar nature of the robberies and one participant's testimony that the purpose was to acquire cash. *Id.* at 346–47, 416 S.E.2d at 605–06. Finally, the panel determined that, unlike *Medlin*, there was no evidence of meetings among the participants between each robbery. *Id.* at 346, 416 S.E.2d at 605. As a result, the panel held there was evidence of one conspiracy " 'to break or enter as many times as the participants could get away with.' " *Id.* at 347, 416 S.E.2d at 606 (quoting *Medlin*, 86 N.C. at 122, 357 S.E.2d at 179). The panel vacated three of the defendant's conspiracy convictions and remanded with instructions to resentence. *Id.*

C. *State v. Griffin*

In *State v. Griffin*, the defendant was indicted on eight counts of conspiracy to provide an inmate with a controlled substance. 112 N.C. App. at 838, 437 S.E.2d at 391. The State's evidence showed that the defendant conspired with civilians and other inmates to smuggle various prescription drugs into the prison so the defendant could make a profit, and drugs were smuggled into the prison as a part of this conspiracy on at least four separate occasions in June 1991. *Id.* at 839–40, 437 S.E.2d at 391–92. The defendant was convicted of four counts of conspiracy and appealed, arguing there was only a single scheme to bring drugs into the prison. *Id.* at 840, 437 S.E.2d at 392.

The *Griffin* panel applied the *Rozier* factors and held that this amounted to one conspiracy, not four. *Id.* at 841, 437 S.E.2d at 392. First, the panel determined the one-month span was a short time interval. *Id.* Second, there were four common participants based on who the State named in its indictments. *Id.* Third, the common objective of each conspiracy was to deliver controlled substances to an inmate to sell for a profit. *Id.* "Finally, the State presented no evidence concerning the number of meetings which took place between [the] defendant and the other participants." *Id.* Thus, the panel vacated three of the defendant's four conspiracy convictions and remanded for resentencing. *Id.* at 842, 437 S.E.2d at 393.

D. *State v. Fink*

In *State v. Fink*, the State's evidence revealed that the defendant and his brothers sold cocaine from their house. 92 N.C. App. 523, 525, 375 S.E.2d 303, 304 (1989). One of the buyers was an undercover SBI agent who purchased cocaine from the defendant over the course of several months. *Id.* at 525, 375 S.E.2d at 305. The basis of the State's two conspiracy charges of trafficking in cocaine occurred on the evening of 19 February and the morning of 20 February 1987. *Id.* at 525–26, 375 S.E.2d at 305. The undercover agent conducted a drug buy at the defendant's residence on the 19th and executed a search warrant the next morning, and cocaine was found on both occasions. *Id.* The defendant was convicted of two counts of conspiracy and one count of trafficking in cocaine. *Id.* at 527, 375 S.E.2d at 305–06. The defendant appealed, arguing that there was evidence of only one conspiracy. *Id.* at 532, 375 S.E.2d at 308.

On appeal, the *Fink* panel held that the two charged conspiracies "were so overlapped as to comprise one continuing conspiracy." *Id.* at 533, 375 S.E.2d at 309. Applying the *Rozier* factors, the panel first determined that the two conspiracies occurred within hours of each other. *Id.* Second, the participants (i.e., the defendant and his brothers) were the same, with the exception of a middle man for the drug buy on 19 February 1987. *Id.* Third, the common objective was to traffic in cocaine, notwithstanding the varying amounts of cocaine for each conspiracy. *Id.* Finally, despite no evidence of meetings, the State argued at trial that this was a "continuing conspiracy." *Id.* The panel vacated one of the conspiracy convictions and remanded for resentencing on the remaining conspiracy conviction. *Id.* at 534, 375 S.E.2d at 310.

IV. Analysis

I agree with defendant that the four *Rozier* cases are similar to the present case. Each relevant factor is addressed in turn.

A. Application of *Rozier* Factors

i. Time Intervals

The first *Rozier* factor is the time interval between each crime. It is implied that time is a crucial factor because a short time interval between crimes signifies a low possibility that an agreement can be made between each crime.

The panel in each of the four *Rozier* cases found the respective time intervals to be short. *Griffin*, 112 N.C. App. at 841, 437 S.E.2d at 392 (one month); *Wilson*, 106 N.C. App. at 346, 416 S.E.2d at 605 (two weeks); *Fink*, 92 N.C. App. at 533, 375 S.E.2d at 309 (less than 24 hours); *Medlin*, 86 N.C. App. at 122, 357 S.E.2d at 179 (four months). Although the defendants in the *Rozier* cases had plenty of time to meet or make an agreement in between the crimes, the State did not present evidence of meetings or agreements that occurred in between the crimes in those cases. Moreover, the panels in those cases did not infer the presence of meetings or agreements based on the time intervals.

Here, the time interval in which the five robberies occurred is two to three hours — much shorter than in any of the four *Rozier* cases. Notably, the longest time interval cited by any of the *Rozier* cases is four months, yet the *Medlin* panel still held that application of the *Rozier* factors resulted in a single conspiracy. Nevertheless, the majority fails to credit the time interval of two to three hours in this case.

ii. Participants

The second *Rozier* factor is the specific participants involved in each crime. This factor is significant because when the participants to each crime are completely different, the State must prove separate conspiracies for each crime. However, when the participants are the same, there could potentially be one conspiracy to commit several crimes.

In *Medlin* and *Wilson*, the same two individuals participated in each crime, but a third individual participated in some but not all of the crimes. In *Fink*, the defendant and his brother participated in each alleged crime, despite the SBI's use of a middle man to make the drug purchase. Regardless, the *Wilson* panel determined that the addition or absence of one participant was "inconsequential."

That scenario is not present in this case. Here, as in *Griffin*, the participants are the exact same in each of the five robberies.

iii. Objectives

The third *Rozier* factor is the objective of each alleged conspiracy. 69 N.C. App. at 52, 316 S.E.2d at 902. When the objective of each alleged conspiracy is different, this leans toward separate conspiracies. But when the objective of each alleged conspiracy is same, this leans toward a single conspiracy.

Each panel in the *Rozier* cases determined that the objective of each alleged conspiracy was the same. The *Medlin* panel determined that the conspirators had the common goal to "break or enter as many times as [they] could get away with." The *Wilson* panel concluded there was a common objective to acquire cash during the several robberies, which was determined based on the nature of the robberies and the testimony of a participant.

Defendant's case is most similar to *Medlin*. Here, the participants committed a string of robberies early one morning over the course of a few hours before they were caught by the police. Unlike *Wilson*, there was no testimony from a participant about the objective, but the objective here can be determined based on the nature and similarity of the crimes. Thus, the objective of each alleged conspiracy is to commit an armed robbery, which leans toward a single conspiracy.

iv. Meetings

The final *Rozier* factor is the number of meetings among the participants. This factor is crucial to determining the number of conspiracies because it tends to reflect the number of agreements among the participants. To prove a single conspiracy, the State must show an express or implied understanding of an agreement. *Morgan*, 329 N.C. at 658, 406 S.E.2d at 835. To prove two or more conspiracies, the State must prove two or more separate agreements. *Griffin*, 112 N.C. App. at 840, 437 S.E.2d at 392. When the State proves multiple separate meetings among the participants, a jury could infer multiple implied understandings, and thus multiple conspiracies. *See State v. Choppy*, 141 N.C. App. 32, 40–41, 539 S.E.2d 44, 50 (2000), *disc. rev. denied*, 353 N.C. 384, 547 S.E.2d 817 (2001).

In *Griffin*, *Wilson*, and *Fink*, the State presented no evidence of any meetings among the conspirators before, during, or after the crimes that would allow the jury to infer implied understandings of agreements. Although the *Medlin* panel determined that the participants met between the robberies, the purpose of the meetings was to divide the

spoils and plan the next robbery "in furtherance of the original unlawful agreement." One similarity in each *Rozier* case is that no panel held that an implied understanding could be shown by the participants' actions.

As the majority notes, the State "offered no testimony concerning any discussions between the co-participants before, during, or after each robbery," similar to *Griffin*, *Wilson*, and *Fink*. However, there is evidence that defendant spent the evening prior to the robberies with the other two perpetrators. Although this may be enough for a jury to find an implied understanding of an agreement for a single conspiracy, I respectfully disagree with the majority's conclusion that there is no error in defendant's convictions.

The State failed to present substantial evidence of four meetings or agreements among the participants. The State charged defendant with five conspiracies and, under *Griffin*, was required to prove five separate meetings or agreements between the participants. Defendant established an implied understanding for one agreement when he testified that he and his fellow perpetrators met the night before the robbery. This single meeting is only enough for the jury to infer a single conspiracy, and the burden was on the State to present evidence of four other separate meetings or agreements. However, the State impliedly admits that it failed to do this by arguing on appeal that "[i]ndeed, there is *no* evidence present that any meetings ever took place between the defendant and any of his fellow perpetrators." (Emphasis added.) Because the State did not present *any* evidence – substantial or not – of the agreement element for four of the five conspiracies, the trial court should have granted defendant's motion to dismiss. The State argues there was an implied understanding to commit each robbery based on the action of committing each robbery. However, the panels in the *Rozier* cases did not find an implied understanding based on the participants' actions, and I believe it would be unwise to depart from that precedent now.

B. "Continuing Conspiracy"

The *Fink* panel, like *Wilson* and *Griffin*, determined there was no evidence of any meetings between any co-conspirator prior to or during the crimes. It held, however, that there was a "continuing conspiracy" to commit a crime. Here, the majority does not believe this is a continuing conspiracy because each crime was "committed and completed before [d]efendant and his co-conspirators moved on and happened upon and *mutually agreed* to rob and commit other crimes on their next targets . . ." (Emphasis added.) I respectfully disagree. The five robberies at issue here were completed in an exceedingly short time interval, the same

participants were involved in each robbery, there was a common objective to commit each crime, and the State did not present evidence of five separate agreements between the co-conspirators. Furthermore, the majority concludes that the participants mutually agreed to commit these crimes without evidence of five separate agreements.

C. Multiple Conspiracy Cases

The majority cites to two cases from this Court to support its conclusion that there were multiple conspiracies here. Both, however, are distinguishable from the instant case.

i. *State v. Roberts*

In *State v. Roberts*, the State's evidence showed the defendant engaged in two robberies on consecutive nights in December 2002. 176 N.C. App. 159, 160–61, 625 S.E.2d 846, 848 (2006). Both robberies involved three masked perpetrators, and each night, one perpetrator brandished a shotgun while another forced their victim to perform fellatio on him. *Id.* at 161, 625 S.E.2d at 848. The State's evidence also revealed that, on the night of the first robbery, the defendant met with the other two individuals from that robbery. *Id.* at 167, 625 S.E.2d at 852. It is unclear if those two individuals were the same or different participants in the second robbery. The defendant was convicted of, *inter alia*, four counts of conspiracy to commit the offenses of first degree burglary and robbery with a dangerous weapon. *Id.* at 161–62, 625 S.E.2d at 848–49. The defendant appealed, arguing the State only proved a single conspiracy. *Id.* at 166, 625 S.E.2d at 851.

On appeal, the *Roberts* panel mentioned the *Rozier* factors but did not apply them. *Id.* at 167, 625 S.E.2d at 852. Instead, the panel determined there was no evidence that the agreement made among the defendant and his co-perpetrators was meant to extend beyond the first robbery. *Id.* The panel stated that "[t]he mere fact that the defendant was involved in a similar crime the next night does not indicate the two crimes were committed as part of the agreement made on" the night of the first robbery. *Id.* The *Roberts* panel ultimately overruled the defendant's assignment of error on the conspiracy convictions. *Id.*

The majority cites to *Roberts* to show that our Court has upheld multiple conspiracy convictions, but fails to see that *Roberts* indicates that defendant here should have been charged with one conspiracy. In *Roberts*, the defendant was charged with two counts of two different conspiracies, which required the State to prove separate elements for each different conspiracy. It is not clear whether the defendant in

Roberts participated in each robbery with the same two perpetrators. Assuming *arguendo* that the defendant was the only common perpetrator in each robbery, then the defendant would have had to make two separate agreements.

Here, the perpetrators in the five robberies were all the same, and defendant was charged with five counts of conspiracy to commit robbery with a firearm. This means the State had to prove each element of this conspiracy five separate times, but the evidence only established the "agreement" element once. Thus, *Roberts* is distinguishable from the case at bar, and I would not apply it.

ii. *State v. Glisson*

In *State v. Glisson*, the defendant sold oxycodone to an undercover officer on three separate occasions. ___ N.C. App. at ___, 796 S.E.2d at 126. The first drug buy in August 2012 was initiated by an informant with an undercover officer present, while the second and third drug buys in September and December 2012 were initiated by the undercover officer. *Id.* The defendant also brought the same third party to each drug buy. *Id.* The trial court convicted the defendant of conspiracy to sell opium, conspiracy to deliver opium, and conspiracy to possess with the intent to sell or deliver opium. The defendant appealed, arguing that she engaged in one continuing conspiracy. *Id.* at ___, 796 S.E.2d at 127–28.

On appeal, the *Glisson* panel applied the *Rozier* factors and found multiple conspiracies. *Id.* at ___, 796 S.E.2d at 128–29. First, the panel found that one month passed between the first and second drug buys and two months passed between the second and third. *Id.* at ___, 796 S.E.2d at 129. Second, even though the informant was only present for the first drug buy, the participants were the same: the defendant, her third party, and the undercover officer. *Id.* Third, even though the objectives may have been similar, the amount of drugs varied. *Id.* Finally, and most significantly, there was no meeting among the participants to engage in each drug buy, and the defendant did not plan the next drug buy since each was initiated by either the informant or the undercover officer. *Id.* This shows the defendant could not have anticipated future drug buys and therefore had to separately agree to each transaction. *Id.* Thus, the *Glisson* panel concluded there were multiple conspiracies. *Id.*

Again, the majority cites to *Glisson* to support its contention that our Court has previously found multiple conspiracies, but it fails to acknowledge the factual differences between the two cases. First, as in *Roberts*, the defendant in *Glisson* was charged with three conspiracies related to three different incident offenses, which required the State

to prove separate elements for each conspiracy. Here, defendant was charged with five counts of conspiracy for the same incident offense. Second, even though the *Glisson* panel applied the *Rozier* factors, the "meeting" factor is significantly different. In *Glisson*, it was determined there were no meetings between the participants, except for the drug buys themselves, because the defendant did not initiate the transactions and thus could not have anticipated the future drug buys. Here, defendant spent the night prior to the robberies with his fellow perpetrators, and a jury could infer that the purpose of this meeting was to plan and agree to commit as many robberies as possible. Additionally, the State presented no evidence of any other meetings prior to or during the robberies. Coupled with the other *Rozier* factors, this indicates a single conspiracy. This case is therefore distinguishable from *Glisson*.

V. Conclusion

The majority declines to apply *Rozier* and its progeny to this case, effectively overlooking years of precedent from this Court. I, however, would apply the *Rozier* factors to defendant's case. First, the time interval was a few hours – much shorter than in *Medlin*, *Wilson*, *Griffin*, or *Fink*. Second, the participants in the five robberies appear to be the same: defendant and the two men he met earlier that night. Third, the objective of each crime is the same: to commit robbery with a dangerous weapon. Finally, the State presented no evidence of any meetings between defendant and the co-conspirators prior to or during the robberies. Although the jury could find an implied understanding to commit a robbery based on defendant's testimony that he spent the evening prior to the robberies with the other two perpetrators, this only supports one conspiracy conviction; the State failed to present evidence of four other *separate* meetings or agreements. Similar to *Medlin*, the facts here show one agreement to commit as many robberies as possible.

Applying *Rozier*, I believe defendant committed only one conspiracy. I would therefore hold that the trial court erred by failing to dismiss the four other counts of conspiracy to commit robbery with a firearm, and I would vacate four of defendant's five conspiracy convictions and remand for resentencing on the remaining one. *See*, *e.g.*, *Rozier*, 69 N.C. App. at 54, 316 S.E.2d at 903 (holding that the earliest conspiracy conviction should stand when more than one conspiracy is charged but only one is proven). I respectfully dissent from the majority's decision to uphold four of defendant's conspiracy convictions.

STATE v. WILKES

[256 N.C. App. 385 (2017)]

STATE OF NORTH CAROLINA
v.
JERMAINE WILKES

No. COA17-208

Filed 7 November 2017

1. Appeal and Error—appealability—writ of certiorari—appeal of suppression order instead of judgments

The Court of Appeals exercised its discretion in a first-degree murder case to issue a writ of certiorari to address the merits of defendant's appeal where defendant's appeal of the suppression order instead of the judgments was technical in nature and the State did not oppose the petition.

2. Confessions and Incriminating Statements—motion to suppress—probable cause to arrest—witness testimony—corroborating evidence—breaking or entering—murder

The trial court did not err in a first-degree murder case by denying defendant's motion to suppress incriminating statements based on alleged lack of probable cause to arrest him. A witness's statements, in connection with a cut screen and other evidence corroborating his story, were sufficient to raise a fair probability in the officers' minds that defendant committed the crime of breaking or entering the victim's house (even though they also suspected he had murdered the victim and then burned her body inside her car to conceal the offense).

Appeal by defendant from judgments entered 15 August 2016 by Judge Robert T. Sumner in Catawba County Superior Court. Heard in the Court of Appeals 21 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adren L. Harris, for the State.

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

DIETZ, Judge.

This case began when law enforcement discovered an abandoned, burned car with a woman's body inside. Officers arrested Defendant

Jermaine Wilkes and, during questioning after his arrest, Wilkes implicated himself in the woman's murder.

Wilkes later moved to suppress those incriminating statements on the ground that law enforcement lacked probable cause to arrest him. The trial court denied the motion to suppress and Wilkes challenges that denial on appeal.

As explained below, we reject Wilkes's arguments. At the time law enforcement arrested Wilkes, they had already visited the victim's home and found a knife on a chair near a window with a cut screen. Later, when officers questioned the victim's boyfriend, he admitted that he was with Wilkes at the victim's home on the night of the murder and that, after the victim locked the two men out of her house, the boyfriend cut the screen, entered the house through the window, unlocked the front door from the inside, and let Wilkes back in.

These facts and circumstances constituted sufficient, reasonably trustworthy information from which a reasonable officer could believe that Wilkes had committed a breaking and entering. Thus, regardless of whether the officers had probable cause to arrest Wilkes for murder, we agree with the trial court that the officers had probable cause to arrest Wilkes for that lesser crime. Accordingly, we reject Wilkes's arguments and affirm the trial court's judgments.

Facts and Procedural History

Jermaine Wilkes is the cousin of Antoine Reid. On the evening of 6 June 2012, Wilkes and Reid arrived at the home of the victim, Brianne Ginty, to have drinks and to play cards. Reid was Ms. Ginty's boyfriend.

Ms. Ginty and Reid argued throughout the evening and, after one argument, Reid and Wilkes left the house. Once outside, Reid tried to go back in but discovered that Ms. Ginty had locked the door behind them. Reid used a knife and a chair located on the porch to cut out a window screen and pry open a window on the side of the house. He then climbed through the window and opened the front door so Wilkes could enter as well.

Once he was back inside, Reid continued to argue with Ms. Ginty until he finally decided to walk home, leaving Wilkes behind. Wilkes and Ms. Ginty then followed Reid home in Ms. Ginty's car, offering to give Reid a ride home. Reid initially agreed, but when he and Ms. Ginty continued to argue, Reid decided to resume his walk home instead.

Reid got out of the car sometime between 3:00 a.m. and 5:00 a.m. and claims that this was the last time he saw Ms. Ginty alive. Reid's mother told police that Reid arrived home at 6:30 a.m.

Around 8:30 a.m. that morning, witnesses saw smoke coming from a burning car on Hopewell Church Road. Catawba County law enforcement found Ms. Ginty's burned body inside the car.

After officers arrested Reid, and interviewed his mother, they began searching for Wilkes, believing that he was the last person to see Ms. Ginty alive. Reid's mother told law enforcement that Wilkes lived with them on their property and that he was home when the officers arrived to question Reid. She explained that, after the officers arrested Reid, Wilkes walked to the trailer where he lived and locked the doors. After the officers looked for Wilkes and could not find him, Reid's mother informed them that Wilkes was "on the run now."

Reid told law enforcement that he saw Wilkes riding a moped on Hopewell Church Road near where Ms. Ginty's car was found, around 9:00 a.m. that morning. Another witness also told officers he saw Wilkes on the back of a scooter near Hopewell Church Road that morning.

Later that day, officers located Wilkes, handcuffed him, and took him to the Sheriff's Department where they read him his Miranda rights. Wilkes was not free to leave during this questioning but no one informed Wilkes that he was under arrest. During questioning, Wilkes eventually implicated himself in Ms. Ginty's murder.

The State indicted Wilkes for first degree murder, burning personal property, and concealment of death. Wilkes moved to suppress his statements to the officers at the Sheriff's Department. The trial court denied the motion and Wilkes pleaded guilty to second degree murder and the other remaining charges, while reserving his right to appeal the denial of his motion to suppress. The court sentenced Wilkes to 238 to 298 months in prison for second degree murder and concealment, and a concurrent sentence of 11 to 23 months in prison for burning personal property. Wilkes gave oral notice of appeal from the order denying his motion to suppress.

Analysis

I. Petition for writ of certiorari

[1] As an initial matter, we must address our jurisdiction to hear this appeal. Wilkes concedes that he only appealed the order denying his motion to suppress, not the trial court's judgments. By statute, a criminal defendant seeking review of the denial of a motion to suppress must appeal the judgment of conviction, not merely the suppression order. N.C. Gen. Stat. § 15A-979(b). Because Wilkes failed to appeal from the judgments, this Court lacks jurisdiction over his appeal. Wilkes has therefore petitioned this Court for a writ of certiorari.

Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure authorizes this Court to issue a writ of certiorari when a party loses the right to prosecute an appeal by failing to take timely action. That is what happened here. Because the infirmity in Wilkes's notice of appeal—appealing the suppression order rather than the judgments—is technical in nature, and because the State does not oppose the petition, we exercise our discretion to issue a writ of certiorari and address the merits of Wilkes's appeal.

II. Probable cause to seize and arrest Wilkes

[2] Wilkes argues that the trial court should have granted his motion to suppress because law enforcement lacked probable cause to arrest him. Specifically, Wilkes claims that, when he was taken into custody, the officers only had information tying Reid to the break-in at Ms. Ginty's home. Wilkes further contends that the officers lacked probable cause to believe that Ms. Ginty's car and body were burned intentionally, rather than in an accident. Simply put, Wilkes contends that law enforcement did not have enough information to reasonably believe he had committed any particular crime and thus lacked probable cause to arrest him. As explained below, we reject this argument.

This Court reviews the denial of a motion to suppress to determine whether "competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015). We review the trial court's conclusions of law *de novo*. *State v. Smith*, 328 N.C. 99, 114, 400 S.E.2d 712, 720 (1991).

Law enforcement may make a warrantless arrest of "any person the officer has probable cause to believe has committed a criminal offense." N.C. Gen. Stat. § 15A-401(b) (2009); *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Courts look to the totality of the circumstances to determine whether an officer had probable cause to arrest someone. *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983). The existence of probable cause depends upon whether, at the moment of arrest, "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck*, 379 U.S. at 91. The degree of certainty required for probable cause is a "fair probability," which courts have acknowledged is proof greater than "reasonable suspicion" but less than a "preponderance of the evidence." *State v. Crawford*, 125 N.C. App. 279, 282, 480 S.E.2d 422, 424 (1987).

Here, when officers arrived at Ms. Ginty's home to investigate her suspicious death, they found a cut screen on the outside of a window, and a knife and chair located just below it. Officers then arrested and interrogated Reid, who told officers that Ms. Ginty locked both he *and Wilkes* out of her home and that Reid then broke into Ms. Ginty's home through a window and unlocked the door to let Wilkes back in. This information is sufficient for a prudent person to believe Wilkes committed the crime of breaking and entering. *Beck*, 379 U.S. at 91.

Wilkes also challenges the reliability of the information forming the basis for probable cause—all of which leaned heavily on statements by Reid. In doing so, Wilkes implies that law enforcement could not claim probable cause to arrest him without first obtaining concrete proof that crimes occurred and that he committed them. But probable cause deals with probabilities, not hard certainties. *United States v. Cortez*, 449 U.S. 411, 418 (1981). These probabilities need not amount to prima facie showings of guilt. *State v. Biber*, 365 N.C. 162, 169, 712 S.E.2d 874, 879 (2011). Here, Reid's statements, in connection with the cut screen and other evidence corroborating his story, were sufficient to raise a fair probability in the officers' minds that Wilkes committed a crime.

To be sure, at the time officers determined there was probable cause to arrest Wilkes for breaking and entering, they also suspected he had committed a far more serious crime—murdering Ms. Ginty and then burning her body inside her car to conceal the offense. But the fact that law enforcement suspected Wilkes committed other, more serious crimes does not prevent the State from arresting Wilkes on charges for which there was probable cause. *See Devenpeck v. Alford*, 543 U.S. 146, 152–53 (2004). Accordingly, the trial court properly denied Wilkes's motion to suppress.

Conclusion

We affirm the trial court's judgments.

AFFIRMED.

Chief Judge McGEE and Judge BERGER concur.

STEPHANIE T. TREJO, PETITIONER
v.
NC DEPARTMENT OF STATE TREASURER
RETIREMENT SYSTEMS DIVISION, RESPONDENT

No. COA16-1182

Filed 7 November 2017

1. Setoff and Recoupment—statutory offset—long-term state disability benefits—overpayment—Social Security disability benefits

The trial court erred by concluding the State could not apply a statutory offset and reduce plaintiff retired public school teacher's long-term disability benefits to recoup an overpayment despite a four-year delay, and the Office of Administrative Hearings' entry of judgment in favor of the State was reinstated. The State was required by an earlier version of N.C.G.S. § 135-106(b), in effect when plaintiff's benefits vested, to offset plaintiff's state benefits by the amount of benefits she hypothetically could have received had she been awarded Social Security disability benefits despite the fact that plaintiff was denied any actual Social Security disability benefits.

2. Estoppel—laches—waiver—offset and recoupment—overpayment of long-term disability benefits—State Disability Income Plan—four-year delay

The equitable doctrines of estoppel, laches, and waiver did not bar the State's efforts to apply an offset and recoup an overpayment of long-term disability benefits of the State Disability Income Plan from plaintiff retired public school teacher who was injured while working, despite the State's four-year delay. Plaintiff could not show either a representation by the State that it would not apply an offset, or any change in her own position based on her reasonable belief that the State would not do so.

3. Statutes of Limitation and Repose—offset—long-term disability benefits—State Disability Income Plan—overpayment—recoupment

The State's efforts to apply an offset to plaintiff retired public school teacher's long-term disability benefits from the State Disability Income Plan due to an overpayment was not barred by the statute of limitations under N.C.G.S. § 135-5(n) where the reduction in plaintiff's benefits was not an "action," but rather a "recoupment," which was expressly authorized by N.C.G.S. § 135-9.

Appeal by respondent from judgment entered 1 August 2016 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 9 August 2017.

The Vincent Law Firm, P.C., by Branch W. Vincent, III, for petitioner-appellee.

Attorney General Joshua H. Stein, by Deputy Solicitor General James W. Doggett, for respondent-appellant.

DIETZ, Judge.

Stephanie Trejo was injured while working as a public school teacher and began receiving long-term disability benefits from the State Disability Income Plan. Four years after she started receiving those benefits, the State informed her that it had overpaid her. By law, the State was required to offset Trejo's state benefits by the amount of benefits Trejo hypothetically could have received had she been awarded Social Security disability benefits. Trejo had applied for Social Security disability, but the Social Security Administration concluded that she was not disabled.

Trejo challenged the State's attempt to recoup these alleged overpayments in an administrative proceeding, but the administrative law judge rejected her arguments. She appealed to the trial court and prevailed. As explained below, we reverse the trial court and reinstate the judgment of the administrative law judge.

The applicable statutory provision—an earlier version of the law currently in place—required the State to apply the hypothetical offset for Social Security disability. Moreover, before Trejo began receiving her state benefits, the State informed her of the possibility that it would need to apply this offset and seek recoupment if it overpaid her. Trejo signed a form acknowledging that she understood these facts. Thus, the equitable doctrines of estoppel, laches, and waiver do not bar the State's efforts to apply the offset and recoup the overpayment, despite the State's four-year delay in discovering the overpayments and seeking recoupment.

Facts and Procedural History

In 2002, Stephanie Trejo was injured while employed by the State as a public school teacher and vested in the State Disability Income Plan for state employees.

In 2006, Trejo applied for disability benefits from the Social Security disability program. The Social Security Administration denied Trejo's

request for Social Security disability, concluding that she "was not under a disability, as defined in the Social Security Act."

That same year, Trejo began the process of applying for long-term disability benefits from the State Disability Income Plan. The State approved Trejo's request for long-term disability benefits, retroactive to 2004, but Trejo did not complete the paperwork required to receive disability payments at that time. In 2009, Trejo completed her paperwork and the State began paying her long-term disability, including retroactive payments for benefits that accrued since 2004.

In July 2013, more than four years after the State first began paying long-term disability benefits to Trejo, the State mailed her a letter informing her that it had mistakenly failed to apply a statutory offset based on the hypothetical Social Security disability benefits she might have received. The letter informed Trejo that this offset should have occurred beginning in January 2008. Trejo challenged her reduction of benefits in an administrative proceeding at the Office of Administrative Hearings. An administrative law judge entered summary judgment in favor of the State and Trejo sought judicial review in Dare County Superior Court. The lower court reversed the administrative decision and entered judgment in favor of Trejo. The State timely appealed to this Court.

Analysis

This is an appeal from a judgment of the Superior Court on judicial review of an administrative decision from the Office of Administrative Hearings. This Court has held that when a party "appeals from superior court either affirming or reversing the decision of an administrative agency, our scope of review is twofold, and is limited to determining: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard." *Mayo v. North Carolina State Univ.*, 168 N.C. App. 503, 507, 608 S.E.2d 116, 120, *aff'd per curiam*, 360 N.C. 52, 619 S.E.2d 502 (2005).

I. Applicability of the offset

[1] The crux of this dispute is the applicability of a mandatory offset for Social Security disability benefits in the law governing long-term disability payments for state employees. The statute applicable here, which is an earlier version of N.C. Gen. Stat. § 135-106(b) in effect when Trejo's benefits vested, provides that "[a]fter the commencement of benefits under this section, . . . upon the completion of four years from the conclusion of the waiting period as provided in G.S. 135-104, the

beneficiary's benefit shall be reduced by an amount . . . equal to a primary Social Security disability benefit to which the beneficiary might be entitled had the beneficiary been awarded Social Security disability benefits."[1] N.C. Gen. Stat. § 135-106(b) (2006) (amended 2007).

In other words, after several years, recipients' state long-term disability benefits must be offset by the amount of Social Security disability benefits that those recipients *hypothetically* could have received, regardless of whether they actually received those benefits.

Trejo argues that, by its plain terms, this statutory offset is not calculated until "[a]fter the commencement of benefits under this section." N.C. Gen. Stat. § 135-106(b) (2006). Trejo contends that her benefits did not commence until after she completed her benefits paperwork in 2009 and received her first benefits payments. By that time, Trejo had been unemployed for years and was no longer insured by the Social Security disability program. Thus, she argues, her hypothetical offset is zero because, as someone not qualified for Social Security disability, she could not have received any benefits, even in a hypothetical scenario.

This argument fails for several reasons. First, as the State correctly observes, Trejo's benefits commenced in 2004, not 2009. Although Trejo delayed completing her state long-term disability paperwork until 2009, she qualified for long-term disability payments beginning in 2004 and the State retroactively paid benefits from 2004 onward. Thus, even if we accepted Trejo's interpretation of the statute, her benefits commenced in 2004 and, at that time, Trejo was insured by the Social Security disability program and hypothetically could have received benefits, although the Social Security Administration rejected her request after concluding she was not disabled.

Second, and more fundamentally, the plain language of this mandatory offset provision does not require the recipient to be insured by the Social Security disability program when state benefits commence. The statute instructs that "[a]fter the commencement of benefits under this section" the State must apply an offset "equal to a primary Social Security disability benefit to which the beneficiary might be entitled had the beneficiary been awarded Social Security disability benefits." N.C. Gen. Stat. § 135-106(b) (2006). The fact that the recipient's eligibility for

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1. The General Assembly later amended the statute to eliminate the delay in applying the offset. That amendment also terminated recipients' state long-term disability benefits entirely after 36 months unless those recipients were awarded Social Security disability benefits. 2007 N.C. Sess. Laws 325, s. 2.

Social Security disability had terminated by the time state disability payments commenced is irrelevant; use of the offset turns on whether, at some point after becoming disabled, the recipient was insured by the Social Security disability program and *might* have been awarded benefits, even if the recipient never applied for those benefits or applied for them but was denied.

That is the case here. Trejo concedes that she was insured by the Social Security disability program following her injury and applied for Social Security disability benefits in 2006. Thus, hypothetically, Trejo could have received Social Security disability benefits beginning in 2006, and those benefits would have continued beyond 2009, when she completed her application for state long-term benefits. Accordingly, despite the fact that Trejo was denied any actual Social Security disability benefits, the State properly applied the statutory offset to account for the "Social Security disability benefit to which the beneficiary might be entitled had the beneficiary been awarded Social Security disability benefits." N.C. Gen. Stat. § 135-106(b) (2006).

We also note that, as the State observes, Trejo's interpretation of the statute would create a perverse incentive to delay applying for state long-term disability benefits until after the recipient was no longer insured in the Social Security disability program. This would frustrate two key purposes of the hypothetical offset: first, encouraging recipients to vigorously pursue benefits through the Social Security disability program; and, second, enforcing the policy determination, implicit in the statutory scheme, that those who are denied Social Security disability benefits should receive less state disability benefits because they may be able to seek some form of gainful employment and should do so. *See* N.C. Gen. Stat. §§ 135-100(b), 135-106(c). Accordingly, we hold that the Office of Administrative Hearings correctly determined that the State must apply the statutory offset in this case.

II. Estoppel, laches, and waiver

[2] Trejo also contends that, even if the statutory offset applies, "equitable principles apply to restrain the actions of the State." Specifically, Trejo argues that the equitable doctrines of estoppel, laches, and waiver bar the State from applying the offset because the State awarded her benefits in 2009 but did not inform her that the offset applied until 2013, more than four years after her benefits began.

Much of the parties' briefing turns on whether the courts have the power to apply these equitable remedies in this case. The State argues that doing so creates an "individualized public disability benefit" unique

to Trejo, which in turn violates various provisions of the North Carolina Constitution governing use of public funds, suspension of state laws, and separation of powers.

As explained below, we need not address these constitutional issues because, even if equitable remedies could be applied in this case, the record on appeal demonstrates that Trejo is not entitled to any of the asserted equitable remedies as a matter of law. Each of the equitable doctrines on which Trejo relies—estoppel, laches, and waiver—require a showing of some affirmative representation by the State that it would not apply the offset, or some change in position by Trejo based on her reasonable belief the State would not apply the offset, or both. *See Hawkins v. M & J Finance Corp.*, 238 N.C. 174, 177, 77 S.E.2d 669, 672 (1952) (Estoppel requires a representation "which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert."); *Stell v. First Citizens Bank & Tr. Co.*, 223 N.C. 550, 552–53, 27 S.E.2d 524, 526–27 (1943) (Laches requires that the "lapse of time has resulted in some change . . . in the relations of the parties which would make it unjust to permit the prosecution of the claim."); *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 336, 777 S.E.2d 272, 279 (2015) (Waiver of a right requires "knowledge of the right and an intent to waive it.")

Here, Trejo cannot show either a representation by the State that it would not apply the offset, or any change in her own position based on her reasonable belief that the State would not do so. To the contrary, Trejo concedes that in 2006, when she first began her state long-term disability paperwork (which she did not complete until 2009), she signed an acknowledgement form which explained the offset and stated that "payments from the Plan will be reduced by an amount equal to a primary Social Security disability benefit to which you might be entitled had you been awarded Social Security disability benefits." The acknowledgement form further stated that "I fully understand the above and if I am overpaid benefits by the Disability Income Plan, I will reimburse the [Plan] when advised."

Trejo conceded at oral argument that no state representative ever contradicted this language in the acknowledgement. Likewise, Trejo conceded that no state representative told her the State would not seek to apply the offset described in the form, or told her the State would not seek reimbursement if it overpaid her. Finally, there is no evidence in the record that Trejo changed her position based on a reasonable (but mistaken) belief that the State had abandoned its right to apply the offset or recoup overpayment. Thus, as a matter of law, Trejo has

not shown that any of the equitable doctrines on which she relies could apply in this case.

III. Statute of limitations

[3] Finally, Trejo argues that the State's efforts to apply the offset are barred by the statute of limitations contained in N.C. Gen. Stat. § 135-5(n). That provision states that "no action shall be commenced by the State or the Retirement System against any retired member or former member or beneficiary respecting any overpayment of benefits or contributions more than three years after such overpayment was made." N.C. Gen. Stat. § 135-5(n). Trejo argues that the State's reduction in benefits to recoup the overpayment is an "action" by the State and thus is barred by the three-year limitations period.

The State responds that the reduction in Trejo's benefits is not an "action" but rather a "recoupment," which is expressly authorized by a separate statutory provision:

> Notwithstanding any provisions to the contrary, any overpayment of benefits . . . to a member in . . . the Disability Income Plan of North Carolina, including any benefits paid to . . . any member or beneficiary who is later determined to have been ineligible for those benefits or unentitled to those amounts, may be offset against any retirement allowance, return of contributions or any other right accruing under this Chapter to the same person, the person's estate, or designated beneficiary.

N.C. Gen. Stat. § 135-9.

We agree with the State that the term "action" in N.C. Gen. Stat. § 135-5(n) is inapplicable to the State's reduction of future state benefits. When used in this context, the phrase "no action shall be commenced" has a special meaning, drawn from N.C. Gen. Stat. § 1-2, which describes an action as "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." The State's reduction of Trejo's benefits to recoup the overpayment and apply the offset going forward is not a proceeding in a court of justice and thus is not the commencement of an action for purposes of the statute of limitations.

Moreover, N.C. Gen. Stat. § 135-9 permits the State to recoup any overpayment through the reduction of other state benefits owed to the recipient "[n]otwithstanding any provisions to the contrary" and N.C.

Gen. Stat. § 135-5(n) provides that its three-year limitation "does not affect the right of the Retirement System to recoup overpaid benefits as provided in G.S. 135-9." Thus, the State is permitted to use recoupment to recover an overpayment regardless of whether N.C. Gen. Stat. § 135-5(n) might limit the State's ability to recover that same overpayment through other legal means in a court proceeding. Accordingly, we reject Trejo's argument that the State's reduction in her benefits is time barred.

Conclusion

For the reasons discussed above, the State properly applied the statutory offset and reduced Trejo's long-term disability benefits to recoup an overpayment. We reverse the trial court's order and reinstate the Office of Administrative Hearings' entry of judgment in favor of the State.

REVERSED.

Judges ELMORE and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 NOVEMBER 2017)

ALDAY v. ALDAY No. 17-485	Guilford (14CVD9219)	Reversed and Remanded
BRIDGERS v. WOODRUFF No. 17-593	Buncombe (15CVS5429)	Affirmed
BROWN v. N.C. DEP'T OF PUB. INSTRUCTIONS No. 17-276	N.C. Industrial Commission	Affirmed (352789) (X51838) (Y22531)
BRUNGARD v. CANESTORP No. 17-503	Craven (15CVS1568)	Affirmed
COMSTOCK v. COMSTOCK No. 17-179	Mecklenburg (10CVD12874)	Affirmed
GRIFFITH v. N.C. PRISONER LEGAL SERVS., INC. No. 17-490	Durham (15CVS2678)	Dismissed
IN RE A.C-H. No. 17-466	Brunswick (14JT1)	Reversed
IN RE E.D.B. No. 17-476	Iredell (15JT99-100)	Affirmed
IN RE E.J.V. No. 17-365	Dare (14CVD673) (15SP212)	Dismissed
IN RE G.P. No. 17-414	McDowell (16JA107)	Affirmed
IN RE L.D.P. No. 17-325	Wilkes (15JT10)	Affirmed
IN RE N.J.P. No. 17-532	Pitt (16JA142)	Reversed and Remanded in part and Affirmed in part
IN RE S.A. No. 17-387	Orange (16JA55)	Affirmed in part; vacated and remanded in part

IN RE S.L.B. No. 17-280	Mitchell (14JT24) (14JT25)	Affirmed
IN RE Z.E.B. No. 17-382	Guilford (15JT326-328)	Affirmed
IN RE Z.M.S. No. 17-356	Lenoir (14JT75-77) (14JT96)	Affirmed
KYLES v. GOODYEAR TIRE & RUBBER CO. No. 17-594	N.C. Industrial Commission (14-022081) (14-044570) (15-018910)	AFFIRMED IN PART AND REMANDED.
METCALF v. CALL No. 17-418	Swain (16CVS97)	Affirmed
PITTS v. TART No. 17-232	Wilson (15CVS1694)	Reversed and Remanded
SERENITY COUNSELING & RES. CTR., INC. v. CARDINAL INNOVATIONS HEALTHCARE SOLS. No. 17-439	Guilford (16CVS7153)	Affirmed
STATE v. BATTLE No. 16-533	Vance (14CRS53602) (14CRS53603)	No prejudicial error
STATE v. BRINKLEY No. 16-572	Nash (14CRS50238-39)	New Trial
STATE v. BYRD No. 17-288	Forsyth (13CRS53133) (13CRS61214)	No Error
STATE v. CASEY No. 17-263	Rockingham (11CRS51054)	No Error
STATE v. FARROW No. 17-517	Hyde (15CRS50006)	Reversed
STATE v. FRANKS No. 17-391	Jackson (14CRS50582-83) (14CRS701477)	NO ERROR IN PART; VACATED IN PART AND REMANDED.
STATE v. GOODNIGHT No. 17-479	Rutherford (16CRS362) (16CRS373)	No Error

STATE v. HOLLIDAY No. 17-374	Iredell (13CRS50662-69)	Dismissed
STATE v. MARTIN No. 17-462	Lincoln (15CRS53507)	NO PREJUDICIAL ERROR IN PART; DISMISSED IN PART.
STATE v. WALKER No. 17-357	Brunswick (13CRS1660-64) (13CRS701341)	VACATED IN PART; REMANDED FOR RESENTENCING AND CORRECTION OF CLERICAL ERROR.

BEROTH OIL COMPANY; SMITH, PAULA AND KENNETH; CLAPP, BARBARA; CROCKETT, PAMELA MOORE; ESTATE OF WR MOORE; N&G PROPERTIES, INC.; KOONCE, ELTON V.; REPUBLIC PROPERTIES; KIRBY, EUGENE AND MARTHA; HARRIS TRIAD HOMES, INC.; HENDRIX, MICHAEL; ENGELKEMIER, DARREN; HUTAGALUNG, IAN; MAEDL, SYLVIA; STEPT, STEPHEN; NELSON, JAMES AND PHYLISS; SHUGART ENTERPRISES, LLC; STUMP, FRANKLIN AND MINNIE; JADE ASSOCIATES, LLC.; CLAYTON, ALMA C.; PEGRAM, ELAINE SMITH; TRIDENT PROPERTIES, LLC; MCALLISTER, JUDITH T.; MARSHALL, ANDREW WILLIAM (JOINTLY HELD FAM. PROPERTY); SEIDELMANN, JOHN H. AND ROSEMARY; POPE, JAMES AND WANDA; PATEE, RONNIE AND VESTA; MCFADDEN, KENNETH AND PAMELA; MANN, RONALD CARSON; HIATT, EARL B. AND CRISSMAN; LITTLE, LOREN A. AND MARGARET; LEWIS, HENRY AND REBECCA; LAWSON, KATHRYN L.; KINNEY, LOIS K.; FULK, MICHAEL DAVID; EUDY, KRONE EDWARD; DILLON, CHARLES RAY AND JUDY; BULLINS, BILLIE JOE AND CAROLYN; CW MYERS TRADING POST, INC.; BRABHAM, VERDELL & MARLA; DIEHL, SCOTT C.; HIATT, EVERETT AND TERESA; LASLEY, KATHRYN M.; OMEGA SEAFOOD (GUS AND MARIA HODGES); PEAK, GARY W.; SHROPSHIRE, JOHN AND BESSIE; SMITH, CHESTER MONROE AND BETTY; THORE, BRENDA SUE, SDARAH THORE HAMMOND, JAMES THORE; TURPIN, JAMES AND SISTER, MARJORIE HUTCHENS; HOWELL, MARK AND MELISSA; WATKINS, JAMES AND DELORES; LEWIS, JERRY B. AND DENNIS; CANIPE, CONSTANCE FLYNT MULLINEX AND DONALD F. WEISNER; WEISNER, JOHNNY AND HAZEL (JOINTLY HELD FAM PROPERTY); ALLAN, AND WIFE, JOAN; BOOSE, THELMA; MYERS, DALE AND MARY; CONTE, JUDITH A.; CLINE, JEFFERY AND DANA; PFAFFTOWN BAPTIST; PROVIDENCE MORAVIAN; GREER, HONEY CHRISTINE COLLINS AND JEFFEREY; TERRONEZ, INOCENTE AND SONIA DOMIQUEZ; FOLK, JOHN AND MARGARET; HOUCK, SCOTT; BLANCHARD, PAUL; BERRIER, DON M. AND LINDA; BLACKFORD, KEN A.; WEEKS, SHAWN D.; ALEXANDER, JOHN H. AND WIFE KAREN L.; BAILEY, ROBERT CHRISTOPHER AND KAREN K.; BARRY, HILDA S.; BUCHANAN, JOHN A. JR. AND WIFE CAROL JONES; CALDWELL, MELVIN AND SHERIE; CAMERON, CARMIE J. AND WAYNE R.; CENTRAL TRIAD CHURCH - LEROY KELLY; CHURCH, CHRISTOPHER D. AND SHELLEY J.; CONRAD-WHITT, GLADY B. AND LORETTA C. WHITT ET AL.; CONRAD, HAROLD GRAY; DARRAH, ELIZABETH S. AND JASON D.; DAVENPORT, LEONARD C. AND ELSIE H.; DAVIS, SHERRY L.; DECKER, DONNA BALLARD; DILLON, TONY LEE AND TONI P.; DORN, FRANK R.; FABRIZIO, JEFFREY P.; FRANCIS, LINDA DENISE; FULP, JARVIS R. AND GLORIA F.; GIRARD, FRANK J. AND WIFE CAROL; GRIFFIN, THOMAS J. AND NANCY C.; HAMMAKER, DOUGLAS E. AND MELICENT S.; HAMMOCK, HELEN MANOS AND MARGARET HAMMOCK HOERNER; HAYWORTH, SIBYL F.; HEMRIC, DANNY W. AND BEVERLY M.; HENNIS, TAMRA; HOBAN, JANET AND CRAIG; HOLMES, SCOTT P. AND PAMELA A. HILL-HOLMES; HUBBARD REALTY OF W-S INC.; IRON CITY INVESTMENTS, LLC - SCOTT SCEARCE; JONES ESTATE ET AL.; KEITH, MARK A. AND CATHY E.; KISER, JEFFREY AND ELIZABETH; LEE/MCDOWELL, LATRICE NICOLE; LOWRY, HARRY R. AND SANDRA P; LUTHERAN HOME W/S PROPERTY; MAIN, JEFFREY C. AND AMBER D.; MARTIN, TERRY W. AND JO ANN H.; MILLER, CARL JR. AND CURTIS CARPENTER; MITCHELL, CHRISTOPHER R.; MOORE, HILDA BROWN, WIDOW; MORAVIAN CHURCH SOUTHERN PROVINCE; NASH, RICHARD AND MEL - CROWDER, RICK AND SARAH ET AL.; BOARD OF TRUSTEES OF OAK GROVE MORAVIAN CHURCH; REGIONAL REALTY, INC - KEITH D. NORMAN ET AL.; SHELTON, JC AND MAGALENE R.; SIMCIC, JOESPH J. AND REBECCA M.; SMITH, LINDA G.; SNELL, DAVID P.; STACK, WILLIAM C. AND DONYA J.; STAFFORD, VIOLET G.; STEPHENSON, GREGORY J.

AND LE'ANNA H.; SUMNER, JOHN E., SR. AND ANN H.; SWAIM, DERRICK AND WIFE KRISTINA C.; TAFFER, LANDON AND EVON; TAFT, LAMAR S. AND CHARLES V.; THOMASON, PATTIE W. AND VELMA G PARNELL; VANHOY, DALE C.; VIOLETTE, MICHAEL E. AND DEBORAH W.; WHITE, LEE AND AREATHER; WRAY, MEGAN P AND ALAN MICHAEL; WESTFALL, ROBERT W. AND KELLI D.; BEHAN, AUSTIN C. AND MARY JEAN; BENTLEY, CHARLES J., SR. AND BRENDA G.; BETHANY BAPTIST CHURCH; COOK, SHIRLEY T. AND COOPER, JENNY C.; WILMOTH-DOUTHIT ET AL.; DASILVA, GEORGE; FLUITT, JOE AND PAMELA MARTIN; HANNA, HEATHER W. AND MARK J.; HUBBARD REALTY; KUHL, WILLIAM A. AND BRENDA S.; LB3 LLC - HILO ENTERPRISES, LLC; LINER, DALE S. AND PEGGY; LUPER, FERRELL M. AND JOYCE; GLASS, LAVONDA; MDC INVESTMENTS, LLC; SEIVERS, HARVEY W. AND BETTY C.; SMALLS, SAMPSON H. AND SHARON; SMITH, SAM & CHRIS; SWAISGOOD, THOMAS D.; THRUSH, GLENN E., JR.; TROTTER, HELEN L.; TUCKER, MARGARET; VANCE, LATANDRA T.; WESTMORELAND, CB HEIRS ET AL.; WHITE, DORIS T., WIDOW; HICKS, RONALD; SMITH, LINDA; SNOW, CRAIG; SEDGE GARDEN POOL; KEARNEY, CLYDE AND HUGH; BEANE, TABITHA; FLAKE, WILDON C., JR.; ADAMS, WEBB, THOMAS; GORDON, HELEN; PEARSON, BEVERLY; BIAS, TERESA; BOYLES, DANTE; CLARK, JON; FLETCHER, JOSEPH; EMBLER, DEBBIE; GURSTEIN, SCOTT; HOBBS, STEVEN; THORE, BOBBY; CHARLES, DEBORAH T.; FORTNEY, WALTER; NODINE, DENNIS AND ELIZABETH; MESSICK, BILL (J.G. MESSICK & SON, INC.); MONROE, ELDER RONALD; WARD, PEGGY; PERKINS, JERRIE; SHOUSE, CHRISTINE R. KAUTZ AND PAUL KAUTZ; PEEPLES, WADE AND MARY LOU; CUNNINGHAM, JOHN AND GAYLE; CHAPMAN, LEE AND PEGGY – CHAPMAN FAMILY TRUST; WILLARD, DANIEL; CREWS, RACHEL; ROGERS, DARRELL AND AMBER; HEMMINGWAY, REESHEMAH; HOLT, LINDA; ALDRIDGE, MARTHA; HOOPER, MARY; WESTMORELAND, JACK; BOLIN, AMBER; BREWER JR., BOBBY; BRIGGS, JOHN; BURCHETTE, GLENN & TAMMY; HILL, EUGENE - ESH RENTAL; HAWKS, HOWARD; SPEAR, JOYCE & KIMBERLY; STOLTZ, WILLIAM; STIMPSON, ROBERT; STEWART, ASHLEY; RODDY, TERRY; NELSON, STEPHEN AND THERESA; MCKINNEY, MATTHEW AND TANGELA; FLINCHUM, MARLENE; Plaintiffs

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Defendant

and

BELL, KENNETH E.; BARLEY, JO ELLEN AND MARY B. WATSON; SUMMERS, MICHAEL AND BRENDA; GRUNDMAN, ROBERT E. AND LINDA L.; PICKARD, MARK J. AND LINDA J.; FELTS FAMILY LIMITED PARTNERSHIP; Plaintiffs

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Defendant

No. COA17-74

Filed 21 November 2017

1. Appeal and Error—interlocutory appeal—substantial right—eminent domain—transportation corridor map

The North Carolina Department of Transportation (NCDOT) did not demonstrate that an interlocutory order was appealable as affecting a substantial right in an eminent domain case involving a

transportation corridor map where the trial court order established the procedures and timetable by which NCDOT would file plats identifying the interest and areas taken. NCDOT appealed the order immediately but had no substantial right because it had not yet filed a map or plat.

2. Appeal and Error—appealability—interlocutory appeal—transportation corridor map—sovereign immunity

Sovereign immunity did not provide the North Carolina Department of Transportation (NCDOT) a substantial right justifying an immediate appeal in an action involving a transportation corridor map and a court order setting procedures and a timetable for identifying the property subject to eminent domain. The State implicitly waived sovereign immunity because the General Assembly established a statutory framework conferring rights to landowners when the State has exercised its eminent domain power. Although NCDOT disputed the right to compensation of these plaintiffs, NCDOT had consistently admitted that it had filed transportation corridor maps that placed restrictions on the property. The regulatory taking was, effectively, admitted.

3. Appeal and Error—appealability—interlocutory order—separation of powers

The North Carolina Department of Transportation could not establish substantial grounds for appellate review of an interlocutory order by arguing separation of powers in an eminent domain case arising from a transportation corridor map. The taking was established, as discussed elsewhere in the case, and was deemed to have been admitted. The admission brought plaintiffs within the scope of a statutory avenue for compensation.

4. Appeal and Error—appealability—interlocutory order—substantial right expense—transportation corridor map

The North Carolina Department of Transportation's policy argument concerning expense did not establish a substantial right through which to justify the appeal of an interlocutory order in an eminent domain case involving a transportation corridor map.

Judge DILLON dissenting.

Appeal by defendant from order entered 3 October 2016 by Judge John O. Craig III in Forsyth County Superior Court and Guilford County Superior Court. Heard in the Court of Appeals 17 May 2017.

Hendrick Bryant Nerhood Sanders & Otis, LLP, by Matthew H. Bryant, T. Paul Hendrick, Timothy Nerhood, W. Kirk Sanders, and Kenneth C. Otis III, for plaintiffs-appellees.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James M. Stanley, Jr.; Teague Campbell Dennis & Gorham, LLP, by Matthew W. Skidmore and Jacob H. Wellman; and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Steven M. Sartorio and William H. Moss, for the North Carolina Department of Transportation, defendant-appellant.

BERGER, Judge.

The North Carolina Department of Transportation ("NCDOT") appeals an October 3, 2016 order (the "Order") that addressed three issues in an inverse condemnation action filed by two hundred and eleven plaintiffs in both Forsyth and Guilford Counties against NCDOT seeking just compensation for the regulatory taking effectuated by NCDOT's recordation of a transportation corridor map pursuant to N.C. Gen. Stat. § 136-44.50 to .54 (the "Map Act"). In some instances, the plaintiff's property rights were taken almost two decades ago. The appealed order granted nine plaintiffs' summary judgment motion as directed by our Supreme Court and this Court, partially granted the remaining plaintiffs' motion for judgment on the pleadings, and set forth the rules and procedures by which the trial court would adjudicate the remaining issues of the individual cases.

To establish grounds for immediate review of the interlocutory order, NCDOT asserts two substantial rights that it alleges would not be fully and adequately protected by appellate review after final judgment. First, NCDOT argues that decisions involving title and area taken in eminent domain proceedings affect a substantial right and are appropriate for immediate review. While this is a substantial right, and may justify interlocutory review, it is a right of one who holds an interest in property, not a right of the condemnor if that condemnor holds no interest. NCDOT has not argued that it holds any interest in the properties at issue in this appeal. Therefore, this ground for interlocutory review must fail.

Second, NCDOT argues that decisions depriving the State of its right to sovereign immunity affect a substantial right and require immediate review. Again, this is generally a substantial right and could certainly justify our interlocutory review, except that the litigation has progressed

well past the point where sovereign immunity could be asserted, as it is a jurisdictional bar to suit against the State. Furthermore, sovereign immunity does not bar suit against the State when the State has exercised its eminent domain power. Therefore, in this instance, sovereign immunity provides no protection for the State, and NCDOT's assertion of sovereign immunity appears to be for no reason but either delay or distraction.

Because sovereign immunity has generally been held to be a substantial right allowing interlocutory appeal, NCDOT initially introduces its argument attempting to establish grounds for appellate review as one of sovereign immunity. Yet, the substance of its argument quickly shifts to a separation of powers argument in which NCDOT asserts that the judicial branch is barred from ordering the executive branch to expend monies from the state treasury absent an appropriation of the legislative branch. *See* N.C. Const. art. V, § 7 ("No money shall be drawn from the State treasury but in consequence of appropriations made by law."). However, NCDOT cites no precedent whereby this Constitutional restriction of power creates for it a substantial right that could permit NCDOT interlocutory review.

"There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Veazey v. Durham*, 231 N.C. 357, 363, 57 S.E.2d 377, 382, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). When the State takes private property for a public use, it must pay just compensation. Sovereign immunity will not relieve it of this restriction on the use of its eminent domain power. Because both grounds given by NCDOT to justify our interlocutory review fail, we dismiss.

Factual & Procedural Background

The order NCDOT has herein appealed was entered October 3, 2016. In the order, the trial court followed the instructions of this Court, that reversed a prior order, and the Supreme Court, that affirmed the opinion of this Court. *Kirby v. N.C. Dep't of Transp. (Kirby I)*, 239 N.C. App. 345, 769 S.E.2d 218, *appeal dismissed*, *disc. review allowed*, ___ N.C. ___, 775 S.E.2d 829 (2015), *aff'd*, *Kirby v. N.C. Dep't of Transp. (Kirby II)*, 368 N.C. 847, 786 S.E.2d 919 (2016). Because only procedural aspects of this case have changed since *Kirby II*, we adopt that opinion's recitation of the pertinent facts:

> In 1987 the General Assembly adopted the Roadway Corridor Official Map Act (Map Act). Act of Aug. 7, 1987,

ch. 747, sec. 19, 1987 N.C. Sess. Laws 1520, 1538–43 (codified as amended at N.C.G.S. §§ 136-44.50 to -44.54 (2015)); *see also* N.C.G.S. §§ 105-277.9 to -277.9A, 160A-458.4 (2015). Under the Map Act, once NCDOT files a highway corridor map with the county register of deeds, the Act imposes certain restrictions upon property located within the corridor for an indefinite period of time. N.C.G.S. § 136-44.51. After a corridor map is filed, "no building permit shall be issued for any building or structure or part thereof located within the transportation corridor, nor shall approval of a subdivision, as defined in G.S. 153A-335 and G.S. 160A-376, be granted with respect to property within the transportation corridor." *Id.* § 136-44.51(a)[.] . . . Despite the restrictions on improvement, development, and subdivision of the affected property, or the tax benefits provided, NCDOT is not obligated to build or complete the highway project.

. . . .

Plaintiffs are landowners whose properties are located within either the Western or Eastern Loops of the Northern Beltway, a highway project planned around Winston-Salem. Plaintiffs allege that the project "has been planned since 1965, and shown on planning maps since at least 1987 with the route determined by the early 1990s."

On 6 October 1997, in accordance with the Map Act, NCDOT recorded a highway transportation corridor map with the Forsyth County Register of Deeds that plotted the Western Loop of the Northern Beltway. Plaintiffs whose properties are located within the Western Loop had all acquired their properties before NCDOT recorded the pertinent corridor map. On 26 November 2008, NCDOT recorded a second map that plotted the Eastern Loop. Plaintiffs whose properties are located within the Eastern Loop had also purchased their properties before NCDOT recorded that corridor map, some as recently as 2006. The parties do not dispute that the Map Act imposed restrictions on property development and division as soon as NCDOT recorded the corridor maps.

The NCDOT has voluntarily purchased at least 454 properties within the beltway through condemnation

proceedings, and since July 2010, has continued to purchase property located in the Western and Eastern Loops. In June 2013, NCDOT announced a public hearing regarding modification of the Western Loop boundaries, noting that "[a] 'Protected Corridor' has been identified that includes the areas of the beltway that the Department expects to purchase to build the proposed road." At the hearing an NCDOT official advised that "no funding for the proposed Western Section of the Northern Beltway had been included in the current" budget through 2020 and that there was "no schedule" establishing when construction would start.

From October 2011 to April 2012, following denial of their motion for class certification, *Beroth Oil Co. v. NCDOT (Beroth II)*, 367 N.C. 333, 347, 757 S.E.2d 466, 477 (2014), *aff'g in part and vacating in part Beroth Oil Co. v. NCDOT (Beroth I)*, 220 N.C. App. 419, 725 S.E.2d 651 (2012), plaintiffs filed separate complaints against NCDOT, asserting various, similar constitutional claims related to takings without just compensation, including inverse condemnation. On 31 July 2012, the Chief Justice certified plaintiffs' cases as "exceptional" under Rule 2.1 of the General Rules of Practice for the Superior and District Courts, and the trial court subsequently consolidated plaintiffs into the same group for case management purposes.

The NCDOT timely answered, asserted various affirmative defenses, including, *inter alia*, lack of standing, and moved to dismiss plaintiffs' claims under Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 8 January 2013, the trial court entered an order denying NCDOT's motion to dismiss the claim for inverse condemnation.

All parties moved for summary judgment. The trial court first determined that plaintiffs failed to establish a taking, reasoning that "a regulatory taking" by police power only occurs when the legislation "deprive[s] the property of *all* practical use, or of *all* reasonable value" (citing and quoting *Beroth I*, 220 N.C. App. at 436-39, 725 S.E.2d at 661-63), and that the "mere recording of project maps do[es] not constitute a taking" (citing, *inter alia*, *Browning v. N.C. State Highway Comm'n*, 263 N.C. 130,

> 135-36, 139 S.E.2d 227, 230-31 (1964)). Therefore, the trial court concluded the inverse condemnation claim was "not yet ripe" and granted summary judgment for NCDOT, dismissing the claim without prejudice. Plaintiffs appealed the dismissal and summary judgment orders to the Court of Appeals, and NCDOT cross-appealed the same, arguing for dismissal "with prejudice."
>
> The Court of Appeals reversed the dismissal of plaintiffs' inverse condemnation claim. *Kirby [I]*. The Court of Appeals concluded that, unlike regulations under the police power, which the State deploys to protect the public from injury, "the Map Act is a cost-controlling mechanism," *id.* at [363], 769 S.E.2d at 232, that employs the power of eminent domain, allowing NCDOT "to foreshadow which properties will eventually be taken for roadway projects and in turn, decrease the future price the State must pay to obtain those affected parcels," *id.* at [363], 769 S.E.2d at 232 (quoting *Beroth II*, 367 N.C. at 349, 757 S.E.2d at 478 (Newby, J., dissenting in part and concurring in part)). The Court of Appeals determined that the Map Act imposed restrictions on "Plaintiffs' ability to freely improve, develop, and dispose of their own property," *id.* at [367], 769 S.E.2d at 235, that "never expire," *id.* at [366], 769 S.E.2d at 234 (quoting *Beroth II*, 367 N.C. at 349, 757 S.E.2d at 478), and that, as a result, the Map Act effectuated a taking of their "elemental [property] rights," *id.* at [366], 769 S.E.2d at 234. Therefore, the Court of Appeals concluded that plaintiffs' inverse condemnation claim was ripe and remanded the matter for a "discrete fact-specific inquiry," *id.* at [368], 769 S.E.2d at 235 (quoting and discussing *Beroth II*, 367 N.C. at 343, 757 S.E.2d at 474 (majority opinion)), to determine "the amount of compensation due," *id.* at [368], 769 S.E.2d at 236.

Kirby II, 368 N.C. at 848-52, 786 S.E.2d at 921-23 (footnotes omitted).

The Supreme Court granted NCDOT's petition for discretionary review, and affirmed this Court's opinion in *Kirby I*. Specifically, the Supreme Court held, *inter alia*: "The language of the Map Act plainly points to future condemnation of land in the development of corridor highway projects, thus requiring NCDOT to invoke eminent domain." *Id.* at 854, 786 S.E.2d at 925. "The Map Act's indefinite restraint on fundamental property rights is squarely outside the scope of the police power."

Id. at 855, 786 S.E.2d at 925. "Justifying the exercise of governmental power in this way would allow the State to hinder property rights indefinitely for a project that may never be built." *Id.* "The societal benefits envisioned by the Map Act are not designed primarily to prevent injury or protect the health, safety, and welfare of the public. Furthermore, the provisions of the Map Act that allow landowners relief from the statutory scheme are inadequate to safeguard their constitutionally protected property rights." *Id.*

The Supreme Court concluded by stating that:

> Through inverse condemnation the owner may recover to the extent of the diminution in his property's value as measured by the difference in the fair market value of the property immediately before and immediately after the taking. Obviously, not every act or happening injurious to the landowner, his property, or his use thereof is compensable. Thus, to pursue a successful inverse condemnation claim, a plaintiff must demonstrate not only a substantial interference with certain property rights but also that the interference caused a decrease in the fair market value of his land as a whole.
>
> By recording the corridor maps at issue here, which restricted plaintiffs' rights to improve, develop, and subdivide their property for an indefinite period of time, NCDOT effectuated a taking of fundamental property rights. On remand, the trier of fact must determine the value of the loss of these fundamental rights by calculating the value of the land before the corridor map was recorded and the value of the land afterward, taking into account all pertinent factors, including the restriction on each plaintiff's fundamental rights, as well as any effect of the reduced *ad valorem* taxes. Accordingly, the trial court improperly dismissed plaintiffs' inverse condemnation claim.

Id. at 855-56, 786 S.E.2d at 925-26 (citations and internal quotation marks omitted).

After the case was remanded, the trial court entered the order herein appealed on October 3, 2016, which had followed the instructions given by both Appellate Courts. That order granted Plaintiffs' motion for partial judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure, finding a taking of Plaintiffs'

fundamental property rights had occurred by inverse condemnation; granted Plaintiffs' partial summary judgment finding a taking; and established the rules and procedures by which NCDOT would file plats, appraise Plaintiffs' properties, deposit just compensation, as well as any hearing or trial schedules and procedures as may be required moving forward. NCDOT timely appealed.

Analysis

"The threshold question is whether this case is properly before us." *Burlington Industries, Inc. v. Richmond County*, 90 N.C. App. 577, 579, 369 S.E.2d 119, 120 (1988) (citing *In re Watson*, 70 N.C. App. 120, 318 S.E.2d 544 (1984), *disc. review denied*, 313 N.C. 330, 327 S.E.2d 900 (1985)). An order is either "interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2015). As a general principle, "there is no right to appeal from an interlocutory order." *Darroch v. Lea*, 150 N.C. App. 156, 158, 563 S.E.2d 219, 221 (2002) (citation omitted). "An appeal is interlocutory when noticed from an order entered during the pendency of an action, which does not dispose of the entire case and where the trial court must take further action in order to finally determine the rights of all parties involved in the controversy." *Peterson v. Dillman*, ___ N.C. App. ___, ___, 782 S.E.2d 362, 365 (2016) (citation omitted). Here, the appealed order did not resolve all issues of this case and is interlocutory. The trial court, along with NCDOT, had further actions required before a final determination of all rights of all parties could be made.

NCDOT has argued that N.C. Gen. Stat. § 1-277 gives it grounds for immediate review. Section 1-277 states, in pertinent part, that "[a]n appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding." N.C. Gen. Stat. § 1-277(a) (2015). For this Court to have jurisdiction for interlocutory review of the appealed order, NCDOT, as "the appellant[,] has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). NCDOT must also bear

> the burden of demonstrating that the order from which [it] seeks to appeal is appealable despite its interlocutory nature. Thus, the extent to which an appellant is entitled

> to immediate interlocutory review of the merits of [its] claims depends upon [it] establishing that the trial court's order deprives the appellant of a right that will be jeopardized absent review prior to final judgment.

Richmond Cnty. Bd. of Educ. v. Cowell, 225 N.C. App. 583, 585, 739 S.E.2d 566, 568 (citations and internal quotation marks omitted), *disc. review denied*, 367 N.C. 215, 747 S.E.2d 553 (2013). "The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (citation omitted), *disc. review denied*, 363 N.C. 653, 686 S.E.2d 515 (2009).

"As our Supreme Court candidly admitted, the 'substantial right' test is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context[.]" *LaFalce v. Wolcott*, 76 N.C. App. 565, 568, 334 S.E.2d 236, 238 (1985) (citation and internal quotation marks omitted). In determining the appealability of interlocutory orders under the substantial right exception, a two-part test has evolved: (1) "the right itself must be 'substantial,' " and (2) "the enforcement of the substantial right must be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5-6, 362 S.E.2d 812, 815 (1987).

Some of our previous "decisions have apparently blurred or otherwise failed to distinguish the two requirements of appealability under the substantial right exception." *Id.* at 6, 362 S.E.2d at 815 (citing, e.g., *New Bern Assoc. v. The Celotex Corp.*, 87 N.C. App. 65, 359 S.E.2d 481, 483 (1987) (defining "substantial right" as "one which will be lost")). "More important, some decisions have completely omitted the requirement that the right be lost or prejudiced if not immediately appealed." *Id.* at 6, 362 S.E.2d at 816. "While we value the case-by-case flexibility afforded us by the substantial right test, appellate application of this statutory test need not be so uncertain or inconsistent that premature or fragmentary appeals are needlessly encouraged." *Id.* at 9, 362 S.E.2d at 817. Bearing all of these considerations in mind,[1] we address each of NCDOT's arguments attempting to establish grounds for interlocutory review.

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1. We especially note that our controlling precedent has established a two-part test for the determination of whether it is appropriate for us to address the merits of an appeal, as opposed to dismissing an appeal as premature. The dissent would allow the merits of this appeal to be reached merely because NCDOT has asserted sovereign immunity

I. Title & Area Taken

[1] First, NCDOT has asserted that our immediate review is proper because "interlocutory orders concerning title or area taken must be immediately appealed as vital preliminary issues involving substantial rights adversely affected." *N.C. Dep't Of Transp. v. Stagecoach Village*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005) (citation and internal quotation marks omitted). However, this substantial right accrues only to one who holds an interest in the subject property of the eminent domain proceeding, if title to the interest is contested, or to a party who contends that the area taken is different from that identified by the condemnor on the map or plat of the land taken filed by the condemnor pursuant to Article 9 of Chapter 136. *Lautenschlager v. Board of Transportation*, 25 N.C. App. 228, 212 S.E.2d 551, *cert. denied*, 287 N.C. 260, 214 S.E.2d 431 (1975). *See* N.C. Gen. Stat. §§ 136-104, -108, and -111 (2015); *see also Berta v. Highway Comm.*, 36 N.C. App. 749, 754-55, 245 S.E.2d 409, 412 (1978) ("The provisions of G.S. 136-108 apply to condemnation proceedings under G.S. 136-111 as well as under G.S. 136-104." (citation omitted)).

In Article 9, Section 108 provides:

> After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, *title to the land*, interest taken, and *area taken*.

N.C. Gen. Stat. § 136-108 (2015) (emphasis added).

The government authority effectuating the taking has no substantial right justifying interlocutory review of an order concerning title or area taken unless and until that condemnor has filed a map or plat pursuant to Article 9 identifying the property subject to eminent domain proceedings and condemnation. In this case, the order being appealed by NCDOT established, *inter alia*, the procedures and timetable by which

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or the expending of resources as a substantial right. Simply stating something that has been held to be a substantial right is not sufficient; it must be shown that the appellant possesses the right, that the right is substantial, and that the right would be lost absent interlocutory review. Accordingly, nowhere does the dissent explain how these 'substantial rights' would be lost if interlocutory review was not granted. Furthermore, the dissent conflates reaching the merits of NCDOT's claims with what we are commanded to do: to look at the facts and circumstances of the case to determine whether interlocutory review is appropriate.

NCDOT would file plats identifying the interests and areas taken so as to comply with Article 9. Therefore, asserting that NCDOT has a substantial right justifying interlocutory review affected by a decision involving title and area taken is premature, at best.

NCDOT also cites to *Kirby I* in asserting that "an order granting partial summary judgment on the issue of NCDOT's liability to pay just compensation for a claim of inverse condemnation is an immediately appealable interlocutory order affecting a substantial right." *Kirby I*, 239 N.C. App. at 354, 769 S.E.2d at 227. NCDOT further argues that the trial court's order impacts the identical rights that were impacted in *Kirby I* and *II*, but from the perspective of the opposite party. This argument is without merit because it asks that we allow previously decided matters to be re-litigated. Of course the order impacts the identical rights but from the opposite party's perspective. This Court, as affirmed by the Supreme Court, reversed the trial court on this issue. For that reason, the trial court did as directed and ordered that summary judgment be granted to the "opposite party" than to the party it had been previously granted.

NCDOT has not carried its burden of demonstrating that the order from which it seeks to appeal is appealable despite its interlocutory nature because it is unable to show that, as an order involving title and area taken, the order has in fact affected a substantial right of NCDOT. Therefore, we must address NCDOT's second asserted ground for interlocutory appellate review.

II. Sovereign Immunity

[2] NCDOT has asserted sovereign immunity as a substantial right justifying our interlocutory review. "The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760, 152 L. Ed. 2d 962, 977 (2002). Our Supreme Court has long held that "[i]t is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless by statute it has consented to be sued or has otherwise waived its immunity from suit." *Smith v. Hefner*, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1952) (citations omitted).

The common law doctrine of sovereign immunity is a defense to a claim of personal jurisdiction, with specific, legislatively created exceptions, and "mandates that 'the State of North Carolina is immune from suit unless and until it expressly consents to be sued.' " *Coastland Corp. v. N.C. Wildlife Resources Comm'n*, 134 N.C. App. 343, 346, 517 S.E.2d 661, 663 (1999) (brackets omitted) (quoting *State v. Taylor*, 322 N.C.

433, 435, 368 S.E.2d 601, 602, *reh'g denied*, 322 N.C. 838, 371 S.E.2d 284 (1988)). Sovereign immunity is an entire defense, the successful use of which precludes a party or the courts from forcing the State to answer a suit, not a substantial right justifying interlocutory review of an adverse ruling on a technical question within a suit. *See Burlington Industries, Inc.*, 90 N.C. App. 577, 369 S.E.2d 119; *Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141, *reh'g denied*, 306 N.C. 393, ___ S.E.2d ___ (1982).

While, particular to this case, "[t]he power of eminent domain, that is, the right to take private property for public use, is inherent in sovereignty," *Morganton v. Hutton & Bourbonnais Company*, 251 N.C. 531, 533, 112 S.E.2d 111, 113 (1960), sovereign immunity must be juxtaposed with the contrary sovereignty of the individual, whose natural rights preceded government and were enumerated in the federal Bill of Rights and our own State Constitution's Declaration of Rights. Our Supreme Court held that "[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights." *Corum v. University of North Carolina*, 330 N.C. 761, 785-86, 413 S.E.2d 276, 291, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied sub nom. Durham v. Corum*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992).

In American jurisprudence, the rights and powers of our dual sovereigns, federal and state, were created through a grant of power from the citizens themselves and are derivative of the "certain unalienable rights" endowed to all persons by their Creator. The Declaration of Independence para. 2 (U.S. 1776); *see also* N.C. Const. art. I, § 1 ("We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."); § 2 ("All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."). The state was created as sovereign to secure these natural rights of her citizens, Declaration of Independence para. 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . ."), and "[s]uch constitutional rights are a part of the supreme law of the State." *Corum*, 330 N.C. at 786, 413 S.E.2d at 291-92 (citing *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989)). "[T]he doctrine of sovereign immunity is not a constitutional right; it is a common law theory or defense established by [our Supreme] Court . . . . Thus, when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.* at 786, 413 S.E.2d at 292.

Every expropriation of a citizen's fruits of his or her labor by the government is a taking, whether through taxation or by the power of eminent domain. However, of all rights enumerated in our constitutions, only the taking of an individual's property rights by the sovereign for public use requires remuneration. This right "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 1561 (1960).

Both our State and Federal Constitutions condition the exercise of eminent domain with the required payment of just compensation. "Although the North Carolina Constitution does not expressly prohibit the taking of private property for public use without payment of just compensation, our Supreme Court has considered this fundamental right as part of the 'law of the land' clause in article I, section 19 of our Constitution." *Guilford Co. Dept. of Emer. Serv. v. Seaboard Chemical Corp.*, 114 N.C. App. 1, 11, 441 S.E.2d 177, 182-83 (citation omitted), *disc. review denied*, 336 N.C. 604, 447 S.E.2d 390 (1994). Furthermore, the Fifth Amendment to the United States Constitution requires that just compensation be paid when private property be taken for public use. U.S. Const. amend V. Through the due process clause of the Fourteenth Amendment to the Federal Constitution, the Fifth Amendment applies this condition for taking private property for public use to the states. *Delaware, L., & W.R. Co. v. Town of Morristown*, 276 U.S. 182, 193, 72 L. Ed. 523, 528 (1928). "The constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of its exercise." *Long Island Water-Supply Co. v. City of Brooklyn*, 166 U.S. 685, 689, 41 L. Ed. 1165, 1166 (1897).

Our General Assembly has expressly granted NCDOT the power of eminent domain. N.C. Gen. Stat. § 136-18 and -19 (2015). In establishing a framework by which NCDOT can condemn private property, it also conferred statutory rights to landowners by which they could seek just compensation, in addition to their Constitutional right. *See* N.C.G.S. Chpt. 136, Art. 9 (2015). To hold the State accountable for payment of just compensation following a taking of private property, a landowner must approach the sovereign in her courts by filing suit pursuant to statute. *Id.* This is true even though "[t]he right to compensation for property taken under the power of eminent domain does not rest solely upon statute because property owners have a constitutional right to just compensation for takings." *Ferrell v. Dept. of Transportation*, 104 N.C. App. 42, 46, 407 S.E.2d 601, 604 (1991) (citing *Browning v. Highway*

Commission, 263 N.C. 130, 137, 139 S.E.2d 227, 231 (1964)), *aff'd*, 334 N.C. 650, 435 S.E.2d 309 (1993).

Because the General Assembly has established the statutory framework conferring rights to landowners when the State has exercised its eminent domain power, the State has implicitly waived sovereign immunity to the extent of the rights afforded in Chapter 136 of our General Statutes. *Ferrell*, 334 N.C. at 655, 435 S.E.2d at 313. Therefore, to the extent the plaintiffs *sub judice* are within this framework through which the State pays just compensation for a taking, sovereign immunity is waived.

However, NCDOT disputes that the plaintiffs have a right to just compensation, and has consistently and strenuously argued that the trial court erred in applying Section 111 of Chapter 136 to the cases in which no taking has been admitted, and that error is what affects NCDOT's substantial right justifying interlocutory review. Section 111 grants "any person whose land or compensable interest therein" a remedy when said land or interest has been taken and no declaration of taking has been filed by NCDOT, as is the case here. Section 111 states, in pertinent part, that:

> if said taking is admitted by the Department of Transportation, it shall, at the time of filing answer, deposit with the court the estimated amount of compensation for said taking and notice of said deposit shall be given to said owner. Said owner may apply for disbursement of said deposit and disbursement shall be made in accordance with the applicable provisions of G.S. 136-105 of this Chapter. If a taking is admitted, the Department of Transportation shall, within 90 days of the filing of the answer to the complaint, file a map or plat of the land taken.

N.C. Gen. Stat. § 136-111 (2015).

In its pleadings filed prior to July 15, 2015, NCDOT consistently admitted that it had filed transportation corridor maps for the Northern Beltway, that the filing of the maps placed restrictions upon the properties located within the corridor's borders, and that the property of the particular plaintiff to whose complaint NCDOT was responding was within the corridor's borders. As our Supreme Court held, "[t]hese restraints, coupled with their indefinite nature, constitute a taking of plaintiffs' elemental property rights by eminent domain." *Kirby II*, 368 N.C. at 848, 786 S.E.2d at 921.

However, NCDOT consistently denied that a taking had occurred. In all pleadings filed post-July 15, 2015, NCDOT made a general denial of all allegations, even denying the existence of NCDOT as a legal entity and its ability to own property. To those responses to allegations filed after July 15, 2015, the trial court applied what it described in the order herein appealed as "the doctrine of legal estoppel" to hold that NCDOT's "general denials in its post-July 15, 2015 filings are legally untenable and are therefore deemed admitted."

This deemed admission had the effect of placing the plaintiffs *sub judice* squarely in the scope of Section 111, allowing them to enforce their right to just compensation for the regulatory taking. Substantively, while calling the doctrine used to establish this admission "legal estoppel," the trial court applied the doctrine of *judicial estoppel*, which has long been a part of the common law of North Carolina but expressly adopted by our Supreme Court in *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 591 S.E.2d 870 (2004).

Whether our Supreme Court has held that a party "cannot swap horses in midstream," *Roberts v. Grogan*, 222 N.C. 30, 33, 21 S.E.2d 829, 830 (1942), should not be permitted to "blow hot and cold in the same breath," *Kannan v. Assad*, 182 N.C. 77, 78, 108 S.E. 383, 384 (1921) (citation and internal quotation marks omitted), or needs to face "the lesson, taught every day in the school of experience, that he cannot safely 'run with the hare and hunt with the hound,' " *Rand v. Gillette*, 199 N.C. 462, 463, 154 S.E. 746, 747 (1930), it has consistently held that "a party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation." *Roberts*, 222 N.C. at 33, 21 S.E.2d at 830-31 (citation and internal quotation marks omitted). By prohibiting a litigant from changing positions, "judicial estoppel seeks to protect courts, not litigants, from individuals who would play fast and loose with the judicial system," and is an inherently flexible and discretionary doctrine. *Whitacre P'ship*, 358 N.C. at 26, 591 S.E.2d at 887 (citation and internal quotation marks omitted). In

> [n]oting that the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle, [our Supreme] Court enumerated three factors that typically inform the decision whether to apply the doctrine in a particular case. First, a party's subsequent position must be 'clearly inconsistent' with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position,

> so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 28-29, 591 S.E.2d at 888-89 (citations, internal quotation marks, and footnote omitted).

Before July 15, 2015, NCDOT admitted in its pleadings Plaintiffs' allegations that it had recorded the highway corridor map and that this recordation placed restrictions on Plaintiffs' fundamental property rights for an unlimited period of time. It was this set of facts that established for our Supreme Court that a taking had occurred. *See Kirby II*, 368 N.C. 847, 786 S.E.2d 919. Pleadings filed after July 15, 2015 denied the allegations of these facts, which makes NCDOT's subsequent position 'clearly inconsistent' with its former position. Additionally, NCDOT's prior position was accepted by the courts to such an extent that, when this litigation was previously before our Supreme Court, that Court used these facts as the structure under which it found a taking had occurred. Judicial acceptance of NCDOT's latter inconsistent position does pose a threat to judicial integrity in that it could lead to inconsistent court determinations or the perception that either the first or the second court was misled.

Finally, NCDOT is attempting to avoid payment of just compensation by asserting a technical argument that, because NCDOT has admitted no taking, it therefore will pay no just compensation. This inconsistent position gives NCDOT an unfair advantage in that it effectively ends Plaintiffs' statutory right to pursue a cause of action seeking just compensation. This would most certainly impose an unfair detriment on the Plaintiffs in that their alleged damages suffered as a result of NCDOT's actions would no longer be compensable. It is for these reasons that the trial court found NCDOT's general denials as legally untenable, and deemed the facts establishing that each of the Plaintiffs' properties were within the highway corridor maps' boundaries admitted.

Therefore, because the regulatory taking has effectively been admitted, the Plaintiffs are within the scope of Section 111. Furthermore, because Plaintiffs are suing under both the statutory framework of Section 111, as well as the constitutional framework of takings, sovereign immunity provides no bar to Plaintiffs' suit against NCDOT.

[3] NCDOT also attempts to establish grounds for interlocutory review by asserting within their sovereign immunity argument that our constitutional framework of a tripartite system of government prohibits the judicial branch from enforcing collection of liabilities against the executive branch, citing Article V, Section 7 of the State Constitution. Specifically, NCDOT argues that the trial court may not order it to make deposits with the court the estimated amount of compensation for the takings at issue here because said takings have not been admitted by NCDOT. It is this alleged violation of the constitutionally-mandated separation of powers that NCDOT contends further gives it a substantial right affected by the trial court's order which justifies immediate review.

However, as discussed above, the taking contested here has been established and was deemed to have been admitted. As also discussed above, this admission has brought the Plaintiffs' claims within the scope of Section 111, and it is this statute that allows the Plaintiffs an avenue by which they can be compensated for the taking. Therefore, this argument must also fail and we dismiss this appeal.

[4] We must finally note that NCDOT closed its attempt to establish grounds for appellate review with the brief policy argument that irreparable harm would be done to the taxpayers of this state if it is forced to pay deposits to the court for the takings here. While it is admirable to protect the public purse and spend it wisely, this argument is not helpful at this point in the litigation. This should have been a consideration before the highway corridor map was filed. The constitutional right to just compensation when the state takes an individual's private property rights for public use will not be suspended on the mere fact that it may be expensive.

The decision to select certain property on which the state exercises its power of eminent domain is a political decision outside the purview of the judicial branch. "Under our division of governmental power into three branches, executive, legislative and judicial, the right to authorize the exercise of the power of eminent domain, and the mode of the exercise thereof, is wholly legislative." *Hedrick v. Graham*, 245 N.C. 249, 256, 96 S.E.2d 129, 134 (1957) (citations omitted). In explaining this division of power among the various branches, our Supreme Court cited with approval 18 Am. Jur. *Eminent Domain* § 9 (1938) which contained the following:

> The executive branch of the government cannot, without the authority of some statute, proceed to condemn property for its own uses. . . . Once authority is given to

> exercise the power of eminent domain, the matter ceases to be wholly legislative. The executive authorities may then decide whether the power will be invoked and to what extent, and the judiciary must decide whether the statute authorizing the taking violates any constitutional rights; and the fixing of the compensation is wholly a judicial question.

State v. Club Properties, 275 N.C. 328, 334-35, 167 S.E.2d 385, 389 (1969) (citation and internal quotation marks omitted); *accord*, 26 Am. Jur. 2d *Eminent Domain* § 5 (2017).

The State's judiciary provides the avenue by which the amount of compensation here will be fixed. While there will be a high monetary price, and conceivably a political price as well, once NCDOT pays just compensation for exercising its eminent domain power, perhaps this will force NCDOT to respect the rights of our individual citizens and not restrict their rights without the ability or willingness to pay.

Conclusion

It was NCDOT that had complete discretion in selecting which parcels of property it would subject to the regulations allowed by the Map Act when it recorded the highway transportation corridor map for the Northern Beltway's Western Loop on October 6, 1997 and Eastern Loop on November 26, 2008. NCDOT has been unable to establish grounds for interlocutory review in this appeal, and we must therefore dismiss. At this juncture, it is NCDOT that must follow the order of the trial court appealed herein and file plats or maps, without further delay, identifying interests and areas taken to comply with G.S. § 136-111 and with the clear mandates of this Court in *Kirby I*, and our Supreme Court in *Kirby II*.

Following this, as per the appealed order, either party may schedule a hearing pursuant to Section 108 from which the trial court would determine any and all issues raised by the pleadings other than the issue of damages. The measure of damages can then be determined by a jury pursuant to N.C. Gen. Stat. § 136-112, to which the trial court shall add interest accrued from the date of the taking to the date of judgment pursuant to N.C. Gen. Stat. § 136-113, as well as reimbursement of costs, disbursements, and expenses pursuant to N.C. Gen. Stat. § 136-119.

As previously discussed, because it is "necessary to resolve the question in each case by considering the particular facts of that case and

the procedural context in which the order from which appeal is sought was entered[,] . . . the particular facts and procedural history of the case at bar warrant a dismissal." *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 430, 444 S.E.2d 694, 699 (1994) (citations and internal quotation marks omitted).

DISMISSED.

Judge ZACHARY concurs.

Judge DILLON dissents with separate opinion.

DILLON, Judge, dissenting.

This appeal involves a number of actions brought by landowners claiming that NCDOT has "taken" interests in their land by filing of maps showing future highway projects pursuant to the Map Act. The trial court entered an order determining that NCDOT's filing of the maps constituted a taking and directed NCDOT to post deposits (which may be taken down by the landowners) and to file maps or plats regarding the taking, pursuant to N.C. Gen. Stat. § 136-111. NCDOT has appealed the trial court's order, essentially arguing that since it has not admitted to the taking, it cannot be forced to post deposits and file maps/plats at this stage of the litigation.

I agree with the majority that NCDOT has factually admitted to a taking in its pleadings and, therefore, must comply with the order of the trial court. I disagree, however, with the majority's mandate to *dismiss* the appeal based on the majority's conclusion that we lack appellate jurisdiction to consider NCDOT's appeal. Rather, I conclude that we have jurisdiction to consider the merits of NCDOT's argument. However, on the merits, I would side with the landowners (as the majority essentially has done) and would *affirm* the order of the trial court.

In determining our appellate jurisdiction, we are not to look at the *merits* of NCDOT's claim to a substantial right in answering the threshold jurisdictional question. To do so would, in the words of the United States Supreme Court, "conflat[e] the jurisdictional question with the merits of the appeal." *Arthur Andersen LLP, v. Carlisle*, 556 U.S. 624, 628 (2009) ("Jurisdiction over the appeal, however, must be determined by focusing on the category of order appealed from, rather than upon the strength of the grounds for reversing the order.") In other words,

in considering whether we have appellate jurisdiction, we are to ask whether the right *claimed* by the appellant is one that is substantial and whether the order appealed from would affect that right, assuming appellant's claim to that right has merit. Only after we determine that we have jurisdiction do we consider the merits of the appellant's argument.

Our Supreme Court's opinion in *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 681 S.E.2d 770 (2009), is extremely instructive, if not controlling on this point. In that case, the defendants moved the trial court to dismiss an action based on collateral estoppel; the trial court denied the motion; the defendants appealed; and a panel of our Court held that we had jurisdiction to review the interlocutory order and, on the merits, agreed with the defendants that collateral estoppel was implicated and, therefore, reversed the trial court's order. *Id.* The plaintiffs appealed to our Supreme Court, which recognized the two separate issues before it were to *first* consider the existence of appellate jurisdiction and *then* consider the merits of the defendants' collateral estoppel argument:

> "This case presents two issues. First we must determine whether the trial court's interlocutory order denying defendant's motion to dismiss is suitable for immediate appellate review. If that order is immediately appealable, we must then decide whether the trial court erred in denying defendant's motion to dismiss."

Id. at 555-56, 681 S.E.2d at 772. On the first issue, our Supreme Court, without considering the merits of the defendants' argument, concluded that there was appellate jurisdiction over the appeal:

> "[Collateral estoppel] 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. We therefore hold that a substantial right was affected by the trial court's denial of defendant's motion to dismiss, and proceed to the merits of defendant's appeal."

Id. at 558, 681 S.E.2d at 773. *Then*, on the second issue, our Supreme Court addressed the *merits* of the defendants' collateral estoppel argument and concluded that the defendants' collateral estoppel argument had no merit after all:

> "We affirm the portion of the Court of Appeals opinion holding that the trial court's order is immediately appealable, [but] we reverse the Court of Appeals' holding

> that the trial court erred in denying defendant's motion to dismiss."

Id. at 562, 681 S.E.2d at 775-76.[1]

Turning to the issue of whether NCDOT has claimed a right that is "substantial," NCDOT argues that the trial court's order "compelling [NCDOT] to make deposits, conduct title examinations, prepare maps, prepare appraisals, and pay relocation expenses" affects a substantial right.[2] Binding precedent compels us to conclude that NCDOT has, indeed, succeeded in claiming a right which is substantial. Specifically, in an opinion affirmed by our Supreme Court, we held that "an order granting partial summary judgment on the issue of NCDOT's liability to pay just compensation for a claim for inverse condemnation is an immediately appealable interlocutory order affecting a substantial right[.]" *Kirby v. NCDOT*, 239 N.C. App. 345, 354, 769 S.E.2d 218, 227 (2015), *aff'd* 368 N.C. 847, 786 S.E.2d 919 (2016). And here, the trial court determined that NCDOT was liable to pay just compensation in these inverse condemnation actions.

Further, our Supreme Court and our Court have held in other contexts that an interlocutory order which compels a party to pay money or which forces a party to do something affects a substantial right of that party and that, therefore, the party has the right to immediate review

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1. In *NCDOT v. Blue*, 147 N.C. App. 596, 556 S.E.2d 609 (2001), we held that we had jurisdiction over NCDOT's appeal of an interlocutory order based on its claimed right to sovereign immunity. *Id.* at 600, 556 S.E.2d at 615. But then after recognizing our appellate jurisdiction, we rejected the *merits* of NCDOT's sovereign immunity argument, concluding that NCDOT had waived sovereign immunity; and, therefore, we *affirmed* the trial court's order. *Id.* at 601, 556 S.E.2d at 616. In other words, we did not *dismiss* the appeal based on our determination on the merits of NCDOT's claim of sovereign immunity. Rather, we assumed the NCDOT's claim had merit in determining our jurisdiction; and, only after invoking appellate jurisdiction did we consider the merits. *See also Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 677 S.E.2d 203 (2009) (denying an appellee's motion to dismiss appeal of an interlocutory order where the appellant claimed sovereign immunity, but affirming the order after determining that the Meherrin Tribe was not an indigenous tribe which enjoyed sovereign immunity).

2. NCDOT makes this argument under the heading of "sovereign immunity." The majority rejects this argument in part, because "sovereign immunity" is a bar against being sued and this litigation has progressed too far for it to be asserted. Though NCDOT labels its argument as a "sovereign immunity" argument, the thrust of their argument, at least in part, does not concern their immunity from suit, but rather that the trial court's order determines that NCDOT is liable to pay just compensation and directs NCDOT to expend its resources to file maps and post deposits. It is *this* argument where I find NCDOT has alleged a substantial right, whatever its label.

of the order. For instance, in *Wachovia Realty v. Housing, Inc.*, our Supreme Court held that an interlocutory order directing a party to pay money to the opposing party affected a substantial right and that it was error for our Court to have dismissed the appeal "without passing upon the merits thereof." *Wachovia Realty v. Housing, Inc.*, 292 N.C. 93, 100, 232 S.E.2d 667, 672 (1977). *See also Rockford-Cohen Group, LLC, v. N.C. Dep't. of Ins.*, 230 N.C. App. 317, 320, 749 S.E.2d 469, 472 (2013) (holding that preliminary injunction against private company affected a substantial right).

Now reaching the merits of NCDOT's argument, I agree with the majority that the trial court got it right. Section 136-111 requires NCDOT to post a deposit and file maps/plats in an inverse condemnation action where NCDOT *has admitted to a taking*. And NCDOT has essentially admitted to a taking here by admitting to certain facts. Specifically, our Supreme Court has held that a taking occurs where NCDOT files a map pursuant to the Map Act and the map covers the property of the landowner bringing the inverse condemnation claim. *Kirby v. NCDOT*, 368 N.C. 847, 856, 786 S.E.2d 919, 926 (2016) ("By recording the corridor maps [under the Map Act], NCDOT effectuated a taking of fundamental property rights."). And, based on *Kirby*, NCDOT here has factually admitted to a taking by admitting that it has filed maps pursuant to the Map Act which cover the properties of the Plaintiffs. It is not relevant that NCDOT has also pleaded that it has not engaged in a taking, since this allegation is a mere legal conclusion. NCDOT has admitted facts which, as a matter of law, constitute a taking. It must, therefore, follow the procedures set forth in Section 136-111 when it has admitted to a taking.

In conclusion, I believe that NCDOT has clearly articulated a substantial right that, if meritorious, is affected by the order of the trial court. The trial court has determined NCDOT to be liable to pay just compensation and has ordered NCDOT to engage in an expensive process of surveying and appraising a large number of tracts in order to file maps and to post deposits. But on the merits, I believe that the trial court acted appropriately in ordering NCDOT to follow this procedure based on Section 136-111. Accordingly, my vote is to affirm the order of the trial court.

LENTON C. BROWN, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, AN AGENCY OF THE STATE OF NORTH CAROLINA, AND DIVISION OF ADULT CORRECTION AND JUVENILE JUSTICE, A SUBUNIT CONTAINED WITHIN THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA16-1298

Filed 21 November 2017

Public Officers and Employees—dismissed correctional officer—Whistleblower Act—claim not timely—no jurisdiction

A whistleblower claim against the State by a dismissed correctional officer was not timely and the Office of Administrative Hearings did not have subject matter jurisdiction where the claim accrued before the statute's effective date but was not timely filed under the statute. N.C.G.S. § 126-34.02.

Appeal by petitioner from final decision and order entered 2 September 2016 by Administrative Law Judge Melissa Owens Lassiter in the Pitt County Office of Administrative Hearings. Heard in the Court of Appeals 8 August 2017.

The Webster Law Firm, by Walter S. Webster, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Tamika L. Henderson, for respondent-appellee.

CALABRIA, Judge.

Lenton C. Brown ("petitioner") appeals from a final decision and order entered in the Office of Administrative Hearings ("OAH") dismissing his contested case for lack of subject matter jurisdiction. We affirm.

I. Background

Petitioner was previously employed as a correctional officer at Maury Correctional Institution in Greene County, North Carolina. On 10 December 2013, petitioner filed a complaint in Wake County Superior Court against his employer, the North Carolina Department of Public Safety and its Division of Adult Correction and Juvenile Justice (collectively, "respondent"). Petitioner alleged that on 11 December 2012, respondent denied petitioner a promotion in retaliation for his reporting other officers' use of excessive force against an inmate, in violation of the Whistleblower Act. *See* N.C. Gen. Stat. § 126-84, *et seq.* (2015).

On 6 July 2015, petitioner voluntarily dismissed the Wake County Superior Court action. However, on 27 June 2016, petitioner filed a petition for a contested case hearing in the Pitt County OAH, alleging nearly identical claims to those he asserted in the Wake County Superior Court action. On 12 July 2016, respondent filed a motion to dismiss petitioner's action pursuant to the doctrine of sovereign immunity; N.C. Gen. Stat. § 126-34.02; and Rules 12(b)(1)-(3) of the North Carolina Rules of Civil Procedure. Respondent argued that, as a career State employee, petitioner was required to file his Whistleblower claim in the OAH within 30 days following the denial of his promotion, and his failure to do so divested the OAH of subject matter jurisdiction.

On 12 July 2016, the Administrative Law Judge ("ALJ") sent petitioner a "Request for Response to Motion." The ALJ ordered petitioner to file a written response to respondent's motion for dismissal "on or before" 22 July 2016, if he "desire[d] objections to be considered" prior to the ALJ's ruling. Petitioner did not respond or file any written objections to respondent's motion.

On 2 September 2016, the OAH entered a "Final Decision Order of Dismissal." The OAH found, *inter alia*, that

> 2. At all relevant times, Petitioner was a career state employee subject to Article 8 of N.C. Gen. Stat. § 126.
>
> 3. On August 21, 2013, the Governor signed House Bill ("HB") 834 into law. HB 834 revised N.C. Gen. Stat. § 126, known as the State Personnel Act, by renaming it the "North Carolina Human Resources Act," and required that a state employee subject to Article 8 of Chapter 126 bring a claim related to violations of the Whistleblower Act in the Office of Administrative Hearings (OAH).
>
> 4. Before passage of HB 834, a career state employee, like the Petitioner, could bring a claim for violations of the Whistleblower Act by either filing a contested case petition in OAH or in Superior Court. HB 834 became law on August 21, 2013.

Because petitioner failed to file his Whistleblower claim in the OAH within 30 days following the denial of his promotion, as required by the North Carolina Human Resources Act, the OAH concluded that it lacked subject matter jurisdiction and dismissed petitioner's contested case with prejudice. Petitioner appeals.

II. Analysis

Our standard of review of a motion to dismiss for lack of jurisdiction under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) is *de novo*. *Country Club of Johnston Cty., Inc. v. U.S. Fid. & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002). Under *de novo* review, the Court "considers the matter anew and freely substitutes its own judgment for that of the trial court." *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 92, 614 S.E.2d 351, 353 (brackets omitted), *appeal dismissed and disc. review denied*, 360 N.C. 177, 626 S.E.2d 648 (2005).

On appeal, petitioner contends that the OAH erroneously dismissed his contested case for lack of subject matter jurisdiction. We disagree.

Following the issuance of a final agency decision, an aggrieved State employee may appeal by filing a contested case in the OAH. N.C. Gen. Stat. § 126-34.02(a). "The contested case must be filed within 30 days of receipt of the final agency decision." *Id.* The following issues may be heard as contested cases in the OAH: (1) discrimination or harassment; (2) retaliation for protesting discrimination; (3) just cause for dismissal, demotion, or suspension; (4) denial of veteran's preference; (5) failure to post a State position, or to give a career State employee priority consideration for promotion; and (6) whistleblower grievances. N.C. Gen. Stat. § 126-34.02(b)(1)-(6).

The Whistleblower Act is codified in Chapter 126, Article 14 of our General Statutes. N.C. Gen. Stat. § 126-84, *et seq*. The purpose of the Act is to encourage State employees to report improper governmental activities, N.C. Gen. Stat. § 126-84, and to protect them from retaliation for doing so, N.C. Gen. Stat. § 126-85. A State employee who is not subject to Article 8's provisions for "Employee Appeals of Grievances and Disciplinary Action" may assert a Whistleblower claim "in superior court for damages, an injunction, or other remedies . . . against the person or agency who committed the violation within one year after the occurrence of the alleged violation . . . ." N.C. Gen. Stat. § 126-86. A career State employee, however, is subject to Article 8, and therefore, must pursue a Whistleblower grievance by filing a contested case in the OAH "within 30 days of receipt of the final agency decision." N.C. Gen. Stat. § 126-34.02(a); *see also* N.C. Gen. Stat. § 126-1.1 (defining "career State employee" as "a State employee or an employee of a local entity who is covered by [Chapter 126] pursuant to [N.C. Gen. Stat. §] 126-5(a)(2) who: (1) [i]s in a permanent position with a permanent appointment, and (2) [h]as been continuously employed by the State of North Carolina

or a local entity . . . in a position subject to the North Carolina Human Resources Act for the immediate 12 preceding months").

Petitioner correctly notes that on 11 December 2012, the date on which the alleged retaliation occurred, "two statutes provide[d] avenues to redress violations of the Whistleblower statute." *Newberne v. N.C. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 797, 618 S.E.2d 201, 211 (2005). At that time, an aggrieved State employee could either pursue a Whistleblower Act claim in superior court, or file a petition for a contested case hearing in the OAH pursuant to the State Personnel Act, "but not both." *Id.* at 797, 618 S.E.2d at 211-12. However, as of 21 August 2013, a career State employee *must* assert a Whistleblower grievance by filing a contested case in the OAH pursuant to N.C. Gen. Stat. § 126-34.02(a). The provisions that previously allowed career State employees choice of venue no longer apply following the enactment of the North Carolina Human Resources Act. *See* N.C. Gen. Stat. § 126-34.1 ("Repealed by Session Laws 2013-382, s. 6.1, effective August 21, 2013, and applicable to grievances filed on or after that date."); *see also* 2013 N.C. Sess. Laws 382, s. 7.10 (amending N.C. Gen. Stat. § 126-86, effective 21 August 2013, to apply to any State employee alleging Whistleblower violations "who is not subject to Article 8 of this Chapter").

Petitioner acknowledges that he was, at all relevant times, a career State employee, and that he filed his Whistleblower claim on 10 December 2013, after the passage of the North Carolina Human Resources Act. Nevertheless, petitioner asserts that the law's changes do not apply to him, because his claim accrued prior to the statute's effective date. We disagree. The law took effect 21 August 2013 and "applies to grievances *filed on or after that date*." 2013 N.C. Sess. Laws 382, s. 6.5. (emphasis added). The claim's accrual date is irrelevant.

"The right to appeal to an administrative agency is granted by statute, and compliance with statutory provisions is necessary to sustain the appeal." *Lewis v. N.C. Dep't of Hum. Res.*, 92 N.C. App. 737, 739, 375 S.E.2d 712, 714 (1989); *see also* N.C. Gen. Stat. § 126-34.02(c) (providing that "[a]ny issue for which an appeal to the [OAH] has not been specifically authorized by this section shall not be grounds for a contested case hearing"). Here, petitioner's failure to comply with N.C. Gen. Stat. § 126-34.02 divested the OAH of subject matter jurisdiction. Accordingly, we affirm the OAH's dismissal of petitioner's contested case.

AFFIRMED.

Judges BRYANT and STROUD concur.

BUYSSE v. JONES

[256 N.C. App. 429 (2017)]

BOB BUYSSE, JOAN GUILKEY AND MIKE MILES, PLAINTIFFS
v.
ADAM AND SUSAN JONES, DEFENDANTS

No. COA17-419

Filed 21 November 2017

Real Property—restrictive covenants—1923 set-back

The trial court erred in interpreting restrictive covenants concerning a building set-back that originated in 1923 in a case involving a front porch addition. Although there were revisions and attempted revisions of the original covenant, along with an unrecorded survey and an ineffective plat, the result created ambiguity where there was none in the original deed. The intention of the original grantor was clear and the trial court was bound to construe the restrictive covenants narrowly and in accord with the original intent.

Appeal by plaintiffs from order entered 21 November 2016 by Judge Paul C. Ridgeway in Orange County Superior Court. Heard in the Court of Appeals 18 October 2017.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael W. Mitchell and Andrew P. Atkins, and John Joseph Korzen, for defendant-appellants.

Manning Fulton & Skinner, P.A., by J. Whitfield Gibson and Robert S. Shields, Jr., for plaintiff-appellees.

TYSON, Judge.

Adam and Susan Jones ("Defendants") appeal from an order granting Bob Buysse, Joan Guilkey, and Mike Miles ("Plaintiffs") specific performance of the restrictive covenants of the Gimghoul Neighborhood, requiring Defendants to remove the portion of their front porch addition that protrudes into a purported forty-foot setback from Gimghoul Road and a permanent injunction. We reverse and remand.

I. Background

A. The Restrictive Covenants

In 1923, The Junior Order of Gimghouls owned and endeavored to develop a tract of land into a residential neighborhood, later known as

the Gimghoul Neighborhood. The land was subdivided into various lots, including Lot 7 at issue in this case, and a plat was recorded in Plat Book 1 Page 51 in the Orange County Registry in 1923. This plat includes the handwritten notation "building line is 40 feet from Gimghoul Road" and shows a drawn line indicating the setback. This plat does not specify width or a specific right-of-way of Gimghoul Road.

Restrictive covenants were included in all the original recorded deeds. One of the covenants included the following restriction:

> That no residences or buildings of any kind erected on the lot shall be nearer any street than the building line designated as "Residence Building Line," *this being 40 feet from the northern boundary of Gimghoul Road*, nor shall any residence be nearer either side line of said lot than ten feet, provided where two or more lots are combined to make a larger lot no residence shall be nearer either side line of the larger lot than ten feet. This does not apply to steps having no roof. (Emphasis supplied).

This restriction was included in the original deed of Lot 7, conveying the lot from The Junior Order of Gimghouls to "S.A. Stoudemire and Irene S. Stoudemire, his wife" on 5 May 1926, and recorded at Book 84 Page 286 in the Orange County Registry.

In 1950, an unsuccessful attempt was made to modify the original covenants. One proposed change referenced the setback: "[t]hat no residence or building of any kind erected on any lot shall be nearer any street than the building line designated as 'Residence Building Line' on said plot, and in no case less than 40 feet from the front property line . . . ." These proposed modifications were never executed by the lot owners nor recorded in the Orange County Registry.

In 1983, the Gimghoul Homeowners Association ("HOA") retained an attorney to opine on the validity of the original covenants and the HOA's ability to amend or add restrictions. Several drafts of proposed changes were produced, and several meetings were held to discuss the alterations. The setback requirement was not the focus of the revisions and not discussed until the final draft.

When questioned concerning the purpose of the proposed change, one HOA member claimed the modification was an effort to "simplify and clarify the setback for each lot since it was not clear what was intended by the 'northern boundary' building line" described in the original covenant. No objections were made to the resulting modification, and the

change above was reflected in the final draft, "[n]o residences or buildings of any kind shall be erected on a lot nearer any street than forty (40') feet . . . ." The term "street" was not defined in the 1984 Declaration.

The final draft of the 1984 Declaration was accepted by a majority of the lot owners and recorded in June of 1984. The 1984 Declaration stated the intention behind the changes was "to insure, as much as practical, that the basic purpose of the original restrictions and of the 1950 amendments are attained. That purpose was and continues to be the retention of the single family residential character of the neighborhood." Not all property owners of the subdivided lots shown on the 1923 plat signed the 1984 Declaration, but Sterling A. Stoudemire and Mary Arthur B. Stoudemire, owners of Lot 7, did.

B. Lot 7

The Junior Order of Gimghouls conveyed Lot 7 to "S.A. and Irene S. Stoudemire, his wife" on 5 May 1926. On 30 May 1961, Sterling A. Stoudemire and Mary Arthur B. Stoudemire, as wife, conveyed Lot 7 to John T. Manning, who, along with his wife Elizabeth T. Manning, conveyed Lot 7 back to Sterling A. and Mary Arthur B. Stoudemire on the same day, on back-to-back recorded deeds. This conveyance was apparently made to place Mary Arthur B. Stoudemire into the chain of title. These deeds were recorded in Book 182 on Page 66 and 67, respectively.

On 9 June 1995, Mary Arthur B. Stoudemire conveyed Lot 7 to James C. Cusack and Julia C. Shivers, who had requested a survey be prepared of Lot 7 on 2 June 1995 by Charles R. Billings, RLS. This survey is not recorded. James C. Cusack and Julia C. Shivers then conveyed Lot 7 to Mary Wright Harrison on 17 July 2000, using the identical description contained in their 1995 deed.

Defendants purchased Lot 7, with a single family structure located thereon, from Mary Wright Harrison on 29 December 2006. Defendants' deed referenced and incorporated therein the unrecorded 1995 survey, which indicated a forty-foot building setback being measured from the property line adjoining Gimghoul Road, which is shown on the survey as having a fifty-foot right-of-way. Defendants assert they had not previously seen a copy of the unrecorded survey prior to litigation, but do not contest its inclusion in the description in their deed.

On 13 November 2013, Defendants submitted plans for a porch addition to the Chapel Hill Planning Department for a Certificate of Appropriateness ("COA"). These plans were reviewed by the Historic District Commission on 12 December 2013. A revised COA application

was submitted on 13 January 2014, indicating minor changes to the original plans.

On 27 February 2014, the Historic District Commission reviewed and approved Defendants' plans, and issued a COA. A zoning compliance permit was issued on 20 March 2014. A building permit was issued on 4 June 2014, and construction of the covered porch began.

Prior to Defendants beginning construction on their covered porch addition, the HOA asserted the Defendants were violating the forty-foot setback restriction. Despite repeated warnings of the purported setback violation, and several offers to assist with remedying the violation, Defendants completed construction of their addition. The covered porch extends to approximately thirty-three feet south of the Lot 7 property line, approximately forty-three feet from the edge of the pavement of Gimghoul Road, and approximately eighty-three feet from the "northern boundary of Gimghoul Road."

C. Procedural History

On 18 August 2014, Plaintiffs filed a complaint against Defendants, and sought specific performance of the restrictive covenant and a permanent injunction. Plaintiffs filed an amended complaint on 9 July 2015, adding other homeowners who would also be subject to the restriction as necessary parties.

Both Plaintiffs and Defendants filed motions for summary judgment, and both motions were denied on 20 November 2015. The trial court's order found genuine issues of material fact exist concerning the definition of the word "street" and an exception to the Marketable Title Act protected the restrictive covenants of Gimghoul Neighborhood. N.C. Gen. Stat. § 47B-3(13) (2015).

Both parties stipulated to a summary bench trial and submitted briefs. On 15 November 2016, the trial court issued judgment in favor of Plaintiffs, granted specific performance of the forty-foot setback restriction from the southern edge of the right-of-way of Gimghoul Road, and issued a permanent injunction requiring removal of the portion of the porch that encroaches within the forty-foot setback from the asserted Gimghoul Road right-of-way. Defendants filed notice of appeal on 12 December 2016.

II. Jurisdiction

The judgment entered on 15 November 2016 is a final judgment of a superior court from which an appeal of right may be taken to this Court. N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Issues

Defendants argue the trial court erred in (1) concluding the exception in N.C. Gen. Stat. § 47B-3(13) of the Marketable Title Act preserved the validity of the setback restriction from extinction; (2) resolving the ambiguity of the term "street" in favor of Plaintiffs, as if the restrictive covenants were valid; and (3) failing to apply traditional rules of contract construction and considering inadmissible evidence.

IV. Analysis

A. Standard of Review

In a non-jury trial, the standard of review is "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Jackson v. Culbreth*, 199 N.C. App. 531, 537, 681 S.E.2d 813, 817 (2009) (citation and quotation marks 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.*

"Interpretation of the language of a restrictive covenant is a question of law reviewed *de novo*". *Erthal v. May*, 223 N.C. App. 373, 378, 736 S.E.2d 514, 517 (2012). Restrictive covenants are a restraint on the free use of property and are strictly construed. *J. T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, 70, 274 S.E.2d 174, 179 (1981) ("such covenants are not favored by the law, and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land" (citations omitted)).

B. The Setback Requirement

Plaintiffs originally sought a ruling on the meaning of the word "street" in the restrictive covenants, while Defendants questioned the validity of the covenants themselves. We do not need to address ambiguous words nor statutory construction when this matter can be resolved by looking at the plain language of the original covenants. *See Moss Creek Homeowners Ass'n v. Bissette*, 202 N.C. App. 222, 228, 689 S.E.2d 180, 184 (2010) ("restrictive covenants are contractual in nature, and that acceptance of a valid deed incorporating covenants implies the existence of a valid contract with binding restrictions").

The restrictive covenants in Gimghoul Neighborhood have endured through revision and attempted revision since 1926. The most recent

iteration, the 1984 Declaration, attempted to remove the purported ambiguities in the original 1926 covenants. Instead, the revision marking the setback line as no "nearer any street than forty (40') feet" created ambiguity. "An ambiguity exists where the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Hemric v. Groce*, 169 N.C. App. 69, 76, 609 S.E.2d 276, 282 (2005) (citation omitted).

The word "street" was not defined in the 1984 Declaration, and, as the trial court found, that word is clearly susceptible to either definition and interpretation proposed by the parties in this case. *See id.* The first two definitions for "street" allow for either the inclusion or exclusion of sidewalks: "1.a. A public way or thoroughfare in a city or town, usu. with a sidewalk or sidewalks. b. Such a public way considered apart from the sidewalks." *Street*, The American Heritage College Dictionary (3d ed. 1997).

When we encounter an ambiguous word in a contract, we "may consider all the surrounding circumstances, including those existing when the document was drawn." *Simmons v. Waddell*, 241 N.C. App. 512, 520, 775 S.E.2d 661, 671 (2015) (quoting *Century Commc'ns, Inc. v. Hous. Auth. of City of Wilson*, 313 N.C. 143, 146, 326 S.E.2d 261, 264 (1985)). "The grantor's intent must be understood as that expressed in the language of the deed[.]" *Id.* (quoting *County of Moore v. Humane Soc'y of Moore County, Inc.*, 157 N.C. App. 293, 298, 578 S.E.2d 682, 685 (2003)).

The original 1926 deed to Lot 7 clearly and unambiguously states the setback line is to be measured "40 feet from *the northern boundary* of Gimghoul Road." (Emphasis supplied). The trial court found this language was included in other deeds recorded from that time. The Junior Order of Gimghouls, the original sub-divider and grantor, could have indicated any point from which to measure the setback requirement in the original conveyances, and it appears many of the deeds noted the "northern boundary" as the origination point. *See Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) ("If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract.").

The trial court improperly found the attempted 1950 modifications of the restrictive covenants were designed to remedy inconsistencies between the original deed and the 1923 plat, purportedly showing the setback line as being measured from the southern side of Gimghoul Road. No evidence supports this finding of fact, as nowhere in the record is the "intent" of the 1950 drafters of an attempted but unexecuted document indicated.

The proposed 1950 amendments were never adopted nor recorded, which negates any purpose for opining what the "intent of the drafters" might have been. Further, the hand drawn and un-located "setback" line from the undefined bounds of Gimghoul Road shown on the 1923 plat was not binding upon the original developers, and without enforceable covenants is not binding on subsequent purchasers. *See Turner v. Glenn*, 220 N.C. 620, 626, 18 S.E.2d 197, 201 (1942) ("A deed which makes reference to a map or plat incorporates such plat for the purpose of more particular description but does not bind the seller, nothing else appearing, to abide by the scheme of division laid down on that map.").

Presuming the validity of the 1984 Declaration, but finding ambiguity in the use of the term "street" therein, we review the original covenants. *See Simmons*, 241 N.C. App. at 520, 775 S.E.2d at 671. Finding no ambiguity in the plain language of the restrictive covenants in the original deed to Lot 7, we "must construe the contract as written[.]" *Hemric*, 169 N.C. App. at 76, 609 S.E.2d at 282 (citation omitted).

The original deed clearly indicates the forty-foot setback as being measured and starting from the "northern boundary line of Gimghoul Road." Defendants' addition does not intrude into this forty-foot setback. *See Callaham v. Arenson*, 239 N.C. 619, 625, 80 S.E.2d 619, 624 (1954) ("Therefore, restrictive covenants clearly expressed may not be enlarged by implication or extended by construction. They must be given effect and enforced as written."). Plaintiffs' arguments are overruled.

V. Conclusion

The trial court's purported findings of inconsistencies between the original covenant and the 1923 plat, and the 1950 attempted revisions and subsequent 1984 revisions, which sought to remedy these inconsistencies, are not supported by competent evidence. The trial court's conclusion to resolve the purported ambiguity by considering the intent of the parties under these facts is error. *See Claremont Prop. Owners Ass'n v. Gilboy*, 142 N.C. App. 282, 289, 542 S.E.2d 324, 329 (2001) (holding the meaning of ambiguous restrictive covenants must be determined by construing the intent of the parties).

The original covenants in the 1926 deed are not ambiguous, and clearly state the measuring point for the forty-foot setback is "from the northern boundary of Gimghoul Road." The intent of the original grantor is clear. This Court is bound to construe the restrictive covenants narrowly and in accord with this original intent *See Hemric*, 169 N.C. App. at 76, 609 S.E.2d at 282; *see also Callaham*, 239 N.C. at 625, 80 S.E.2d at 624 (1954).

We do not address the validity or enforcement of the purported forty-foot setback from the southern boundary of Gimghoul Road, as is shown in the unrecorded 1995 survey referenced and incorporated into Defendants' deed. That issue is not before us. In light of our ruling, it is also unnecessary to and we do not reach Defendants' arguments under the Marketable Title Act. N.C. Gen. Stat. § 47B-3(13).

The ruling of the trial court finding for the Plaintiffs is reversed and remanded for entry of judgment for Defendants. *It is so ordered.*

REVERSED AND REMANDED.

Judges STROUD and HUNTER concur

IN THE MATTER OF DAVIS, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM, CLAIMANT-APPELLANT

No. COA15-882-2

Filed 21 November 2017

1. Tort Claims Act—involuntary sterilization—Eugenics Asexualization and Sterilization Compensation Program—nonconstitutional issues outside mandate of remand order

The full Commission's ruling that an involuntarily sterilized claimant could not demonstrate she was a qualified recipient of compensation under the Eugenics Asexualization and Sterilization Compensation Program was partially affirmed based on claimant's nonconstitutional arguments that were outside the mandate of our Supreme Court's remand order.

2. Appeal and Error—preservation of issues—Rule of Appellate Procedure 10(a)(1)—failure to argue constitutional issue

The Court of Appeals assumed arguendo that N.C. R. App. P. 10(a)(1) applied under *Redmond II*, 369 N.C. 490 (2017), to an involuntarily sterilized claimant's constitutional arguments of equal protection and fundamental fairness regarding the denial of compensation under the Eugenics Asexualization and Sterilization Compensation Program, and held that claimant did not preserve her constitutional issues for appellate review.

3. Constitutional Law—equal protection—fundamental fairness—right to compensation—documentation—method of proof—involuntary sterilization

Assuming arguendo that the Court of Appeals was required by *Redmond II*, 369 N.C. 490 (2017), to address an involuntarily sterilized claimant's constitutional argument regarding equal protection and fundamental fairness, the argument failed to state a cognizable claim where there was nothing indicating that the Industrial Commission indicated that documentation from the Eugenics Board was the only method of proof of eligibility to receive compensation from the Eugenics Asexualization and Sterilization Compensation Program.

4. Constitutional Law—equal protection—denial of compensation—involuntary sterilization under authority of N.C. Eugenics Board—similarly situated

Assuming arguendo that an involuntarily sterilized claimant stated a cognizable equal protection claim for the denial of compensation under the Eugenics Asexualization and Sterilization Compensation Program, the Court of Appeals already rejected this argument in *Hughes II*, 253 N.C. App. 699 (2017). Claimant could not demonstrate that she was sterilized under the authority of the N.C. Eugenics Board in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937, as required by N.C.G.S. § 143B-426.50, and thus could not demonstrate that she was similarly situated with those claimants.

Appeal by Claimant-Appellant Davis from decision and order entered 14 May 2015 by the North Carolina Industrial Commission. Heard originally in the Court of Appeals 11 January 2016, and opinion filed 15 March 2016. Petition for discretionary review was allowed by the North Carolina Supreme Court for the limited purpose of reversing the Court of Appeals' dismissal of Claimant's "constitutional claims." The case was remanded to the Court of Appeals for expedited consideration of Claimant's "constitutional claims" on the merits.

Leslie O. Wickham, Jr. for Claimant-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Marc X. Sneed, for North Carolina Department of Justice, Tort Claims Section.

McGEE, Chief Judge.

I. Supplemental Factual and Procedural Background[1]

Claimant Davis ("Claimant") was involuntarily sterilized in 1946. Claimant makes three arguments on appeal: (1) that her involuntary sterilization "had to be performed under Public Law 1933, Chapter 224 in order to be performed lawfully," (2) that the full panel of the Industrial Commission's ("Full Commission") "strict construction of N.C. Gen. Stat. § 143B-426.50(5) constitute[d] denial of compensation benefits to [her] due to an overly strict and technical construction of the statute[,]" and (3) the "[Full] Commission violated [her] constitutional rights to equal protection and fundamental fairness by denying compensation" based upon a lack of record evidence of the involvement of the North Carolina Eugenics Board ("Eugenics Board").

This matter was first decided by this Court on 15 March 2016. *Maye I*, __ N.C. App. __, 784 S.E.2d 237, 2016 WL 1012877. In *Maye I*, we held that Claimant could not demonstrate that she was a qualified recipient of compensation pursuant to the Eugenics Asexualization and Sterilization Compensation Program ("Compensation Program") based upon our prior opinion in *In re House*, __ N.C. App. __, 782 S.E.2d 115 (2016) ("*House I*") and, for this reason, overruled her first two arguments. By order entered on 28 September 2017 ("Remand Order"), our Supreme Court granted Claimant's petition for discretionary review, along with three additional petitions from different claimants, stating:

> The petitions for discretionary review . . . are allowed for the limited purpose of reversing the Court of Appeals' dismissal of claimants' constitutional claims. These cases are remanded to the Court of Appeals for expedited consideration of the constitutional claims on the merits. *See In re Redmond*, __ N.C. __, __, 797 S.E.2d 275, 280 (2017) [("*Redmond II*")] ("When an appeal lies directly to the Appellate Division from an administrative tribunal, . . . a constitutional challenge may be raised for the first time in the Appellate Division as it is the first destination for the dispute in the General Court of Justice.").

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1. See *In re Maye*, __ N.C. App. __, 784 S.E.2d 237, 2016 WL 1012877 (2016) (unpublished) ("*Maye I*"), for a more detailed factual and procedural background of this case. In *Maye I*, this Court decided three appeals, including *Maye I*; the present appeal, *In re Davis*; and *In re Staggers*, COA15-883. *See Maye I*, __ N.C. App. __, 784 S.E.2d 237, 2016 WL 1012877, at *1. Claimant Davis was the only claimant from *Maye I* who petitioned our Supreme Court for discretionary review.

II. Analysis

1. *Non-Constitutional Arguments*

[1] Claimant's first two arguments do not involve constitutional questions and, therefore, fall outside the mandate of the Remand Order. This Court's opinion in *Maye I* has therefore not been overruled with respect to Claimant's first two arguments. For the reasons stated in an opinion, *In re House*, __ N.C. App. __, __ S.E.2d ___, (COA15-879-2) ("*House II*"), that is being filed concurrently with the present opinion, we again affirm the ruling of the Full Commission as it pertains to Claimant's first two arguments on appeal.

2. *Constitutional Argument*

Claimant further argues that "[t]o exclude from [the] restitution program similarly-situated victims of involuntary government sterilization whose records were not maintained in the State archives is to render the statute grossly under-inclusive in violation of" provisions of both the North Carolina Constitution and the United States Constitution. However, Claimant only included her first two arguments in her "Statement of Grounds for Appeal to the Full Commission," and those arguments do not include any constitutional claims. The Full Commission only addressed the two arguments before it in its 14 May 2015 Decision and Order. In addition, Claimant's "Proposed Issues on Appeal" only included her first two arguments. As we stated in *Maye I*,

> there is no record evidence in the present case that Claimant[] presented this argument to the Industrial Commission, or brought it up in any manner prior to making it in [her] appellate brief[.] Nor did Claimant[] petition this Court for review of these matters. "Where a party appeals a constitutional issue from the Commission and fails to file a petition for *certiorari* or fails to have the question certified by the Commission, this Court is without jurisdiction." *Myles v. Lucas & McCowan Masonry*, 183 N.C. App. 665, 665, 645 S.E.2d 143, 143 (2007) [(citing *Carolinas Med. Ctr. v. Employers & Carriers Listed In Exhibit A*, 172 N.C. App. 549, 616 S.E.2d 588 (2005))]. Therefore, Claimant['s] constitutional argument[] must be dismissed.

Maye I, __ N.C. App. __, 784 S.E.2d 237, 2016 WL 1012877, at *2.

Our Supreme Court remanded this case for consideration of Claimant's constitutional argument pursuant to the following language in *Redmond II*:

> When an appeal lies directly to the Appellate Division from an administrative tribunal, in the absence of any statutory provision to the contrary, *see*, *e.g.*, N.C.G.S. § 150B–45(a), a constitutional challenge may be raised for the first time in the Appellate Division as it is the first destination for the dispute in the General Court of Justice.

Redmond II, __ N.C. at __, 797 S.E.2d at 280. This language in *Redmond II* was used to reverse three opinions of this Court, all of which were initially decided in *In re Hughes*, __ N.C. App. __, 785 S.E.2d 111 (2016) ("*Hughes I*").[2] In *Hughes I*, this Court explained:

> because the Industrial Commission is not part of the judicial branch, it could not have made any determinations concerning a statute's constitutionality. For this reason, in their appeals from the decisions of the deputy commissioners, the attorneys representing the estates of Redmond and Smith included motions to certify the constitutional questions relevant to those appeals to this Court. The estate of Hughes, apparently operating without benefit of an attorney at the time, filed its appeal to the Full Commission without any motion to address the constitutional issues. The current attorney for the Hughes estate petitioned this Court for a writ of *certiorari*, which was granted 9 November 2015, in order to include the appeal of the Hughes estate along with those of the Redmond and Smith estates for consideration of their constitutional challenges.

Id. at __, 785 S.E.2d at 116 (citation omitted), *rev'd on other grounds by Redmond II*, __ N.C. __, 797 S.E.2d 275. It is unclear if our Supreme Court's holding in *Redmond II* applies to the present case because the claimants in *Hughes I*, *Redmond I*, and *Smith* all made attempts to have their constitutional questions certified to this Court, whereas Claimant in the present matter made no attempt to pursue review of any constitutional issue pursuant to the two methods provided by statute, as recognized in *Redmond II:*

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2. *Hughes I* itself, and two additional cases that were decided in the same opinion as *Hughes I*: *In re Redmond* ("*Redmond I*") and *In re Smith*. *See Hughes I*, __ N.C. App. at __, 785 S.E.2d at 111.

> Although not controlling on this Court, *we note with approval* the Court of Appeals' reasoning in a similar case. When the Industrial Commission determined in its opinion and award that certain changes to the Workers' Compensation Act violated the Due Process Clause . . ., the Court of Appeals vacated the opinion and award, citing the "well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board." *Carolinas Med. Ctr. v. Emp'rs & Carriers*, 172 N.C. App. 549, 553, 616 S.E.2d 588, 591 (2005). In reaching this holding, the court reasoned that a party has at least two avenues to challenge the constitutionality of a statute. First, the party asserting the constitutional challenge may bring "an action under the Uniform Declaratory Judgment Act, N.C. Gen. Stat. § 1–253 *et seq.* (2004)." *Id.* at 553, 616 S.E.2d at 591 ("A petition for a declaratory judgment is particularly appropriate to determine the constitutionality of a statute when the parties desire and the public need requires a speedy determination of important public interests involved therein."). "Alternatively, pursuant to N.C. Gen. Stat. § 97–86 the Industrial Commission of its own motion could have certified the question of the constitutionality of the statute to this Court before making its final decision."

Redmond II, __ N.C. at __, 797 S.E.2d at 278 (citations omitted) (emphasis added). *Carolinas Med. Ctr.* also includes the following analysis concerning certification of questions of law to this Court:

> The Industrial Commission acknowledged this option in its decision in *Carter v. Flowers Baking Co.*, in which it held that "the Commission does not have the authority to find that enactments of the Legislature are unconstitutional[,]" and that:
>
> > If the Commissioners feel strongly that a statute is unconstitutional and that it would clearly offend their oath to apply it, or that applying it would cause irreparable prejudice, or that the question would not otherwise be reviewed in the courts, etc., the Commission "may certify questions of law to the Court of Appeals for decision and determination" [pursuant to N.C. Gen.

> Stat. § 97-86], which would "operate as a supersedeas except as provided in G.S. 97-86.1."

Carolinas Med. Ctr., 172 N.C. App. at 553, 616 S.E.2d at 591 (citation omitted).

We further note that in *Carolinas Med. Ctr.*, cited with approval in *Redmond II*, this Court *dismissed* the constitutional question argued on appeal, explaining that "[i]t is not the role of the appellate courts to render advisory opinions in matters that are not properly before them." *Carolinas Med. Ctr.*, 172 N.C. App. at 554, 616 S.E.2d at 592 (citation omitted). This Court further held that the constitutional question was not properly before it because the constitutional matter had not been made part of a *declaratory judgment action* and, although "N.C. Gen. Stat. § 97-96 allows this Court to consider questions of law certified to it by the Industrial Commission[,]" N.C.G.S. § 97-96 "does not presume to allow this Court to certify matters to itself for review and consideration. The provisions of Rule 2 are discretionary, and cannot be used to confer jurisdiction upon this Court in the absence of jurisdiction." *Id.* at 554, 616 S.E.2d at 592 (citation omitted). By citing *Carolinas Med. Ctr.* with approval, it is inferred that this Court was correct – or at least had the discretion – to refuse to consider, for the first time on appeal from an agency decision, a constitutional argument when *no* attempt had been made by the appellant to bring that argument forward at the lower tribunal. As stated in *Carolinas Med. Ctr.*, this Court considered the failure to utilize methods available at the trial level in order to address a constitutional issue to be a jurisdictional error. *Id.* The circumstances before us are in relevant ways the same as those in *Carolinas Med. Ctr.*

This Court has regularly held that constitutional issues not raised before the Industrial Commission will not be heard for the first time on appeal. *See Powe v. Centerpoint Human Servs.*, 215 N.C. App. 395, 412, 715 S.E.2d 296, 307 (2011); *Myles*, 183 N.C. App. at 665–66, 645 S.E.2d at 143–44 (citing *Carolinas Med. Ctr.*) (emphasis added) ("Where a party appeals a constitutional issue from the Commission and fails to file a petition for *certiorari* or fails to have the question certified by the Commission, this Court is without jurisdiction. In the instant case, there is no evidence in the record that the Commission has certified the question nor is there any evidence that a petition for *certiorari* was filed. Accordingly, we are *without jurisdiction to hear this case*. For the foregoing reasons, plaintiff's appeal is dismissed.").

Unlike in the present case, the constitutional issues involved in our Supreme Court's opinion in *Redmond II* were raised before the

Industrial Commission. In two of the cases addressed in *Redmond II*, the Industrial Commission, in its decisions and orders, explicitly stated that it was certifying those constitutional questions to this Court. In the third case we granted the claimant's petition for writ of *certiorari*. Therefore, it is unclear to this Court whether the holding in *Redmond II* is limited to situations where the constitutional issues had first been raised before the Industrial Commission, or had been included in a petition for writ of *certiorari*.[3]

Therefore, we are uncertain how broadly we should interpret the following language from *Redmond II*:

> When an appeal lies directly to the Appellate Division from an administrative tribunal, in the absence of any statutory provision to the contrary, *see*, *e.g.*, N.C.G.S. § 150B–45(a), a constitutional challenge may be raised for the first time in the Appellate Division as it is the first destination for the dispute in the General Court of Justice.[4]

Redmond II, __ N.C. at __, 797 S.E.2d at 280. If we interpret this language broadly, then we must conclude that this Court was wrong to dismiss the constitutional argument in *Carolinas Med. Ctr.*, despite the fact that *Redmond II* cites that opinion with approval, *id.* at __, 797 S.E.2d at 278, and that this Court is without authority or discretion to refuse to address the merits of any constitutional argument made for the first time on appeal, so long as that appeal is from a final agency decision.

In an attempt to gain further clarity, we consider the right of appeal from agency decisions – including from decisions pursuant to the Compensation Program and other agency decisions. Pursuant to the Compensation Program, appeal was governed by N.C. Gen. Stat.

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3. We note that although the Remand Order limits our review on remand to constitutional issues pursuant to our Supreme Court's reasoning in *Redmond II*, not every opinion included in the Remand Order contains a constitutional issue. *See House I*, __ N.C. App. __, 782 S.E.2d 115. Therefore, we cannot presume that the mandate of the Remand Order is meant to require this Court to address the merits of every one of our opinions contained therein.

4. Absent utilization of the Declaratory Judgment Act. N.C.G.S. § 1-253 ("Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.").

§ 143B-426.53 (2015).[5] A claimant first had to have a claim determined by a deputy commissioner based upon an application and supporting materials. N.C.G.S. § 143B-426.53(b). If the claim was denied, the claimant could then submit additional documentation to the deputy commissioner, and obtain additional review. N.C.G.S. § 143B-426.53(c). If the claim was again denied, claimant could then request a hearing before the deputy commissioner. N.C.G.S. § 143B-426.53(d). Upon a final denial by the deputy commissioner, the claimant could then appeal to the Full Commission for *de novo* review. N.C.G.S. § 143B-426.53(e). Finally, if the claim was denied by the Full Commission, the claimant could "appeal the decision of the [F]ull Commission to the Court of Appeals[.] Appeals under this section shall be in accordance with the procedures set forth in G.S. 143-293 and G.S. 143-294." N.C.G.S. § 143B-426.53(f).

N.C. Gen. Stat. § 143-293 is part of Article 31 of Chapter 143, known as the "Tort Claims Act," and states in relevant part that appeal to the Court of Appeals "shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions[.]" N.C.G.S. § 143-293. The Industrial Commission, whether acting pursuant to the Tort Claims Act, the Worker's Compensation Act, the Compensation Program, or any other authority, is prohibited from ruling on constitutional questions. *Redmond II*, __ N.C. at __, 797 S.E.2d at 277 (citations omitted) (the "judicial power [of the Industrial Commission] clearly does not extend to consideration of constitutional questions").

However, the Rules of Appellate Procedure, including Rule 10, have been regularly applied to appeals from the Industrial Commission. *See* N.C. Gen. Stat. § 97-86 (2015) ("appeal from the decision of [the] Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. The procedure for the appeal shall be as provided by the rules of appellate procedure."); N.C. Gen. Stat. § 105-345(d) (2015) (appeal from Property Tax Commission shall be to the Court of Appeals and "[t]he procedure for the appeal shall be as provided by the rules of appellate procedure); *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360 (2005) (Court of Appeals should have dismissed appeal in action brought pursuant to Tort Claims Act for violations of Rule 10 and Rule 28 of the Rules of Appellate Procedure); *Brooks, Comr. of Labor v. Grading Co.*, 303 N.C. 573, 591, 281 S.E.2d 24, 35 (1981) (in opinion considering appeal from a final agency decision,

5. The provisions of the Compensation Program are no longer in force except for those few cases that were properly initiated but have yet to reach final disposition, such as the present case.

our Supreme Court admonished: "We remind counsel that the Rules of Appellate Procedure are mandatory and failure to comply invites dismissal of the appeal.").

Our Supreme Court has regularly held that constitutional arguments not brought forth at the lower court level will be dismissed on appeal pursuant to Rule 10(a)(1). *See, e.g.*, *State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007); *State v. Roache*, 358 N.C. 243, 284, 595 S.E.2d 381, 408 (2004) (defendant failed to raise constitutional error at the trial court; therefore, pursuant to Rule 10(a)(1) it was not preserved for appellate review); *State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 514 (1998); *State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995).

Based upon the following language, it is possible that *Redmond II*, at least concerning constitutional questions, has overruled the applicability of certain of our Rules of Appellate Procedure to appeals from administrative tribunals – or perhaps has concluded that these rules have never applied with respect to constitutional issues not brought forth before administrative tribunals in the first instance:

> That the Commission is not a court, but an administrative agency of the State with statutorily limited judicial authority, also makes distinguishable our prior reasoning in cases like *City of Durham v. Manson*, 285 N.C. 741, 743, 208 S.E.2d 662, 664 (1974) ("[I]n conformity with the well established rule of appellate courts, we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." (italics omitted) (quoting *State v. Jones*, 242 N.C. 563, 564, 89 S.E.2d 129, 130 (1955))), and *State v. Cumber*, 280 N.C. 127, 132, 185 S.E.2d 141, 144 (1971) ("Having failed to show involvement of a substantial constitutional question which was raised and passed upon in the trial court and properly brought forward for consideration by the Court of Appeals, no legal basis exists for this appeal to the Supreme Court, and it must therefore be dismissed."). As we have established already, the Commission has no authority to decide constitutional questions, making the rule announced in these cases inapplicable to whether the Court of Appeals may consider the constitutional question raised in this case.

Redmond II, __ N.C. at __, 797 S.E.2d at 279. Because we lack certainty concerning whether failure to bring forth constitutional arguments at

the trial level in the first instance – even when the tribunal is an administrative agency – constitutes a jurisdictional defect as stated in *Carolinas Med. Ctr.*, or whether this Court, when considering an appeal from an administrative tribunal, retains any discretion pursuant to Rule 10(a)(1) to refuse to address constitutional issues not first argued at the trial level, we make the following holdings in the alternative.

a. Rule 10(a)(1)

[2] Because this Court is uncertain whether Rule 10(a)(1) applies to Claimant's constitutional argument in light of *Redmond II*, we first make an *arguendo* holding applying Rule 10(a)(1). N.C.G.S. § 143-293 ("appeal shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions"). Assuming, *arguendo*, that Rule 10(a)(1) applies to Claimant's constitutional argument, we hold that Claimant has not preserved her constitutional issue for appellate review, and we dismiss it. *Carolinas Med. Ctr.*, 172 N.C. App. at 554, 616 S.E.2d at 592. If dismissal of Claimant's constitutional argument is proper pursuant to Rule 10(a)(1), then only the following language in *Maye I* has been overruled:

> Further, to the extent, if any, that Claimants' arguments contain a facial challenge to any statute based upon an alleged violation of the North Carolina Constitution or of federal law, this Court has held that it does not have jurisdiction to decide those matters. *See In re Hughes*, __ N.C. App. __, __ S.E.2d __, 2016 WL 611548 (Feb. 2016).

Maye I, __ N.C. App. __, 784 S.E.2d 237, 2016 WL 1012877, at *2. The remainder of this Court's opinion in *Maye I* would remain undisturbed.

b. Eugenics Board Records

[3] Assuming, *arguendo*, this Court is required by *Redmond II* to address the merits of Claimant's constitutional argument, we hold that her argument fails to state a cognizable constitutional claim. Claimant argues:

> By requiring that a sterilization victim must have documentation in the Eugenics Board archives in order to be compensated under the [Compensation Program], the Industrial Commission created a classification which makes the Act "grossly under-inclusive" as it "does not include all who are similarly situated" – a construction which undercuts any claims that the requirement serves a legitimate State interest, and thus violates [Claimant's] constitutional rights to equal protection and fundamental fairness.

Initially, Claimant does not demonstrate that the underlying premise of her argument is based in fact or law. Claimant directs this Court to nothing in the Compensation Program that requires a claimant to produce documentation from the Eugenics Board in order to prosecute a successful claim for compensation. The requirements for proving entitlement to compensation were set forth in N.C. Gen. Stat. § 143B-426.52 (2015):

> (a) An individual shall be entitled to compensation as provided for in this Part if a claim is submitted on behalf of that individual in accordance with this Part . . . on or before June 30, 2014, *and that individual is subsequently determined by a preponderance of the evidence to be a qualified recipient*[.]
>
> . . . .
>
> (d) The Commission shall adopt rules for the determination of eligibility and the processing of claims in accordance with G.S. 150B-21.1.

N.C.G.S. § 143B-426.52. The Industrial Commission adopted temporary rules, effective 3 December 2013, for the determination of eligibility. 4 N.C.A.C. 10K.0101 *et seq*. These rules include no requirement that a claimant produce documentation from the Eugenics Board in order to be determined eligible for compensation. Initial determination of eligibility was decided in relevant part as follows:

> (a) A claimant . . . shall file a claim on or before June 30, 2014, by filing the Claim for Compensation under the [Compensation Program] with the Office of Justice for Sterilization Victims [(the "Office")]. The form shall request the following information:
>
> (1) the claimant's current name, mailing address, county, email address, phone numbers;
>
> (2) if applicable, the claimant's maiden name;
>
> (3) the claimant's birthdate;
>
> (4) the claimant's full name at time of procedure;
>
> (5) the claimant's nickname or alias at time of procedure;
>
> (6) the estimated date or year of procedure;
>
> (7) the county of residence at time of procedure;
>
> (8) the name of facility where procedure was performed;

. . . .

(b) The Commission *will not dismiss a claim solely because all of the information listed in Subparagraph (a)(1)-(9) is not submitted.*

(c) The Office . . . shall search the program records for the North Carolina Eugenics Board and collect the following documentation *as available*:

(1) Petition for Operation of Sterilization or Asexualization;

(2) Order for Operation of Sterilization;

(3) Certificate of Surgeon;

(4) Letter of Authorization to Surgeon;

(5) consent of parent, guardian, spouse, or next of kin;

(6) minutes of proceedings of the Eugenics Board;

(7) proof of any search efforts of the [Office];

(8) other pertinent records; and

(9) any other evidence submitted by the claimant.

The Office . . . shall complete and transmit the Claim for Compensation under the [Compensation Program] along with the available documentation to the Industrial Commission. The Industrial Commission shall provide a copy of the Claim for Compensation under the [Compensation Program] *along with the available documentation* to the claimant upon receipt from the Office[.]

(d) *The Commission shall make an initial determination of eligibility for compensation by filing a written decision.*

4 N.C.A.C. 10K.0201 (emphasis added).

This rule simply states that the claimant and the Office shall collect as much relevant evidence and documentation as possible in order for the Industrial Commission to conduct its review. There is nothing indicating that the Industrial Commission was prohibited from determining that a claimant was eligible based upon evidence that did not include records from the Eugenics Board. Further, "[i]n the interests of justice . . . the Commission may, except as otherwise provided by the rules in this Subchapter, waive or vary the requirements or provisions of any of

the rules in this Subchapter in a case pending before the Commission upon written application of a claimant[.]" 4 N.C.A.C. 10K.0501. Because we find nothing in the Eugenics Act, nor in the temporary rules promulgated by the Industrial Commission, that required documentation from the Eugenics Board as the only method of proof of eligibility, we reject Claimant's argument. We further note that an absence of documentation at the Eugenics Board could potentially indicate that a claimant was sterilized pursuant to the actions of a county, and not pursuant to "the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." N.C.G.S. § 143B-426.50. Although a sterilization not performed pursuant to the authority of the Eugenics Board would likely have been unlawful, compensation pursuant to the Compensation Program would still have been unavailable. *House I*, __ N.C. App. at __, 782 S.E.2d at 120; *House II*, __ N.C. App. at __, __ S.E.2d at __ (reaffirming our opinion in *House I*).

c. Equal Protection

[4] Assuming, *arguendo*, that Claimant has argued a cognizable equal protection argument, that argument fails. This Court rejected an equal protection argument involving the Compensation Program in *In re Hughes*, __ N.C. App. __, 801 S.E.2d 680 (2017) ("*Hughes II*").[6] As this Court has stated:

> The Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution forbid North Carolina from denying any person the equal protection of the laws, and require that all persons similarly situated be treated alike.

Id. at __, 801 S.E.2d at 685–86 (citation omitted). We have thoroughly considered Claimant's argument and hold that, because she cannot demonstrate that she was sterilized pursuant to "the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937[,]" N.C.G.S. § 143B-426.50, she cannot demonstrate that she is similarly situated with claimants who were able to so prove. *House*, __ N.C. App. at __, 782 S.E.2d at 120; *House II*, __ N.C. App. at __, __ S.E.2d at __.

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6. *Hughes II* was decided after the reversal and remand of *Hughes I* by our Supreme Court.

Therefore, Claimant's equal protection argument must fail. We affirm the 14 May 2015 decision and order of the Full Commission.

AFFIRMED.

Judges MURPHY and ARROWOOD concur.

IN THE MATTER OF H.L.

No. COA17-302

Filed 21 November 2017

1. Child Abuse, Dependency, and Neglect—juvenile—neglect—failure of parents to remedy conditions

The trial court properly concluded that a juvenile was neglected where her father and mother failed to remedy the conditions which required that she be placed with her sister in a safety plan.

2. Child Custody and Support—juvenile—dependent—findings—not sufficient

An adjudication that a neglected juvenile was dependent was reversed where the trial court's order did not include findings addressing the parent's ability to provide care and the availability to the parent of alternative child care arrangements.

3. Child Abuse, Dependency, and Neglect—neglected juvenile—initial disposition—adult sister

The trial court did not err by awarding guardianship of a neglected juvenile to an adult sister without first requiring reunification efforts. The court's order did not place the juvenile in the custody of the department of social services.

4. Child Abuse, Dependency, and Neglect—neglected juvenile—initial disposition—adult sister—sister's understanding and resources

The trial court properly verified that the adult sister of a neglected juvenile could serve as the juvenile's guardian.

5. Child Abuse, Dependency, and Neglect—neglected juvenile—concurrent 90-day review, permanency planning hearing, and secondary plan of reunification

The trial court did not err by in a case involving a neglected juvenile by making an initial disposition, conducting a concurrent 90-day review and permanency planning hearing, and establishing a secondary permanent plan of reunification. Respondent-father received multiple notices that the trial court would be conducting a combined hearing, and he did not object. Although respondent-father argued that the court only examined his behavior before the hearing, he had voluntarily entered into a case plan with the department of social services and then failed to comply with the plan. The trial court could consider respondent-father's previous failure to comply when determining whether further reunification efforts would be successful and complied with its obligations under N.C.G.S. § 7B-906.2.

6. Child Abuse, Dependency, and Neglect—neglected juvenile—guardianship—visitation by parents—inconsistent findings

A guardianship order in a juvenile neglect case was remanded where the trial court's findings concerning visitation with the respondents were inconsistent.

Appeal by respondent-father from order entered 24 January 2017 by Judge Laura Powell in McDowell County District Court. Heard in the Court of Appeals 19 October 2017.

Aaron G. Walker for petitioner-appellee McDowell County Department of Social Services.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Annick Lenoir-Peek, for respondent-appellant father.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

No brief was filed on behalf of respondent-mother.

BRYANT, Judge.

Respondent-father appeals from the trial court's order following a combined adjudication, disposition, and permanency planning hearing. The order concluded that respondent-father's minor child ("Hannah")[1]

1. The parties stipulated to this pseudonym for the minor child pursuant to N.C. R. App. P. 3.1(b) (2017).

was neglected and dependent, relieved DSS from its obligation to pursue reunification efforts, and awarded guardianship of Hannah to her adult half-sister. We affirm in part, reverse in part, and remand.

On 4 October 2016, McDowell County Department of Social Services ("DSS") filed a juvenile petition alleging that Hannah was neglected and dependent. DSS alleged that it had previously been involved with the family on multiple occasions, due to domestic violence and substance abuse. On 24 February 2016, DSS received a report that respondent-father and Hannah's mother were involved in an argument over Hannah and her mother leaving the home. Hannah's sister came to the home in order to remove Hannah from the scene. Respondent-father and the mother were each pulling on Hannah while she was screaming and crying. Eventually, respondent-father relented, and Hannah's sister was able to leave the home with Hannah.

In April 2016, the parents entered into a safety plan with DSS and Hannah was placed with her sister as a safety resource placement. Under the plan, the parents were not permitted to remove Hannah from her sister's care. The plan also required both parents to submit to clinical assessments and to submit to random drug screens and follow any recommendations. Both parents submitted drug screens in April and July 2016, of which both screens tested positive for methamphetamines.

The petition was heard on 9 January 2017. After hearing testimony and reviewing other evidence, the trial court orally adjudicated Hannah a neglected juvenile. The case then moved to disposition. On 24 January 2017, the trial court entered an "Adjudication, Dispositional, 90 Day Review, & Permanency Planning Order." The written order adjudicated Hannah as neglected and dependent, awarded guardianship of Hannah to her sister, and relieved DSS of the obligation to pursue reunification efforts. Respondent-father filed timely notice of appeal.[2]

On appeal, respondent-father argues that the trial court erred by (I) adjudicating Hannah a neglected and dependent juvenile; (II) awarding guardianship of Hannah to her adult sister as an initial disposition; (III) conducting a concurrent 90-day review and permanency planning hearing and establishing a secondary permanent plan of reunification; and (IV) including inconsistent provisions regarding visitation in its order.

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2. The mother did not appeal the trial court's order and is not a party to this appeal.

I

Respondent-father argues that the trial court erred by adjudicating Hannah a neglected and dependent juvenile. We disagree that the court erred by adjudicating Hannah neglected, but agree that the court erred by adjudicating her dependent.

A. Standard of Review

This Court's review of an order adjudicating a juvenile neglected and dependent is limited to determining "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Pittman*, 149 N.C. App. 756, 763–64, 561 S.E.2d 560, 566 (2002) (citation omitted). Unchallenged findings are binding on appeal. *In re C.B.*, 180 N.C. App. 221, 223, 636 S.E.2d 336, 337 (2006).

> [Moreover,] it is not *per se* reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party. Instead, this Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we are confident the trial court did so, it is irrelevant whether those findings are taken verbatim from an earlier pleading.

In re J.W., 241 N.C. App. 44, 48–49, 772 S.E.2d 249, 253, *disc. review denied*, 368 N.C. 290, 776 S.E.2d 202 (2015).

B. Neglect

[1] Respondent-father first contends that the trial court erred by concluding that Hannah was neglected. A neglected juvenile is defined in relevant part 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 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) (2015). When, as in the present case, the child has been voluntarily removed from the home prior to the filing of the petition,

> the court should consider "evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the [adjudication] proceeding."

In re K.J.D., 203 N.C. App. 653, 660, 692 S.E.2d 437, 443 (2010) (alteration in original) (quoting *In re Brim*, 139 N.C. App. 733, 742, 535 S.E.2d 367, 372 (2000)). Essentially, the trial court must consider "the conditions and the fitness of the parent to provide care at the time of the adjudication . . . ." *Id.*

In this case, the trial court based its neglect adjudication on the facts which led to Hannah's placement with her adult sister as well as the parent's lack of progress in addressing the conditions which led to that placement. Respondent-father challenges virtually all of the trial court's findings. First, he challenges finding of fact 7, which states, in relevant part, as follows:

> 7. [DSS] received a report screened in for neglect, concerning the parent/step-parent of [Hannah] . . . involving allegations of being under the influence of drugs (substance abuse), improper discipline of the child[] and domestic violence. While working with the family the parents tested positive for methamphetamine and the child [was] placed in a safety resource.

Respondent-father argues that this finding is invalid because it was "copied and pasted directly from the allegations contained in the petition[]" and was not supported by testimony at the hearing. However, the social worker specifically testified that DSS received a report on 24 February 2016 of "substance abuse and domestic violence."[3] DSS also submitted into evidence the results of both parents' drug screens, which were each positive for methamphetamine.

Respondent-father challenges finding of fact 8 for similar reasons. This finding detailed four prior reports that DSS received regarding the family. At the hearing, the social worker testified that "[t]here have been four, I believe – four prior reports regarding the family. Basically, about drugs." However, the social worker did not testify about the specific

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3. Respondent-father notes that testimony regarding this report was admitted for the limited purpose of demonstrating why DSS became involved in the case. The trial court's order reflects this evidence was properly considered only for that purpose.

details of these reports, and they were not received into evidence. Thus, the portion of finding of fact 8 which includes these details is unsupported by the evidence and must be disregarded.

Respondent-father next challenges finding of fact 9, which details the 24 February 2016 incident involving the family. It states, in relevant part, as follows:

> 9. . . . [DSS] received a report regarding the respondents and this child on February 24, 2016, and the allegations were that the respondent father would not allow child or mom to leave the home. He was blocking the door not letting them leave. [The sister] . . ., the respondent-father's adult daughter and the sister to the child, came to the home. She had [Hannah] in her arms and the respondent father began pulling on child trying to take child away from her with child screaming and crying. The child was less than two years old and this tugging on the child could easily result in physical injury to the child. The respondent mother later tried to enter her car to leave the respondent father's home and he got into the car with mom and would not allow her to start the car. During all this law enforcement was called and did respond.

At the hearing, Hannah's sister testified that she received a message from Hannah's mom indicating that respondent-father would not let her leave with Hannah. Respondent-father concedes that additional testimony also established the following: (1) when Hannah's sister arrived, she picked up Hannah and tried to take her out of the home; (2) respondent-father yelled in the sister's face and took Hannah away from her; (3) Hannah's mother and respondent-father were each pulling on Hannah, each trying to wrest her away from the other; and (4) once Hannah's mother got control of her, she gave Hannah to the sister, who left. Respondent-father is correct that some additional details in this finding were not supported by the testimony at the adjudication hearing, and consequently, we will not consider these additional details.

Respondent-father also challenges the following portion of finding of fact 10: "The Court finds that [respondent-father] had visible signs of methamphetamine use, with visible scars." Respondent-father is correct that no evidence regarding the cause of his appearance was presented at the hearing. The guardian ad litem ("GAL") argues that this challenged portion of the trial court's finding was proper within the context of the trial court's ability to observe the "in-court demeanor, attitude,

and credibility" of witnesses. *In re Oghenekevebe*, 123 N.C. App. 434, 441, 473 S.E.2d 393, 398 (1996). However, we do not find this argument persuasive, as the determination of the cause of respondent-father's scars would require additional evidence that was not presented to the trial court. As a result, we will not consider the portion of this finding that attributes respondent-father's scars to methamphetamine use. Nonetheless, the remainder of the court's finding, including its determination that respondent-father "continued to use methamphetamine," can be properly considered as part of our review and appears to be supported by father's positive drug screens.

Next, respondent-father challenges the following findings:

> 11. . . . [DSS] is asking to give custody/guardianship of [Hannah] to her adult sister . . . who has had care of her since April 9, 2016.
>
> 14. Because of the respondents['] ongoing substance abuse and failure to appropriately progress on their case plans, . . . [DSS] thinks that the (sic) without court intervention the minor child would continue to be exposed to an environment that is injurious to [her] well-being.
>
> 15. DSS filed the petition because it thought the child [was] neglected and dependent and that staying in the home of the respondent mother was detrimental to the child's welfare.

Respondent-father argues that these findings "state DSS's 'thoughts' or motivation for filing the petition" and were not supported by any evidence at the hearing. However, the social worker specifically testified that DSS filed the petition because Hannah's parents failed to address their substance abuse issues. Additionally, the trial court was permitted to consider DSS's pleadings as evidence of why those same pleadings were filed. These findings are supported by competent evidence and are binding on appeal.

Respondent-father also contends that the trial court's finding with respect to the requirements of his case plan were unsupported. The court found that Hannah's parents were required to engage in substance abuse treatment, place Hannah in a safety resource, and engage in services with respect to domestic violence, conflict resolution, and improper discipline. As the GAL concedes, the social worker only testified to requirements with respect to substance abuse and Hannah's safety placement. The remainder of the finding is unsupported and must be disregarded.

Finally, respondent-father challenges the trial court's ultimate finding and conclusion that Hannah was neglected. Although we have sustained many of respondent-father's objections to isolated portions of the trial court's findings, we may still utilize the supported findings to uphold the trial court's conclusion. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) ("When, however, ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error." (citation omitted)). The trial court's supported findings show that respondent-father and Hannah's mother were in an altercation during which both parents tugged on Hannah causing her to scream and cry, that both parents had failed multiple drug tests, and that Hannah was living with her sister as a safety resource due to the parents' drug use. Respondent-father did not address his substance abuse issues while Hannah was in her sister's care. While respondent-father claims that there was no evidence that his or Hannah's mother's drug use placed Hannah at any risk of harm, this claim cannot be reconciled with the fact that Hannah had to be removed from her the home of her mother and respondent-father and placed with her sister as a safety resource placement. As a result, the trial court properly concluded that Hannah was neglected because respondent-father and Hannah's mother had failed to remedy the conditions which required Hannah to be placed with her sister in a safety plan, such that they were unable to provide Hannah with proper care. *See In re K.J.D.*, 203 N.C. App. at 661, 692 S.E.2d at 444 (affirming the conclusion that the minor child was neglected where the findings indicated that both parents failed to remedy the conditions that led to the removal of the child).

C. Dependency

[2] Respondent-father next argues the trial court erred by concluding that Hannah was dependent.[4] A dependent juvenile is defined, in relevant part, as "[a] juvenile in need of assistance or placement because . . . the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2015). "In determining whether a juvenile is dependent, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability

4. At the adjudication, the trial court did not announce an adjudication of dependency. However, the trial court's written order, which concluded that Hannah was dependent, is controlling. *See In re O.D.S.*, ___ N.C. App. ___, ___, 786 S.E.2d 410, 418 (2016) (holding that where the trial court was silent on the ground of dependency but entered a written order not otherwise in conflict with the rendered judgment, the written order controls).

to the parent of alternative child care arrangements." *In re T.B.*, 203 N.C. App. 497, 500, 692 S.E.2d 182, 184 (2010) (citation omitted). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007) (citation omitted).

In this case, the trial court's order did not include findings that address either prong of dependency. While the court's findings, as chronicled above, detail the parents' history of drug abuse and failure to make progress with their case plan, there are no findings that these behaviors rendered them wholly unable to parent Hannah. Instead, the findings indicate that respondent-father's drug abuse and other "erratic" behavior "resulted in an environment that is injurious to the child," which supported the trial court's conclusion that Hannah was neglected. In addition, there are no findings that the parents lacked an alternative child care arrangement. Accordingly, we must reverse the adjudication of dependency. *Id.*

II

[3] Respondent-father argues that the trial court erred by awarding guardianship of Hannah to her adult sister as an initial disposition. We disagree.

"All dispositional orders of the trial court after abuse, neglect and dependency hearings must contain findings of fact based upon the credible evidence presented at the hearing." *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003) (citation omitted). "The district court has broad discretion to fashion a disposition from the prescribed alternatives in N.C. Gen. Stat. § 7B-903(a), based upon the best interests of the child. . . . We review a dispositional order only for abuse of discretion." *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008) (citing *In re Pittman*, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567 (2003)).

North Carolina General Statutes, section 7B-903 permits the trial court to "[a]ppoint a guardian of the person for the juvenile as provided in G.S. 7B-600" as a disposition after a neglect and dependency adjudication. N.C. Gen. Stat. § 7B-903(a)(5) (2015). This dispositional option was added to the statute in 2015, *see* 2015 N.C. Sess. Law 136, sec. 10, and this Court has not yet discussed guardianship in the context of an initial disposition. Respondent-father argues that the trial court erred by failing to order DSS to pursue reunification efforts as part of its initial disposition.

Dispositional hearings are governed by General Statutes, section 7B-901: "If the disposition order places a juvenile *in the custody of a county department of social services*, the court shall direct that reasonable efforts for reunification as defined in G.S. 7B-101 shall not be required if the court makes written findings of fact pertaining to any" of several subsequently-listed circumstances. N.C. Gen. Stat. § 7B-901(c) (2015) (emphasis added). Respondent-father argues that the trial court circumvented this statute by granting guardianship to Hannah's sister without first requiring DSS to engage in reunification efforts. However, N.C. Gen. Stat. § 7B-901(c) does not apply to the initial disposition in this case, because the trial court's order did not place Hannah "in the custody of a county department of social services." *Id.* The statute clearly permits the granting of guardianship as an initial disposition without requiring any findings under N.C.G.S. § 7B-901(c).[5]

[4] Respondent-father also argues that the trial court failed to adequately verify that the sister understood the legal consequences of guardianship or that the sister had sufficient resources to care for Hannah. Before placing a juvenile in a guardianship, the trial court is required to determine whether the proposed guardian "understands the legal significance of the appointment" and "will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. §§ 7B-600(c), 7B-906.1(j) (2015). "We have held that the trial court need not 'make any specific findings in order to make the verification' under . . . [subsection (j)]. . . . But the record must contain competent evidence of the guardians' financial resources . . . ." *In re J.H.*, ___ N.C. App. ___, ___, 780 S.E.2d 228, 240 (2015) (quoting *In re J.E.*, *B.E.*, 182 N.C. App. 612, 616-17, 643 S.E.2d 70, 73 (2007)); *see also In re P.A.*, ___ N.C. App. ___, ___, 772 S.E.2d 240, 246 (2015) ("[S]ome evidence of the guardian's 'resources' is necessary as a practical matter, since the trial court cannot make any determination of adequacy without evidence.").

At the hearing, the social worker testified that she had explained to the sister "the duties and responsibilities of a guardian." Moreover, the sister testified that she understood she "would be responsible for getting the child to school, making sure the child remains in school whenever the child is school age, and that [she]'d see to all of her medical treatment" as well as for Hannah's "overall care." This testimony was

5. Accordingly, this case is distinguishable from this Court's recent decision in *In re J.M.*, ___ N.C. App. ___, ___ S.E.2d ___, No.COA17-275 (N.C. Ct. App. Sept. 19, 2017), which held that findings under N.C. Gen. Stat. § 7B-901(c) were required in a combined dispositional and permanency planning order when the child was placed in DSS custody and DSS was relieved of making reunification efforts.

sufficient to support the trial court's finding that the sister understood the legal consequences of guardianship.

The trial court also received specific evidence regarding the sister's resources. The sister submitted an affidavit detailing her finances, including her present income, and she testified she was able to financially care for Hannah. The social worker additionally testified that the sister was employed and had been able to make child care arrangements for Hannah while she worked. This was sufficient "evidence of the guardian's 'resources' " for the trial court to determine that the sister could adequately care for Hannah financially. *See In re P.A.*, ___ N.C. App. at ___, 772 S.E.2d at 246; *In re N.H.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, No. COA17-171 N.C. Ct. App. Sept. 19, 2017). Thus, the court properly verified that the sister could serve as Hannah's guardian, and we discern no abuse of discretion in the trial court's determination that guardianship with her sister was in Hannah's best interests.

III

[5] Although the trial court properly awarded guardianship of Hannah to her sister as an initial disposition, the court also conducted concurrent 90-day review and permanency planning hearings and established a secondary permanent plan of reunification. Respondent-father challenges the portion of the trial court's order which resulted from these portions of the combined hearing. He contends that this portion of the order violates the "Juvenile Code's priority for reunification efforts." We disagree.

Pursuant to N.C. Gen. Stat. § 7B-905,

> [a] dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker shall direct that the review hearing required by G.S. 7B-906.1 be held within 90 days from of [sic] the date of the dispositional hearing and, if practicable, shall set the date and time for the review hearing.

N.C. Gen. Stat. § 7B-905(b) (2015). General Statutes, section 7B-906.1 states, in turn:

> In any case where custody is removed from a parent, guardian, or custodian, the court shall conduct a review hearing within 90 days from the date of the dispositional hearing and shall conduct a review hearing within six months thereafter. Within 12 months of the date of the initial order removing custody, there shall be a review

> hearing designated as a permanency planning hearing. Review hearings after the initial permanency planning hearing shall be designated as subsequent permanency planning hearings. The subsequent permanency planning hearings shall be held at least every six months thereafter or earlier as set by the court to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile.

N.C.G.S. § 7B-906.1(a). In this case, the court purported to conduct a combined "dispositional, a 90 day review, and an initial permanency planning hearing." Respondent-father appears to challenge the trial court's authority to conduct this combined hearing to the extent that it was used to "allow DSS to circumvent providing reunification efforts." However, the record reflects that respondent-father received multiple notices in the weeks and months before the hearing that the trial court would be conducting a combined adjudication, disposition, and permanency planning hearing. Moreover, respondent-father did not object when DSS informed the court that the hearing "was noticed on for both permanency planning and disposition, so we'd like to proceed with both." Accordingly, he has waived appellate review of the propriety of the combined hearing. *See* N.C. R. App. P. 10(a)(1) (2017).

"At the conclusion of each permanency planning hearing, the judge shall make specific findings as to the best permanent plans to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C.G.S. § 7B-906.1(g). Permanent plans are governed by N.C. Gen. Stat. § 7B-906.2, which states, in relevant part, as follows:

> At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall remain a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. The court shall order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans and may specify efforts that are reasonable to timely achieve permanence for the juvenile.

N.C. Gen. Stat. § 7B-906.2(b) (2015).

As noted above, the trial court's order contains no findings under N.C. Gen. Stat. § 7B-901(c), as that statutory subsection does not apply

to this case since Hannah was not placed in DSS custody. Thus, when establishing permanent plans, the court was required by N.C. Gen. Stat. § 7B-906.2 to make reunification a primary or secondary plan and require reunification efforts by DSS, unless the court found that "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C.G.S. § 7B-906.2(b). The court was permitted to make this finding even though this was the first permanency planning hearing in the case. *Cf.* N.C. Gen. Stat. § 7B-906.2(c) (2015) ("*At the first permanency planning hearing* held pursuant to G.S. 7B-906.1, the court shall make a finding about whether the efforts of the county department of social services toward reunification were reasonable, *unless reunification efforts were ceased in accordance with . . . this section*." (emphasis added)). The trial court's order includes the following finding of fact:

> Although the secondary plan shall be reunification, it would be clearly unsuccessful for the department to make reunification efforts with the respondents at this time. The child has been placed outside the home since February 2016, and with the child's adult sister . . . since April 2016. The respondents have tested positive twice for methamphetamine since April 2016. The respondents did submit to a comprehensive clinical assessment where they were recommended services and they subsequently failed to complete those services before a petition was filed in this matter. They have not completed or made any progress on their case plans since the petition was filed. . . .

Based on this finding, the court concluded that "[i]t is contrary to the safety and health of the juvenile to return to the home of the aforementioned respondents at this time." Respondent-father argues that this finding and conclusion are unsupported because they only examine his behavior prior to the hearing, when he was not under a court order to participate in a case plan. He cites this Court's decision in *In re A.G.M.*, a termination of parental rights case, for the proposition that

> neither the trial court nor DSS ha[s] the authority in [a] . . . neglect and dependency proceeding to require Respondent to sign any service agreement or submit to any testing, evaluation, or therapy in relation to any custody determinations concerning the children prior to entry of . . . [a] disposition and permanency planning order.

241 N.C. App. 426, 436, 773 S.E.2d 123, 131 (2015). This case is distinguishable, because unlike the respondent in *A.G.M.*, who never agreed

to a case plan, respondent-father voluntarily entered into a case plan with DSS which resulted in Hannah being removed from the home, and then he failed to comply with the case plan. The trial court could obviously consider respondent-father's previous failure to comply with his own agreed-upon plan when determining whether further reunification efforts made by DSS would be successful. Respondent-father argues that because these efforts were made before the filing of the petition, they should be considered "preventative" rather than reunification efforts and that they should not be considered when predicting the success of future reunification efforts by DSS. However, respondent-father cannot forestall review of his conduct by taking advantage of DSS's good faith efforts to reunify him with Hannah before resorting to filing a juvenile petition. Respondent-father willingly subjected himself to a case plan in order to be reunified with Hannah, and the trial court was permitted to consider his conduct in response to the plan, as well as DSS's efforts when considering the propriety of further reunification efforts.

The court's findings, which were supported by testimony and evidence introduced at the hearing, demonstrate that respondent-father completely failed to comply with his case plan while Hannah was in a safety placement with her sister. Respondent-father tested positive for methamphetamines twice while Hannah was in her sister's care, and he did not follow through on any recommended treatment. Instead, he continued to deny his drug use, even as late as the adjudication hearing. The trial court could properly use respondent-father's failure to comply with his voluntary case plan as a factor to determine whether further reunification efforts would be successful. In this context, the court's findings support its determination that further reunification efforts would be unsuccessful. Thus, the trial court complied with its obligations under N.C. Gen. Stat. § 7B-906.2 by setting a primary and secondary plan and by determining that no further reunification efforts were required.

IV

[6] Respondent-father argues that the trial court's order includes inconsistent provisions regarding visitation. We agree.

In one portion of its order, the trial court found that "visitations with the respondents have not been consistent or appropriate and they should be ceased . . . ." However, the court also found that "it is in the best interest of the minor child for the respondents to have visitation with their child for a minimum of one hour supervised per week . . . ." The trial court's oral rendering at the hearing and the decretal portion of its order are consistent with this latter finding, and thus, it appears the

trial court intended to allow supervised visitation for one hour. However, the order must be remanded to reconcile the discrepancy between the visitation findings.

Conclusion

The trial court made adequate findings of fact, supported by competent evidence, to support its conclusion that Hannah was neglected. The court did not abuse its discretion by awarding guardianship to the sister at disposition. The court made sufficient findings of fact to support its conclusion that further reunification would be unsuccessful. Those portions of the trial court's order are affirmed. However, the court failed to make sufficient findings to support its conclusion that Hannah was dependent, and that portion of the trial court's order is reversed. The court's order contains inconsistent findings with respect to visitation. Thus, the order is remanded in order for the trial court to reconcile these findings as to visitation.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges STROUD and ZACHARY concur.

IN THE MATTER OF HOUSE, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program, Claimant-Appellant

No. COA15-879-2

Filed 21 November 2017

Appeal and Error—no constitutional claim on appeal—involuntary sterilization—Eugenics Asexualization and Sterilization Compensation Program

The Court of Appeals reaffirmed its opinion in *House I*, 245 N.C. App. 388 (2016), that involuntarily sterilized claimant could not demonstrate she was a qualified recipient of the Eugenics Asexualization and Sterilization Compensation Program where claimant made no constitutional claim in her appeal and there was nothing for the Court to consider pursuant to the mandate of our Supreme Court's 28 September 2017 order.

Appeal by Claimant-Appellant House from amended decision and order entered 11 May 2015 by the North Carolina Industrial Commission.

Heard originally in the Court of Appeals 30 November 2015, and opinion filed 16 February 2016. Petition for discretionary review was allowed by the North Carolina Supreme Court for the limited purpose of reversing the Court of Appeals' dismissal of Claimant's "constitutional claim." The case was remanded to the Court of Appeals for expedited consideration of Claimant's "constitutional claim" on the merits.

The Bollinger Law Firm, PC, by Bobby L. Bollinger, Jr., for Claimant-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Marc X. Sneed, for North Carolina Department of Justice, Tort Claims Section.

McGEE, Chief Judge.

The North Carolina Industrial Commission ("the Industrial Commission") found that Ms. House ("Claimant") was involuntarily sterilized on 27 November 1974. This matter was first decided by this Court on 16 February 2016. *In re House*, __ N.C. App. __, 782 S.E.2d 115 (2016) ("*House I*").[1] We held in *House I* that Claimant could not demonstrate that she was a qualified recipient of the Eugenics Asexualization and Sterilization Compensation Program, based upon the following:

> N.C. Gen. Stat. § 143B–426.50(5) sets forth two requirements that must be proven before a claimant may be considered a qualified recipient: (1) the claimant must have been involuntarily sterilized "under the authority of the Eugenics Board of North Carolina," and (2) the claimant must have been involuntarily sterilized in accordance with the procedures as set forth in "Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." N.C. Gen. Stat. § 143B–426.50(5). In the present case, unfortunately, Claimant cannot show that either of these requirements has been met.
>
> There is no record evidence that the Eugenics Board was ever informed of Claimant's involuntary sterilization, nor that it was consulted in the matter in any way. Because the language of N.C. Gen. Stat. § 143B–426.50(5) is clear, "there is no room for judicial construction, and [this Court]

1. See *House I* for the factual and procedural background of this case.

> must give it its plain and definite meaning." *Correll*, 332 N.C. at 144, 418 S.E.2d at 235. Further, all the evidence in this matter clearly demonstrates that Claimant's involuntary sterilization was performed without adherence to the requirements set forth in "Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." N.C. Gen. Stat. § 143B–426.50(5). Therefore, we must affirm.

Id. at ___, 782 S.E.2d at 120. Our Supreme Court granted Claimant's petition for discretionary review by order entered 28 September 2017, stating: "To prevent manifest injustice, the petition for discretionary review filed in [this case] is allowed for the limited purpose of remanding the case to the Court of Appeals for expedited consideration of [C]laimant's constitutional claim on the merits." Claimant sets forth two arguments on appeal:

> I. [Claimant's] Sterilization Initiated By Government Officials Had To Be Performed Under Public Law 1933, Chapter 224 In Order To Be Performed Lawfully.
>
> II. The Full Commission's Strict Construction Of N.C. Gen. Stat. § 143(b)-426.50(5) Constitutes Denial Of Compensation Benefits To [Claimant] Due To An Overly Strict and Technical Construction Of The Statute.

There is nothing in Claimant's arguments, as set forth above, that indicates Claimant was attempting to make any constitutional argument on appeal. Upon a thorough additional review of Claimant's arguments on appeal, we can locate no cognizable constitutional argument. Although Claimant does state: "A person who is sterilized by the state 'is forever deprived of a basic liberty.' *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)[,]" this singular statement does not constitute an argument that this Court can address.

Because Claimant in the present matter made no "constitutional claim" in her appeal, there is nothing for this Court to consider pursuant to the mandate of our Supreme Court's 28 September 2017 order, and we reaffirm our opinion in *House I*. We incorporate our opinion in *House I*, __ N.C. App. __, 782 S.E.2d 115, into this opinion, adopt its analysis in its entirety, and re-affirm this Court's holding in *House I* based upon that analysis.

AFFIRMED.

Judges DILLON and DAVIS concur.

IN RE R.D.H.

[256 N.C. App. 467 (2017)]

IN RE R.D.H., III, MINOR JUVENILE

No. COA17-383

Filed 21 November 2017

1. Termination of Parental Rights—grounds for termination—conflict between rendition and entry of judgment

Two of the grounds in a termination of parental rights order were reversed where the trial court said in open court that it was not adopting those grounds but they were included in the order. It appeared from the transcript that the two grounds should not have been included.

2. Termination of Parental Rights—grounds—neglect—findings—reversed

Termination of a father's parental rights based upon neglect was reversed where there was no evidence that the father knew of the mother's substance abuse prior to Department of Social Services' involvement and where respondent was one of two putative fathers. It was reasonable for respondent to wait until paternity testing results before taking steps to gain custody of the child, and the steps he could have taken to protect the child from neglect by his mother were not clear. Furthermore, the trial court made no findings regarding respondent's home or ability to care for the child at the time of the hearing. Also, there were material conflicts about the mother's willfulness and the reasonableness of her progress that were not resolved by the trial court order.

Appeal by respondent-father from judgment entered 24 January 2017 by Judge Ward D. Scott in District Court, Buncombe County. Heard in the Court of Appeals 2 November 2017.

John C. Adams, for Buncombe County Department of Social Services.

Coltrane & Overfield, PLLC, by Patrick S. Lineberry, for guardian ad litem.

Richard Croutharmel for respondent-appellant.

STROUD, Judge.

Respondent appeals from an order terminating his parental rights to his minor child. After careful consideration, we reverse and remand.

I. Background

In March of 2015, the Buncombe County Department of Social Services ("DSS") filed a petition alleging Rudy[1], then one year old, was an abused, neglected, and dependent juvenile, after having been injured when his mother and her boyfriend got into a fight and upon testing positive for marijuana, cocaine, and methamphetamine. DSS received non-secure custody of Rudy. Rudy's mother is not a party to this case, and his father, respondent, stated during the hearing regarding the termination of his parental rights that he originally told DSS he did not want custody of Rudy because he did not know if Rudy was his child. In August of 2015, the district court adjudicated Rudy neglected and dependent, and the order noted that paternity had been established with respondent. Around May of 2016, the trial court entered an order establishing a primary permanent plan of adoption. DSS filed a petition to terminate parental rights, and in January of 2017, the district court entered an order terminating respondent's parental rights on the grounds of neglect, failure to make reasonable progress, failure to pay a portion of the costs, and abandonment. Respondent appeals.

II. Failure to Pay a Reasonable Portion of the Costs and Abandonment

[1] Respondent first contends the trial court erred by concluding in the order that he had failed to pay a portion of the costs for the care of Rudy and had abandoned Rudy "because the trial court's orally-rendered order at the TPR hearing was that DSS had failed to prove those two TPR grounds." (Original in all caps.) Indeed, the transcript confirms that the trial court stated it was "not adopting[,]" the grounds of failure to pay a portion of the costs of care and abandonment. Although the written, filed order may include provisions which are different from the oral rendition of the trial court's ruling, *see In re O.D.S.*, ___ N.C. App. ___, 786 S.E.2d 410, 415, ("The announcement of judgment in open court is the mere rendering of judgment, and is subject to change before 'entry of judgment.' A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.") (citations and quotation marks omitted)), *disc. review denied*, 369 N.C. 43, 792 S.E.2d 504 (2016), in this instance, from the transcript it appears that these grounds should not have been included. In addition, DSS acknowledges that the grounds of failure to pay costs and abandonment should not have been included

1. A pseudonym is used to protect the identity of the minor involved.

in the order. We therefore reverse the grounds of failure to pay costs and abandonment and turn to the remaining two grounds, neglect and failure to make reasonable progress.

III. Neglect and Failure to Make Reasonable Progress

[2] North Carolina General Statute § 7B-1111(a)(1) provides that a trial court may terminate parental rights upon a finding that the parent has neglected the juvenile. N.C. Gen. Stat. § 7B-1111(a)(1) (2015). A neglected juvenile is

> [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 the custody of whom has been unlawfully transferred under G.S. 14-321.2; 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 been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (Supp. 2016).

> At the adjudicatory stage, the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist. If the trial court concludes that the petitioner has proven grounds for termination, this Court must determine on appeal whether the court's findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law. Factual findings that are supported by the evidence are binding on appeal, even though there may be evidence to the contrary. 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.

In re L.A.B., 178 N.C. App. 295, 298, 631 S.E.2d 61, 64 (2006) (citations, quotation marks, and brackets omitted).

> [T]o reach the legal conclusion of neglect, the trial court must determine neglect exists at the time of the termination of parental rights proceeding. The trial court must consider evidence of changed conditions following the adjudication and must evaluate the probability of repetition of neglect. Where the evidence shows a likelihood of repetition of neglect, the trial court may reach a conclusion of neglect under N.C. Gen. Stat. § 7B–1111(a)(1).
>
> Relevant to the determination of probability of repetition of neglect is whether the parent has made any meaningful progress in eliminating the conditions that led to the removal of the children. That a parent provides love and affection to a child does not prevent a finding of neglect. Neglect exists where the parent has failed in the past to meet the child's physical and economic needs and it appears that the parent will not, or cannot, correct those inadequate conditions within a reasonable time.

In re J.H.K., 215 N.C. App. 364, 368–69, 715 S.E.2d 563, 567 (2011) (citations, quotation marks, and brackets omitted).

While respondent challenges several findings of fact, respondent does not challenge the findings establishing that:

> 35. At disposition, the Court ordered that the respondent father participate in a CCA and follow all recommendations; that the respondent father not engage in additional criminal activity including substance abuse.
>
> 36. The respondent father, upon paternity being established on March 23, 2015, began visits with the minor child and signed an out of home family services agreement, and agreed to a CCA. Prior to paternity being established, that respondent father indicated that he would not engage in services or visitation until he knew that the minor child was his. The respondent father knew that he might be the father of the minor child since at least October of 2014, due to the efforts made by [DSS] to engage him in the investigative process.
>
> 37. The respondent father attended three visits with the minor child, and did not appear for three visits with the minor child, even after the social worker called him to confirm that he would be present. The respondent father scheduled a CCA, but did not appear. He did not

attend the Child and Family Team in late April of 2015. In mid-May[,] the social worker called the respondent father to set up a meeting to discuss his missed visits; the respondent father met with the social worker the next day and reported that he needed visitation days and times to change, due to his part-time job. The visitation schedule was changed to accommodate him. The respondent father missed the Child and Family Team on June 3, 2015, and reported that he could not attend because he was just released from the hospital for a medical issue.

38. The respondent father reports that he quit smoking marijuana regularly because his doctor informed him that he was allergic to it; when asked if he could pass a drug test, the respondent father noted that it would still show up in his system, due to his large size.

39. Since the last court date on June 16, 2015, the respondent father did not respond to multiple phone calls made by the social worker. The respondent father's mother . . . called . . . [DSS] on June 18, 2015 and shared with the social worker that her son—the respondent father—would not engage with . . . [DSS] and that he would like for the minor child to be placed with the respondent father's aunt and uncle[.]

40. On July 31, 2015, the social worker attempted another phone call with the respondent father and he answered. The social worker discussed concerns that he was not visiting with the minor child. The respondent father said he was busy starting his own janitorial business and he is often out of town attending trainings. The respondent father said that he is trying to get his life together and he does not have time to pursue reunification with the minor child. The respondent father said he would like for the minor child to live with [his aunt and uncle] if the respondent mother is not able to reunify. The social worker discussed with the respondent father a posting he put on Facebook in regards to his house being raided by the [Drug Enforcement Agency] because they thought he was a crack cocaine dealer. The respondent father admitted that this raid did occur but he does not sell crack cocaine and people have been spreading rumors about him.

. . . .

42. The respondent father has been regularly invited to attend Child and Family Team (CFT) meetings concerning the minor child. The respondent father has failed to attend CFT meetings during the lifetime of this case.

. . . .

50. The respondent father submitted to a CCA . . . on March 10, 2016, some nine months after he was ordered to do so by the Court, and well over a year after it was recommended that he do so in his case plan with the Department. As a result, it was recommended that he engage in . . . services, follow guidelines of his treatment provider, complete random drug screens, utilize community support groups, participate in drug treatment court, engage in counseling, and complete parenting education classes.

51. The respondent father has not complied with the recommendations of his CCA. He began drug treatment . . . in June of 2016 and testified that he will complete his drug treatment classes in December of 2016. He admitted to having a positive drug screen for marijuana and cocaine in June of 2016. The respondent father [h]as started, but not completed an approved parenting class, and has not engaged in counseling.

. . . .

53. The respondent father has not visited consistently with the minor child since September of 2015. The respondent father would call to schedule supervised visitation, then would "no call/no show". The respondent father contacted the [social worker] on March 29, 2016, and requested resumption of supervised visitation. However, the respondent father did not respond to the efforts of the [social worker] to schedule his requested visits, and continued to miss visits with the minor child even after the social worke[r] changed his visitation to accommodate his work schedule.

. . . .

57. Between April 10, 2016, and June 24, 2016, the respondent father missed four visits with the minor child.

> The respondent father admitted that he has missed visits, and has been late to visits, because he oversleeps.
>
> 58. . . . The respondent father has pending criminal charges for misdemeanor communication of threat[s] and misdemeanor assault on a female.

The unchallenged findings of fact are binding on this Court. *See In re C.B.*, ___ N.C. App. ___, ___, 783 S.E.2d 206, 208 (2016) ("Unchallenged findings are binding on appeal.")

However, respondent does challenge other findings of fact, including several findings upon which the trial court relied for its ultimate determination. Finding of fact 41, which the trial court explicitly relies on in its conclusion regarding neglect, states, "The respondent father was made aware that the minor child was being exposed to substance abuse and violence as early as March of 2014, yet took no action to prevent further neglect of the minor child by respondent mother." The trial court's conclusion on neglect, conclusion of law 5, stated that "respondent father has failed to protect the minor child from the neglect of the respondent mother. The respondent father knew of the respondent mother's substance use, and knew that she was exposing the minor child to violence since at least March of 2014." But there was simply no evidence that respondent had any idea of Rudy's mother's substance abuse problems or abuse before DSS involvement.

DSS's brief fails to even address the evidence regarding what respondent knew about Rudy's mother and the guardian *ad litem* brief places responsibility on respondent to act as a parent long before paternity was established in March of 2015. While there may be certain situations where a man should "know" he is likely the father of a child, this is not one of them. It appears from the evidence that respondent and Rudy's mother had no relationship other than "casual meetings" which were sexual in nature. Furthermore, while we use pseudonyms and will not divulge Rudy's real name, we note Rudy is named after another man whom the mother had identified as a potential father. In other words, Rudy Doe's mother was involved with a man named Rudy Doe. The child was named after another man, and under these circumstances it seems reasonable for respondent to wait until the paternity testing results before he began taking steps to gain custody of Rudy. In fact, respondent's ability to care for Rudy would have been very limited given that he was one of two putative fathers. After April of 2015, Rudy was already in the custody of DSS and not his mother, so it is unclear what steps respondent could have taken to protect Rudy from future neglect by his mother.

Furthermore, while the trial court is not required to make a finding of fact on every single piece of evidence, the trial court does need to resolve material issues. *See In re A.B.*, ___ N.C. App. ___, 799 S.E.2d 445, 451 (2017) (noting that a trial court must resolve issues arising from the material evidence); *Witherow v. Witherow*, 99 N.C. App. 61, 63, 392 S.E.2d 627, 629 (1990), *aff'd per curiam*, 328 N.C. 324, 401 S.E.2d 362 (1991) ("[T]he trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute."). Respondent testified that he now wanted Rudy to live with him, and he had a safe and stable home with his fiancée for Rudy to live in which included a bedroom for Rudy and a playroom. The trial court is not required to believe respondent's testimony, but it must consider the respondent's circumstances at the time of the hearing to make a determination of a likelihood of repetition of neglect. *See In re J.H.K.*, 215 N.C. App. at 368, 715 S.E.2d at 567. But the trial court made no findings regarding respondent's home or ability to care for Rudy as of the time of the hearing, either positive or negative.

This case presents a situation similar to that in *A.B.*, where this Court stated, "[W]e believe the evidence would support different inferences and conclusions regarding the likelihood of a repetition of neglect based on evidence regarding respondent['s] circumstances at the time of the hearing. Given the findings of fact, however, we would be speculating as to the trial court's rationale were we to affirm its adjudication[.]" *Id.* (citation and quotation marks omitted) ("Our review of the transcript reveals that CCDHS social worker Cynthia Bowers and respondent-mother presented testimony that would support additional findings up to the time of the termination hearing. We further believe there are material conflicts in the evidence relating to the issue of respondent-mother's willfulness and the reasonableness of her progress that were not resolved by the trial court's order. Similarly, we believe the evidence would support different inferences and conclusions regarding the likelihood of a repetition of neglect based on evidence regarding respondent-mother's circumstances at the time of the hearing. Given the findings of fact, however, we would be speculating as to the trial court's rationale were we to affirm its adjudication under either N.C.G.S. § 7B-1111(a)(1) or (2)." (citations, quotation marks and brackets omitted)).

There are findings of fact tending to support the ground of neglect, but because there is a material finding of fact not supported by the evidence in that respondent knew of Rudy's mother's parental neglect, and because there is an unresolved issue as to respondent's current housing

situation and ability to care for Rudy, we must reverse and remand. We note that respondent has challenged other findings of fact on appeal, and thus other findings of fact may not be supported by the evidence, but we need not review each and every challenged finding as we have already determined that we must reverse and remand with instructions for the trial court to carefully consider the evidence before it, make findings that are supported by competent evidence, make findings that are necessary for the trial court's ultimate determination, and make conclusions supported by those findings. The findings must address the respondent's current circumstances and the possibility of a repetition of neglect. While this direction may seem simple and obvious, we have already noted that the trial court signed an order which included two grounds for termination which should not have been included; in addition, the order included at least one material unsupported finding of fact and failed to address respondent's current circumstances. Respondent makes essentially the same arguments regarding the ground of willfully leaving Rudy in DSS's care without making reasonable progress to correct the conditions which led to his removal as he does for the ground of neglect. The ground of failing to make reasonable progress raises many of the same problems we just noted regarding neglect, and so on remand the trial court must give proper and thoughtful consideration of this ground as well.

IV. Conclusion

For the foregoing reasons, we reverse and remand.

REVERSED and REMANDED.

Judges BRYANT and ZACHARY concur.

JOHNSTON v. JOHNSTON

[256 N.C. App. 476 (2017)]

WILLIAM RUSSELL JOHNSTON, PLAINTIFF
v.
ALLYSON SCOTT JOHNSTON, DEFENDANT

No. COA16-641

Filed 21 November 2017

1. Appeal and Error—interlocutory orders and appeals—denial of motion to dismiss—prior pending action

An interlocutory order that denies a motion to dismiss on the ground of a prior pending action is immediately appealable.

2. Child Custody and Support—child custody—motion to dismiss—subject matter jurisdiction—case filed in different county when one already pending—first filed

The trial court erred by denying defendant wife's motion to dismiss a child custody case filed by plaintiff husband in Caswell County and to have it transferred to Wake County where defendant already filed a claim in Wake County. The UCCJEA had no relevance to this case since both parties and the children were all in North Carolina. Further, the fact that the husband was avoiding service and the reasons the wife filed were of no consequence to the legal determination of who filed the action first.

Appeal by defendant from order entered 20 January 2016 by Judge Lloyd Michael Gentry in District Court, Caswell County. Heard in the Court of Appeals 9 January 2017.

Manning, Fulton, & Skinner, by Michael S. Harrell, for plaintiff-appellee.

Tharrington, Smith, LLP, by Steve Mansbery, for defendant-appellant.

STROUD, Judge.

Defendant Allyson Scott Johnston appeals an order denying her motion to dismiss the case filed by plaintiff in Caswell County and to have it transferred to Wake County. Because defendant's custody claim was filed in Wake County before plaintiff filed his claim in Caswell County, the district court in Caswell County did not have subject matter jurisdiction over the custody claim. We reverse the order denying defendant's

motion to dismiss, remand for consideration of defendant's motion for sanctions, and vacate the temporary visitation and custody orders.

I. Background

On 4 April 2009, plaintiff William Russell Johnston ("Husband") and defendant Allyson Scott Johnston ("Wife") were married. The parties had two children, one in 2012 and one in 2014. The parties separated, although the exact date is in dispute, and on 15 September 2015, Husband filed a complaint in Caswell County against Wife for custody, divorce from bed and board, and equitable distribution, alleging the parties had separated on 2 August 2015. On 22 September 2015, the complaint was served on Wife. Thereafter, on 1 October 2015, Husband voluntarily dismissed his Caswell County complaint without prejudice.

On 8 October 2015, Wife filed a complaint against Husband in Wake County for custody, child support, post-separation support, alimony, and attorney fees. A temporary custody hearing was set in Wake County for 15 December 2015. Husband was not served with the Wake County summons and complaint on the sheriff's initial attempts, and he later admitted that he intentionally avoided service. On 13 October 2015, Husband filed a second complaint against Wife in Caswell County for custody, divorce from bed and board, and equitable distribution; the complaint fails to note the active suit in Wake County, although husband was aware that it had been filed.

On 19 October 2015, Husband filed a motion in Caswell County requesting entry of an order for temporary child custody and visitation. On 2 November 2015, Wife filed a motion to dismiss the Caswell County case for lack of jurisdiction because of her prior pending action in Wake County. Also on 2 November 2015, the district court heard Husband's request for temporary custody, although Husband was not present and his attorney admitted he did not come to the hearing he had scheduled for temporary custody because he was avoiding service in the Wake County case:

> MS. RAMSEY: His client's not even here. His client is asking for temporary custody of the children, and he's not even here. The reason he's not here is because he knows, if he comes in here, he's going to be served with this Wake County action. He's avoiding service.
>
> THE COURT: Well, let me say this. Mr. Bradsher, you need to get your client available for service so –

> MR. BRADSHER: Your Honor, I don't doubt it. But there's nothing that says he has to make himself available. And we're prepared to go forward today . . . . We have everybody here.
>
> . . . .
>
> MR. BRADSHER: Your Honor, I mean, this is a civil matter.
>
> THE COURT: Okay. Okay. As a directive from the bench, make sure your client is available for service on this -- on her -- on the Wake County case --
>
> MR. BRADSHER: I don't know that I have the ability to do --
>
> THE COURT: -- this week. Somebody in this room can get Russell Johnston into the Sheriff's Office to get served this week. Well, maybe I -- I'm just telling you he needs to get -- go ahead and get served.

Despite Husband's absence and the lack of any apparent emergency or need for an immediate order, the district court entered a temporary custody order granting Husband visitation on weekends and holidays and set Wife's motion to dismiss for hearing on 18 December 2015.

On 6 November 2015, Husband was served with the summons and complaint in the Wake County action. On 30 November 2015, Husband filed a motion to amend his complaint alleging that he had voluntarily dismissed his prior Caswell County complaint based upon Wife's indication that she wanted to reconcile but he later learned this was not true. On 18 December 2015, Husband responded to Wife's motion to dismiss the action in Caswell County, arguing Caswell County was the proper venue because Wife was served in the Caswell County action before he was served in the Wake County action and alleging that Wife "tricked" him into dismissing his first Caswell County action so that she could file in Wake County.

Also on 18 December 2015, the district court heard Wife's motion to dismiss. The parties agreed that the equitable distribution and divorce from bed and board claims were properly in Caswell County and the post-separation support and alimony claims were only in Wake County.[1] The only claim for which jurisdiction was at issue was child custody;

1. The Wake County complaint included claims for child custody, post-separation support, and alimony claims; the Caswell county complaint included claims for child custody, divorce from bed and board, and equitable distribution.

Husband argued the case was properly in Caswell County and Wife argued Caswell County had no jurisdiction because the Wake County action had been filed first. Wife's counsel directed the district court to the applicable laws in Chapter 50 of the North Carolina General Statutes. In response to the district court's focus on where the children had lived for the six months next preceding the filing of the action, Wife's counsel pointed out that the UCCJEA, North Carolina General Statute, Chapter 50A, was not applicable to this case since both parties are in North Carolina. On 4 January 2016, in Wake County, Husband filed a motion to dismiss the Wake County action or alternatively for a change of venue to Caswell County.

On 13 January 2016, the district court returned to complete the hearing on the motion to dismiss and to enter an additional order addressing temporary custody. The district court did not hear any evidence. Wife's counsel requested a finding of fact that the district court was basing its temporary custody decision on absolutely no evidence, and the district court acknowledged that the order was "based solely on the pleadings and arguments of counsel." The court's concern was "whether I think I've got jurisdiction over the child custody." Ultimately, the district court denied Wife's motion to dismiss, and on 20 January 2016 entered an order denying Wife's motion to dismiss and an order granting joint temporary custody to Husband and Wife with an alternating week custodial schedule. Wife appeals the order denying her motion to dismiss.

II. Motion to Dismiss

[1] Wife makes two arguments on appeal. We first note that an order which denies a motion to dismiss on the ground of a prior pending action, while interlocutory, is immediately appealable. *See Gillikin v. Pierce*, 98 N.C. App. 484, 486, 391 S.E.2d 198, 199 (1990). Wife's first argument challenges many of the district court's findings of fact as (1) not being supported by competent evidence since there was no evidence, testimonial or documentary, presented at the hearing, or (2) actually being conclusions of law and not findings of fact. As the order notes, the district court considered only the pleadings and arguments of counsel, so there was no evidence upon which to base findings regarding custody or visitation. But Wife's second argument involves the crucial matter of subject matter jurisdiction to enter any custody order, so we will address this issue first.

[2] Wife argues that because she filed her custody complaint first in Wake County, Wake County had jurisdiction over the custody matter, and Caswell County did not. Wife specifically contends that "the trial

court erred by concluding as a matter of law that i[t] has jurisdiction over the subject matter and of the parties to this action in conclusion of law 1 and by denying defendant-appellant's motion to dismiss." We review *de novo* the denial of Wife's motion to dismiss on the basis that the district court had subject matter jurisdiction. *See Shoaf v. Shoaf*, 219 N.C. App. 471, 474–75, 727 S.E.2d 301, 304 (2012) ("As a result of the fact that Defendant's dismissal motions raise issues of law, the trial court's refusal to dismiss Plaintiffs' complaint is subject to *d[e] novo* review.")

The relevant portion of the district court's order challenged on appeal and its decree, are as follows:

> 1. The Court has jurisdiction of the subject matter and of the parties to this action.
>
> 2. The findings of fact above are hereby incorporated by reference as if restated.
>
> Ordered, adjudged, and decreed as follows:
>
> 1. *Coble v. Coble*, 229 N.C. 81, is the controlling case on the issue of Defendant Mother's Motion to Dismiss.
>
> 2. *Benson v. Benson*, 39 N.C. App. 254 is not controlling on the issue because Plaintiff father had not yet been served with the Wake County Complaint at the time the Court entered the Temporary Visitation Order (signed by counsel for both parties) on November 2, 2015.
>
> 3. The legislative intent under the UCCJEA is to stop forum shopping.
>
> 4. Although this Court acknowledges that the UCCJEA applies to custody actions between two states, the Court believes this legislative intent dissuading forum shopping applies to intrastate forum shopping as well.
>
> 5. The Court has continuing exclusive jurisdiction over the issue of child custody.
>
> 6. The Court has jurisdiction to hear the issues of Divorce from Bed and Board and Equitable Distribution, raised in Plaintiff Father's Complaint.
>
> 7. The Court reserves its ruling on attorney's fees as Defendant Mother's counsel made an oral notice of appeal at the end of the Court's ruling.
>
> 8. Defendant's Motion to Dismiss is denied.

The district court determined "*Coble v. Coble*, 229 N.C. 81, is the controlling case[.]" However, *Coble* addressed an *interstate* factual situation and was decided before the adoption of the Uniform Child-Custody Jurisdiction Enforcement Act ("UCCJEA") which now controls *interstate* custody cases in North Carolina. *See Coble v. Coble*, 229 N.C. 81, 47 S.E.2d 798 (1948); *see generally* N.C. Gen. Stat. Ch. 50A (2015). In *Coble*, both the wife and children lived outside of the State of North Carolina and our Supreme Court determined North Carolina did not have jurisdiction over determining child custody:

> *If the custody of children is the issue, they must be within the bounds of the State.*
>
> The action, as it relates to the custody of the children, is in the nature of an *in rem* proceeding. The children are the *res* over which the court must have jurisdiction before it may enter a valid and enforceable order. Indeed, a divorce action is so considered, the status being the *res*. It is for this reason service of summons by publication is permitted.
>
> *At the time the order was issued, the res was not within the jurisdiction of the court. The defendant—the custodian—was not served with notice and was not accorded an opportunity to be heard.* This runs counter to the genius of a free people and will not be permitted. The order is void.
>
> . . . .
>
> It is true that upon the institution of a divorce action the court is vested with jurisdiction of the children of the marriage for the purpose of entering orders respecting their care and custody. *But the action is not instituted, within the meaning of this rule, until and unless the court acquires jurisdiction of the person of the defendant, and is subject to the fundamental requirement of notice and opportunity to be heard.*
>
> *If both parents are in court and subject to its jurisdiction, an order may be entered, in proper instances, binding the parties and enforceable through its coercive jurisdiction. But such is not the case here. Neither the infants nor their mother was subject to the jurisdiction of the court at the time the order was entered.*

> *It is fundamental that a State has no power to enact laws to operate upon things or persons not within her own territory.*

Coble, 229 N.C. at 84–85, 47 S.E.2d at 800–01 (emphasis added) (citations and quotation marks omitted). While service was an issue in *Coble*, the Court's ruling was ultimately based upon the fact that North Carolina did not have jurisdiction over the mother and children, who were not within the State. *See id.*

We find it particularly odd that the district court specifically relied upon *Coble* in its ruling, a 1948 case, even after expressing a concern that *Benson v. Benson*, 39 N.C. App. 254, 249 S.E.2d 877 (1978), a 1978 case cited by Wife as controlling, may not be good law, since "[t]his is a '78 case and it's a lot -- a lot of change since then[;]" apparently the district court was concerned about approximately 40 years of change, but not about 70 years. Furthermore, *Benson*, which the district court determined was "not controlling," is in fact controlling; *see Benson*, 39 N.C. App. 254, 249 S.E.2d 877, the district court even noted, at the initial hearing, that *Benson* appeared to be controlling, but also noted that the trial court "hated" that result and would do additional research on the applicable law in the hope of finding a different result. *Benson* was an *intrastate* custody case which held that the county where the first custody case was filed had jurisdiction:

> The defendant's complaint in the Anson County action was filed one day prior to the filing of the plaintiff's complaint in this action in Wilkes County. Generally speaking, actions for child custody, child support and alimony follow the same procedures as other civil actions. A civil action is commenced by filing a complaint with the court. Once an action is commenced, it is pending before the court. If there is a pending action for annulment, divorce, or alimony without divorce, there cannot be any subsequent action or proceeding instituted for the custody and the support of a minor child of the marriage, it being necessary for a determination of custody and support of the minor child, that the issue be joined in the pending action or by a motion in the cause in such action.
>
> The defendant's action in Anson County seeking alimony without divorce, child custody and child support, having been commenced prior to the commencement of this action in Wilkes County, the trial court was without

> jurisdiction to entertain this independent action by the plaintiff for custody of the minor child. The trial court did not have jurisdiction to consider any matter arising from the plaintiff's complaint, and the entire proceeding before the trial court and its order are, therefore, null and void.

Id. at 255–56, 249 S.E.2d at 878 (citations and quotation marks omitted).

Here, the Wake County complaint was filed first. Because Wife filed first in Wake County, the district court in Caswell County "was without jurisdiction to entertain this independent action by the plaintiff for custody of the minor child. The trial court did not have jurisdiction to consider any matter arising from the plaintiff's complaint, and the entire proceeding before the trial court and its order are, therefore, null and void." *Id.* The fact that Husband was avoiding service is of no consequence, as the legal determination turns on first filed, not first served. *See id.*

As to the trial court's conclusions regarding the UCCJEA, as pointed out by Wife's counsel at the hearing, the UCCJEA simply has no relevance to this case since both parties and the children were all in North Carolina. *See generally In re E.X.J.*, 191 N.C. App. 34, 49–50, 662 S.E.2d 24, 33 (2008), *aff'd*, 363 N.C. 9, 672, S.E.2d 19 (2009) "Further, the facts before us are distinguishable from the facts presented in *In re Poole*. The UCCJEA did not control the analysis or outcome of that case, because the issues before the Court in *In re Poole* dealt solely with intrastate parties and matters.") Although the district court's concern regarding the UCCJEA's policy goal of avoiding forum-shopping is well-taken, for intrastate disputes, any forum-shopping issues are more properly addressed under the venue statutes, as the district court itself noted at one point: "unless you get a change of venue, to me, it will have to be tried in Wake County."

Looking outside of the numerous errors in the district court's conclusions of law, Husband's brief makes much of the fact that wife "tricked" him into dropping his originally filed Caswell County case, but ultimately he has no law to support any of his contentions. It may be impossible to determine whether Wife wanted to reconcile with Husband or tricked him; perhaps Wife did not even know from moment to moment, as is quite common in this sort of case where emotions run high. Nonetheless, why or how Wife filed in Wake County first is not a relevant legal consideration in this case; only the date of filing matters. *Benson*, 39 N.C. App. at 255–56, 249 S.E.2d at 878.

Husband also focuses on the fact that Caswell County had both subject matter and personal jurisdiction, but Wake County did not have personal jurisdiction over him, as he had not yet been served. But again, service of process is simply not part of the analysis of where the action was first commenced. *See id.* Furthermore, it is somewhat ironic that Husband bases his first argument on his claims of Wife's bad intent but then ignores the fact that he -- a licensed attorney and Caswell County bar president -- purposefully avoided being served with the Wake County complaint in support of his flawed legal theory.

III. Conclusion

We reverse the district court's order denying Wife's motion to dismiss. Because the trial court was without subject matter jurisdiction, we vacate the temporary custody order entered in Caswell County. We remand with instructions to consider Wife's motion for attorney fees in Caswell County since that motion was part of her motion to dismiss, upon which she should have prevailed. The district court in Caswell County will retain the issues of divorce from bed and board and equitable distribution because they were not filed in Wake County.

REVERSED in part, VACATED in part, and REMANDED.

Chief Judge McGEE and Judge TYSON concur.

KE v. ZHOU

[256 N.C. App. 485 (2017)]

SHENG YU KE A/K/A STEVEN KE AND DUAN Z. ZHANG A/K/A SHIRLEY KE, PLAINTIFFS
v.
HENG-QIAN ZHOU A/K/A RAY ZHOU, AND SEVEN SEAS, CONTRACTORS, INC., DEFENDANTS

No. COA16-1297

Filed 21 November 2017

1. Fraud—motion for directed verdict—reasonable reliance—licensed general contractor—jury issue

The trial court did not err by denying defendants' motion for directed verdict on plaintiff restaurant owners' fraud claim where the issue of whether plaintiffs were reasonable in relying upon defendant individual's statement that he was a licensed general contractor, despite the fact that he simultaneously displayed an electrician's license, was for the jury to resolve.

2. Corporations—motion to set aside entry of default—agreement to convert property to restaurant—fraud—unfair and deceptive trade practices—licensed attorney required to represent corporation

The trial court did not err in a fraud and unfair and deceptive trade practices case, arising out of an agreement to convert property into a restaurant, by denying defendant corporation's motion to set aside entry of default under N.C.G.S. § 1A-1, Rule 55(b). Even if defendant individual intended to file his answer on behalf of both himself and his corporation, the answer was not a valid response for the corporation since defendant individual was not a licensed attorney. Further, defendant corporation did not file its motion until approximately seven months after default was entered.

3. Attorney Fees—fraud—unfair and deceptive trade practices—no abuse of discretion

The trial court did not abuse its discretion in a fraud and unfair and deceptive trade practices case, arising out of an agreement to convert property into a restaurant, by denying plaintiff restaurant owners' motion for attorney fees where it found that defendants did not engage in an unwarranted refusal to fully resolve the matter.

Appeal by Defendants from judgment entered 6 June 2016 and appeal by Plaintiffs from order entered 6 June 2016 by Judge Richard S. Gottlieb in Guilford County Superior Court. Heard in the Court of Appeals 10 August 2017.

Sigmon Klein, PLLC, by Grant Sigmon, for the Plaintiffs-Appellees/Cross-Appellants.

Bennett & Guthrie, P.L.L.C., by Joshua H. Bennett, for the Defendants-Appellants/Cross-Appellees.

DILLON, Judge.

This dispute arose from a contractual relationship between Plaintiffs and Defendants. Plaintiffs are the owners of a restaurant in Winston-Salem. Defendant Zhou is the owner and operator of Defendant Seven Seas Contractors, Inc. ("Seven Seas"). All parties have appealed from separate orders of the trial court. Defendants appeal from judgment entered upon a jury verdict finding that Plaintiffs were entitled to damages for fraudulent acts committed by Defendants. Plaintiffs appeal from the trial court's order denying Plaintiffs' request for attorney's fees.

I. Background

The evidence presented at trial tended to show as follows:

In 2014, Plaintiffs entered into an agreement with Defendants to convert property owned by Plaintiffs into a restaurant. Defendant Zhou held himself and his company out to be a licensed general contractor, despite the fact that Defendants held no such license. Rather, Defendant Zhou intended to obtain the necessary permits under the name of an acquaintance who purportedly was licensed.

At some point during the project's progress, the City became aware that Defendant Zhou was performing the project work without supervision of a licensed contractor. At a meeting with the City, Defendant Zhou indicated that he would have no problem finding another contractor under whom he could complete the project. Plaintiffs, however, decided to terminate the contract.

In February 2015, Plaintiffs filed a complaint against Defendants, alleging that Defendants had failed to perform the work pursuant to the contract, despite Plaintiffs' payment of $60,000; that Defendant Zhou was not, in fact, a licensed general contractor, despite his representation that he was; and that Defendants did not obtain the proper permits to start and complete the project.

In April 2015, after the time to answer had expired, but before any default had been entered, Defendant Zhou filed and served a document *pro se* which responded to Plaintiffs' allegations. Shortly thereafter,

Plaintiffs sought an entry of default against both Defendants. The clerk of court, however, entered default *only* against Defendant Seven Seas. The trial court later denied Defendant Seven Seas' motion to set aside the entry of default.

After a jury trial, the trial court entered judgment in favor of Plaintiffs, finding both Defendants liable for fraud, unfair and deceptive trade practices, and punitive damages. The jury awarded Plaintiffs $76,000 in compensatory damages and $5,000 in punitive damages. The trial court determined that, as a matter of law, Defendants' misrepresentations violated the provisions of Chapter 75 of our General Statutes, and therefore that Plaintiffs were entitled to a trebling of the compensatory damages. *See* N.C. Gen. Stat. § 75-1.1 (2015). Accordingly, the trial court entered a treble damage award of $201,000[1] in favor of Plaintiffs. Defendants appealed.

After trial, Plaintiffs filed a motion for costs and a motion for attorney's fees. The trial court allowed the motion for costs but denied the motion for attorney's fees. Plaintiffs appealed.

II. Analysis

A. Defendants' Appeal

1. Motion for Directed Verdict

[1] At the close of Plaintiffs' evidence, Defendants moved for directed verdict on Plaintiffs' fraud claim, arguing that Plaintiffs' reliance upon Defendant Zhou's representation that he was a general contractor was unreasonable. The trial court denied the motion. On appeal, Defendants contend that this was error. We disagree.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991). In addition, where the question of granting a directed verdict is a close one, our Supreme Court has instructed that "the better practice is for the trial court to reserve its decision on the motion and allow the case to be submitted to the jury." *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

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1. The trial court arrived at the $201,000 figure as follows: The trial court reduced the $76,000 compensatory damage award by $9,000, an amount Plaintiffs already received from two other defendants who settled prior to trial. The trial court then trebled the difference ($67,000) to arrive at the final amount.

In order to establish a claim for fraud in North Carolina, a plaintiff must show, in part, that his reliance on the allegedly false representation made by the defendant was *reasonable*. *See Forbis v. Neal*, 361 N.C. 519, 526–27, 649 S.E.2d 382, 387 (2007). Here, for the following reasons, we conclude that the trial court properly denied Defendants' motion for directed verdict, allowing the jury to decide the issue of whether Plaintiffs' reliance was reasonable. *See id.* at 527, 649 S.E.2d at 387 (stating "[t]he reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion").

Defendants argue that Plaintiffs' reliance on Defendant Zhou's representation that he held a general contractor's license was not reasonable in light of the fact that Defendant Zhou displayed an *electrician's* license during a conversation involving his certifications. However, there was also evidence presented that Defendant Zhou told Plaintiff Ke that "he had all the legal paper," that he "had [a] general contractor's license," and that Defendant Zhou showed Plaintiff Ke papers with the State seal and his company name on them and told Plaintiff Ke that the papers were his general contractor's license. Although the license Defendant Zhou actually displayed was an electrician's license, we conclude that the above evidence, taken as true and considered in the light most favorable to Plaintiffs, was sufficient to withstand Defendants' motion for directed verdict. The issue of whether Plaintiffs were reasonable in relying upon Defendant Zhou's statement that he was a licensed general contractor, despite the fact that he simultaneously displayed an electrician's license, is one for the jury to resolve. *See id*; *see also Johnson v. Owens*, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965) (noting that pinpointing "[j]ust where reliance ceases to be reasonable and becomes [] negligence and inattention [such] that it will, as a matter of law, bar recovery for fraud is frequently very difficult to determine").

2. Motion to Set Aside Entry of Default

[2] Defendant Seven Seas challenges the trial court's denial of its motion to set aside entry of default.

Defendants were both personally served with Plaintiff's complaint on 11 March 2015. Defendants were required to serve their answers "within 30 days after service of the summons and complaint[.]" N.C. Gen. Stat. § 1A-1, Rule 12(a)(1) (2015). However, two months later, the only response filed with the court was an answer prepared and signed by "Ray Chow."[2]

2. It appears from the record that Defendant Zhou signed his name as "Ray Chow" on his answer to Plaintiffs' complaint.

On 18 May 2015, Plaintiffs moved for entry of default against both Defendants. A week later, the clerk of superior court entered default against Defendant Seven Seas due to its "fail[ure] to plead or otherwise respond to [Plaintiffs'] Complaint within the time allowed under the North Carolina Rules of Civil Procedure."

Seven months later, in January 2016, at a hearing on Defendant Seven Seas' motion to set aside entry of default, the trial court determined that Defendant Seven Seas had failed to show good cause, and denied the motion.

On appeal, Defendant Seven Seas contends that Defendant Zhou intended his answer to be on behalf of both himself and his company. Indeed, the heading of the answer reads: "Ray Zhou" on one line and "Seven Seas Contractors, Inc." on the next line, followed by an address. Defendants argue that Defendant Zhou, as the owner of Seven Seas Contractors, Inc., had the right to make an appearance in court on Defendant Seven Seas' behalf for the limited purpose of avoiding default. In support of this position, Defendants cite *Lexis-Nexis, Div. of Reed Elsevier, Inc. v. Travishan Corp.*, 155 N.C. App. 205, 208, 573 S.E.2d 547, 549 (2002), which states:

> The prevailing rule is that a corporation cannot appear and represent itself either in proper person or by its officers, but can do so only by an attorney admitted to practice law. . . . [However,] the North Carolina Court of Appeals [has] recognized that a corporation may make an appearance in court through its vice-president and thereby avoid default.

Id. (citing *Roland v. W&L Motor Lines, Inc.*, 32 N.C. App. 288, 231 S.E.2d 685 (1977)). Defendants contend that this quotation from *Lexis-Nexis* compels the conclusion that the answer was properly filed on behalf of Defendant Seven Seas.

We conclude that Defendants misconstrue *Lexis-Nexis*. The precise holding in *Lexis-Nexis* was that a corporate officer may *not* represent the corporation in a lawsuit, except in small claims court. *Id.* at 209, 573 S.E.2d at 549. The above quotation was mere dicta and did not stand for the proposition that a corporate officer could *file an answer* in a lawsuit pending in superior court in order to avoid default. Rather, in *Roland* on which *Lexis-Nexis* relies, we merely held that an officer could make an appearance for a corporation in order to require that any default *judgment* be entered by a judge and *not* by the clerk of court. *See Roland*, 32 N.C. App. at 291, 231 S.E.2d at 688 (holding that "when a party, or his representative, has appeared in an action and later defaults,

then [N.C. Gen. Stat. §] 1A-1, Rule 55(b) requires that the judge, rather than the clerk, enter the judgment by default after the required notice has been given").

There is a clear distinction between making an appearance for a corporation and filing an answer for a corporation, as detailed in the case of *Bodie Island Beach Club Ass'n, Inc. v. Wray*, 215 N.C. App. 283, 289 716 S.E.2d 67 (2011). In *Bodie Island*, we articulated the exceptions to the general rule that "a corporation must be represented by a duly admitted and licensed attorney-at-law" and cannot proceed *pro se*:

> The exceptions noted by our court in *Lexis-Nexis* were as follows: [1] a corporate employee, who was not an attorney, could prepare legal documents[;] [2] a corporation need not be represented by an attorney in the Small Claims Division[;] and [3] a corporation may make an appearance in court through its vice-president and thereby avoid default.

Bodie Island at 289–90, 716 S.E.2d at 74 (internal marks omitted) (citing *Lexis-Nexis*, 155 N.C. App. at 208, 573 S.E.2d at 549). We then concluded that an attempt by a doctor to file an answer on behalf of his corporate medical practice did *not* "fit within the exceptions noted by our Court in *Lexis-Nexis*" because the doctor "was not a licensed attorney." *Id.* at 290, 716 S.E.2d at 74.

Therefore, here, even if Defendant Zhou in fact *intended* to file his answer on behalf of both himself and his corporation, the answer was not a valid response for his corporation because he was not a licensed attorney. Accordingly, it was appropriate for the clerk to enter default pursuant to Rule 55(b) (2015).

We now turn to Defendants' argument that the trial court improperly denied Defendant Seven Seas' motion to set aside entry of default. In evaluating Defendants' argument, we note that on appeal, "[t]he determination of whether an adequate basis exists for setting aside [an] entry of default rests in the sound discretion of the trial judge[,]" *Byrd v. Mortenson*, 308 N.C. 536, 539, 302 S.E.2d 809, 812 (1983), and "the order of the trial court ruling on such a motion will not be disturbed on appeal absent a showing of abuse of that discretion." *Coulbourn Lumber Co. v. Grizzard*, 51 N.C. App. 561, 563, 277 S.E.2d 95, 96 (1981). Further, we note that an entry of default may be set aside for "good cause shown." N.C. Gen. Stat. § 1A-1, Rule 55(d).

Here, Defendant Seven Seas did not file its motion to set aside entry of default until approximately seven months after the default was entered by the clerk. In *First Citizens Bank & Tr. Co. v. Cannon*, 138 N.C. App. 153, 530 S.E.2d 581 (2000), our Court found no abuse of discretion in the trial court's refusal to set aside an entry of default where the defendant filed her motion to set aside almost six months after the entry of default. *First Citizens*, 138 N.C. App. at 158, 530 S.E.2d at 584. In light of the time elapsed before the motion was filed to set aside the entry of default, we are unable to conclude that the trial court abused its discretion in denying Defendant Seven Seas' motion. *See Automotive Distributors*, 87 N.C. App. at 608, 361 S.E.2d at 896-97 (requiring this Court to consider whether the defendant was "diligent in pursuit of [the] matter").

B. Plaintiffs' Appeal

[3] Plaintiffs have appealed the trial court's denial of their motion for attorney's fees. Because the decision as to whether to award attorney's fees is discretionary, and because we do not believe the trial court abused its discretion in this case, we hereby affirm the trial court's order denying Plaintiffs' motion for attorney's fees.

Section 75-16.1 of our General Statutes provides that a presiding judge may award attorney's fees against an opposing party found to have willfully violated N.C. Gen. Stat. § 75-1.1 and who has engaged in "an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit[.]" N.C. Gen. Stat. § 75-16.1 (2015). And as stated in the statute, "[w]hether to award or deny attorneys' fees is within the sound discretion of the trial judge." *Custom Molders, Inc. v. American Yard Products, Inc.*, 342 N.C. 133, 141-42, 463 S.E.2d 199, 204 (1995). So even where the trial court finds that the elements of N.C. Gen. Stat. § 75-16.1 have been met, the trial court retains the discretion to refuse to award attorney's fees. *Willen v. Hewson*, 174 N.C. App. 714, 722, 622 S.E.2d 187, 192 (2005).

Here, while the trial court did find that Defendants' actions constituted unfair and deceptive trade practices, it also found that Defendants did *not* engage in an unwarranted refusal to fully resolve the matter. On appeal, Plaintiffs do not challenge this finding as unsupported by the evidence; rather, Plaintiffs note that the trial court should consider settlement offers by opposing parties in exercising its discretion to award or deny attorney's fees, citing *Washington v. Horton*, 132 N.C. App. 347, 350-51, 513 S.E.2d 331, 334 (1999). We have reviewed the findings and the evidence, and we conclude that the trial court did not abuse

its discretion in refusing to order attorney's fees. *See Custom Molders*, 342 N.C. at 141-42, 463 S.E.2d at 204; *Willen*, 174 N.C. App. at 722, 622 S.E.2d at 192 (2005).

NO ERROR.

Judges ZACHARY and BERGER concur.

NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY; NATIONWIDE MUTUAL INSURANCE COMPANY; AND NATIONWIDE INSURANCE COMPANY OF AMERICA, THIRD-PARTY PLAINTIFFS

v.

TIMOTHY W. SMITH AND TIMOTHY R. SMITH, THIRD-PARTY DEFENDANTS

No. COA17-283

Filed 21 November 2017

Insurance—underinsurance motorist carrier—contribution—negligently serving alcohol and allowing to drive—not a tortfeasor

The trial court did not err in an action arising from an automobile accident by granting third party defendants' motion to dismiss underinsurance motorist carrier's third-party complaint seeking contribution for negligently serving defendant alcohol and allowing her to drive. N.C.G.S. § 1B-1(b) prohibited the carrier's claim for contribution since neither the underinsurance motorist carrier, nor its insured, was a tortfeasor.

Appeal by Third-Party Plaintiffs from order entered 2 December 2016 by Judge Phyllis M. Gorham in Duplin County Superior Court. Heard in the Court of Appeals 7 September 2017.

Marshall, Williams & Gorham, L.L.P, by William Robert Cherry, Jr., for the Third-Party Plaintiffs-Appellants.

Donald E. Clark, Jr., Attorney at Law, PPLC, by Donald E. Clark, Jr., for the Third-Party Defendants-Appellees.

DILLON, Judge.

The Third-Party Plaintiffs (collectively "Nationwide") appeal from an order of the trial court dismissing their Third-Party Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

I. Background

Plaintiffs George Olsen, Sr., and his wife, Sharon N. Olsen, purchased a personal automobile underinsurance motorist insurance policy from Nationwide. This policy provided coverage to the Olsens should they be injured by an at-fault driver whose liability coverage limits were too low to cover their damages.

In late 2013, Mr. Olsen was walking by the side of the road when he was struck by a car driven by Skylar Wellington ("Defendant"). Defendant had lost control of her vehicle and drifted off of the paved portion of the street. About three hours after the accident, Defendant's blood alcohol concentration was tested and registered a blood alcohol level of .15.

In 2014, Plaintiffs filed this action against Defendant and Nationwide. Nationwide filed a third-party complaint against Timothy W. Smith and Timothy R. Smith, alleging that the Smiths had negligently served Defendant alcohol and allowed her to drive.[1] Nationwide sought contribution from the Smiths for a portion of their alleged common liability for Plaintiffs' injuries.

Defendant's auto liability carrier offered the full limit of their liability coverage to Plaintiffs in exchange for Plaintiffs' execution of a covenant not to enforce judgment. Defendant's liability carrier was thus released from further liability and was not obligated to participate in the lawsuit.

Plaintiffs then negotiated a settlement with Nationwide for $850,000. Following the settlement, Plaintiffs signed a release of all claims and filed a voluntary dismissal of their complaint with prejudice. Accordingly, the only remaining issue in the case was Nationwide's third-party complaint against the Smiths, who had allegedly served Defendant alcohol shortly before the accident.

The Smiths' moved to dismiss Nationwide's third-party complaint for contribution. The trial court granted the Smiths' motion based on Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Nationwide timely appealed.

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1. Nationwide's answer and third-party complaint referenced in this opinion is its second response to Plaintiffs' suit, filed in response to Plaintiffs' second amended complaint.

II. Analysis

On appeal, Nationwide argues that the trial court improperly granted the Smiths' motion to dismiss Nationwide's claim for contribution, contending that it had a cause of action to seek contribution from the Smiths for their role in causing its insured's injuries.

"A motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure presents the question [of] whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991). We review a trial court's Rule 12(b)(6) dismissal *de novo*. *Wray v. City of Greensboro*, ___ N.C. ___, ___, 802 S.E.2d 894, 898 (2017).

In its brief, Nationwide asserts that it has the right to recover from the Smiths because Defendant and the Smiths have a common liability for the injury to the Plaintiffs. However, the Smiths contend that Nationwide has no right to assert a claim based on *contribution* because a claim for contribution is only available among joint tort-feasors and Nationwide, as *Plaintiffs'* insurer, is not a tort-feasor. Based on our jurisprudence, we must agree, and therefore affirm the ruling of the trial court.

Section 20-279.21 of our General Statutes regulates motor vehicle liability policies in North Carolina and allows an underinsured motorist insurer to fully participate in an action by its insured against an underinsured motorist:

> [T]he underinsured motorist insurer shall have the right to appear in defense of the claim without being named as a party therein, and . . . *may participate in the suit as fully as if it were a party.* The underinsured motorist insurer may elect, but may not be compelled, to appear in the action in its own name and *present therein a claim against other parties.*

N.C. Gen. Stat. § 20-279.21(b)(4) (2015) (emphasis added). However, we have held that the right of a plaintiff's underinsurance motorist insurer to *bring* claims does not extend to a right to seek *contribution* against other tort-feasors who may have contributed to causing the accident. *Johnson v. Hudson*, 122 N.C. App. 188, 468 S.E.2d 64 (1996).

In *Johnson*, we acknowledged that N.C. Gen. Stat. § 20-279.21(b)(4) clearly allows Nationwide to assert a claim against other parties when it appears in its own name. *Id.* at 190, 468 S.E.2d at 66. However, we

also noted that our General Statutes provide that "[t]he right of contribution exists only in favor of a *tort-feasor* who has paid more than his pro rata share of the common liability[.]" N.C. Gen. Stat. § 1B-1(b) (2015) (emphasis added). In *Johnson*, our Court concluded that "[t]he specific language of N.C.G.S. § 1B-1(b) controls over the more general provision of N.C.G.S. § 20-279.21(b)(4)[,]" ultimately holding that the underinsured insurance carrier was *not* a tort-feasor. Therefore, N.C. Gen. Stat. § 1B-1(b) prohibited the carrier's claim of *contribution*, specifically. *See Johnson*, 122 N.C. App. at 190, 468 S.E.2d at 66 ("[N.C. Gen. Stat. § 20-279.21] allows the underinsured insurance carrier to assert all claims that could have been asserted *by its insured, the [plaintiff]*." (Emphasis added.)); *see also McCrary v. Byrd*, 148 N.C. App. 630, 638, 559 S.E.2d 821, 827 (2002) ("An underinsurance motorist carrier is not a tort-feasor and thus has no right of contribution.").

Here, Nationwide, as the underinsured insurance carrier, has no right to assert a claim against the Smiths for contribution because its insured – the Plaintiffs – never had any right to assert such a claim. Even in Nationwide's brief to this Court, it acknowledges that "[t]he rights of contribution arise when a *tortfeasor* has paid damages which exceed his pro rata share." (Emphasis added.) Therefore, as in *Johnson*, we hold that, as a matter of law, Nationwide has no right to seek contribution from the Smiths because neither Nationwide nor its insured is a tort-feasor. Accordingly, the trial court did not err in granting the Smiths' motion to dismiss Nationwide's third-party complaint seeking contribution. This holding should not be construed as a restriction on Nationwide's ability to assert any properly preserved direct claim which could have been asserted by its insured, the Plaintiffs. *See Johnson*, 122 N.C. App. at 190, 468 S.E.2d at 66 ("[W]hile N.C. [Gen. Stat.] § 1B-1(b) prohibits a claim of contribution by [the insurer], N.C. [Gen. Stat.] § 20-279.21(b)(4) allows [the insurer] to assert a direct claim that could have been asserted by its insured[.]").

AFFIRMED.

Judges HUNTER, JR., and ARROWOOD concur.

OCRACOMAX, LLC, PLAINTIFF
v.
CHRISTOPHER M. DAVIS AND WIFE, JENNIFER L. DAVIS; OCRACOKE HORIZONS UNIT OWNERS ASSOCIATION, INC., DEFENDANTS

No. COA17-608

Filed 21 November 2017

Attorney Fees—costs—declaratory judgment—condominium—inclusion of fees incurred on appeal

The trial court did not abuse its discretion by taxing costs and attorney fees solely against certain defendants (and not all defendants), from an underlying declaratory judgment action concerning plaintiff's right to a parking space in a shared garage of a condominium, where the issue of fees and costs was not conclusively decided until the costs order. N.C.G.S. § 47C-4-117 grants authority to award attorney fees in condominium association cases and can be construed broadly to allow an award including fees incurred on appeal.

Appeal by Defendants from order entered 12 October 2016 and order entered 2 February 2017 by Judge Wayland J. Sermons, Jr., in Hyde County Superior Court. Heard in the Court of Appeals 16 October 2017.

Hornthal, Riley, Ellis & Maland, LLP, by L. Phillip Hornthal, III, for the Plaintiff-Appellee.

Nexsen Pruet PLLC, by Norman W. Shearin, for the Defendants-Appellants.

DILLON, Judge.

Christopher M. Davis and Jennifer L. Davis (the "Davis Defendants") appeal the trial court's order dismissing their appeal from a decision on the Ocracomax, LLC, ("Plaintiff") Motion for Costs in the underlying action. The Davis Defendants argue that their appeal was meritorious, in that the order granting trial costs to Plaintiff (1) improperly assigned said costs to them alone, and not to all the defendants; and (2) included costs incurred by Plaintiff in a prior appeal. After careful review, we affirm.

I. Background

Plaintiff and the Davis Defendants are each residents of a condominium complex overseen by Defendant Ocracoke Horizons Unit Owners

Association, Inc. (the "HOA Defendant"). In February 2015, Plaintiff filed the underlying action against all Defendants, seeking a declaratory judgment stating its right to a parking space in a shared garage. After considering the briefs and pleadings, the trial court issued an order granting Plaintiff's Motion for Judgment on the Pleadings and taxing costs to Defendants (the "Judgment"), which our Court later affirmed in a prior appeal in this matter.

Plaintiff filed a Motion to Determine Costs. The trial court entered an order determining Plaintiff's costs in the underlying action (the "Costs Order"). In the Costs Order, the trial court taxed all of Plaintiff's fees throughout trial and the first appeal to the Davis Defendants alone.

The Davis Defendants filed a Petition for Writ of Certiorari, requesting that our Court review the Costs Order. We allowed Defendant's petition, and now consider their appeal.

II. Analysis

The Davis Defendants challenge the costs assigned by the trial court in two respects: First, the Davis Defendants argue that the trial court erred in taxing costs and attorney's fees against them, but not against the HOA Defendant. Second, Defendants allege that the trial court improperly included attorney's fees incurred on appeal in its award to Plaintiff. We address each argument in turn.

A trial court's grant of attorney's fees, supported by statutory authority, will not be overturned absent an abuse of discretion. *Buford v. Gen. Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994). We review the trial court's decision only to determine if its "ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co.*, ___ N.C. ___, ___, 797 S.E.2d 264, 269 (2017).

The Davis Defendants contend that the trial court abused its discretion by taxing costs and attorney's fees solely against the Davis Defendants, because the Cost Order was contradictory to the "law of the case" established in the first appeal, where we affirmed the trial court's order granting Plaintiff judgment on the pleadings, including costs, against all Defendants. *See N.C. Nat'l Bank v. Va. Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983) ("Once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case."). Specifically, the Judgment, which we affirmed in the first appeal, included a decree that "[c]osts are taxed

to the defendants." The Davis Defendants read this decree to mean that costs are to be taxed against *all* the Defendants. We disagree.

The Judgment dealt at length with the merits of the underlying case. The Judgment established Plaintiff's rights in the condominium property, and spoke to the assignment of fees and costs only insofar as costs were to be "taxed to the defendants." We do not find the language of the Judgment, which did not determine the *amount* of costs, to be conclusive on how the costs were to be allocated among the defendants. We are unpersuaded by Plaintiff's argument that the language in the Judgment amounts to the law of the case which determined how the costs were to be allocated. Further, it is clear from the procedural history of this case that the issue of fees and costs was not conclusively decided until the Costs Order. The Judgment determined the rights of the parties, while the Costs Order thoroughly set out the amount of the costs awarded and each defendant's obligations with regard to the award.

The Davis Defendants also contend that the trial court lacked the statutory authority necessary to grant attorney's fees which Plaintiff incurred in the first appeal. Specifically, the Davis Defendants argue that N.C. Gen. Stat. § 47C-4-117, the statute under which the trial court awarded attorney's fees, should have been construed strictly to allow an award of attorney's fees generated only from trial proceedings. We disagree.

It is true that courts may not award attorney's fees (and costs) without statutory authority to do so, *Hicks v. Albertson*, 284 N.C. 236, 238, 200 S.E.2d 40, 42 (1973), and that such authority is generally to be construed strictly according to its express terms. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991). However, when the ability to grant attorney's fees is assigned in a non-remedial spirit, fees and costs may be granted from "all stages of litigation, including on appeal." *McKinnon v. CV Indus., Inc.*, 228 N.C. App. 190, 199, 745 S.E.2d 343, 350 (2013) (holding that unlike attorney's fees awarded under N.C. Gen. Stat. § 6-21.5 (2013), the grant of attorney's fees under N.C. Gen. Stat. § 75-16.1 (2013) is "not confined solely to the trial level"); *see United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 192, 437 S.E.2d 374, 380 (1993) (explaining the purpose of a chapter-specific attorney's fee statute as to encourage private enforcement, rather than simply punitive). This Court has previously held that N.C. Gen. Stat. § 47C-4-117 is a specific grant of authority to award attorney's fees in condominium association cases, which supersedes more general attorney's fee statutes. *Brockwood Unit Ownership Ass'n v. Delon*, 124 N.C. App. 446, 448-49, 477 S.E.2d 225, 226 (1996).

We now hold that N.C. Gen. Stat. § 47C-4-117 is a non-remedial grant to award attorney's fees, and may thereby be construed broadly to allow an award including fees incurred on appeal. Chapter 47C of the North Carolina General Statutes contains the North Carolina Condominium Act, including a specific grant of authority to award attorney's fees in actions under the Chapter.

We recognize the Davis Defendants' argument in their brief that the language of N.C. Gen. Stat. § 47C-4-117 does not expressly grant the authority to grant fees incurred on appeal. However, we need not construe this statute so strictly. The statute vests a cause of action in any person, or class of person, adversely affected by a condominium association's failure to comply with any provision of either Chapter 47 of the North Carolina General Statutes, or of the association's bylaws. N.C. Gen. Stat. § 47C-4-117 (2015). In order to promote actions by private actors under this cause of action, the statute further grants authority to the reviewing court to grant reasonable attorney's fees to a prevailing party. *Id.* It is clear from the position of N.C. Gen. Stat. § 47C-4-117 within Chapter 47C, and the granting language as a whole, that the statute was designed to convey the ability to prosecute an action notwithstanding the threat of overbearing fees, whether at the trial level or the appellate level.

We find no error in the trial court's Costs Order, as it acted within its sound discretion to determine the amount of attorney's fees and costs and tax them against the Davis Defendants, and we thereby affirm.

AFFIRMED.

Chief Judge McGEE and Judge ELMORE concur.

PLUM PROPERTIES, LLC, PLAINTIFF
v.
JAVENO NAJAHWANN HOLLAND, TARA LATRICE DIALLO FORMERLY TARA LATRICE COVINGTON, DONALD RAY LITTLEJOHN, JR., JEREMY TUCKER, DELISA L. THOMPSON (A/K/A DELISA L. SPARKS AND TUCKER), ARNOLD F. SPAUGH, MATEJ SELAK, SABAHETHA SELAK, JUSTIN LASHAWN WILLIAMS AND IRMA ELIZABETH ZIMMERMAN, DEFENDANTS

No. COA17-50

Filed 21 November 2017

Negligence—failure to supervise minor children—vandalism—partial summary judgment—no reason to suspect or opportunity to exercise control

The trial court did not err by granting partial summary judgment in favor of defendant parents on the issues of negligence and failure to supervise minor children where defendants had no reason to suspect their sons would break into and vandalize plaintiff's property, nor would they have had an opportunity to exercise control over the boys who snuck out. Testimony stating that the boys had engaged in destructive acts in the past was inadmissible hearsay.

Appeal by Plaintiff from order entered 5 June 2014 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 9 August 2017.

Gregory A. Wendling, for Plaintiff-Appellant.

Teague, Rotenstreich, Stanaland, Fox & Holt, PLLC, by Stephen G. Teague, for Defendant-Appellees.

MURPHY, Judge.

Where property owners were damaged by the intentional acts of minor children, the parents cannot be held liable if they did not know or should not have known of the necessity for exercising such control. The minors' "sneaking out" and resulting injury to personal property could not have been prevented by the exercise of reasonable care by the parents. Summary judgment is proper in favor of defendants when plaintiffs can show no genuine issue of material fact to support their claims that the parents were negligent or in breach of duty to supervise their minor children.

Plum Properties, LLC ("Plaintiff") sued in Guilford County Superior Court on claims of negligence, breach of parent's, guardian's, and/or responsible adult's duty to supervise minor children, trespass to real and personal property, private nuisance, parental strict liability for destruction of property by minors, and punitive damages against the above named Defendants. The trial court granted a motion for partial summary judgment for Sabahetha Selak and Delisa Sparks ("Defendants") dismissing the claims of negligence, breach of parent's, guardians's and/or responsible adult's duty to supervise minor children, trespass to real and personal property, private nuisance, and punitive damages.[1] Defendants did not move for summary judgment as to the complaint of parental strict liability for destruction of property by minors. After a bench trial, judgment was entered against Defendants in favor of Plaintiff on 26 August 2016 for $6,0000 each. On appeal, Plaintiff argues that genuine issues of material facts as to its claims of negligence and failure to supervise minor children exist relative to Defendants, and thus partial summary judgment was not appropriate. We affirm the trial court's order, concluding that there were no genuine issues of material fact existing relative to Defendants, and thus partial summary judgment by the trial court was appropriate.

Background

On three separate occasions between 5 to 21 November 2010, Defendants Javeno Holland, Justin LaShawn Williams, Matej Selak, and Jeremy Tucker broke into and vandalized four neighborhood properties owned by Plaintiff. At the time of the vandalisms, Defendants Matej Selak and Jeremy Tucker were both juveniles and lived with their mothers, Sabahetha Selak and Delisa L. Sparks, respectively. Defendants Matej Selak and Jeremy Tucker testified that, on each occasion of vandalism, they had "snuck out" of the Defendant Delisa Sparks's residence.

Defendants testified that they had no prior knowledge of their sons sneaking out of the Sparks's residence. Although Matej Selak and Jeremy Tucker both admitted to trying marijuana once, both parents also testified that they did not know of their respective sons using marijuana prior to 2010. Both parents kept reasonable rules concerning their children's curfew and behavior. Matej Selak admitted that he had snuck

1. Our Court has jurisdiction for determination of this appeal under N.C.G.S. §§ 7A-27(b)(1) and 1-277(a) (2015), as the Order Granting Motion for Partial Summary Judgment is now ready for appeal as there have been final judgments entered in the underlying action. Plaintiff does not argue nor cite authority in its brief in support of its claim for nuisance, trespass, or punitive damages. These claims are deemed abandoned. N.C.R. App. P. 28(b)(6) (2016).

out of his mother's house on two occasions. Jeremy Tucker testified that he too had snuck out of his mother's house "once or maybe twice." Both Matej Selak and Jeremy Tucker testified that they had not previously engaged in vandalism or acts of property damage.

Defendant Javeno Holland testified that he had heard that Matej Selak had been involved in "something about him messing up [a] football field", and that Jeremy Tucker had been involved previously in an act of vandalism with Jeremy's uncle, although he could provide no details for either claim or vouch for whether or not they were true.

Analysis

"Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted). Summary judgment is appropriately granted if the movant can prove that "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.G.S § 1A-1, Rule 56 (2015); *In re Estate of Redding v. Welborn*, 170 N.C. App. 324, 329-30, 612 S.E.2d 664, 668 (2005). The movant may meet its burden "(1) by showing an essential element of the opposing party's claim is nonexistent or cannot be proven, or (2) by showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 84, 590 S.E.2d 15, 18 (2004). Upon production of evidence supporting the motion for summary judgment, the burden then shifts to the non-movant to produce evidence of a prima facie case at trial. *Welborn*, 170 N.C. App. at 329, 612 S.E.2d at 668. Here, Plaintiff failed to meet its burden on the elements of its claims for negligence and breach of parent's, guardians's, and/or responsible adult's duty to supervise minor children by failing to produce any admissible evidence of a prima facie case at trial.

"The correct rule is that the parent of an unemancipated child may be held liable in damages for failing to exercise reasonable control over the child's behavior if the parent *had the ability and the opportunity to control the child and knew or should have known of the necessity for exercising such control*." *Moore v. Crumpto*n, 306 N.C. 618, 623, 295 S.E.2d 436, 440 (1982) (citations omitted) (emphasis added).

In *Moore*, our Supreme Court held that the parents were not liable for negligent parental supervision of their seventeen year old minor, who threatened and raped a woman. The minor had a history of substance abuse, regularly using marijuana and other controlled substances. The

parents were aware of the substance abuse at all times. The minor was also in possession of a number of weapons given to him by his parents. The parents were aware of his instability, but left him home alone while going on vacation. During this time, the minor took a number of drugs, and broke into a girl's house, and raped her. *Id.* at 621-25, 295 S.E.2d at 439-41. There were discrepancies in the testimony which suggested that Moore's father may have been home and asleep when the child snuck out. *Id.* at 626, 295 S.E.2d at 442.

Our Supreme Court determined that the parents had no opportunity to control their child. "Short of standing guard over the child twenty-four hours a day, there was little that the defendant father could do to prevent [the minor] from leaving the home after the father was asleep." *Id.* at 626-27, 295 S.E.2d at 442. Our Supreme Court also determined that after midnight, when the parents were typically asleep, was "a time when parents ordinarily would not be expected to be engaged in maintaining surveillance of their children." *Id.* at 626, 295 S.E.2d at 442. Furthermore, the Supreme Court found that even with the plethora of evidence showing the parents were aware of his previous issues and substance abuse problems, this awareness did not "support a conclusion that the father knew or should have known that his failure more closely to control [the minor] would result in generally injurious consequences to anyone other than, perhaps, [the minor]." *Id.* at 628, 295 S.E.2d at 443.

In the instant case, Defendants had no reason to suspect their sons would break into and vandalize Plaintiff's property, and they would not have had an opportunity to exercise control over them. On each occurrence of vandalism, the boys "snuck out" while Delisa Sparks was asleep and while the boys were supposed to be asleep at the Sparks's home in the late night or early morning hours of the day. These are hours, as stated in *Moore*, when parents would ordinarily be expected to be in bed and not expected to be surveilling their children. Furthermore, the parents did not have any indication their children were out to cause any trouble in the neighborhood. While the boys admitted to trying marijuana previously and admitted such to their parents, this was not an indication that they would engage in destructive behavior.

The testimony given by Javeno Holland stating that the boys had engaged in destructive acts in the past is inadmissible hearsay, and cannot be used to meet the burden of production necessary to defeat summary judgment for Defendants. In order to support a motion for summary judgment, affidavits and accompanying evidence must be made on "personal knowledge, . . . [and] *be admissible in evidence*." N.C.R. Civ. P. 56(e) (2017) (emphasis added). Inadmissible hearsay evidence cannot

be used in opposition to a motion for summary judgment. *Rankin v. Food Lion*, 210 N.C. App. 213, 220, 706 S.E.2d 310, 315 (2011) (holding that hearsay evidence should not be considered with respect to a motion for summary judgment).

While Javeno Holland testified that he heard Matej Selak had "messed up" a football field at one time, and that Jeremy Tucker once reported an incident of vandalism involving his uncle, Holland was neither testifying of his own personal knowledge, nor were the statements by a party opponent. This testimony is inadmissible hearsay. Assuming, *arguendo*, this testimony had been admissible, these events would not rise to the level required under *Moore* or alert the parents that they should have known that their sons would commit vandalism, as they had no recent information to indicate that another such instance might occur. *Moore*, 306 N.C. at 627, 295 S.E.2d at 442.

Conclusion

The trial court correctly found that there were no genuine issues of material fact as to the preserved claims against Defendants. Accordingly, we affirm Judge Bray's grant of partial summary judgment in Defendants' favor.

AFFIRMED.

Judges HUNTER, JR. and JUDGE DAVIS concur.

STATE OF NORTH CAROLINA
v.
CARLOUSE LATOUR ALLBROOKS, DEFENDANT

No. COA16-741

Filed 21 November 2017

1. Evidence—eyewitness signed statement—corroboration

The trial court did not abuse its discretion in a first-degree murder case by allowing into evidence an eyewitness's signed statement provided to the police, over defendant's objection, as corroboration of the witness's trial testimony where it did not materially differ.

2. Homicide—first-degree murder—no instruction on lesser-included offense—voluntary manslaughter

The trial court did not err in a first-degree murder case by failing to instruct the jury on the lesser-included offense of voluntary manslaughter where the State's evidence was positive for all the elements of first-degree murder and there was no evidence that defendant acted in "the immediate grip of sufficient passion" to require instruction on the lesser offense.

3. Constitutional Law—double jeopardy—hung jury—retrial

The prohibition against double jeopardy did not prevent defendant's retrial for first-degree murder where his previous trial ended in a hung jury.

Appeal by defendant from judgment entered 8 January 2016 by Judge James M. Webb in Superior Court, Moore County. Heard in the Court of Appeals 9 March 2017.

Attorney General Joshua H. Stein, by Senior Deputy Attorney General Alexander McC. Peters, for the State.

M. Gordon Widenhouse, Jr., for defendant-appellant.

STROUD, Judge.

Defendant appeals his conviction and judgment for first degree murder. Where the written witness statement provided to police soon after the incident was presented by the State to corroborate her trial testimony, we find that the statement did not materially differ from her

trial testimony, so the trial court properly allowed the statement for this purpose. The trial court also correctly instructed the jury only on first degree murder and not voluntary manslaughter, since the State's evidence was positive as to all of the elements of first degree murder, and there was no evidence that defendant acted in "the immediate grip of sufficient passion" to require instruction on a lesser offense. We therefore conclude that there was no error in defendant's trial.

I. Background

The State's evidence tended to show that on 12 September 2013, defendant was trying to get into Shannon Smith's home while she, her boyfriend Tyrone Allmond, and her children were inside. Ms. Smith yelled at defendant to leave and eventually threw a chair at him. Mr. Allmond told defendant to leave; the two continued to have "some words[,]" and then defendant shot Mr. Allmond who died from his gunshot wounds. Defendant was indicted for murder and found guilty by a jury of first degree murder. The trial court entered judgment and sentenced defendant to life imprisonment without parole. Defendant appeals.

II. Out-of-Court Statement

[1] An eyewitness had provided a signed statement to the police which the State later introduced at trial over defendant's objection. The statement read:

> Tyrone Allmond was at my mother's house, Kimberly Durant . . . . It was me, my sister and my cousin, Tyrone. Ma was in bed. Me and my sister was in the room playing with my son. Tyrone came in and said, Cuz, come up to the top of the hill and let's talk. . . .
>
> He told Ma bye and he left. I asked my sister Ty'Onika to watch my baby. So I got him ready for bed and put him down. It had to be after 10:00 o'clock p.m. but I remember telling my sister 10:47 when she asked about the time.
>
> By this time Shanda, my cousin, had came down. I asked her to walk with me up to the top of the hill, and she did. . . . We were by Edwina Hainey's apartment when I heard Shannon, Tyrone's girlfriend, fussing. She was fussing about something on FaceBook and Twitter. She was loud and that drew attention.
>
> A group of guys started getting closer. She was coming out of Ms. Edwina's apartment. As I was getting close Tyrone had walked up. Shannon was walking back to her

> apartment and Tyrone was following. He was like, Get the kids inside, wash them up. It's a school night. The kids were outside running around. There are two of them.
>
> Tyrone goes in the apartment followed with the kids, then Shannon. Just then Smoke[, defendant,] started in the apartment and Shannon told him to get out. Smoke tried to push his way in. Shannon threw a chair at Smoke. That's when Tyrone got in the middle and told Smoke to leave. He was like, "Just leave. Go on ahead, just leave." Smoke was like, "Word, Word Bone." Bone was like, "What, what you mean?" Smoke was like, "All right, Bones, all right." That's when Smoke pulled a little handgun like a little smaller than yours. Smoke started shooting at Bones. Bones started to run, but couldn't get far before he collapsed.
>
> After I saw my cousin drop, I ran to my mama's house and told her Smoke was -- and told her. Smoke was wearing a black shirt and blue jeans. They could have been shorts because you know how they sag. It wasn't long after the shooting I went back up the hill after I told Ma about it. I've known Smoke my whole life growing up and have seen him around.
>
> All this is what I saw. No one has made any threats or promises against me for me to say this. I don't know Smoke's real name but his last name's Allbrooks. I remember now his first name is Carlouse. Bones is a nickname we call my cousin Tyrone Allmond.

The trial court allowed the jury to hear the testimony "not for the truth of the matters asserted therein *but to determine whether or not State's Exhibit 3A does or does not corroborate the testimony of Bre'Onica Durant*." (Emphasis added.) Defendant contends that the trial court erred in overruling his objection and allowing the witness to testify to the out-of-court statement "where it added critical details that were not otherwise shown by the evidence[.]" (Original in all caps.)

"A trial court's determination that evidence is admissible as corroborative evidence is reviewed for abuse of discretion." *State v. Cook*, 195 N.C. App. 230, 243, 672 S.E.2d 25, 33 (2009).

> Prior consistent statements of a witness are admissible for purposes of corroboration even if the witness has not been impeached. When so offered, evidence of a prior consistent statement must in fact corroborate a

> witness's later testimony; however, there is no requirement that the rendition of a prior consistent statement be identical to the witness's later testimony. Slight variances in the corroborative testimony do not render it inadmissible. 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.
>
> > In order to be admissible as corroborative evidence, a witness' prior consistent statements merely must tend to add weight or credibility to the witness' testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates.
>
> Moreover, if the previous statements are generally consistent with the witness' testimony, slight variations will not render the statements inadmissible, but such variations affect only the credibility of the statement. On the other hand, the witness's prior statements as to facts not referred to in his trial testimony and not tending to add weight or credibility to it are not admissible as corroborative evidence; additionally, the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony.

State v. Walker, 204 N.C. App. 431, 435–36, 694 S.E.2d 484, 488–89 (2010) (citations, quotation marks, ellipses, and brackets omitted).

Defendant argues that the statement added the following "critical facts": defendant

> purportedly said to Tyrone Allmond ("Word, Word Bone") and a description of Mr. Allbrooks "pulling a little handgun like a little small[er] than yours" and "started shooting at [Tyrone]" at which Tyrone "started to run but couldn't get far before he collapsed."

First, many of the "critical facts" noted by defendant are present in both the witness's statement and testimony. For instance, the witness testified, "He was like, " 'Word, Bone,' 'Word, Bone[,]' " and "that's when the

shots started going off, and I seen my cousin running." But other facts noted by defendant as "critical facts" are not critical facts. Both the witness's statement and trial testimony agreed that defendant approached Ms. Smith's apartment, Mr. Allmond told him to leave, an argument ensued, and defendant shot Mr. Allmond. "[S]light variations will not render statements inadmissible[,]" *id.*, 204 N.C. App. at 436, 694 S.E.2d at 488, and thus the trial court did not abuse its discretion in allowing in the out-of-court statement for corroboration of the witness's testimony. *See Cook*, 195 N.C. App. at 243, 672 S.E.2d at 33. This argument is overruled.

III. Lesser-Included Offense Instruction

[2] Defendant next argues that the trial court erred in failing to instruct the jury on the lesser-included offense of voluntary manslaughter. "A trial court's decision not to give a requested lesser-included offense instruction is reviewed *de novo* on appeal." *State v. Matsoake*, ___ N.C. App. ___, ___, 777 S.E.2d 810, 814 (2015), *disc. review denied*, 368 N.C. 685, 781 S.E.2d 485 (2016).

> The trial court must instruct the jury upon a lesser-included offense when there is evidence to support it. 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.
>
> 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.

Id. at ___, 777 S.E.2d at 814–15 (citations, quotation marks, and brackets omitted).

Defendant contends that when he "responded to Tyrone's words or his non-lethal assault, . . . [he] was acting under the immediate grip of sufficient passion so as to be guilty of at most voluntary manslaughter." Defendant did not testify nor did any witnesses testify on his behalf. The evidence offered from the State indicated defendant was the initial aggressor in the incident, and he was the only one to make any threats or to perform any violent actions. There is simply no evidence to support "the immediate grip of sufficient passion" for the purposes of a voluntary manslaughter instruction. *See State v. Long*, 87 N.C. App. 137, 141, 360 S.E.2d 121, 123 (1987) ("The court is required to instruct the jury as to a lesser included offense only when there is evidence from which

the jury could find that such lesser offense was committed. Voluntary manslaughter is a lesser included offense of murder and is defined as the unlawful killing of a human being without malice, premeditation or deliberation. Killing another while under the influence of passion or in the heat of blood produced by adequate provocation is voluntary manslaughter. To reduce the crime of murder to voluntary manslaughter, the defendant must either rely on evidence presented by the State or assume a burden to go forward with or produce some evidence of all elements of heat of passion on sudden provocation." (citations and quotation marks omitted)). This argument has no merit.

IV. Double Jeopardy

[3] Lastly, defendant "preserve[s]" the argument that the trial court erred in denying his motion to dismiss because "the constitutional prohibition against double jeopardy prevented him from being tried a second time after the first trial ended when the jury could not reach a unanimous verdict." (Original in all caps.) Defendant acknowledges that our courts have already rejected his contention but raises it "to preserve the matter for further review." Indeed, "[t]he courts in this country have long held that the prohibition against double jeopardy does not prevent defendant's retrial when his previous trial ended in a hung jury." *See State v. Odom*, 316 N.C. 306, 309, 341 S.E.2d 332, 334 (1986). We note defendant's attempt to preserve the issue.

V. Conclusion

For the foregoing reasons, we determine there was no error.

NO ERROR.

Judges DIILLON and MURPHY concur.

STATE v. COX

[256 N.C. App. 511 (2017)]

STATE OF NORTH CAROLINA
v.
JUJUAN MAQUIS COX, DEFENDANT

No. COA17-188

Filed 21 November 2017

1. Appeal and Error—appealability—motion to dismiss motion for appropriate relief—lack of jurisdiction

The Court of Appeals allowed defendant's motion to dismiss his motion for appropriate relief in a multiple murder case and vacated the trial court's order on the motion due to lack of jurisdiction.

2. Homicide—first-degree murder—motion to dismiss—sufficiency of evidence—lying in wait

The trial court did not err by denying defendant's motion to dismiss a first-degree murder charge on the theory of lying in wait where the victim was taken by complete surprise and had no opportunity to defend himself.

3. Appeal and Error—preservation of issues—failure to move to dismiss—failure to argue insufficient elements of charge

Although defendant contended the trial court erred by denying defense counsel's motion to dismiss a charge of second-degree murder, defendant failed to preserve this issue for appellate review where the trial transcript showed defendant neither moved to dismiss the charge nor argued there was insufficient evidence of the elements.

4. Assault—deadly weapon with intent to kill—motion to dismiss—sufficiency of evidence—intent to kill

The trial court did not err by denying defendant's motion to dismiss a charge of assault with a deadly weapon with the intent to kill inflicting serious injury where there was sufficient evidence for the jury to infer that defendant intended to kill whoever was inside a trailer he knew was occupied when he fired numerous shots into it.

5. Assault—deadly weapon with intent to kill inflicting serious injury—jury instruction—transferred intent

The trial court did not err by failing to instruct the jury on the doctrine of transferred intent for a charge of assault with a deadly weapon with the intent to kill inflicting serious injury where the State did not argue transferred intent at trial and neither party requested this instruction.

6. Jury—jury instructions—deadlocked jury—continue deliberations

The trial court did not err in a multiple murder case by allegedly giving the jury a coercive instruction after the jury informed the trial court it was deadlocked where the trial court's instructions to the jury to continue its deliberations were in accordance with N.C.G.S. § 15A-1235(b).

7. Constitutional Law—effective assistance of counsel—dismissed without prejudice

Defendant's claims of ineffective assistance of counsel in a multiple murder case were dismissed without prejudice to assert claims during a later motion for appropriate relief proceeding.

Appeal by Defendant from judgment entered 21 October 2015 by Judge J. Carlton Cole in Wayne County Superior Court. Heard in the Court of Appeals 24 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Steven M. Arbogast for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Jujuan Maquis Cox ("Defendant") appeals from a 21 October 2015 judgment entered after a jury convicted him of first-degree murder, second-degree murder, attempted first-degree murder, two counts of assault with a deadly weapon with intent to kill, and five counts of discharging a weapon into occupied property. Defendant argues the trial court erred by: (1) failing to dismiss the first-degree murder charge on the theory of lying in wait; (2) failing to dismiss the charge of second-degree murder; (3) failing to dismiss the charge of assault with a deadly weapon with the intent to kill inflicting serious injury ("AWDWIKISI"); and (4) giving a coercive jury instruction after the jury repeatedly stated it was deadlocked. Defendant also argues ineffective assistance of counsel. We find the court committed no error on the issues raised on appeal and dismiss Defendant's claim of ineffective assistance of counsel without prejudice to refile the claim in a Motion for Appropriate Relief.

I. Procedural and Factual Background

On 5 August 2013, a grand jury indicted Defendant on multiple counts of first-degree murder, attempted first-degree murder,

AWDWIKISI, discharging a firearm into an occupied dwelling, and two counts of discharging a firearm into an occupied vehicle. The State tried Defendant on the following: two charges of first-degree murder, two charges of attempted first-degree murder, two charges of AWDWIKISI, three charges of discharging a firearm into an occupied dwelling, and two charges of discharging a firearm into an occupied vehicle in operation.

On 12 October 2015, the trial court called Defendant's case for trial. The State's evidence tended to show the following. The State first called Aaron Michael Cantwell ("Cantwell") with the Wayne County Sheriff's Office. While on duty on 2 December 2012, Cantwell received a "shots fired" call over the radio as he was driving. Upon arrival at the scene, Cantwell saw another officer's patrol car approach. Cantwell then spoke to a man walking on a path crossing Mt. Olive Road, when he heard a female voice crying for help. The two officers approached the screaming woman, who directed them to a trailer. Cantwell entered the trailer through its back door, and heard a "painful holler."

Advancing into the trailer, Cantwell saw three victims lying on the floor. The first man Cantwell saw was shot and immobile. The second man, later identified as Trae Stokes ("Stokes"), was also shot, but was "coherent and yelling." Cantwell noticed a .40 caliber Glock handgun under some clothing between the unconscious individual and Stokes. Cantwell instructed the other officer to keep people from entering the trailer. Cantwell then "secured" the weapon by locking it in the trunk of his car, and called EMS. Upon arrival, EMS initially treated Stokes in the trailer's kitchen. EMS then "removed and transported [Stokes] to Wayne Memorial Hospital." While EMS treated Stokes, Cantwell checked the other two individuals for signs of life.

The State next called Stokes. Stokes and the victim, Jamal Anthony Kornegay ("Kornegay"), had a fifteen year-long friendship. Stokes also knew the other victims Leonard Darden ("Darden") and Nakiea Felicia Garner ("Garner"). Stokes recognized Defendant in the courtroom, and stated they attended school together their entire lives. Stokes was "absolutely" familiar with Defendant's voice.

On 2 December 2012, Stokes drove to Kornegay's trailer. Upon entering the trailer, Stokes saw Kornegay, Garner, and Darden sitting around the kitchen table. Stokes saw Defendant drive his van outside Kornegay's trailer.

At this point, Kornegay went outside. Kornegay returned within 10 seconds and stated, "Juan outside on that bullshit." Stokes knew Kornegay referred to Defendant. Stokes then heard Defendant yell from

outside, "tell your bitch ass home boy [Darden] to come outside." About three seconds later, Stokes heard gun shots and ran into another room. "After that it was just multiple shots came [sic] through the trailer."

Stokes knew the shots went through the trailer, "[b]ecause you could see the debris as they hit." Stokes stated Kornegay and Garner stayed in the kitchen, on the floor:

> As I heard shots I'm laying in this doorway, like laying in the doorway. As I heard shots I peeked out, and I see that [Kornegay] has a pool of blood up under his chest because he's face-down, but he has a pool of blood so I'm trying to see where he's shot. As I'm sliding out, [Garner] raise her head up, and I seen that she had got shot . . . I slid across the floor like right here. I got in between both of them trying to assess their wounds.

As Stokes slid across the room towards Kornegay and Garner, Stokes received a shot in his leg. After Stokes was shot, he heard more shots. He remained still until the police arrived.

The shots subsided, and Darden exited a different room. Stokes told Darden to leave and to call an ambulance. Stokes "[saw Darden] go out the back door," and he "heard his car leave." Once Darden "got about to the top of the path pulling out on to the highway[,]" Stokes heard more shots. Stokes saw Kornegay's handgun and took it in case someone entered the trailer.

At this point, Stokes saw Thompson enter the trailer. Stokes told Thompson to call an ambulance. Thompson left and the police arrived shortly thereafter.

Stokes admitted he lied to the Sheriff's deputies when they interviewed him in the hospital. Stokes told members of the Sheriff's Department he did not recognize Defendant's voice, when he actually did. Stokes felt "the police that we have in Wayne County, they don't really do their job on murders, so I would much rather handle it myself."

The State next called Darden. Darden knew Defendant, Kornegay, and Garner for ten years. Darden also knew Stokes and Thompson. According to Darden, Kornegay lived alone and possessed a .40 caliber Glock handgun. On 2 December 2012, Darden visited Kornegay at Kornegay's trailer. Stokes and Garner arrived later. Kornegay received a phone call from Thompson and went outside for about three to five minutes. Kornegay then came back inside and said, "[Defendant] outside on that bullshit." As Darden stood in the hallway with Kornegay, he

heard approximately ten gunshots. More gunshots continued for fifteen minutes. Kornegay walked past a window to check on Garner, and he received a shot in the head. Garner received a shot in her head as she jumped to grab Kornegay.

Darden went to Kornegay, and noticed his faint breath. Darden also noticed Stokes's leg wound. After the shooting stopped, Darden ran out the back door and jumped into his vehicle. Defendant stood by the trailer's driveway with an assault rifle. Darden drove down the path toward Old Mt. Olive Highway, and Defendant shot at Darden's vehicle. Darden saw police lights at the highway. Darden then pulled up in front of the police, and told them Defendant shot him in the arm.

Thompson testified next for the State. Thompson and Defendant knew each other all their lives. Thompson visited Kornegay the evening of the shooting. Initially, Thompson remained in his car, and saw Defendant's van. He also saw Defendant exit the van while holding a rifle. Thompson yelled for Kornegay to come outside and also called out Defendant had a rifle. Thompson heard Defendant yell, "tell your pussy ass home boy[Darden] to come outside." Thompson testified as he left Kornegay's trailer:

> I back up, I go back where [Defendant] was, and ah -- I tell him, I said man, you need to leave before you do something you regret tonight. He said whatever, whatever I do tonight I make bond off tomorrow; so I pull up a little bit, a few feet, I stop because I get a feeling like, yo, I roll the window down, I said Jujuan Cox, you better not shoot in my car when I drive off. He says to me Antonio Thompson, I don't have no problems with you; I got a problem with your cousin. So I drives off. I get to the end of the path. When I get on the highway I hear gunshots, so I start calling [Kornegay's] phone and he won't pick up.

Thompson then phoned Stokes. Stokes told Thompson everyone in the house was shot. Thompson travelled back toward Kornegay's trailer. On his way, Thompson saw the police stop at the trailer. The police talked to an unknown man by Defendant's van. Thompson returned and entered the trailer before the police arrived. Thompson saw everyone was shot. Only Stokes was alive, but he suffered a shot in his leg. Thompson then heard several more gunshots.

The State rested. At the close of the State's evidence, Defendant moved to dismiss the two first-degree murder charges, the attempted first-degree murder charges, the assault with a deadly weapon with

intent to kill, and the shooting into an occupied dwelling and an occupied vehicle. Defendant's trial counsel specifically argued "there's been not one scintilla of evidence that the [D]efendant, with malice aforethought, which is intent to kill or premeditation or deliberation has been presented in this case concerning either Jamal Anthony Kornegay or Neekea Felicia Garner." Defendant's counsel further argued, "there's been no evidence whatsoever presented in this courtroom by anyone that the [D]efendant unlawfully, willfully and feloniously and of malice aforethought, which again is intent to kill with premeditation and deliberation, attempted to kill or murder Trey Stokes." In response, the State argued, "looking at the evidence in the light most favorable to the State . . . [the evidence sufficiently] shows an intent to kill." The trial court denied Defendant's motions.

Counsel for the defense presented an alibi witness, Maurice Whitehead ("Whitehead"). Whitehead was friends with Defendant's aunt, Dorothy Cox ("Cox"). Whitehead recalled at the time of the shooting, Defendant was with him at Cox's house watching a football game. However, Whitehead also recalled Defendant leaving with his van sometime after 10:00 p.m.

At the close of all the evidence, Defendant renewed his motions to dismiss the charge of first-degree murder of Kornegay, the charge of first-degree murder of Garner, and the charge of assault with a deadly weapon with intent to kill inflicting serious injury of Stokes. Defense counsel argued, "there is not one scintilla of evidence that's been offered that the Defendant fired any shots killing anybody." The trial court denied both Defendant's motions.

During the charge conference, defense counsel objected to the jury instruction of acting in concert. The trial court allowed the instruction to go to the jury. Defendant's counsel also objected to the trial court's instructing the jury on three different theories of murder. The State responded, "the State's not required to pick a theory. We contend the evidence is there for all three of these [theories]." The trial court noted for the record Defendant did not object to the State proceeding on the felony murder rule. However, the trial court noted Defendant's objection to the case proceeding on the theories of premeditation and deliberation and lying in wait. In its discretion, the trial court allowed instructions on all three murder theories to go to the jury. Defendant did not object to the jury instruction for AWDWIKISI.

The jury began to deliberate at 10:57 a.m. About an hour and a half later, the jury submitted a note to the trial court stating "We cannot come

to a unanimous decision on any of the charges against [Defendant]." The trial court said to counsel, "I'll hear from you at this time as to how we can proceed." The State responded, "at some point we need to give the *Allen* charge[.]" Defense counsel agreed.

After lunch, the trial court gave the jury an *Allen* charge:

> Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, it if can be done without violence to individual judgment. Each juror must decide the case for himself or herself, as the case may be, but only after impartial consideration of the evidence with his fellow jurors - - his or her fellow jurors. In the course of deliberations a jury should not hesitate to re-examine his or her own views and change his opinion if convinced it is erroneous, and no juror should surrender his or her honest conviction as to the weight or effect of evidence solely because of the opinion of his or her fellow jurors, or for the mere purpose of returning a verdict. I'm going to ask that you go back in and continue your deliberations.

At 2:22 p.m., the jury requested copies of Darden's, Stokes's, Thompson's and Whitfield's transcripts. The trial court denied the request and instructed the jury to rely on its recollection. Defense counsel did not object. At 2:55 p.m., the jury sent the trial court a note stating, "After several attempts to resolve the issues the dissenting jurors have . . . it is impossible for the jurors to agree with the majority of the jurors." The trial court stated:

> What I would propose is that we - - I read those instructions again, jurors have a duty to consult with one another, to deliberate with a view toward . . . with a view to reaching an agreement if it can be done without violence to individual judgment. Each juror must decide the case for him or herself, but only after an impartial consideration of the evidence with his or her fellow jurors. . . .

Defense did not object, but stated:

> Just, your Honor, the only thing that kind of concerned me was telling them that they needed to try to reach a verdict, and then I just - - I, I mean if they can't they can't, you know. I don't know. That would be the only issue; everything else was fine.

At 3:43 p.m., the trial court received a third note from the jury stating, "[W]e cannot come to a same verdict. Neither side is going to agree. The jurors are still firm to their decision." The jury had been deliberating for less than 5 hours at this point, and the trial court stated "I am, at this time, not prepared, in my discretion, to declare a mistrial." The trial court gave the following instructions:

> I'm going to send you back with those same instructions that I've given you earlier. And while you are back there, you decide whether you all want to work after 5:00 or end at 5:00 and come back tomorrow. You take a vote and let us know. But after 5 days of testimony and less than 5 hours of deliberations, these folks deserve better.

Defense counsel did not object. The jury decided to continue deliberations after a recess. The trial court arranged to have a meal delivered to the jury.

At 6:10 p.m., the jury reached a verdict, finding Defendant guilty of the following: (1) first-degree murder of Kornegay on the theory of lying in wait; (2) second-degree murder of Garner; (3) attempted first-degree murder of Darden; (4) two counts of assault with a deadly weapon with intent to kill inflicting serious injury of Darden and Stokes; (5) three counts of discharging a weapon into occupied property; and (6) two counts of discharging a firearm into an occupied vehicle.

As to the first-degree murder of Kornegay, the trial court sentenced Defendant to life without parole. As to the second-degree murder of Garner, the trial court sentenced Defendant to a minimum of 276 months and a maximum of 344 months, to run at the expiration of Defendant's sentence of life without parole. The trial court consolidated the rest of the judgments into the attempted first-degree murder of Darden. For that charge, the trial court sentenced Defendant to a minimum of 180 months and a maximum of 228 months, to run at the expiration of the second-degree murder sentence. Defendant then orally gave notice of appeal.

[1] On 29 January 2016, Defendant, through trial counsel, filed a motion for appropriate relief in Wayne County Superior Court. The trial court heard the motion on 6 April 2016. In the motion, Defendant contended Defendant's counsel learned juror Number 4 approached Defendant's family in the parking lot after the verdict. Juror Number 4 was crying and told Defendant's family the "Judge forced [the jury] to make a guilty verdict." Upon receiving this information, defense counsel contacted a private investigator to investigate this issue. Juror Number 4 told the

private investigator "the judge did enter the jury room before deliberations were met." Another juror also "stated the judge did enter the jury room before the jury deliberated and [that juror] felt pressured to find [Defendant] guilty." Based on these assertions, Defendant's counsel requested the trial court to hold an evidentiary hearing.

The trial court responded, "Well, under State statute a juror is not competent to testify as to what goes on in the jury room." Therefore, the trial court denied Defendant's motion and Defendant's request for an evidentiary hearing. On that same day, the trial court issued a written order denying Defendant's motion and finding:

> 1. The Motion consists only of general and conclusory allegations and fails to state sufficient grounds in its support.
>
> 2. The Defendant has failed to allege any underlying set of facts or develop any factual basis supported by affidavit or documentary evidence which might show a substantial denial of constitutional rights.
>
> 3. The Motion does not meet the criteria of Article 88 of Chapter 15A of the North Carolina General Statutes; neither does it adequately state a basis in law or fact for the relief requested.

Also on that same day, Defendant, through trial counsel, appealed the trial court's decision in open court.

On 10 July 2017, Defendant filed with this Court a "Motion to Withdraw Appeal Taken on 6 April 2016 and to Vacate Order on Motion for Appropriate Relief For Lack of Jurisdiction." In this motion, Defendant's appellate counsel states:

> 4. After knowing discussions between [Defendant] and undersigned counsel, [Defendant] has elected to dismiss his 6 April 2016 appeal regarding his motion for appropriate relief. [Defendant] has been made aware that the decision to pursue or dismiss the 6 April 2016 appeal is his decision alone and that by dismissing the 6 April 2016 appeal, he loses his only opportunity to pursue it.
>
> . . . .
>
> 6. [Defendant] also moves to vacate the trial court's order on his motion for appropriate relief because the trial court lacked jurisdiction to hear the motion.

. . . .

> 11. Because [Defendant] filed his motion for appropriate relief in the trial court after the trial court had been divested of jurisdiction, the trial court lacked jurisdiction to consider his motion[.]

This Court allows Defendant's motion to dismiss his motion for appropriate relief and vacates the trial court's order on the motion due to lack of jurisdiction.

II. Standard of Review

This Court "reviews the denial of a motion to dismiss for insufficient evidence *de novo*." *State v. Taylor*, 203 N.C. App. 448, 458, 691 S.E.2d 755, 763 (2010) (citation and quotation marks omitted), *cert. dismissed*, 366 N.C. 408, 736 S.E.2d 180 (2012) (quoting *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008)). Under a *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010). "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. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (quoting *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980)).

"Under plain error review, a defendant must demonstrate that the trial court committed 'a fundamental error.' " *State v. May*, 368 N.C. 112, 119, 772 S.E.2d 458, 463 (2015). Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

III. Analysis

A. First-degree Murder

[2] Defendant first contends the trial court erred in denying his motion to dismiss the first-degree murder charge on the theory of lying

in wait.[1] Defendant bases this contention on the ground there was no ambush because Defendant announced his presence. We disagree.

> Murder perpetrated by lying in wait "refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." The assassin need not be concealed, nor need the victim be unaware of his presence. "If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait."

State v. Leroux, 326 N.C. 368, 375, 390 S.E.2d 314, 320 (1990) (internal citations omitted). "Even a moment's deliberate pause before killing one unaware of the impending assault and consequently 'without opportunity to defend himself' satisfies the definition of murder perpetrated by lying in wait." *State v. Brown*, 320 N.C. 179, 190, 358 S.E.2d 1, 10, *cert. denied*, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Our State Supreme Court has held, under the theory of lying in wait, a defendant does not need to be concealed. *See Brown*, 320 N.C. at 190, 358 S.E.2d at 10. Also, a victim does not need to be aware of a defendant's intent to kill under the theory of lying in wait. *Id.* at 190, 358 S.E.2d at 10. *See also State v. Allison*, 298 N.C. 135, 148, 257 S.E.2d 417, 425 (1979) (holding a conviction was proper under the theory of lying in wait when the defendant waited for the victim behind the tree, then called her over and killed her).

Here there was substantial evidence, taken in the light most favorable to the State, to support the submission of the lying in wait theory of first-degree murder. The State's evidence tended to show the victim, Kornegay, was in his residence with his friends at the time of the murders. Defendant arrived at Kornegay's residence after dark, and Kornegay went outside to talk with him. There is no evidence Defendant threatened or directed harm at Kornegay at this time. Kornegay returned to

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1. The State contends Defendant failed to preserve this issue for review because counsel for defense neither made a general motion to dismiss nor moved to dismiss the charge of first-degree murder based on the theory of lying in wait. Defense counsel did argue for dismissal on the specific theories of premeditation and deliberation however. Since the record is unclear whether defense counsel actually made a general motion to dismiss the first-degree murder charge, this Court shall give defense counsel the benefit of the doubt.

his trailer, unharmed, after speaking with Defendant. Defendant waited for Kornegay to go back inside, and then Defendant proceeded to fire his weapon into Kornegay's trailer, killing Kornegay.

The State's evidence also tended to show Kornegay had no warning Defendant intended him any harm. When Defendant talked to Kornegay, he told Kornegay to send Darden outside. At this point, Defendant indicated to Kornegay he only had an issue with Darden. Therefore, Kornegay was taken by complete surprise, and had no opportunity to defend himself. We therefore conclude the trial court did not err in submitting first-degree murder on the theory of lying in wait to the jury.

B. Second-degree Murder

[3] Defendant next contends the trial court erred in denying defense counsel's motion to dismiss the charge of second-degree murder of Garner. We conclude Defendant failed to preserve this issue for appellate review.

Rule 10(a) of the North Carolina Rules of Appellate Procedure states, "[i]n 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) (2017). Additionally, Rule 10(a)(3) provides "[i]n 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." N.C. R. App. P. 10(a)(3) (2017).

At the close of the State's evidence, Defendant made a motion to dismiss each count of first-degree murder as to the victims Kornegay and Garner. Defense counsel explained:

> First off there's been not one scintilla of evidence that the defendant, with malice aforethought, which is intent to kill or premeditation or deliberation has been presented in this case concerning either Jamal Anthony Kornegay or Neekea Felicia Garner. The only evidence that the State has produced is that Mr. Darden, Leonard Darden, goes by Al, Driver stated in his sworn testimony here in the courtroom that [Defendant] was across the path from a trailer shooting at him when he was leaving the scene.
>
> . . . .

> And that definitely doesn't show that the defendant in regards to Jamal Anthony Kornegay or Neekea Felicia Garner at any time unlawfully, willfully, feloniously and malice aforethought did kill and murder either one of these two people.
>
> There is no direct evidence to that and we would be asking the Court to strongly consider a motion to dismiss both counts of first degree murder. I understand the State's proceeding under the felony murder rule I guess. That would be my idea of it, but still you have to show or have to have malice aforethought, intent to kill, premeditation or deliberation as to Jamal Anthony Kornegay and as to Neekea Felicia Garner. There is no evidence of that been presented in this courtroom in this case.
>
> . . . .
>
> That would be my arguments as to the two murder counts.

The trial court denied Defendant's motions to dismiss.

At the close of all the evidence, defense counsel argued:

> The only testimony that you have is Mr. Darden said he shot at his vehicle when he went that way and that the Defendant was across the path with a chopper. And, again, that doesn't really add up either, because if he was facing him the shots wouldn't have been in the rear of the vehicle; but that's the testimony, that's the evidence that's been presented in this case; and it does not add up to first degree murder of . . . Nakiea Felicia Garner or Jamal Anthony Kornegay.
>
> And, again, the motion would be the same motion as to the charge of first degree murder against the decedent Nakiea Felicia Garner, . . . for the exact same reasons; there is no evidence that this man, the Defendant, ever fired a weapon at that trailer by anybody.
>
> Again, Mr. Darden stated he shot at his vehicle from across the path. That's the evidence. And, again, I would ask the Court to consider motions to dismiss both of those counts of murder based upon the testimony under oath and the diagrams of the evidence that's been presented

> in this courtroom as to the Defendant firing any weapon into that trailer.

Defendant clearly made a motion to dismiss the charge of first-degree murder of Garner. However the trial transcript shows Defendant neither moved to dismiss the charge of second-degree murder nor argued there was insufficient evidence of the elements of second-degree murder. Thus, Defendant failed to preserve for appellate review the issue of the sufficiency of the evidence of the charge of second-degree murder. *See* N.C. R. App. P. 10(a)(1), N.C. R. App. P. 10(a)(3); *see also State v. Neville*, 202 N.C. App. 121, 124, 688 S.E.2d 76, 79 (holding "Defendant neither moved to dismiss the charge of second-degree murder, nor argued to the trial court that there was insufficient evidence of any of the elements of second-degree murder. Thus, Defendant failed to preserve for appellate review the sufficiency of the evidence charge.") (citation omitted) *disc. review denied*, 364 N.C. 130, 696 S.E.2d 696 (2010).

C. AWDWIKISI

[4] Defendant next argues the trial court erred in denying Defendant's motion to dismiss the charge of AWDWIKISI as to Stokes. Specifically, Defendant argues the State had to establish Defendant specifically intended to kill Stokes when Defendant fired into Kornegay's trailer. This contention is without merit.

"In order to withstand a motion to dismiss the charge at issue, the State must present substantial evidence of the following elements: (1) an assault, (2) with a deadly weapon, (3) an intent to kill, and (4) infliction of a serious injury not resulting in death." *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994). Substantial evidence is the amount of evidence "a reasonable mind might accept as adequate to support a conclusion." *Id.* at 187, 446 S.E.2d at 86. "[I]t is well settled that the evidence is to be considered in the light most favorable to the State and that the State is entitled to every reasonable inference to be drawn therefrom." *Id.* at 187, 446 S.E.2d at 86.

Our State Supreme Court held:

> An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred. [T]he nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred.

State v. Grigsby, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (internal citations and quotation marks omitted). Furthermore, "an assailant must be held to intend the natural consequences of his deliberate act." *Id.* at 457, 526 S.E.2d at 462 (quoting *State v. Jone*s, 18 N.C. App. 531, 534, 197 S.E.2d 268, 270, *cert. denied*, 283 N.C. 756, 198 S.E.2d 726 (1973)).

It is not determinative to this issue whether or not Defendant knew Stokes was in the trailer. In *Alexander*, the North Carolina Supreme Court upheld the trial court's submission of an AWDWIKISI charge to the jury when a defendant and his accomplice fired into a vehicle, and there was no evidence defendant knew a specific victim was inside that vehicle. *Id.* at 185-88, 446 S.E.2d at 85-86. There, the Court stated, "when a person fires a twelve-gauge shotgun into a moving vehicle, it may fairly be inferred that the person intended to kill *whoever* was inside the vehicle." *Id.* at 188, 446 S.E.2d at 87 (emphasis added).

Applying these principles to the present case, there was sufficient evidence for the jury to infer Defendant intended to kill whoever was inside the trailer. Here, "the nature of the assault, the manner in which it was made, [and] the weapon . . . used" provide "substantial evidence" of intent to kill. *Id.* at 188, 446 S.E.2d at 87. The State's evidence showed Defendant was armed during the time of the shooting, and he fired numerous times into Kornegay's trailer. Defendant also knew the trailer into which he opened fire was occupied. Additionally, Thompson told Defendant not to do anything he would regret, and Defendant replied he would "bond out" for whatever he did. Considering the nature of the assault, the fact Defendant used a gun, and the other surrounding circumstances, we conclude there was sufficient evidence for the trial court to present the jury with the AWDWIKISI charge.

[5] In connection with this issue, Defendant argues this Court should reverse his conviction of AWDWIKISI as to Stokes because the trial court did not instruct the jury on the doctrine of transferred intent. Our State Supreme Court discussed the doctrine of transferred intent:

> It is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. Criminal liability, if any, and the degree of homicide must thereby be determined. Such a person is guilty or innocent exactly as the fatal act had caused the death of his adversary.

State v. Wynn, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971). However, the State did not argue transferred intent as a basis to show Defendant's intent to kill Stokes. Rather, as discussed *supra*, the State's evidence tended to show Defendant knew the trailer was occupied by at least two people when Defendant fired numerous times into the trailer. Based on the nature of the assault, the State's evidence was sufficient for the jury to find Defendant intended to kill "whoever" was in the trailer. *See Alexander* at 188, 446 S.E.2d at 86. The State did not argue transferred intent at trial, and neither party requested the transferred intent instruction. This argument is without merit.

D. Jury Deliberations and Subsequent Instructions

[6] Defendant lastly contends the trial court erred in giving the jury a coercive instruction after the jury informed the trial court it was deadlocked. Because we conclude the trial court's instructions to the jury to continue its deliberations were in accordance with N.C. Gen. Stat. § 15A-1235(b), we disagree.

"In criminal cases, an issue that was not preserved by objection noted at trial . . . 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) (2016). Here, Defendant did not object to the trial court's instructions and remark to the jury upon the judge's learning the jury was deadlocked. Thus, the plain error standard applies.

"[I]n deciding whether a court's instructions force a verdict or merely serve as a catalyst for further deliberations, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury." *State v. Peek*, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985). Under a totality of the circumstances review, this Court generally considers "whether the trial court conveyed an impression to the jurors that it was irritated with them for not reaching a verdict and whether the trial court intimated to the jurors that it would hold them until they reached a verdict." *State v. Porter*, 340 N.C. 320, 335, 457 S.E.2d 716, 723 (1995) (citation omitted). This Court additionally considers the amount of time the jury deliberated, the complexity of the case, and the content and tone of the court's instructions to the jury. *See State v. Patterson*, 332 N.C. 409, 416, 420 S.E.2d 98, 101 (1992).

Here, the jury informed the trial court three times it was unable to reach a unanimous verdict. Each time the trial court gave the jury an instruction consistent with N.C. Gen. Stat. § 15A-1235(b). After the jury

had deliberated less than five hours in a single day, and after its third note to the trial court stating it was deadlocked, the trial court informed the jury it was sending them back to further deliberate with the same instructions it had previously given. However, this time, the trial court added, "after five days of testimony and less than 5 hours of deliberations, these folks deserve better." Defendant contends this comment was impermissibly coercive, and left the jurors with the impression the judge was irritated with them for not reaching a verdict. This argument is not persuasive.

The record does not suggest the trial court expressed irritation with the jury for not yet reaching a verdict. The record suggests the judge was polite, patient, and accommodating. The trial court properly gave the jury an *Allen* charge pursuant to N.C. Gen. Stat. § 15A-1235(b) each time it stated it was deadlocked. Prior to its final comment, the jury received a lunch break, a recess and a meal. After the third impasse, the trial court gave the jury a choice to continue to deliberate that day, or to go home and continue deliberations the next day. In view of the totality of the circumstances, the trial court's comment was not coercive. We therefore conclude the trial court's comment did not prejudice Defendant and did not amount to plain error in this case.

E. Ineffective Assistance of Counsel

[7] Defendant contends if his trial counsel did not preserve the sufficiency of evidence issues with his motions to dismiss, then his counsel provided ineffective assistance of counsel. Generally, ineffective assistance of counsel claims "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). We dismiss Defendant's claims of ineffective assistance of counsel without prejudice and conclude Defendant is free to assert his claims during a later MAR proceeding with a more complete factual record.

IV. Conclusion

We find no error in Defendant's convictions.

NO ERROR.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
RAUL PACHICANO DIAZ, DEFENDANT

No. COA17-444

Filed 21 November 2017

1. Appeal and Error—appealability—Rule 2—avoid manifest injustice—constitutional issues

Based on the specific circumstances in this child abduction, statutory rape, and sexual exploitation case—and in order to avoid the possibility of manifest injustice—the Court of Appeals exercised its discretion under N.C. Rule of Appellate Procedure 2 to reach the merits of defendant's constitutional arguments.

2. Constitutional Law—right to fair trial—affidavit of indigency—bond amount seen by jurors

Defendant's right to a fair trial was not violated in a child abduction, statutory rape, and sexual exploitation case by jurors seeing his bond amount and that no one had posted bond on his affidavit of indigency. The inference did not create the same prejudice as that raised when a defendant appears in court in shackles or prison garb.

3. Constitutional Law—right against self-incrimination—affidavit of indigency—age an element in charges

Defendant's constitutional right against self-incrimination was violated in a child abduction, statutory rape, and sexual exploitation case by the State admitting into evidence his affidavit of indigency, which contained his date of birth. Defendant's age was an element in the abduction of a child and statutory rape charges.

4. Kidnapping—abduction of a child—motion to dismiss—sufficiency of evidence—controlling influence over conduct

The trial court did not err by denying defendant's motion to dismiss an abduction of a child charge under N.C.G.S. § 14-41 where evidence of fraud, persuasion, or other inducement exercising controlling influence upon a child's conduct were sufficient to sustain a conviction for this offense.

Judge ARROWOOD concurring in result only.

Appeal by Defendant from judgments entered 18 May 2016 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 3 October 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton, for the State.

Marilyn G. Ozer, for Defendant-Appellant.

MURPHY, Judge.

The State may not condition one constitutional right upon the violation of another. Thus, a defendant cannot be required to make a sworn statement asserting his date of birth in his affidavit of indigency and the State use this evidence against him later to prove elements of alleged crimes.

Raul Pachicano Diaz ("Defendant") appeals from jury verdicts convicting him of abduction of a child, three counts of statutory rape, and four counts of second degree sexual exploitation. On appeal, Defendant argues: (1) his constitutional rights to due process, a fair trial before an impartial jury, and against self-incrimination were violated when the State gave jurors copies of his affidavit of indigency; and (2) there was insufficient evidence on the abduction of a child charge for the charge to go to the jury. We grant Defendant a new trial on the abduction of a child charge and statutory rape charges, and hold the trial court did not commit error in allowing jurors to see Defendant's amount of bond in his affidavit and in denying Defendant's motion to dismiss the abduction of a child charge.

I. Background

The State's evidence tended to show the following. Defendant and Julie[1] began dating in "late fall, early winter" of 2014. Julie was a freshman in high school, and Defendant was a senior at the same school. At that time, Julie was fourteen years old. Defendant first told Julie he was eighteen years old, but she later found out he was nineteen years old.

Beginning in January 2015, the two started skipping school together. Sometimes the two went "out" or to Durham, but other times the two went to Defendant's home. While at Defendant's home, the two engaged in sexual intercourse on multiple occasions. During one of their sexual engagements in March or April, Defendant asked Julie if he could

1. We use this pseudonym to protect the identity of the juvenile.

record the two of them having sex. Julie agreed to let Defendant tape them, but then later worried Defendant would use it to "manipulate" her. Defendant taped their sexual activity on multiple occasions.

Sometime in March or April, Defendant got the idea to leave town. Julie agreed to leave for several reasons: First, she was in love with Defendant. Second, Defendant told Julie that if she did not go with him, she was never going to see him again. Third, Julie feared he would "use those videos to manipulate [her]" by showing them to people. While Defendant did not force Julie to go with him, she "felt forced." At first, Julie was "nervous, scared, afraid, [and] sad" to leave town, but then she became "excited and happy" at the prospect of "mak[ing] things different." Julie did not tell her mother she planned to leave town.

On 14 April 2015, Julie got on her school bus, as if she was attending school, but then got off the bus and met Defendant. The two waited for Julie's mother to leave Julie's home. After Julie's mother was gone, they went to Julie's home and packed Julie's belongings. Then, they went and retrieved Defendant's belongings from his home.

The two drove Defendant's car to Defendant's uncle's home in New Mexico. Once they arrived, Defendant's uncle told them they had to "do things right" and instructed Julie and Defendant to go back home. Defendant's uncle also told Julie to call her mother. Julie called her mother, but refused to tell her mother where she was.

Defendant and Julie left New Mexico and drove to Broken Arrow, Oklahoma. There, the two "tried to get settled." Both Defendant and Julie began working, and the two leased an apartment together. On 20 May 2015, U.S. Marshals arrived at Julie's place of work. The Marshals asked for her, and she tried to lie and conceal her identity. The Marshals took her away,[2] and then she flew to Charlotte.

On 2 June 2015, Julie gave a written statement to Detective Mitchell of the Pitt County Sheriff's Office. In the written statement, Julie asserted Defendant said, "If you want to go back, I'll take you back. I[']m not forcing you to do anything!" Julie told Defendant, "No I don't want to go back. I don't want to!" However, at trial Julie asserted that at the time she wrote the statement, she still loved Defendant and "felt that [she] had to protect him."

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2. Julie testified the U.S. Marshals took her to "where they put the bad children", and she could not remember the name of the location.

On or about 3 June 2015, Defendant was arrested.[3] On 14 September 2015, a Pitt County Grand Jury indicted Defendant for abduction of a child, three counts of statutory rape, and four counts of first degree sexual exploitation of a minor.

On 6 October 2015, Defendant completed an affidavit of indigency. In the sworn affidavit, Defendant asserted his date of birth was 20 November 1995. Additionally, the affidavit listed Defendant's "Bond Type" as "Secured", in an amount of $500,000.00.

On 16 May 2016, Defendant's case came on for trial. Julie and her mother testified. Following Julie's testimony, the State moved to admit the affidavit of indigency into evidence. Defendant objected on the grounds of "relevance, due process, hearsay, [and] confrontation." The trial court overruled Defendant's objection and allowed the State to publish the affidavit to the jury by distributing an individual copy to each juror. When the State rested, Defendant moved to dismiss all of the charges against him. The trial court denied Defendant's motions. Defendant did not present any evidence, and Defendant renewed his motions to dismiss. The trial court denied Defendant's motions.

The jury found Defendant guilty of abduction of a child, three counts of statutory rape, and four counts of second degree sexual exploitation. The trial court sentenced Defendant as a prior record level I. The court consolidated the abduction convictions and all three statutory rape convictions and sentenced Defendant to 65 to 138 months imprisonment. The court also ordered Defendant pay $1,054.10 in restitution, for Julie's flight from Oklahoma to Charlotte. For the sexual exploitation convictions, the court imposed four consecutive suspended terms of 25 to 90 months imprisonment. Lastly, the court imposed 36 months of supervised probation for each sexual exploitation conviction. Defendant filed timely written notice of appeal.

II. Standard of Review

We review preserved violations of constitutional rights de novo. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citing *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007)). "Once error is shown, the State bears the burden of proving the error was harmless beyond a reasonable doubt." *Id.* at 214, 683 S.E.2d at 444

3. Two of the warrants for arrest list 3 June 2015 as the date of arrest. Defendant's brief also asserts the date he was served with warrants of arrest was 3 June 2015. We note some of the warrants have an ineligible date marked as the date of arrest, and others are dated for 8 July 2015.

(citing N.C.G.S. § 15A-1443 (b) (2009)). "In determining whether error is harmless beyond a reasonable doubt, . . . the rule is that if there is a reasonable possibility that the evidence complained of might have contributed to the conviction, it is not harmless beyond a reasonable doubt." *State v. Knight*, 53 N.C. App. 513, 514-15, 281 S.E.2d 77, 78 (1981).

"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). "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) (quotation marks and citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *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).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (quotation marks, citations, brackets, and emphasis omitted).

III. Analysis

We address Defendant's arguments in two parts: (1) Defendant's affidavit of indigency; and (2) Defendant's motion to dismiss the abduction of a child charge.

A. Defendant's Affidavit of Indigency

Defendant alleges the trial court erred in allowing jurors to see his affidavit of indigency for two reasons: (1) it violated his right to a

fair trial because it indicated he was under a secured bond of $500,000, which had not been posted, thus, indicating he was still in custody; and (2) putting his date of birth on the affidavit violated his right against self-incrimination. We address these arguments in turn, but first we must determine whether Defendant properly preserved his objection for appellate review.

i. Preservation for Appellate Review

[1] After his valid objection to preserve his constitutional rights, Defendant failed to specifically obtain a ruling from the trial court on the constitutional issues he now attempts to raise on appeal. Thus, Defendant has not properly preserved these constitutional issues for appellate review.

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. *It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.*

State v. Blizzard, 169 N.C. App. 285, 292, 610 S.E.2d 245, 250 (2005) (emphasis added) (citation omitted); *see* N.C.R. App. P. 10(a) (1) (2017). "Assignments of error are generally not considered on appellate review unless an appropriate and timely objection was entered *and ruling obtained*." *Id.* at 292, 610 S.E.2d at 250 (emphasis added) (citing *State v. Short*, 322 N.C. 783, 790, 370 S.E.2d 351, 355 (1988)). As such, "a constitutional question which is not raised *and passed upon* in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (emphasis added) (citations omitted).

In the instant case, the State moved the trial court to admit into evidence Defendant's affidavit of indigency as a certified true copy of a public document. Defendant objected, listing both evidentiary and constitutional grounds for the objection, and the trial court ruled as follows:

> [Defense counsel]: We would object, your Honor; relevance, due process, hearsay, confrontation.
>
> THE COURT: All right. The Court is going to find that the document marked State's Exhibit 3 is an affidavit of indigency. The document was signed by the Defendant under oath before the deputy clerk of court on October 6th, 2015. That this is a true copy of the original document as

> it appears in the court file in these matters, at the District Court level. *And pursuant to 902, Rule 902 Rules of Evidence, it is a self-authenticating document, and the Court is going to admit it into evidence.*

(emphasis added).

Where, as here, the trial court did not rule on Defendant's objection on constitutional grounds, this Court should not consider for the first time on appeal the constitutional questions Defendant raises now. *See id.* at 112, 286 S.E.2d at 539; *see State v. Davis*, 198 N.C. App. 146, 148-49, 678 S.E.2d 709, 712-13 (2009) (invoking Rule 2 in order to address the question raised by the defendant on appeal which defendant failed to preserve for appellate review where the defendant's counsel failed to obtain a ruling on the issue). However, based on the specific circumstances in this case and in order to avoid the possibility of a manifest injustice, we exercise our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure and reach the merits of Defendant's constitutional arguments. N.C.R. App. P. 2 (2017).

ii. The Amount of Bond on the Affidavit of Indigency

[2] Defendant first argues the amount of bond on his affidavit of indigency violated his constitutional right to a fair trial. Specifically, Defendant argues he was prejudiced by the jurors knowing he was in custody. We disagree.

"Essential to the concept of due process is the principle that every person who stands accused of a crime is entitled to the 'fundamental liberty' of a fair and impartial trial." *State v. Tolley*, 290 N.C. 349, 364, 226 S.E.2d 353, 366 (1976) (citations omitted). The presumption of innocence "is a basic component of a fair trial under our system of criminal justice." *Id.* at 364, 226 S.E.2d at 366 (citations omitted). Thus, "courts must guard against factors which may undermine the fairness of the fact-finding process and thereby dilute the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Id.* at 365, 226 S.E.2d at 366 (quotation marks and citations omitted).

From these rules, our appellate courts have held, generally, a defendant may not be shackled or bonded during trial. Our Supreme Court listed three reasons for not physically restraining a defendant during trial:

> (1) it may interfere with the defendant's thought processes and ease of communication with counsel, (2) it intrinsically gives affront to the dignity of the trial process, and most importantly, (3) it tends to create prejudice in the

> minds of the jurors by suggesting that the defendant is an obviously bad and dangerous person whose guilt is a foregone conclusion.

Id. at 366, 226 S.E.2d at 367. (citations omitted).

However, the *Tolley* rule has not been extended beyond a defendant being physically restrained in the courtroom. First, in *State v. Montgomery*, 291 N.C. 235, 229 S.E.2d 904 (1976), our Supreme Court declined to extend *Tolley* to a situation where several jurors saw the defendant in handcuffs while being taken from the jail to the courthouse. *Id.* at 251-52, 229 S.E.2d at 913-14. The Court highlighted the fact that the "defendant was never shackled or bound while in the courtroom." *Id.* at 250, 229 S.E.2d at 912. Next, in *State v. Fowler*, 157 N.C. App. 564, 579 S.E.2d 499 (2003), defendant argued the trial court committed constitutional error when the trial court told the jury he was in the custody of the Sheriff's Department. *Id.* at 566, 579 S.E.2d at 500-01. This Court rejected that argument and stated "the statements by the trial court do not create the same prejudice to the defendant as that raised when a defendant appears in court in shackles or prison garb." *Id.* at 566, 579 S.E.2d at 501 (citation omitted).

Defendant argues the information on the affidavit of indigency violated his presumption of innocence. Specifically, Defendant complains the amount of a high bond lended itself to jurors believing the magistrate "considered the crime so grave and the risk of escape so high[.]" Additionally, Defendant contends that because the "By Whom Posted" portion was left blank, "the jurors could have understood that [Defendant] had not been able to make bond and was in custody."

We hold that even if the jurors inferred Defendant was in custody and unable to pay the $500,000 bond, his right to a fair trial was not violated. As in *Fowler*, there is some evidence before the jury that Defendant was in custody, but Defendant was not shackled or handcuffed in the courtroom. *Id.* at 566, 579 S.E.2d at 500-01. This inference does "not create the same prejudice to the defendant as that raised when a defendant appears in court in shackles or prison garb." *Id.* at 566, 579 S.E.2d at 501 (citations omitted). Accordingly, we hold Defendant's right to a fair trial was not violated by the jurors seeing his bond amount, and that no one had posted bond, on his affidavit of indigency.

iii. Defendant's Date of Birth on the Affidavit of Indigency

[3] Defendant next argues his constitutional right against self-incrimination was violated by the State admitting his affidavit of indigency into evidence, which contained his date of birth. We agree.

Our Supreme Court in *State v. White*, 340 N.C. 264, 457 S.E.2d 841 (1995) held:

> [a] defendant cannot be required to surrender one constitutional right in order to assert another. *Simmons v. United States*, 390 U.S. 377, 394, 19 L. Ed. 2d 1247, 1259 (1968). A criminal defendant has a constitutional privilege against compulsory self-incrimination. U.S. Const. amend[s]. V, XIV; N.C. Const. art. I, § 23.

Id. at 274, 457 S.E.2d at 847. Thus, Defendant cannot be required to complete an affidavit of indigency to receive his right to counsel, and the State then use the affidavit against Defendant, violating his constitutional right against self-incrimination. The abduction of a child offense requires Julie to be at least four years younger than Defendant. N.C.G.S. § 14-41 (2015). The statutory rape offenses require the State to prove Defendant was "more than four but less than six years older" than Julie at the time of the offenses. N.C.G.S. § 14-27.7A(b) (2015).

We conclude the trial court erred in admitting the affidavit of indigency, which showed Defendant's age—an element in the abduction of a child charge and the statutory rape charges—over Defendant's objection. The State cannot violate Defendant's right against self-incrimination to prove an element of charges against Defendant. Now, we must determine whether this error was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443 (b) (2015).

In its assertion that the error was harmless beyond a reasonable doubt, the State points to the following portion of Julie's testimony:

> Q. . . . Do you know how old [Defendant] was back during this time period?
>
> A. In the beginning, he told me he was eighteen. But then I found out he was nineteen.
>
> Q. Do you know what his birthdate was?
>
> A. November the 26th.
>
> Q. Do you happen to know what year he was born in?
>
> A. 1995.

Defendant cross-examined Julie about her knowledge of Defendant's birthdate, specifically that she had never seen Defendant's driver's license, birth certificate, or his passport.

We conclude the State has failed to meet the exceedingly high burden of showing this error was harmless beyond a reasonable doubt. Notably, Julie's testimony about Defendant's date of birth was incorrect. Julie testified Defendant was born on 26 November 1995, but the affidavit reflects that Defendant was born on 20 November 1995. Additionally, as evinced through cross-examination, Julie did not testify regarding a basis for her knowledge. Julie had never seen an official document showing Defendant's correct date of birth or age. Based on this, we conclude "there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and the error is not harmless beyond a reasonable doubt. *Knight*, 53 N.C. App. at 514, 281 S.E.2d at 78.

Accordingly, we grant Defendant a new trial on the abduction of a child charge and the statutory rape charges. We do not grant Defendant a new trial on the sexual exploitation of a minor convictions because Defendant's age is not an element of that offense. *See* N.C.G.S. § 14-190.17 (2015). We still address Defendant's argument regarding his motion to dismiss the abduction of a child charge, as any alleged error may occur again at his new trial.

B. Motion to Dismiss the Abduction of a Child Charge

[4] Defendant next argues the trial court erred by denying his motion to dismiss the abduction of a child charge. Defendant contends the evidence only shows Julie voluntarily left her home. We disagree.

N.C.G.S. § 14-41, titled "Abduction of children", states:

> (a) Any person who, without legal justification or defense, abducts *or induces* any minor child who is at least four years younger than the person to leave any person, agency, or institution lawfully entitled to the child's custody, placement, or care shall be guilty of a Class F felony.

Id. (emphasis added). "It is 'not necessary for the State to show she [(the victim)] was carried away by force, but evidence of fraud, persuasion, or other inducement exercising controlling influence upon the child's conduct would be sufficient to sustain a conviction' for this offense." *State v. Lalinde*, 231 N.C. App. 308, 312-13, 750 S.E.2d 868, 872 (2013) (quoting *State v. Ashburn*, 230 N.C. 722, 723, 55 S.E.2d 333, 333-34 (1949)). "Of course, if there is no force or inducement and the departure of the child is entirely voluntary, there is no abduction." *State v. Burnett*, 142 N.C. 577, 581, 55 S.E. 72, 74 (1906).[4]

4. This decision was reprinted in 1913 as 142 N.C. 577.

The evidence presented at trial shows: (1) it was Defendant's decision to leave; (2) Julie characterized 14 April 2015 as the day "we decided to leave"; (3) Defendant videoed the two having sexual relations; (4) Julie wondered if he would use the tapes against her; (5) there is no evidence that Defendant threatened to use the tapes against her; (6) Julie testified she left with Defendant because she was in love with him and because he said she would never see him again if she did not go with him; and (7) When asked if Defendant forced her to go, Julie testified, "No, he didn't, but I felt forced."

When viewing all the evidence in a light most favorable to the State, there is sufficient evidence to survive Defendant's motion to dismiss. When asked why she left with Defendant, Julie testified, "[Defendant] was like, 'If you don't come with me, you're never going to see me again[.]' " This testimony indicates that Defendant induced Julie to leave with him. The evidence presented raises more than just a suspicion or mere conjecture of guilt. Accordingly, we hold the trial court did not err in denying Defendant's motion to dismiss the abduction of a child charge.

IV. Conclusion

For the reasons stated above, we grant Defendant a new trial on the abduction of a child charge and the statutory rape charges. We hold the trial court committed no error by allowing jurors to see the amount of bond on Defendant's affidavit of indigency and by denying Defendant's motion to dismiss the abduction of a child charge.

NEW TRIAL IN PART; NO ERROR IN PART.

Judge BRYANT concurs.

Judge ARROWOOD concurs in result only.

STATE OF NORTH CAROLINA
v.
VICTOR MANUEL FERNANDEZ, DEFENDANT

No. COA17-322

Filed 21 November 2017

1. Constitutional Law—federal—right to bear arms—Felony Firearms Act—reasonable regulation—convicted felon—law-abiding citizen—presumption of lawfulness

The trial court did not err by denying defendant's motion to dismiss a charge of possession of a firearm by a felon based on an alleged violation of his federal Second Amendment rights where defendant was a convicted felon and thus could not show he was a law-abiding responsible citizen under *Hamilton v. Pallozzi*, 848 F.3d 614 (4th Cir. 2017). Further, he could not rebut the Felony Firearms Act's presumption of lawfulness.

2. Constitutional Law—state—right to bear arms—Felony Firearms Act—as applied challenge—Britt factors—public peace and safety

The trial court did not err by denying defendant's motion to dismiss a charge of possession of a firearm by a felon based on an alleged violation of his state Second Amendment rights. Considering the five *Britt* factors, *Britt v. State*, 363 N.C. 546, 549 (2009), the Felony Firearms Act under N.C.G.S. § 14-415.1 was not unconstitutional as applied to defendant, who subsequently violated the law on several occasions, in order to preserve public peace and safety.

Appeal by Defendant from judgment entered 16 November 2016 by Judge Gary M. Gavenus in Mitchell County Superior Court. Heard in the Court of Appeals 18 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Rajeev K. Premakumar, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Paul M. Green, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Victor Manuel Fernandez ("Defendant") appeals his conviction of possession of a firearm by a felon. Defendant contends N.C. Gen. Stat.

§ 14-415.1, which generally prohibits felons from possessing firearms, was unconstitutional as applied to him. We disagree and find no error in the trial court's judgment.

I. Factual and Procedural Background

On 19 September 2016, Defendant was indicted for possession of a firearm by a felon under N.C. Gen. Stat. § 14-415.1 (2016).

On 10 October 2016, Defendant filed a motion to dismiss the indictment contending N.C. Gen. Stat. § 14-415.1 is unconstitutional as applied to him. In the alternative, Defendant contended the trial court should suppress the results of an illegal search. The State did not file a written response to this motion. Counsel for Defendant subsequently moved to withdraw for health reasons. On 13 October 2016, the trial court allowed defense counsel's motion to withdraw and appointed another attorney.

Defendant's case was called for trial on 14 November 2016. On that same day, Defendant filed a motion to suppress the State's evidence on the grounds the evidence "was obtained in violation of federal and state constitutional rights to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 20 of the North Carolina Constitution." Defendant also alleged the State obtained its evidence in violation of N.C. Gen. Stat. § 15A-974.

After jury selection, the trial court excused the jurors to address these pre-trial matters with counsel. Defendant first asked the court to dismiss the case based on the State's failure to respond to Defendant's motion to dismiss. The trial court responded Defendant's prior counsel failed to sign Defendant's motion to dismiss. The trial court stated, "[n]ot only is it not signed . . . I am going to deny it. I will find that the statute itself is constitutional, and it is constitutional as it applies to this defendant."

The trial court next addressed Defendant's motion to suppress based on the Fourth Amendment. The State called Deputy Josh Biddix ("Biddix") with the Mitchell County Sheriff's Office. Defendant called the Sheriff's Office to report someone had broken into his home. While personnel from the Sheriff's Office spoke with Defendant, Biddix recognized Defendant's name and thought he had "a status as a convicted felon." Biddix checked his computer "before we went any further." Defendant reported "a couple of rifles" were stolen, along with other valuables and cash. After confirming Defendant's status as a convicted felon, Biddix explained to Defendant "we could not return the guns to him even if we were able to find the stolen weapons."

Biddix and Deputy Hobson ("Hobson") went to Defendant's residence to investigate the break-in:

> [Defendant] came to the door, asked us to come in, told us what had happened, showed us where the back door to his residence had been pushed open, kicked in, and then started to show us where different things had been taken from in the house, uh, some of his valuables, showed us where they'd been stored before they had been stolen.

The two officers and Defendant made their way to Defendant's bedroom. Once in the bedroom, Hobson "pointed out an object to [Biddix] on the floor . . . which [Biddix] was almost, about ready to step on at that point." Biddix stated "[i]t was partially covered by clothes but enough of it was sticking out to see . . . a shotgun." Biddix first finished his report to give to a Detective, and then "placed [Defendant] in handcuffs and fingerprinted him." Biddix next took Defendant to a magistrate.

During cross, Biddix stated he did not have a search warrant.

The State rested, and Defendant offered no evidence. The State then argued for the dismissal of Defendant's motion to suppress. The State contended "this is not a search as contemplated by the Fourth Amendment. This was law enforcement investigating a crime that [Defendant] had reported. Counsel for Defendant responded:

> [A] search is invalid if there's no search warrant. That's where the courts start, at an invalid search. And Your Honor, this is absent exigent circumstances which State's failed to prove. They could've gotten a warrant, easily gone out and got a search warrant, chose not to do so. My client shouldn't have to suffer for that.
>
> . . . .
>
> If they move something to determine its nature, even though it's, even though the deputy said that she seen [sic] the butt sticking out, still had to move his clothing, that creates a search within the meaning of the Fourth Amendment. This was a search, invalid without a search warrant, and we'd ask the Court to dismiss.

The trial court denied Defendant's motion to suppress on the ground "[o]nce the officer observed it, she certainly had the right to pick up what she determined to be a rifle for her own protection."

The trial began the following morning. The State first called Hobson. She recalled Defendant reporting a breaking and entering, and Defendant's request for the Sheriff's Department to come to his home to investigate. While on the telephone with Hobson, Defendant advised Hobson "that he knew that he was a convicted felon[.]" Counsel for Defendant objected, and the trial court excused the jury.

Counsel for Defendant "object[ed] to any statements regarding prior bad acts, anything that would indicate a bad act, possession of a firearm by a felon, anything of that nature." Defense based this objection on "Rule 404(b), due process, the Fifth and Fourteenth Amendment, [and] Article I, Section 19 of the North Carolina Constitution." The trial court responded the witness's testimony "was that the defendant acknowledged to her that he knew he was a convicted felon, and that's a statement of your client. That's not her statement." Defendant "just made an admission." The trial court concluded, "as far as the objection to testimony as to what the defendant said, that objection is overruled."

Hobson continued her testimony and described entering Defendant's bedroom as part of her investigation of the breaking and entering. "[T]he room was in pretty much disarray. There was clothing everywhere and piled up clothing as well." Under the clothing, Hobson saw part of a shotgun butt and barrel. "I picked the shotgun up out of the floor for my safety and advised the lieutenant we had a firearm in possession." Hobson asked Defendant if the firearm belonged to him, and Defendant answered "yes."

The State next called Biddix. Biddix recognized Defendant's name from Defendant's felony conviction approximately ten years ago. Outside the jury's presence, the State noted it did not have "any reason to call anyone from the clerk's office. [Defense counsel and the State] agree[d] [Defendant] doesn't have any issue with us just admitting the certified judgment and allowing Lieutenant Biddix to testify as to his involvement in [Defendant's prior felony]."

The jury returned. Biddix assisted in an investigation over ten years ago, and as a result, Defendant was charged with having a weapon of mass destruction. "It was actually a sawed-off shotgun." Biddix confirmed Defendant pled guilty to that charge.

Prior to Biddix's arrival at Defendant's residence, Biddix informed Defendant over the telephone Defendant's stolen guns could not be returned because Defendant was a convicted felon. Therefore, Defendant "knew better than to have a gun in the house." Once Biddix arrived at Defendant's residence, Biddix asked Defendant if he had any other firearms in the house. Defendant answered no.

The State then introduced a certified copy of the Mitchell County Judgment where Defendant was previously convicted of felony possession of a weapon of mass destruction.

The State rested. The trial court excused the jury and defense counsel moved "that the evidence was insufficient on every element of the offense in violation of the Sixth and Fourteenth Amendments." Defendant also moved to "dismiss based upon the Second Amendment of the United States Constitution, [and] Article I, Section 30 of the North Carolina Constitution. The defendant contends that North Carolina General Statute 14-415.1 is unconstitutional as applied to Defendant." Defense counsel concluded by stating, "[a] written motion is in the file, and the defendant does not wish to be heard further."

The State did not wish to be heard on the motion to dismiss.

The trial court stated, "the motion to dismiss is denied on all the grounds."

After the court satisfied itself Defendant understood his right not to testify, defense counsel "renew[ed] our motions as I stated earlier at the end of all the evidence."

After closing arguments, the trial court instructed the jury. Following deliberations, the jury returned a verdict of guilty of possession of a firearm by a felon.

As to sentencing, the trial court stated:

> [I]n this matter, the defendant having been found guilty by a jury of possession of a firearm by a felon, that is a class G felony, Court finds it's been stipulated to by the parties that the defendant is a prior record level III having six points. The Court makes no findings because the prison term imposed is within the presumptive range of sentencing.
>
> It's the judgment of the Court the defendant be incarcerated for a minimum of 17, a maximum of 30 months in the North Carolina Department of Adult Corrections.

Defendant appealed in open court.

II. Standard of Review

"The standard of review for questions concerning constitutional rights is *de novo*." Furthermore, when considering the constitutionality of a statute or act there is a presumption in favor of constitutionality, and

all doubts must be resolved in favor of the act." *Row v. Row*, 185 N.C. App. 450, 454-55, 650 S.E.2d 1, 4 (2007) (citations, quotation marks, and ellipses omitted), *disc. review denied*, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, 555 U.S. 824, 129 S. Ct. 144, 172 L. Ed. 2d 39 (2008).

Our State Supreme Court has held "regulation of the right to bear arms is a proper exercise of the General Assembly's police power, but that any regulation must be at least 'reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.' " *Britt v. State*, 363 N.C. 546, 549, 681 S.E.2d 320, 322 (2009) (quoting *State v. Dawson*, 272 N.C. 535, 547, 159 S.E.2d 1, 10 (1968)).

The United States Supreme Court declined to establish a specific level of scrutiny for regulations that restrict Second Amendment rights. *See District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S. Ct. 2783, 2821, 171 L. Ed. 2d 637, 683 (2008). "The Fourth Circuit Court of Appeals has consistently applied intermediate scrutiny." *Johnston v. State*, 224 N.C. App. 282, 294, 735 S.E.2d 859, 869 (2012), *aff'd per curiam*, 367 N.C. 164, 749 S.E.2d 278 (2013); *See, e.g.*, *U.S. v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011), *cert. denied*, 565 U.S. 1058, 132 S. Ct. 756, 181 L. Ed. 2d 482 (2011). Intermediate scrutiny requires "the asserted governmental end to be more than just legitimate, either 'significant,' 'substantial,' or 'important' . . . [and] require the fit between the challenged regulation and the asserted objective be reasonable, not perfect." *Johnston* at 294, 735 S.E.2d at 859 (quoting *U.S. v. Marzzarella*, 614 F.3d 85, 98 (3rd Cir. 2010), *cert. denied*, 562 U.S. 1158, 131 S. Ct. 958, 178 L. Ed. 2d 790 (2011)) (alterations in original).

III. Analysis

Defendant contends the trial court erred in denying his motion to dismiss on the ground his individual right to keep and bear arms under the Second and Fourteenth Amendments of the United States Constitution and under Article I, Section 30 of the North Carolina Constitution is a fundamental right that has been violated because N.C. Gen. Stat. § 14-415.1 prohibits him from keeping firearms in his home. Defendant challenges N.C. Gen. Stat. § 14-415.1, the Felony Firearms Act, as applied to him.

N.C. Gen. Stat. § 14-415.1 (2017) provides:

> (a) It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c). For the purposes of this section, a firearm is (i) any weapon, including a starter gun, which will or is designed

> to or may readily be converted to expel a projectile by the action of an explosive, or its frame or receiver, or (ii) any firearm muffler or firearm silencer. This section does not apply to antique firearm, as defined in G.S. 14-409.11.

A. Defendant's Federal Constitutional Claim

[1] In *Johnston* this Court addressed whether the Felony Firearms Act was constitutional under the Second Amendment of the Federal Constitution as applied to the plaintiff. *Id.* at 294, 735 S.E.2d at 869. This Court applied a two-prong test articulated by the Fourth Circuit in *U.S. v. Chester*, 628 F.3d 673 (4th Cir. 2010). As to the first prong:

> The first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid. If the regulation burdens conduct that was within the Second Amendment's scope at the time the Second Amendment was ratified, then we move to the second step of applying an appropriate form of means-end scrutiny.

Johnston at 290, 735 S.E.2d at 866-67 (quoting *Chester*, 628 F.3d at 680) (internal citations and quotation marks omitted). As to the second prong, "the State must demonstrate a substantial government objective." *Johnston* at 295, 735 S.E.2d at 869. Additionally, "the State must demonstrate a reasonable fit between the Act and the objective of ensuring the public safety." *Id.* at 295, 735 S.E.2d at 869. However, in *Johnston*, this Court ultimately could not conclude, based on the record before it, "that the State carried the burden of establishing a reasonable fit and a substantial relationship between the important goal of ensuring public safety and the Act." *Id.* at 295, 735 S.E.2d at 870.

Since this Court's opinion in *Johnston*, the Fourth Circuit "streamlined" its analysis when "a presumptively lawful regulatory measure is under review." *Hamilton v. Pallozzi*, 848 F.3d 614, 623 (4th Cir. 2017), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. June 20, 2017) (No. 16-1517).[1] Under this "streamlined" portion of the analysis, "[the Fourth

1. Although decisions from the Federal Circuit Court of Appeals are not binding on this Court, we may consider such decisions as persuasive authority. *See CarolinaPower & Light Co. v. Employment Sec. Comm'n of N.C.*, 363 N.C. 562, 569, 681 S.E.2d 776, 780 (2009) (noting that while not binding, a decision from another jurisdiction was nonetheless "instructive").

Circuit] effectively supplant[s] the historical inquiry with the more direct question of whether the challenger's conduct is within the protected Second Amendment right of 'law-abiding, responsible citizens to use arms in defense of hearth and home.' " *Hamilton* at 624 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S. Ct. 2783, 2821, 171 L. Ed. 2d 637, 683 ((2008)). The Fourth Circuit then concluded, "we simply hold that conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment." *Hamilton* at 626. That Court reasoned:

> Where the sovereign has labeled the crime a felony, it represents the sovereign's determination that the crime reflects "grave misjudgment and maladjustment," as recognized by the district court. A felon cannot be returned to the category of "law-abiding, responsible citizens" for the purposes of the Second Amendment and so cannot succeed at step one of the *Chester* inquiry, unless the felony conviction is pardoned or the law defining the crime of conviction is found unconstitutional or otherwise unlawful.

Id. at 626.

In *Hamilton*, the plaintiff sought a declaration as to whether Maryland's firearms regulatory scheme prohibiting anyone who has been "convicted of a disqualifying crime"[2] from possessing a firearm violated the Second Amendment as applied to him. *Id.* at 618. There, the Fourth Circuit stated, [plaintiff] is a state law felon, has not received a pardon, and the basis for his conviction has not been declared unconstitutional or otherwise unlawful. As such, he cannot state a claim for an as-applied Second Amendment to Maryland's regulatory scheme for handguns and long guns." *Id.* at 628. Therefore, the Fourth Circuit concluded:

> [A] state law felon cannot pass the first step of the Chester inquiry when bringing an as-applied challenge to a law disarming felons, unless that person has received a pardon or the law forming the basis of conviction has been declared unconstitutional or otherwise unlawful. Relatedly, we hold that evidence of rehabilitation, the likelihood of recidivism, and the passage of time may not be considered at the first step of the *Chester* inquiry as a result.

Id. at 629. Like the plaintiff in *Hamilton*, Defendant in this case is a convicted felon. He therefore cannot show he is a "law-abiding, responsible

2. *See* Md. Code Ann., Pub. Safety §§ 5-133(b)(1), 5-205(b)(1) (2016).

citizen" under *Hamilton*, or rebut the challenged Act's presumption of lawfulness. Under our *de novo* review, Defendant cannot pass the first prong of the *Hamilton* analysis. We need not address the second prong of the analysis.

B. Defendant's State Constitutional Claim

[2] As for an as-applied State constitutional challenge to N.C. Gen. Stat. § 14-415.1, this Court "must determine whether, as applied to [Defendant], N.C.G.S. § 14-415.1 is a reasonable regulation." *Britt* at 549, 681 S.E.2d at 322 (2009). In doing so, this Court considers the following five factors:

> (1) the type of felony convictions, particularly whether they "involved violence or the threat of violence[,]" (2) the remoteness in time of the felony convictions; (3) the felon's history of "lawabiding conduct since [the] crime," (4) the felon's history of "responsible, lawful firearm possession" during a time period when possession of firearms was not prohibited, and (5) the felon's "assiduous and proactive compliance with the 2004 amendment."

State v. Whitaker, 201 N.C. App. 190, 205, 689 S.E.2d 395, 404 (2009) (brackets omitted) (citing *Britt* at 550, 681 S.E.2d at 323).

This Court has held that in order to prevail on an as-applied constitutional challenge to N.C. Gen. Stat. § 14-415.1, the party challenging the statute must present sufficient evidence to allow the trial court to make findings of fact relevant to the five above-quoted factors enumerated in *Britt*. *State v. Buddington*, 210 N.C. App. 252, 255, 707 S.E.2d 655, 657 (2011). When the trial court fails to make findings of fact, this Court may still analyze defendant's as-applied challenge to N.C. Gen. Stat. § 14-415.1 when there is uncontroverted evidence in the record "as to defendant's prior convictions, his history of a lack of lawabiding conduct since [the] crime, and of firearm possession, and his compliance with the 2004 amendment." *Whitaker* at 205, 689 S.E.2d at 404 (internal citation and quotation marks excluded).

Applying the five factors in this case, N.C. Gen. Stat. § 14-415.1 is constitutional as applied to Defendant. First, we consider whether Defendant's prior felony conviction involved violence or a threat of violence. *Whitaker* at 205, 689 S.E.2d at 404. The record reveals Defendant was convicted of possessing a sawed-off shotgun in 2005, a weapon of mass destruction. Second, although Defendant's felony conviction was eleven years ago, this Court has upheld the statute as constitutional as applied to a defendant where there was a span of

eighteen years between the prior felony conviction and the possession charge. *See State v. Bonetsky* ___ N.C. App. ___, ___, 784 S.E.2d 637, 641, *disc. review denied*, ___ N.C. ___, 786 S.E.2d 917 (2016). As to the third factor, the felon's history of law-abiding conduct, Defendant has been convicted of driving while impaired, simple assault and assault on a female. Defendant also has two convictions for driving without an operator's license, one charge of being intoxicated and disruptive, felony possession of a weapon of mass destruction, and most recently, fishing without a license. This Court has assessed previous misdemeanor convictions as part of a "blatant disregard for the law." *Whitaker* at 206, 689 S.E.2d at 404. The fourth factor related to the felon's history of lawful firearm possession. Here, the record establishes Defendant was unlawfully possessing at least one firearm since his conviction in 2005. As to the fifth factor, compliance with N.C. Gen. Stat. § 14-415.1, Defendant concedes he cannot claim compliance with that statute. In considering these five *Britt* factors, we cannot conclude N.C. Gen. Stat. § 14-415.1 is unconstitutional as applied to Defendant.

As to Defendant, N.C. Gen. Stat. § 14-415.1 is a reasonable regulation which is "fairly related to the preservation of public peace and safety." *Britt* at 550, 681 S.E.2d at 323. It is not unreasonable to prohibit a convicted felon who has subsequently violated the law on several occasions from possessing a firearm in order to preserve "public peace and safety." *Id.* at 550, 681 S.E.2d at 323. N.C. Gen. Stat. § 14-415.1 is not unconstitutional under our State Constitution as applied to Defendant.

NO ERROR.

Judges STROUD and TYSON concur.

STATE v. HARRIS

[256 N.C. App. 549 (2017)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
ED LEVAN HARRIS, DEFENDANT

No. COA17-346

Filed 21 November 2017

1. Evidence—testimony—gang activity—motion in limine

The trial court did not commit plain error in an attempted first-degree murder case by allowing the State to offer testimony related to gang activity where it was admitted in accordance with the relief sought by defendant in his motion in limine.

2. Constitutional Law—effective assistance of counsel—failure to object to gang testimony—trial strategy

Defendant did not receive ineffective assistance of counsel in an attempted first-degree murder case based upon his trial counsel's failure to object to testimony about street gangs where trial counsel's decisions regarding the admission of this evidence were part of an intentional trial strategy.

Appeal by defendant from judgment entered 23 April 2016 by Judge Charles H. Henry in Lenoir County Superior Court. Heard in the Court of Appeals 20 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brian D. Rabinovitz, for the State.

Paul F. Herzog for defendant-appellant.

ZACHARY, Judge.

Ed Levan Harris (defendant) appeals from the judgment entered upon his convictions of attempted first-degree murder, assault with a deadly weapon intending to kill inflicting serious injury, and possession of a firearm by a convicted felon. On appeal, defendant argues that the trial court committed plain error by allowing the State to offer testimony related to gang activity in Kinston, North Carolina in July of 2014. In the alternative, defendant argues that he received ineffective assistance of counsel, based upon his trial counsel's failure to object to the challenged testimony. After careful consideration of defendant's arguments, we conclude that defendant is not entitled to relief based on either of these arguments.

Factual and Procedural Background

On 3 July 2014, Keith Williams sustained a gunshot wound to the back of his neck. On 2 February 2015, defendant was indicted for attempted first-degree murder, assault with a deadly weapon intending to kill inflicting serious injury, and possession of a firearm by a convicted felon, with all of these charges arising from the incident in which Mr. Williams was shot.

The charges against defendant were tried beginning on 18 April 2016. The State's evidence tended to show, in relevant part, the following: Sergeant Roland Davis of the Kinston Police Department testified that shortly after midnight on 3 July 2014, he was dispatched to a convenience store on Martin Luther King Jr. Boulevard in response to a reported shooting incident. Mr. Williams was sitting in front of the store, and Sergeant Davis saw a bullet hole in the back of Mr. Williams's neck. Mr. Williams indicated that he had been shot at a location several blocks away, and Sergeant Davis found a .25 caliber shell near a small pool of blood on Fields Street.

Keith Williams testified that between sixth and tenth grades he attended Sampson School. Defendant was a student at the same school, and Mr. Williams and defendant spent time together. During the time that defendant and Mr. Williams attended the same school, they had no fights or disagreements. After Mr. Williams transferred to a different school, they did not see each other often.

Shortly after midnight on the night of 3 July 2014, Mr. Williams was walking in Kinston when defendant called to him and they greeted each other. Defendant was riding a bicycle which Mr. Williams described as a BMX "trick bike." As defendant and Mr. Williams walked along, defendant asked Mr. Williams if he wanted to smoke marijuana, and Mr. Williams agreed. When a law enforcement officer passed them, defendant suggested that they move to a side street, and they turned onto Fields Street. After they left the main street, defendant passed Mr. Williams the marijuana cigarette and then, with no warning, he shot Mr. Williams in the neck.

After he was shot, Mr. Williams turned around and saw defendant riding away on his bike. Mr. Williams ran to Martin Luther King Jr. Boulevard and asked someone at a convenience store to call 911. Mr. Williams testified that when he spoke with law enforcement officers shortly after he was shot and while he was in the hospital, he did not reveal who had shot him because he feared for his personal safety. When Mr. Williams returned home from the hospital, he spoke with his

family and decided to share information with law enforcement officers. Accordingly, Mr. Williams met with Kinston Police Officer Eubanks and provided a recorded interview during which Mr. Williams told Officer Eubanks that defendant was the person who had shot him.

Mr. Williams believed that defendant was "associated with" members of the Bloods, a street gang, but did not know if defendant was a member of the gang. Several weeks prior to Mr. Williams's meeting with defendant, a "high ranking" member of the Bloods had been killed. Mr. Williams "associated" or socialized with members of the Crips, a rival street gang, but was not a member of the gang. Mr. Williams spoke with law enforcement officers several times before he admitted his association with the Crips. Mr. Williams had previous criminal convictions for various offenses, including felony larceny and assault on a female, and he was on probation at the time of trial. On cross-examination, Mr. Williams testified that he was shot a second time on 10 August 2014, while defendant was incarcerated, that Mr. Williams's cousin, Shakeel Stanley, was in the Crips gang, and that Mr. Stanley lived in an apartment on Morningside Drive.

Officer Douglas Connor of the Kinston Police Department testified that on 15 July 2014, he participated in a search of Apartment C on Morningside Drive. Law enforcement officers seized an Astra Firecat handgun in a bedroom. Forensic testing showed that the Astra Firecat had fired the bullet whose shell casing was found on Fields Street. Kinston Police Officer Travis Moore testified that several weeks prior to the incident in which Mr. Williams was shot, the officer had arrested defendant for misdemeanor possession of marijuana and trespassing at the Morningside Drive address. At that time, defendant told Officer Moore that he was visiting someone who lived in Apartment C. On 16 July 2014, Officer Connor assisted with the search of a home on South Adkin Street, where defendant lived with his parents. In a bedroom, officers found a cell phone that had a photo of defendant on the lock screen, as well as .25 caliber bullets. Officers also seized a BMX bicycle, which was the brand of bicycle described by Mr. Williams. Officer Connor took the bicycle to the law enforcement center, and as he was taking the bike to the evidence storage area, defendant appeared in the company of other officers and said, "That's my bike, boy" in an agitated manner.

Defendant offered the testimony of Sergeant Chad Rouse of the Kinston Police Department. On 15 July 2014, Sergeant Rouse was dispatched to the Morningside Drive apartments to investigate a report that Mr. Stanley had been shot. The apartment smelled of marijuana, and drug paraphernalia was observed inside. Thereafter, Sergeant

Rouse obtained a search warrant, pursuant to which the Astra Firecat handgun was seized. Mr. Stanley was arrested for a narcotics charge. Kinston Police Sergeant Stephen Reavis testified that when Mr. Stanley was arrested he was in possession of pills that appeared to be narcotics.

On 23 April 2016, the jury returned verdicts finding defendant guilty of attempted first-degree murder, assault with a deadly weapon intending to kill inflicting serious injury, and possession of a firearm by a convicted felon. The trial court consolidated the offenses for purposes of sentencing and imposed a sentence of 162 to 207 months' imprisonment. Defendant noted a timely appeal to this Court.

Admission of Testimony Related to Street Gangs

[1] Prior to trial, defendant filed a motion *in limine* addressing the potential admission of evidence or testimony concerning street gangs. In his motion, defendant alleged that the Kinston Police Department had a unit that was commonly referred to as the Gang Unit; that defendant believed that the State might try to introduce evidence of defendant's membership in a gang; that the weapon associated with the shooting was seized from an apartment where a gang member lived, and; that Mr. Williams had made a statement in which he speculated that the shooting was gang-related. Defendant also made two contradictory assertions: first, that Mr. Williams's "mere suppositions do not show that gang membership is relevant in this case", but also that "the shooting of the victim may have been gang related" although defendant was not involved. In his prayer for relief, defendant asked that the trial court:

> 1. Not allow any use of the word "gang" including in the context of the law enforcement "Gang Unit."
>
> 2. In the alternative, if the Court does allow the use of the term "gang" to be used as an admission or fact against the defendant, that it be fair game as to the examination and cross-examination of all witnesses.

Following a hearing on defendant's motion *in limine*, the trial court ruled that the State and law enforcement officers would not be allowed to refer to the "Gang Unit" in the Kinston Police Department, but that Mr. Williams would be allowed "to testify to the fact that he had -- associated with gang members and hung around with certain gang members, and be able to testify from his personal knowledge as to the defendant's similar association with a particular gang." Defendant did not note an objection to the trial court's ruling, or object at trial to Mr. Williams's testimony that (1) he socialized or associated with members of the Crips

gang; (2) defendant socialized with members of the Bloods gang; and (3) a few weeks before Mr. Williams was shot, a "high-ranking" member of the Bloods had been shot. In addition, defendant was permitted to cross-examine witnesses concerning gang-related issues. For example, defendant's counsel obtained admissions from Mr. Williams that he did not know whether defendant was a gang member, and that the firearm used to shoot him had been found in an apartment where his cousin, a member of the Crips, was living.

On appeal, defendant concedes that he did not object to the introduction of this testimony at trial, and asks that we review it for plain error. However, as discussed above, defendant's motion *in limine* requested that the trial court either bar any reference to the word "gang", or in the alternative, if witnesses were permitted to testify about gangs, that the term "gang" would be "fair game as to the examination and cross-examination of all witnesses." The trial court allowed defendant's "alternative" request that he be allowed to cross-examine witnesses on gang-related matters.

We have reviewed the transcript of this trial, and observe that on direct examination, Mr. Williams testified that he "associated with" members of the Crips, but was not a member of the gang, that defendant similarly associated with members of the Bloods, and that a high-ranking member of the Bloods had been shot a few weeks earlier. Defendant's counsel cross-examined Mr. Williams extensively about gang-related matters. Mr. Williams admitted that he did not initially admit to law enforcement officers that he associated with the Crips, that his cousin, Shakeel Stanley, was a Crip, that Mr. Williams had prior convictions for weapons offenses, that Mr. Williams typically drank and smoked marijuana with the Crips, that he possessed marijuana when he was shot, and that he was shot on a later occasion while defendant was in jail.

In addition, in their closing arguments both the prosecutor and defense counsel urged the jury to consider gang-related issues. The prosecutor speculated that defendant may have shot Mr. Williams in an attempt to curry favor with the Bloods:

> PROSECUTOR: Keith [(Mr. Williams)] tells you that Ed [(defendant)] associates with Bloods. Well, I submit to you what's going on here - in the old mobster movies, sometimes you hear them talk about their "made" guys and -- and there are guys who are lower level, hadn't gotten made yet. I submit to you we have a similar circumstance here. There's been, as Keith testified, a higher-ranking

> Blood that's been killed recently. Ed's a younger guy, just 17. He knows Keith associates with the Crips. The young guy wants to make a name for himself, move up the ladder.
>
> . . .
>
> In the initial statement what you heard from Officer Eubanks, [Mr. Williams] put it this way: I think Ed was a Blood. He was looking for somebody to shoot.

Defense counsel also referred to street gangs in his closing argument:

> DEFENSE COUNSEL: Keith says he associates with the Crips. I don't know what the semantics of "associate," "affiliate," but apparently it seemed to be an important distinction to him. And he says he believes that Ed associates with some other group, the Bloods. Now, why does Keith know a high-ranking member of the Bloods? You may ask yourself, why does he have that inside knowledge of high-ranking? I mean, what's going on here?
>
> . . .
>
> Why would somebody who was associated with the Crips make up something about being shot? Why would somebody get shot again a few weeks later?
>
> . . .
>
> So, the logical inference that you jurors are allowed to make, based on the evidence that you have seen and heard -- throughout this case, I've been agog at the idea that that makes sense, that it makes sense that it's his. [(that the Astra Firecat is defendant's.)] Ask Keith who does Shakeel associate with? Crips. Everybody in this whole thing is associated, affiliated something - something - something. Blue bandannas, red stuff there. Keith's certainly not citizen of the year either. Why are guys out there getting shot up? It's not because they spend all of their time at the soup kitchen volunteering. It's not because they are at church all the time. Why does Keith get shot up twice? 'Cause he's out being a nice fellow? Is he honest? Keith a felon? Do you believe a guy with that kind of record?

The record thus establishes that defense counsel and the prosecutor were each permitted to advance theories as to the relationship between

gang-related issues in Kinston in 2014 and the identity of the person who shot Mr. Williams. The prosecutor argued that defendant may have shot Mr. Williams as a form of revenge for the recent shooting of a member of the Bloods, or in order to advance his status with that gang. Defense counsel pointed out that Mr. Williams was involved with the Crips, that the weapon with which he was shot was found in an apartment where a member of the Crips lived, and that Mr. Williams was shot by someone else several weeks later, after defendant had been incarcerated.

On appeal, defendant does not dispute that in his motion *in limine* he posited that although defendant had not shot Mr. Williams, the shooting was, in fact, gang-related. It is undisputed that defendant was granted the alternative relief sought in his motion *in limine*, that he be permitted to cross-examine witnesses concerning gang-related matters. Moreover, it is clear from the contents of defendant's motion *in limine*, his cross-examination of Mr. Williams, and his closing argument, that defense counsel pursued a deliberate trial strategy of attempting to persuade the jury that there was a reasonable doubt as to defendant's guilt, based upon (1) Mr. Williams's affiliation with a street gang and his prior criminal record; (2) the fact that even after defendant was in jail Mr. Williams was shot by someone else; and (3) the fact that the weapon with which Mr. Williams was shot had been located in an apartment with which defendant had only a tangential association but where Mr. Williams's cousin, a Crip, was known to live. We conclude that the testimony that was elicited concerning street gangs was admitted in accordance with the relief sought by defendant – that if the trial court allowed testimony about street gangs, defendant should be allowed to cross-examine witnesses on gang-related issues.

We further conclude that the error, if any, in allowing the admission of such testimony is a textbook example of invited error. Invited error has been defined as "a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining." *Sain v. Adams Auto Grp., Inc.*, __ N.C. App. __, __, 781 S.E.2d 655, 663 (2016) (internal quotation omitted). This principle is codified in N.C. Gen. Stat. § 15A-1443(c) (2016), which provides that "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." In addition, defendant not only failed to object to the prosecutor's questioning of Mr. Williams about gang-related matters, but elicited testimony on this subject on cross-examination. Thus, even in the absence of his motion *in limine*, we would hold that he was not entitled to relief on the basis of the admission of this testimony:

> It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character. Additionally, "[s]tatements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law," and a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review.

State v. Steen, 226 N.C. App. 568, 575-76, 739 S.E.2d 869, 875 (2013) (quoting *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007)) (other quotations omitted). We conclude that because defendant expressly requested that the trial court either exclude all evidence pertaining to gangs, or in the alternative, allow cross-examination on the subject, that any error in the admission of such evidence was invited. Consequently, defendant is not entitled to relief based on this argument.

Ineffective Assistance of Counsel

[2] Defendant also argues that he received ineffective assistance of counsel, on the grounds that his trial counsel's failure to object to the introduction of testimony about street gangs was an error establishing that his counsel's performance was below the objective standard of reasonableness, and that there is a reasonable probability that, absent this error, defendant would not have been convicted. We conclude that defendant has failed to establish that he received ineffective assistance of counsel, and that he is not entitled to relief on this basis.

We address a defendant's claim of ineffective assistance of counsel by applying the standards set out in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). To successfully assert an ineffective assistance of counsel claim, a defendant must satisfy a two-prong 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. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis omitted) (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). "To

demonstrate prejudice when raising an ineffective assistance of counsel claim, defendant must show that based on the totality of the evidence there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *State v. Phillips*, 365 N.C. 103, 144-45, 711 S.E.2d 122, 151 (2011) (quoting *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698).

"On appeal, this Court reviews whether a defendant was denied effective assistance of counsel *de novo*." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citation omitted). The determination of whether a claim of ineffective assistance of counsel may be addressed on direct appeal is analyzed as follows:

> "[Ineffective assistance of counsel] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." Therefore, on direct appeal we must determine if these ineffective assistance of counsel claims have been prematurely brought. If so, we must "dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding."

State v. al-Bayyinah, 359 N.C. 741, 752, 616 S.E.2d 500, 509 (2005) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)) (other citations omitted). In the present case, defendant's appellate counsel "respectfully maintains that the record is more than adequately developed for this Court to decide the case on this issue." We agree with defendant and will next proceed to evaluate defendant's claim of ineffective assistance of counsel.

Defendant's claim that he received ineffective assistance of counsel is based solely upon his trial counsel's failure to object to the introduction of evidence related to street gangs. Defendant's appellate counsel contends that "there could be no strategic reason" for defense counsel's choice not to object, and that counsel "can think of no reason why" defendant's trial counsel would not have objected to the prosecutor's questioning of Mr. Williams on gang-related issues. However, the record clearly establishes that defendant's trial counsel "posit[ed] that the shooting of the victim Keith Williams may have been gang related," and that counsel was willing to accede to the prosecutor's introduction of evidence about gangs, provided that the defendant could cross-examine

witnesses on the same subject. As discussed above, defendant's trial counsel pursued a trial strategy focused on Mr. Williams's own criminal record and gang connections, the fact that Mr. Williams was shot a second time when defendant was incarcerated, and the connection between the location where the gun was found and the gang with which Mr. Williams was associated. Defense counsel argued in closing that the State's prosecution of defendant reflected law enforcement officers' "tunnel vision" and the State's failure to explore other possible culprits. We conclude that defendant's trial counsel's decisions regarding the admission of evidence about street gangs were part of an intentional trial strategy. Thus:

> The defendant's complaint about counsel's [failure to object to testimony about street gangs] is in effect a request to this Court to second-guess his counsel's trial strategy. This we decline to do. . . . Trial counsel are necessarily given wide latitude in these matters. Ineffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness. We ordinarily do not consider it to be the function of an appellate court to second-guess counsel's tactical decisions[.]

State v. Lowery, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986) (internal quotation omitted)). We conclude that defendant has failed to establish that his trial counsel's pursuit of a trial strategy that included consideration of the role of street gangs in Mr. Williams's shooting constituted ineffective assistance of counsel.

Conclusion

For the reasons discussed above, we conclude that defendant has failed to establish that the trial court erred by allowing the introduction of evidence pertaining to gangs, or that defendant's trial counsel's treatment of this issue constituted ineffective assistance of counsel. We further conclude that defendant had a fair trial, free of reversible error.

NO ERROR.

Judges CALABRIA and MURPHY concur.

STATE v. HAYES

[256 N.C. App. 559 (2017)]

STATE OF NORTH CAROLINA
v.
MICHAEL LYNN HAYES

No. COA17-46

Filed 21 November 2017

Motor Vehicles—habitual impaired driving—retrograde extrapolation expert testimony—prejudicial error

The trial court committed prejudicial error under N.C.G.S. § 8C-1, Rule 702(a)(1) and (3) in a habitual impaired driving case by admitting retrograde extrapolation expert testimony where the testimony did not specifically apply characteristics of this particular defendant, there was a lack of evidence of appreciable physical and mental impairment, the State conceded error under *State v. Babich*, 252 N.C. App. 165 (2017), and defendant met his burden of showing a reasonable possibility that a different result would have been reached absent the expert's testimony.

Appeal by defendant from judgment entered 8 June 2016 by Judge J. Thomas Davis in Buncombe County Superior Court. Heard in the Court of Appeals 23 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General June S. Ferrell, for the State.

Jarvis John Edgerton, IV, for defendant.

ELMORE, Judge.

Defendant Michael Lynn Hayes appeals his conviction for habitual impaired driving, challenging the admission of retrograde extrapolation testimony by the State's expert witness. That expert used defendant's 0.06 blood alcohol concentration (BAC) one hour and thirty-five minutes after the traffic stop to determine that defendant had a BAC of 0.08 at the time of the stop. To reach this conclusion, the expert assumed defendant was in a post-absorptive state at the time of the stop, meaning that alcohol was in the process of being eliminated from his bloodstream and his BAC was in decline. The expert admitted that while there were no facts to support this assumption, he made it regardless because his retrograde extrapolation analysis could not be done unless defendant was in a post-absorptive state.

In accordance with *State v. Babich*, ___ N.C. App. ___, 797 S.E.2d 359 (2017), we hold that the expert's testimony was inadmissible under the *Daubert* standard that applies to Rule 702 of the Rules of Evidence. "Although retrograde extrapolation testimony often will satisfy the *Daubert* test, in this case the testimony failed *Daubert*'s 'fit' test because the expert's otherwise reliable analysis was not properly tied to the facts of this particular case." *Id.* at ___, 797 S.E.2d at 360; *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (holding that "helpfulness" standard for admissibility of scientific testimony under Rule 702 of Federal Rules of Evidence requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility); *see also State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016) (holding that *Daubert* standard applies to admissibility determination of expert testimony under amended North Carolina evidentiary rule).

The State concedes error under *Babich*; thus, the only issue remaining on appeal is whether the erroneously-admitted testimony prejudiced defendant. Because defendant has met his burden of showing a reasonable possibility that a different result would have been reached had the expert's testimony been excluded, we find prejudicial error in defendant's conviction. Accordingly, we reverse the trial court's judgment and remand for a new trial.

I. Background

On 23 April 2014, Officer Adam Cabe of the Asheville Police Department conducted a traffic stop leading to defendant's arrest. Defendant was indicted on 7 June 2014 for habitual impaired driving in violation of N.C. Gen. Stat. § 20-138.5. The case came to trial on 6 June 2016, and Officer Cabe testified for the State regarding his interactions with defendant on the evening of the stop.

At approximately 12:43 a.m., Officer Cabe was conducting stationary radar speed enforcement when he measured defendant driving 50 miles per hour in a 35 mile-per-hour zone. The officer followed defendant and initiated a traffic stop based on this observation of speeding. Defendant stopped his vehicle at a gas station, partially in a parking space and partially blocking a gas pump. Officer Cabe exited his patrol car and approached defendant's vehicle, noting that defendant appeared to place chewing gum in his mouth as the officer approached.

When he reached the vehicle, Officer Cabe observed that defendant had glassy eyes, and he asked for defendant's driver's license. Defendant told Officer Cabe he did not have a driver's license and instead produced

a North Carolina identification card, which Officer Cabe noticed defendant had difficulty retrieving from his wallet. During this initial interaction, defendant told the officer he was on his way home from working late and had just picked up his children, all four of whom were passengers in defendant's vehicle. Defendant also told the officer that defendant's oldest son and front-seat passenger was supposed to be driving at the time, but the young man did not know the way home from that particular area.

Officer Cabe returned to his patrol car to run a record check on defendant, which revealed outstanding warrants for driving while license revoked and failure to pay child support. Officer Cabe then placed defendant under arrest based on these warrants. Defendant requested to use the gas station's bathroom prior to being transported to the detention center, but Officer Cabe denied his request; defendant was allowed to use the bathroom upon arrival at the center. As Officer Cabe handcuffed and began to search defendant, he detected a moderate odor of alcohol on defendant's breath. However, the officer did not ask defendant if he had been drinking and, if so, when; he did not ask defendant to perform a field sobriety test at the time of arrest; and he did not arrest defendant on suspicion of impaired driving.

At trial, Officer Cabe testified that he believed defendant was appreciably impaired based on observations of speeding, chewing gum, glassy eyes, a moderate odor of alcohol, bathroom use, and defendant's subsequent refusal to perform a series of field sobriety tests once at the detention center. Defendant also refused to provide a breath sample, leading Officer Cabe to secure a search warrant in order to draw blood from defendant. The test results of that blood draw indicated that defendant's BAC one hour and thirty-five minutes after the traffic stop was 0.06 grams of alcohol per 100 milliliters of blood. At no time did Officer Cabe observe any direct signs of physical or mental impairment, such as difficulty walking or standing, slurred speech, or trouble answering questions and following directions.

In addition to Officer Cabe, Mr. Daniel Cutler testified for the State as an expert witness in the field of blood alcohol pharmacology, physiology, and related research, including retrograde extrapolation. Retrograde extrapolation is a mathematical formula in which a known BAC test result is used to determine a driver's BAC at an earlier time (e.g., the time of a traffic stop). *State v. Cook*, 362 N.C. 285, 288, 661 S.E.2d 874, 876 (2008). The analysis determines the earlier BAC on the basis of (1) the time elapsed between the traffic stop and the known BAC test, and (2) the rate of alcohol elimination from the driver's blood

during the time between the traffic stop and the test. *Id.* In order for retrograde extrapolation to be applied accurately under these circumstances, the driver *must* be in the elimination or "post-absorptive" phase of alcohol consumption at the time of the stop. Mr. Cutler estimated that a driver may peak – that is, his body may go from absorbing alcohol to eliminating it – anywhere from thirty minutes to an hour and thirty minutes after he takes his final drink.

Defendant objected to the admission of retrograde extrapolation evidence at trial pursuant to Rule 702(a) of the Rules of Evidence. During *voir dire* following the objection, Mr. Cutler testified that for purposes of his retrograde extrapolation analysis, he had to assume that defendant had already peaked and thus was in a post-absorptive state at the time of the traffic stop. Mr. Cutler made this assumption because the information used in his analysis, which was based on the State's evidence, admittedly lacked any indication as to when defendant last consumed alcohol. Consequently, the only case-specific data tying Mr. Cutler's analysis to these particular facts was the time elapsed from the traffic stop to the blood draw. In overruling defendant's objection, the trial court expressly acknowledged that Mr. Cutler's retrograde extrapolation analysis did not "specifically [apply] characteristics of this particular defendant." Mr. Cutler went on to tender his expert opinion – based on retrograde extrapolation analysis – that defendant's BAC was 0.08 at the time of the traffic stop.

In its closing argument, the State repeatedly asserted to the jury that Mr. Cutler's retrograde extrapolation analysis was "uncontroverted" and "accepted in the legal community." The State also specifically stated to the jury that its evidence showed defendant's BAC at the relevant time was at least 0.08, which it based entirely on Mr. Cutler's analysis. For its part, the jury asked only two questions of the court during its nearly four hours of deliberations: first, "what defines a relevant time frame after driving for a proper blood alcohol test?," followed forty-five minutes later by a request to see the State's written extrapolation report.

The jury ultimately found defendant guilty of impaired driving under N.C. Gen. Stat. § 20-138.1. Defendant pled guilty to additional charges of speeding and driving while license revoked, and he stipulated that he had previously been convicted of three counts of impaired driving, which elevated his conviction here to habitual status under N.C. Gen. Stat. § 20-138.5. Defendant entered notice of appeal in open court on 8 June 2016.

II. Discussion

On appeal, defendant relies on our decision in *State v. Babich* to support his contention that the trial court violated N.C. Gen. Stat. § 8C-1, Rule 702(a)(1) and (3) by allowing into evidence expert witness opinion testimony that was not based on sufficient facts or data and did not apply the relevant scientific principles reliably to the facts of the case. ___ N.C. App. ___, 797 S.E.2d 359 (2017) (holding that BAC expert's assumption that defendant was in a post-absorptive state at the time of the traffic stop was not based on any facts, thus expert opinion was inadmissible). As to this particular argument, the State is unable to distinguish *Babich* from the case at bar. The State therefore concedes that Mr. Cutler's expert opinion regarding his retrograde extrapolation results should not have been admitted, and we agree. At issue then is whether the trial court's error prejudiced defendant.

Judgment will not be set aside for mere error and nothing more; rather, "it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial[.]" *State v. Rainey*, 236 N.C. 738, 741, 74 S.E.2d 39, 41 (1953). An error is not prejudicial unless "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). The burden of showing such prejudice is on the defendant. *Id.*

A defendant may be convicted of driving while impaired if the State proves that he drove "(1) [w]hile under the influence of an impairing substance; or (2) [a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, [a BAC] of 0.08 or more." N.C. Gen. Stat. § 20-138.1(a). The jury in this case was instructed on both alternative grounds.

In *Babich*, we held that the evidence of the defendant's appreciable impairment was sufficient to show that, even without the challenged expert testimony, there was no reasonable possibility the jury would have reached a different conclusion. ___ N.C. App. at ___, 797 S.E.2d at 365; *see also State v. Taylor*, 165 N.C. App. 750, 600 S.E.2d 483 (2004) (holding that any error in admission of retrograde extrapolation testimony necessary to prove second ground in N.C. Gen. Stat. § 20-138.1(a) was harmless because of strength of evidence that defendant was appreciably impaired under the first ground). The evidence of appreciable impairment in *Babich* consisted of the following: the officer saw the defendant drive 80 to 90 miles per hour while approaching a red light, suddenly slow down, then drive through the red light at approximately

45 miles per hour; the officer smelled alcohol on the defendant's breath; the defendant had glazed and bloodshot eyes; the defendant stumbled as she walked; the defendant ignored the officer's instructions and repeatedly talked over him as he attempted to speak with her; and the defendant did not properly perform the officer's field sobriety tests. *Id.*

The case *sub judice* is distinguishable from *Babich* in this regard. Here, the State presented evidence that the officer believed defendant was appreciably impaired based on observations of speeding, chewing gum, glassy eyes, a moderate odor of alcohol, bathroom use, and refusal to perform a series of field sobriety tests. However, none of these observations amount to evidence of appreciable physical or mental impairment.

On cross-examination, Officer Cabe testified that normal speeding and bathroom use were not identified in any of his training as observable factors that suggest impaired driving. The officer's remaining observations of chewing gum, glassy eyes, a moderate odor, and refusal to perform field sobriety tests merely suggest the recent consumption of an indeterminate amount of alcohol by a person with no incentive to provide evidence of potential impaired driving, especially given his prior record. Significantly, the officer testified that he never observed defendant exhibit slurred speech, reckless driving, weaving, difficulty with motor skills, difficulty answering questions, or difficulty following directions.

Based on this lack of evidence of appreciable physical and mental impairment, defendant contends that the erroneously-admitted retrograde extrapolation testimony prejudiced defendant by playing a pivotal role in determining the outcome of his trial, and we agree. Accordingly, we find that defendant has met his burden of showing prejudicial error in the instant case.

III. Conclusion

For the reasons discussed above, we hold that the trial court erred in admitting the retrograde extrapolation testimony of the State's expert witness, and that this error materially prejudiced defendant. We therefore reverse defendant's conviction for driving while impaired and remand this case for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

Judges STROUD and TYSON concur.

STATE v. MONROE

[256 N.C. App. 565 (2017)]

THE STATE OF NORTH CAROLINA
v.
GREGORY LAMONT MONROE

No. COA17-538

Filed 21 November 2017

1. Appeal and Error—preservation of issues—sufficiency of evidence for guilty plea—failure to argue at trial

Defendant's petition for writ of certiorari to review the trial court's acceptance of a guilty plea and denial of his motion to withdraw a guilty plea in a trafficking and possession of drugs case was denied where at no time during the plea hearing did defendant argue that the factual basis for the entry of judgment against him on all the charges were insufficient.

2. Pleadings—guilty plea—motion to withdraw—no duress—understanding of plea

The trial court did not err in a trafficking and possession of drugs case by denying defendant's motion to withdraw a guilty plea following sentencing where there was no evidence that defendant made his guilty plea under duress. The trial court attempted to proceed to trial, and it was defendant who insisted on pleading guilty. Further, a completed and signed transcript of plea form and the transcript revealed that the trial court made a careful inquiry of defendant's understanding of the plea.

Appeal by defendant from judgments entered 8 November 2016 by Judge W. Erwin Spainhour in Randolph County Superior Court. Heard in the Court of Appeals 31 October 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lisa K. Bradley, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant.

PER CURIAM.

Gregory Lamont Monroe ("defendant") filed petitions for *writ of certiorari* for review of the trial court's acceptance of his guilty plea and denial of his motion to withdraw his guilty plea. The State filed a

motion to dismiss the appeal. Based on the reasons stated herein, we deny defendant's petitions for *writ of certiorari* and grant the State's motion to dismiss.

I. Background

On 14 September 2015, defendant was indicted for trafficking in opium or heroin (possessing more than 28 grams) in violation of N.C. Gen. Stat. § 90-95(h); trafficking in opium or heroin (transporting more than 28 grams) in violation of N.C. Gen. Stat. § 90-95(h); possessing with intent to sell and deliver heroin (more than 28 grams) in violation of N.C. Gen. Stat. § 90-95(a)(1); possessing heroin in violation of N.C. Gen. Stat. § 90-95(a)(3); trafficking in opium or heroin (possessing 4 grams or more but less than 14 grams) in violation of N.C. Gen. Stat. § 90-95(h); and trafficking in opium or heroin (transporting 4 grams or more but less than 14 grams) in violation of N.C. Gen. Stat. § 90-95(h).

On 8 November 2016, defendant's case was heard in the Randolph County Superior Court before the Honorable W. Erwin Spainhour. Defendant, proceeding *pro se* with standby counsel, entered a guilty plea to all charges.

On 8 November 2016, defendant was sentenced to consecutive terms of 25 to 282 months and 70 to 93 months.

On 14 November 2016, defendant filed a form entitled "Request For Services" with the Randolph County Clerk's Office. In the form, defendant stated as follows: "I would like to Appeal my case due to the fact that I signed my name with 'under duress' up under it making the contract voidable and invalit [sic] therefore this time I received is no good." Defendant requested a new court date.

On 17 November 2016, defendant filed a document entitled, " 'AFFIDAVIT' NOTICE OF APPEAL[,]" stating the he "would like to appeal the plea bargan do [sic] to the fact it was made under duress." Defendant also argued, among other things, that he was denied due process and equal protection, Judge Spainhour had committed fraud, his sentence should be vacated, and his case should be dismissed.

The record contains documents from defendant entitled "Motion to Withdraw Plea" and "DEFENDANT AFFIDAVIT OF FACT" in which he contends that his guilty plea was made under duress. On 22 November 2016, the trial court entered an order stating that defendant had sent this motion and affidavit to the Office of the Senior Resident Superior Court Judge of Judicial District 19-B. The order provided that although

the documents were filed 22 November 2016[1], the court was uncertain what date the documents were received and that the accompanying envelope was postmarked 15 November 2016. The order denied defendant's motion to withdraw his guilty plea.

The record also contains a document file-stamped on 28 November 2017 and entitled "NOTICE OF APPEAL" wherein defendant argues that he was not given equal protection or due process, Judge Spainhour violated his oath of office, defendant was threatened "with force of restraint[,]" and he was under duress when signing his guilty plea.

II. Discussion

Defendant presents two issues on appeal. First, defendant argues that the trial court erred in accepting his guilty plea when it was not supported by a sufficient factual basis. Second, defendant contends that the trial court erred by denying his motion to withdraw his guilty plea.

A. Factual Basis for Guilty Plea

[1] Defendant argues that the trial court erred by accepting his guilty plea where there was an insufficient factual basis for the plea, in violation of N.C. Gen. Stat. § 15A-1022(c)[2]. Specifically, defendant contends that there was insufficient evidence to establish the identity of the controlled substances and to support the statutory weights for four of the charges. Defendant also argues that defendant's stipulations were insufficient to establish a factual basis.

We first address the motions that are before our panel. On 10 July 2017, defendant filed a petition for *writ of certiorari* for review of this issue. Defendant also stated that he was filing the petition in the event that our Court finds his *pro se* notice of appeal to be defective for failing to indicate that he was appealing to our Court in violation of Rule 4(b) of the North Carolina Rules of Appellate Procedure. On 14 August 2017, the State filed a motion to dismiss defendant's appeal. As to defendant's first issue, the State argues that defendant's right to appeal is precluded by N.C. Gen. Stat. § 15A-1444 and defendant's guilty plea.

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1. The record on appeal has a file stamp date of 23 November 2016 on the "Motion to Withdraw Plea."

2. N.C. Gen. Stat. § 15A-1022(c) (2015) provides: "The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to: (1) A statement of the facts by the prosecutor. (2) A written statement of the defendant. (3) An examination of the presentence report. (4) Sworn testimony, which may include reliable hearsay. (5) A statement of facts by the defense counsel."

"In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). A defendant "does not have an appeal as a matter of right to challenge the court's acceptance of his guilty plea." *State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987). However, "our Supreme Court has held that when a trial court improperly accepts a guilty plea, the defendant may obtain appellate review of this issue only upon grant of a writ of certiorari." *State v. Demaio*, 216 N.C. App. 558, 562, 716 S.E.2d 863, 866 (2011) (internal quotation marks and citation omitted). "A petition for the writ must show merit or that error was probably committed below. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Rouson*, 226 N.C. App. 562, 563-64, 741 S.E.2d 470, 471 (citing *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)), *disc. review denied*, 367 N.C. 220, 747 S.E.2d 538 (2013).

We find *State v. Kimble*, 141 N.C. App. 144, 539 S.E.2d 342 (2000), *disc. review denied*, __ N.C. __, 548 S.E.2d 150 (2001), to be dispositive here. In *Kimble*, the defendant argued on appeal that the trial court erroneously entered judgment against him for eight counts of solicitation to commit first-degree murder because there was an insufficient factual basis for his guilty plea, in violation of N.C. Gen. Stat. § 15A-1022(c). In the alternative, the defendant argued that the State's factual narrative only supported one solicitation. *Id.* at 147, 539 S.E.2d at 344. Our Court noted that the defendant did not object during the plea hearing to the State's summary of the factual basis for these charges, the defendant did not argue before the trial court that only one count of solicitation was supported by a sufficient factual basis, and the defendant's motion to withdraw his guilty plea after entry of judgment did not include an insufficient factual basis argument. *Id.* Citing to the North Carolina Rules of Appellate Procedure, our Court held that because the issue on appeal was not raised before the trial court, it was not properly before this Court. *Id.* at 147, 539 S.E.2d at 345.

We find the circumstances in the present case analogous to those found in *Kimble*. After defendant's charges were read to him, defendant, proceeding *pro se*, repeated the phrase that he "accept[ed] the value of the charges[]" and "accept[ed] the value of the whole proceeding[]" multiple times. Defendant then stated that he waived a jury trial and that he would "take whatever is given to me." The trial court interpreted defendant's communications as a waiver of a jury trial and an election

of a bench trial. After the State called on four witnesses, the following exchange occurred:

> [Defendant]: . . . I mean, what was the purpose of me pleading guilty if I still got to go through this? I thought I wouldn't have to go through this.
>
> THE COURT: Well, you're having – you don't have to go through it in front of a jury, see? You've – you've taken away a jury trial. Just – just don't – just relax and listen to the evidence, okay?
>
> . . . .
>
> [Defendant]: Can't I just plead guilty –
>
> . . . .
>
> [Defendant]: I can't just accept the guilt and get it over with and you give me time and I'm gone back to prison?
>
> THE COURT: No.
>
> [Defendant]: You can't do it like that? I mean, I –
>
> THE COURT: All right, let's do it this way ----
>
> [Defendant]: God.
>
> THE COURT: Just do you stipulate – I just think that I – I ought to hear this evidence. You don't want me to hear this evidence?
>
> [Defendant]: No, you don't have to hear it; just go ahead and find – sentence me.

The trial court then read through each of defendant's charges and asked defendant if he stipulated, agreed, and admitted to the elements of the offenses. Defendant replied in the affirmative to each charge. Like the *Kimble* defendant, at no time during the plea hearing did defendant argue that the factual basis for the entry of judgment against him on all the charges were insufficient. Rather, defendant continuously interrupted the trial court's attempt to provide a factual basis and insisted that the court move on to sentencing. In addition, defendant's motion to withdraw his plea was not based on the argument of an insufficient factual basis to support his plea. Assuming *arguendo* that we granted defendant's petition, the issue would not be properly before us due to his failure to raise this argument to the trial court. Accordingly, defendant's 10 July 2017 petition for *writ of certiorari* is denied.

B. Denial of Motion to Withdraw Guilty Plea

[2] In his second argument, defendant contends that the trial court erred by denying his motion to withdraw his guilty plea following sentencing.

In the State's 14 August 2017 motion to dismiss the appeal, the State asserts that our Court does not have jurisdiction to review the trial court's denial of defendant's motion to withdraw his guilty plea due to lack of notice of appeal. In response, on 28 August 2017, defendant filed a second petition for *writ of certiorari* to review the trial court's 22 November 2016 order denying defendant's motion to withdraw his guilty plea.

"When a defendant seeks to withdraw a guilty plea after sentencing, his motion should be granted only where necessary to avoid manifest injustice." *State v. Suites*, 109 N.C. App. 373, 375, 427 S.E.2d 318, 320, *disc. review denied*, 333 N.C. 794, 431 S.E.2d 29 (1993).

> Some of the factors which favor withdrawal include whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration.

State v. Handy, 326 N.C. 532, 539, 391 S.E.2d 159, 163 (1990) (internal citations omitted).

Because defendant's motion to withdraw his plea was made post-sentence, it is properly treated as a motion for appropriate relief. *Id.* at 536, 391 S.E.2d at 161. "A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears . . . ." N.C. Gen. Stat. § 15A-1420(c)(6) (2015).

Defendant argues that the trial court should have granted his motion to withdraw his plea because it was made under duress and was based on a misunderstanding of the law. We are not persuaded.

Defendant asserts that he was threatened to be "tide [sic] and gagged" by the trial court judge and thus, his plea was made under duress. The record demonstrates that defendant was uncooperative and unresponsive throughout the entire 8 November 2016 hearing. The trial court stated that if defendant continued to be disruptive, it would have

no choice but to force defendant to have a seat, "to have you bound and gagged[.]" Nevertheless, when the trial court attempted to proceed to trial and jury selection, defendant was initially unresponsive and then stated that he was pleading guilty and "accept[ing] the value" of the charges and of the whole proceeding. When asked if he waived his right to a jury trial, defendant stated, "I waive a jury and accept the value of the whole proceeding[.]" As explained above, the trial court interpreted this to mean that defendant desired a bench trial. When it was time for defendant's opening statement, he stated that he desired to "just plead guilty or whatever and get it over with." Defendant asserted that he wished to make an *Alford* guilty plea. After four of the State's witnesses were called to testify, defendant interrupted the proceedings again and specifically requested that he wanted to plead guilty and move onto sentencing. Therefore, we find no evidence that defendant made his guilty plea under duress as the trial court attempted to proceed to trial and it was defendant who insisted on pleading guilty.

As to defendant's argument that he misunderstood the law, the record includes a completed and signed Transcript of Plea form and the transcript reveals that the trial court made a careful inquiry of defendant regarding the plea. Our Court has held these two things to be sufficient to demonstrate that the plea was entered into freely, understandingly, and knowingly. *See State v. Russell*, 153 N.C. App. 508, 511, 570 S.E.2d 245, 248 (2002); *State v. Wilkins*, 131 N.C. App. 220, 224, 506 S.E.2d 274, 277 (1998).

Considering the foregoing reasons, defendant is unable to establish manifest injustice and unable to show that the trial court erred by denying his motion to withdraw his guilty plea. Thus, the 28 August 2017 petition for *writ of certiorari* cannot show merit and is denied. The State's motion to dismiss appeal is granted.

III. Conclusion

Defendant's 10 July 2017 and 28 August 2017 petitions for *writ of certiorari* are denied. The State's 14 August 2017 motion to dismiss appeal is granted.

APPEAL DISMISSED.

Panel Consisting Of: Bryant, Murphy, Arrowood.

STATE OF NORTH CAROLINA
v.
TINA STAMEY PAYNE

No. COA16-1193

Filed 21 November 2017

1. Appeal and Error—appealability—writ of certiorari—not guilty by reason of insanity

The Court of Appeals in an attempted first-degree murder case granted defendant's petition for writ of certiorari and denied the State's motion to dismiss defendant's appeal based upon its contention that no right of appeal existed from an order ruling that defendant was not guilty by reason of insanity.

2. Constitutional Law—right to assistance of counsel—not guilty by reason of insanity plea—affirmative defense must be asserted by defendant

The trial court erred in an attempted first-degree murder case by denying defendant her constitutional right to assistance of counsel when her defense lawyer pursued a pretrial defense of not guilty by reason of insanity (NGRI) against her wishes. NGRI is an affirmative defense that must be asserted by defendant, who has the final decision-making authority over what plea to enter.

Appeal by Defendant from order entered 19 May 2016 by Judge Robert T. Sumner in Superior Court, Gaston County. Heard in the Court of Appeals 5 June 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathleen N. Bolton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant.

McGEE, Chief Judge.

Tina Stamey Payne ("Defendant") appeals from the trial court's order finding her not guilty by reason of insanity ("NGRI") of one count of attempted first-degree murder and one count of assault with a deadly weapon inflicting serious injury. On appeal, Defendant asserts that she was denied her constitutional right to assistance of counsel when her defense lawyer pursued a pretrial defense of NGRI against her wishes.

I. Background

Evidence presented at multiple pretrial hearings, based in part on court-ordered psychological reports, tended to show the following: On 4 August 2013, Defendant was at her home when she pointed a .22 caliber handgun at A.P., her fifteen-year-old daughter, and said: "I'm sorry." A.P. screamed for her brother and Defendant's twenty-eight-year-old son, R.P., ran into the room and wrestled the gun from Defendant. During the struggle, the gun discharged twice. A.P. was hit in her left shoulder by a bullet, and R.P. was hit in his right hand. Defendant then "went outside with a knife and tried to get hit by a car, and then began cutting her wrists." Defendant was arrested that day, and indicted for attempted first-degree murder and assault with a deadly weapon inflicting serious injury on 19 August 2013.

The day after the incident, on 5 August 2013, a forensic nurse practitioner conducted a psychiatric consultation with Defendant and diagnosed her as suffering from psychosis or being psychotic at the time of the 4 August 2013 incident. Defendant's Counsel filed an ex parte motion on 9 September 2013, requesting the trial court to approve funds to retain a mental health expert to examine Defendant in order "to determine whether or not [] Defendant has any defenses based upon [] psychological, mental, emotional and personality problems." Defendant's counsel's motion was granted, and Defendant was evaluated by an expert retained by her counsel. Defendant's counsel filed a motion on 8 April 2014 stating that Defendant "hereby notifies the State of [her] intention to use at trial defenses of, but not limited to alibi, mental infirmity, diminished capacity, self-defense, mistake of fact, insanity and/or accident."

A. *Initial Capacity Hearings*

At a 6 November 2014 hearing, the trial court was informed by the State that the defense expert had completed his mental health evaluation of Defendant. The State requested that Defendant be committed to Central Region Hospital for evaluation by State experts on capacity and insanity issues. Defendant's counsel did not object. Defendant stated: "I understand the State wants a second opinion for an evaluation, and I agree with that, if that's what the State feels like they need[.]" However, she also informed the trial court: "My attorney and I do not agree on a lot of things. He's made a lot of decisions without even talking to me about it." Defendant further stated:

> I let [my attorney] know on August the 18th of [2013] that I wanted to plead not guilty because it was an accident. [My attorney] waited until April of this year and put in a plea

> for insanity. He told me the truth was not good enough, it was not going to work. He thought an insanity plea was the best. But I know what happened because I was there, and my children were there. I didn't try to murder anybody and I did not shoot anyone. And I know this and my children know this.
>
> . . . .
>
> I know I didn't make a confession, I didn't do it. I did not try to murder anybody and I didn't shoot anybody. You don't confess to that. I don't know why my attorney keeps trying to do this insanity plea when I've made it clear to him that it was an accident, the truth was gonna have to be good enough.

The trial court noted that Defendant sounded "very lucid, very rational," but that it had a petition that said Defendant had mental health issues and a history of paranoia, as well as "two lawyers telling [the court] that they think that [Defendant] need[s] to be examined by another psychiatrist," and so the trial court granted the State's request to commit Defendant for further evaluation to determine her capacity to proceed.

Defendant's capacity to proceed was evaluated at a 21 July 2015 hearing. At that hearing, Defendant stated she had told her counsel she wanted a trial by jury, but that he had not gotten back in contact with her about the matter. Based upon the evidence presented, Defendant was again ordered to be "involuntarily committed . . . for appropriate treatment until such time as she be rendered competent in this matter."

B. *Pretrial Determination of NGRI*

Another hearing was conducted on 7 April 2016, which the State explained to the trial court was for the following two purposes:

> Your Honor, we put this on the calendar specifically for this afternoon to address the defense of insanity pretrial. As we were reviewing the court file and all of the evaluations that have been done [Defendant's counsel] and I discovered that there has not been a finding of capacity at this point. So we will need to address that first. And once that determination has been made then move to a pretrial hearing as to the defense of insanity and whether or not it would apply to [Defendant's] cases that are pending.

Although no written motion is included in the record, it appears Defendant's counsel did move, pursuant to N.C. Gen. Stat. § 15A-959(c)

(2015), for a pretrial determination by the trial court that Defendant was NGRI of the crimes charged. During the 7 April 2016 hearing, the State, Defendant's counsel, and Defendant herself, agreed Defendant was competent to assist her attorney and proceed to trial. The trial court ruled that Defendant was competent to proceed, and a hearing pursuant to N.C.G.S. § 15A-959(c) was then conducted.

The State requested that the trial court "move forward to address specifically the second portion of the purpose of us being here today, which is in regard to whether or not insanity would be a viable defense for [Defendant] . . . at trial proceedings" pursuant to N.C.G.S. § 15A-959(c). The trial court next heard testimony concerning Defendant's motion for pretrial determination of insanity. Defendant's expert witness testified that, in her opinion, Defendant suffered from schizophrenia at the time of the offenses and that Defendant "understood the action of what she was doing but not the wrongfulness of the action." After this testimony, which constituted the entirety of the evidence presented, Defendant asked, and was permitted, to make a statement to the trial court.

> [DEFENDANT]: Your Honor, [my attorney] had spoke[n] to me when I was informed of all of my options for a plea, when I was in the hospital for four months. I took restorative classes and that was an extensive explanation of the court system and process and the pleas that were available to me for the accusations made against me.
>
> [My attorney] and I discussed that. And I expressed to [my attorney] that I did not want him to file a motion for a NGRI plea, that I realized it wasn't an option to me. But basically for it to be heard without hearing all of the evidence to be disputed and to have a proper jury hearing to find me guilty of the crimes I'm alleged to have committed. That it was an admission of guilt with an excuse and that I would prefer – I did not want him to give that plea, enter the motion for the use of that plea.
>
> But [my attorney] did that without my knowledge, and he only informed me of it on last Friday, April the 1st he informed me of that. And that was pretty much it. But as far as it being used in a trial, I have no problem with that. But to be used without a proper trial to dispute any evidence against me I feel like that would violate my rights.
>
> THE COURT: Okay

> [DEFENDANT]: And I'd ask that you would enter – that you would deny an entry of a NGRI plea today before a proper hearing and proper trial to establish guilt because it hasn't been established I committed a crime. I haven't been convicted of a crime to be found not guilty of.
>
> THE COURT: All right. Thank you.

Defendant's counsel then immediately argued that, based on the evidence presented, the trial court should find Defendant "insane and . . . not guilty[.]" The State agreed with the recommendation of Defendant's counsel, but requested that the trial court "make this a dismissal *with leave* so that the State then is responsible and aware of any future actions as it relates to [Defendant]." (emphasis added).

Following the hearing, the trial court concluded:

> [D]efendant has a serious mental illness, schizophrenia, was psychotic at the time of the alleged crimes on August 4, 2013 and due to her psychosis, was unable to understand the wrongfulness of her actions at the time they were allegedly committed.
>
> [D]efendant has a valid defense of insanity and the charges arising out of the occurrences on August 4, 2013 should be dismissed with leave as a matter of law.

The trial court entered an order on 19 May 2016, which ordered "the charges against [D]efendant be dismissed with leave by the State based on the [trial court's] determination that under N.C.G.S. § 15A-959, [D]efendant was insane at the time the acts for which she is charged were committed." Defendant appeals.

II. Appellate Review

[1] The State filed a motion to dismiss Defendant's appeal based upon its contention that no right of appeal exists from the order ruling that Defendant was NGRI. Defendant acknowledges that her only potential avenue for appellate review is for this Court to grant the petition for writ of *certiorari*, which she filed 25 January 2017. We grant Defendant's petition for writ of *certiorari* and deny the State's motion to dismiss.[1] We therefore address the merits of Defendant's appeal.

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1. Recognizing the complicated issues concerning the appealability of the 19 May 2016 order, we grant to the extent necessary, if at all, Defendant's petition pursuant to the authority granted this Court by N.C. Gen. Stat. § 7A-32(c) (2015) and Rule 2 of the North Carolina Rules of Appellate Procedure. *See State v. Ledbetter*, __ N.C. App. __, 794 S.E.2d 551 (2016).

III. Analysis

[2] In Defendant's first argument, she contends "the trial court erred and denied [her] constitutional right to the assistance of counsel when it allowed her lawyer to pursue a pre-trial insanity defense against her wishes," and requests that this Court "vacate the trial court's NGRI order and remand for appropriate proceedings." We agree.

"This Court reviews alleged violations of constitutional rights *de novo*." *State v. Jones*, 220 N.C. App. 392, 394, 725 S.E.2d 415, 416 (2012) (citations omitted). As our Supreme Court has stated:

> The right to counsel in a serious criminal prosecution is guaranteed by the sixth amendment to the Constitution of the United States. The attorney-client relationship
>
> > rests on principles of agency, and not guardian and ward. While an attorney has implied authority to make stipulations and decisions in the management or prosecution of an action, such authority is usually limited to matters of procedure, and, in the absence of special authority, ordinarily a stipulation operating as a surrender of a substantial right of the client will not be upheld.
>
> The attorney is bound to comply with her client's lawful instructions, "and her actions are restricted to the scope of the authority conferred." "No person can be compelled to take the advice of his attorney."

State v. Ali, 329 N.C. 394, 403, 407 S.E.2d 183, 189 (1991) (citations omitted).

The following statute sets forth the requirements for a trial court's pretrial determination finding a defendant not guilty by reason of insanity:

> Upon *motion of the defendant* and with the consent of the State the [trial] court may conduct a hearing prior to the trial with regard to the defense of insanity at the time of the offense. If the [trial] court determines that the defendant has a valid defense of insanity with regard to any criminal charge, it may dismiss that charge, with prejudice, upon making a finding to that effect.

N.C.G.S. § 15A-959(c) (emphasis added). Defendant argued at her hearing that she did not consent to any motion for a pretrial determination of NGRI:

> And I'd ask that you would enter – that you would deny an entry of a NGRI plea today before a proper hearing and proper trial to establish guilt because it hasn't been established I committed a crime. I haven't been convicted of a crime to be found not guilty of.

Defendant also stated to the trial court: "But as far as [the defense of NGRI] being used in a trial, I have no problem with that. But to be used without a proper trial to dispute any evidence against me I feel like that would violate my rights." However, against Defendant's express wishes, Defendant's counsel moved for a pretrial determination of NGRI pursuant to N.C.G.S. § 15A-959(c), the State consented, and the trial court agreed – purportedly dismissing the charges against Defendant based upon its determination that she was NGRI. The trial court also entered "an order finding that [D]efendant ha[d] been found not guilty by reason of insanity of a crime and committ[ed her] to a Forensic Unit operated by the Department of Health and Human Services," until such time as Defendant should be released "in accordance with Chapter 122C of the General Statutes." N.C. Gen. Stat. § 15A-1321(b) (2015).

A. *Competency to Stand Trial*

After initially being found incompetent to assist in her defense, Defendant was found competent to proceed on 7 April 2016. Defendant agrees that she was competent to proceed on 7 April 2016.

According to N.C. Gen. Stat. § 15A-1001 (2015):

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to *assist in his defense in a rational or reasonable manner*. This condition is hereinafter referred to as "incapacity to proceed."

N.C.G.S. § 15A-1001(a) (emphasis added). As explained by this Court:

> "The test for capacity to stand trial is whether a defendant has capacity to comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel[.]" "Evidence that a defendant suffers from mental illness is not dispositive on the issue of competency." Our Supreme Court has noted that

> a defendant does not have to be at the highest stage of mental alertness to be competent to be tried. So long as a defendant can confer with his or her attorney so that the attorney may interpose any available defenses for him or her, the defendant is able to assist his or her defense in a rational manner. It is the attorney who must make the subtle distinctions as to the trial.

State v. Coley, 193 N.C. App. 458, 463–64, 668 S.E.2d 46, 50 (2008) (citations omitted). We therefore proceed with our analysis operating under the legal presumption that Defendant was "[]able to understand the nature and object of the proceedings against [her], to comprehend [her] own situation in reference to the proceedings, [and] to assist in [her] defense in a rational or reasonable manner." N.C.G.S. § 15A-1001(a).

B. *Defendant's Right to Choose Trial Strategy*

Although the 19 May 2016 order purports to have acquitted Defendant of the charges filed against her, we must still determine whether Defendant's rights were violated when the trial court proceeded with a pretrial hearing pursuant to N.C.G.S. § 15A-959(c), against her express wishes, upon the motion of her counsel and the consent of the State. Whether a competent defendant has the right to refuse to pursue a defense of NGRI is a question of first impression in North Carolina.

1. Federal Courts

A defendant's right to refuse a plea of NGRI has not always been decided consistently in other jurisdictions. In one of the seminal opinions addressing this issue, from the United States Court of Appeals for the D.C. Circuit, that Court initially held that "a defendant may not keep the issue of insanity out of the case altogether. He may, if he wishes, refuse to raise the issue of insanity, but he may not, in a proper case, prevent the court from injecting it." *Whalem v. United States*, 346 F.2d 812, 818 (D.C. Cir. 1965) (citations omitted), *overruled by U.S. v. Marble*, 940 F.2d 1543 (D.C. Cir. 1991). However, the D.C. Circuit eventually overruled its decision in *Whalem*, in part because Congress had, post-*Whalem*, made NGRI an affirmative defense in federal courts, and thereby removed the affirmative burden of the State to prove a defendant's mental responsibility beyond a reasonable doubt in every trial.[2] *Marble*, 940 F.2d at 1546. The D.C. Circuit also recognized that "[n]o other federal court of appeals has imposed a duty upon the district court to raise the insanity defense;

2. Insanity is also an affirmative defense in North Carolina that must be asserted prior to trial. N.C.G.S. § 15A-959(a).

indeed, only a few have even considered the issue." *Id.* at 1545 (citations omitted). The *Marble* Court further relied upon the following reasoning based upon two opinions of the United States Supreme Court:

> The [Supreme] Court has also held that the Sixth Amendment guarantees a defendant the right to conduct his own defense. In so doing the Court reaffirmed the "nearly universal conviction . . . that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." The Court explained that "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."
>
> The *Whalem* line of cases is in substantial tension with both *Alford* and *Faretta* insofar as it precludes a district court from simply deferring to the choice of a competent defendant not to plead insanity, and may at times require the court to override that choice. *Alford* stands clearly for the proposition that a court may defer to a defendant's strategic choice to accept criminal responsibility even if his actual culpability is neither proven nor admitted. This seriously undermines the *Whalem* rationale that the law does not countenance the punishment of a person whose crime has been proved beyond a reasonable doubt but whose mental responsibility (although not denied) is objectively in doubt.
>
> [T]o impose a particular defense upon an accused, in essence to force him to affirm that he is insane, makes not only appointed counsel but the defendant himself "an organ of the State." "Unless the accused has acquiesced . . . ., the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his defense*."

Id. at 1546 (citations omitted). After noting "the Supreme Court's deference, expressed in *Faretta* and *Alford*, to a competent defendant's strategic decisions," *id.* at 1547, the *Marble* Court stated that they could "no longer distinguish the decision not to plead insanity from other aspects of a defendant's right . . . to direct his own defense[,]" *id.*, and concluded: "[W]e hold that a district court must allow a competent defendant to accept responsibility for a crime committed when he may have been

suffering from a mental disease. Insofar as they hold to the contrary, *Whalem* and its progeny are overruled." *Id.*[3]

2. North Carolina

The United States Supreme Court has recognized the fundamental right of a Defendant to represent herself, *without the assistance of counsel*, and thereby make *all* trial decisions unrestrained by the intervention of a third party:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make h[er] defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against h[er]," and who must be accorded "compulsory process for obtaining witnesses in h[er] favor." Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is [she] who suffers the consequences if the defense fails.
>
> The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and h[er] right to defend h[er]self personally. To thrust counsel upon the

3. *Marble* has been followed in some jurisdictions, and rejected – in whole or in part – in others. *See United States v. Wattleton*, 296 F.3d 1184, 1194 (11th Cir. 2002) ("we agree with [the defendant] that whether to raise the insanity defense is a decision for the defendant and his counsel"); *Petrovich v. Leonardo*, 229 F.3d 384, 386 (2d Cir. 2000) ("[t]he decision to assert an affirmative defense is akin to other, fundamental trial decisions, such as the decision to plead to a lesser charge or to assert a plea of insanity"); *State v. Gorthy*, 145 A.3d 146, 157 (2016) ("Accordingly, if the trial court has made a finding of competency, it should not interpose its own judgment for that of the defendant, but should respect the defendant's choice [to reject a defense of NGRI]."); *but see People v. Laeke*, 271 P.3d 1111, 1116 (Colo. 2012) (statute allowing a competent defendant's counsel to seek NGRI over the defendant's objection is constitutional so long as the trial court determined that the defendant's competence was not sufficient to independently make the decision to abandon NGRI defense).

> accused, against h[er] considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.

Faretta v. California, 422 U.S. 806, 819–20, 45 L. Ed. 2d 562, 572-73 (1975) (citations omitted).

In North Carolina, because NGRI is an affirmative defense that must be asserted by the defendant, it is the defendant's decision whether to pursue NGRI, and the State has no obligation to address the issue absent the defendant having properly asserted the defense. N.C.G.S. § 15A-959(a); *State v. McDowell*, 329 N.C. 363, 375, 407 S.E.2d 200, 206–07 (1991). Relying on the Sixth Amendment, this Court has repeatedly held:

> "Like the decision regarding *how to plead*, the decision whether to testify *is a substantial right belonging to the defendant*. While strategic decisions regarding witnesses to call, whether and how to conduct cross-examinations, . . . and what trial motions to make are ultimately the province of the lawyer, *certain other decisions* represent more than mere trial tactics and *are for the defendant*. These decisions include *what plea to enter*, *whether to waive a jury trial* and whether to testify in one's own defense."

State v. Chappelle, 193 N.C. App. 313, 332, 667 S.E.2d 327, 338 (2008) (citations omitted) (emphasis added). Our Supreme Court has held:

> A defendant's right to plead "not guilty" has been carefully guarded by the courts. When a defendant enters a plea of "not guilty", he preserves two fundamental rights. First, he preserves the right to a fair trial as provided by the Sixth Amendment. Second, he preserves the right to hold the government to proof beyond a reasonable doubt.
>
> A plea decision must be made exclusively by the defendant. "A plea of guilty or no contest involves the waiver of various fundamental rights such as the privilege against self-incrimination, the right of confrontation and the right to trial by jury." Because of the gravity of the consequences, a decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences.

> This Court is cognizant of situations where the evidence is so overwhelming that a plea of guilty is the best trial strategy. However, the gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

State v. Harbison, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985) (citations omitted). We recognize: "A claim of insanity is an affirmative defense to a crime and does not require a formal inquiry as set forth in N.C.G.S. § 15A–1022, even when a defendant decides to waive his right to plead not guilty." *McDowell*, 329 N.C. at 375, 407 S.E.2d at 206–07 (citation omitted). Nonetheless, our Supreme Court has stated: "It is settled law in this State that when . . . the defendant interposes a plea of insanity, he says by this plea that he did the killing, but the act is one for which he is not responsible." *State v. Bowser*, 214 N.C. 249, 254-55, 199 S.E. 31, 34 (1938) (citations omitted).[4] More importantly, a pretrial determination of NGRI pursuant to N.C.G.S. § 15A-959(c) eliminates a defendant's ability to demand the constitutional rights associated with a trial in the same manner as does a guilty plea. The United States Supreme Court recognized:

> A defendant who stands trial is likely to be presented with choices that entail relinquishment of the same rights that are relinquished by a defendant who pleads guilty: He will ordinarily have to decide whether to waive his "privilege against compulsory self-incrimination" by taking the witness stand; if the option is available, he may have to decide whether to waive his "right to trial by jury," and, in consultation with counsel, he may have to decide whether to waive his "right to confront [his] accusers" by declining to cross-examine witnesses for the prosecution. A defendant who pleads not guilty, moreover, faces still other strategic choices: In consultation with his attorney, he may be

4. However, a defendant is permitted to argue both factual innocence and innocence due to a lack of capacity to have formed criminal intent simultaneously at trial. *See State v. Cooper*, 286 N.C. 549, 591, 213 S.E.2d 305, 332 (1975) (Sharp, C.J., dissenting), *disavowed in part on other grounds by State v. Leonard*, 300 N.C. 223, 266 S.E.2d 631 (1980).

> called upon to decide, among other things, whether (and how) to put on a defense and whether to raise one or more affirmative defenses. In sum, *all* criminal defendants—not merely those who plead guilty—may be required to make important decisions once criminal proceedings have been initiated. And while the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial. (The decision to plead guilty is also made over a shorter period of time, without the distraction and burden of a trial.).

Godinez v. Moran, 509 U.S. 389, 398–99, 125 L. Ed. 2d 321, 331-32 (1993) (citations omitted).

> Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.

Id. at 399, 125 L. Ed. 2d 321 at 332.[5]

Though *Harbison* dealt with the consequences of a defendant's attorney admitting defendant's guilt to certain charges without the defendant's consent, in light of *Godinez* and other precedent, we find the following reasoning in *Harbison* applicable to the present case:

> This Court is cognizant of situations where the evidence is so overwhelming that a plea of guilty [or NGRI] is the best trial strategy. However, the gravity of the consequences demands that the decision to plead guilty [or NGRI] remain in the defendant's hands. When counsel admits his client's guilt [or moves for a pretrial determination of NGRI] without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. . . . . Counsel in such

5. *Godinez* recognizes that whereas a finding of competence to stand trial establishes a defendant's competence to waive fundamental rights at trial and competence to make critical decisions such as whether to raise affirmative defenses, and waiver of certain rights such as the waiver of right to counsel or the right to trial by pleading guilty, it also requires assurances that the defendant's waiver is "knowing and voluntary." *Godinez*, 509 U.S. at 400, 125 L. Ed. 2d at 333 (citations omitted).

> situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Harbison, 315 N.C. at 180, 337 S.E.2d at 507 (citation omitted).

By ignoring Defendant's clearly stated desire to proceed to trial rather than moving for a pretrial verdict of NGRI pursuant to N.C.G.S. § 15A-959(c), the trial court allowed — absent Defendant's consent and over her express objection — the "waiver" of her fundamental rights, including the right to decide "what plea to enter, whether to waive a jury trial and whether to testify in [her] own defense[,]" *Chappelle*, 193 N.C. App. at 332, 667 S.E.2d at 338 (citations omitted), as well as "the right to a fair trial as provided by the Sixth Amendment[,] . . . the right to hold the government to proof beyond a reasonable doubt[,] . . . [and] the right of confrontation[.]" *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507 (citations omitted). These rights may not be denied a competent defendant, even when the defendant's choice to exercise them may not be in the defendant's best interests. In the present case, Defendant had the same right to direct her counsel in fundamental matters, such as what plea to enter, as she had to forego counsel altogether and represent herself, even when Defendant's choices were made against her counsel's best judgment. We hold that, because the decision of whether to plead not guilty by reason of insanity is part of the decision of "what plea to enter," the right to make that decision "*is a substantial right belonging to the defendant*." *Chappelle*, 193 N.C. App. at 332, 667 S.E.2d at 338 (emphasis added).[6] Therefore, by allowing Defendant's counsel to seek and accept a pretrial disposition of NGRI, the trial court "deprived [Defendant] of [her] constitutional right to conduct [her] own defense." *Faretta*, 422 U.S. at 836, 45 L. Ed. 2d at 582.[7] We are not called upon to determine how that right should be protected when asserted by a defendant's counsel at trial but, at a minimum, a defendant's affirmative declaration that the defendant does not wish to move for a pretrial determination of NGRI must be respected.[8]

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6. For a thorough and thoughtful review of the issues before us, *see State v. Handy*, 421 N.J. Super. 559, 25 A.3d 1140 (2011) ("*Handy I*"); *State v. Handy*, 215 N.J. 334, 73 A.3d 421 (2013) ("*Handy II*"); and *State v. Gorthy*, 226 N.J. 516, 145 A.3d 146 (2016).

7. *See also Gorthy*, 145 A.3d at 157, in which the Supreme Court of New Jersey overruled prior opinions allowing the trial court to impose an insanity defense over a competent defendant's informed objections.

8. The trial court is, of course, encouraged to conduct a more formal inquiry in the nature of that set forth in N.C. Gen. Stat. § 15A-1022 (2015) to insure a defendant fully understands the consequences of the defendant's decision.

The State argues that Defendant cannot show prejudice because she is subject to periodic hearings, the first of which would have occurred within fifty days of her involuntary commitment pursuant to N.C.G.S. § 15A-959(c) and N.C.G.S. § 1321(b). *See* N.C. Gen. Stat. § 122C-268.1(a) (2015). However, because the trial court found Defendant NGRI, Defendant was not only automatically involuntarily committed pursuant to N.C.G.S. § 15A-1321(b), she was also subject for the entirety of her commitment to the more onerous conditions specific to commitment pursuant to N.C.G.S. § 15A-1321(b) that are not applicable to ordinary civil commitment. For example, the burdens of proof to demonstrate that a defendant is no longer mentally ill and dangerous are different, depending on whether the defendant was civilly committed or committed pursuant to NGRI. N.C. Gen. Stat. § 122C-271 (2015).[9] The differences between civil involuntary commitment and commitment pursuant to a finding of NGRI are substantial and prejudicial to the committed individual if that person is subject to the requirements of commitment pursuant to NGRI, even if that person meets the requirements for civil involuntary commitment.

As Defendant argues in her brief, because she was found competent to assist her counsel and stand trial, she should have been allowed to weigh "(1) the risk of a conviction and lengthy but definite prison sentence, versus; (2) the risk of an NGRI verdict and indefinite commitment, versus; (3) the possibility of an outright acquittal, and ultimately decide that pursuit of a jury trial was the most advantageous strategy." The denial of Defendant's right to counsel advocating for her wishes, which resulted in the denial of Defendant's right to trial and her indefinite involuntary commitment pursuant to N.C.G.S. § 15A-959(c) and N.C.G.S. § 1321(b), constituted reversible error.

C. *Double Jeopardy*

Defendant argues that, as a result of the violation of her Sixth Amendment rights, "the trial court's NGRI order must be vacated." Normally, when this Court vacates a defendant's judgment the proper course of action is to remand the matter for a new trial. However, in certain circumstances, remand for a new trial is not appropriate because retrial would violate the defendant's double jeopardy rights. The United

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9. *See also*, e.g., N.C. Gen. Stat. § 122C-62(b) (2015) ("[E]ach adult client who is receiving treatment or habilitation in a 24-hour facility at all times keeps the right to: . . . . (4) Make visits outside the custody of the facility unless: a. Commitment proceedings were initiated as the result of the client's being charged with a violent crime . . . and the respondent was found not guilty by reason of insanity or incapable of proceeding[.]").

States Supreme Court reviewed its double jeopardy jurisprudence in *Evans v. Michigan*:

> It has been half a century since we first recognized that the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is "based upon an egregiously erroneous foundation." *Fong Foo v. United States*, 369 U.S. 141[.] A mistaken acquittal is an acquittal nonetheless, and we have long held that "[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." Our cases have applied *Fong Foo's* principle broadly. An acquittal is unreviewable whether a judge directs a jury to return a verdict of acquittal, or forgoes that formality by entering a judgment of acquittal herself. And an acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence; a mistaken understanding of what evidence would suffice to sustain a conviction; or a "misconstruction of the statute" defining the requirements to convict. In all these circumstances, "the fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character."

Evans v. Michigan, 568 U.S. 313, 318, 185 L. Ed. 2d 124, 133 (2013) (citations omitted).

Certain state appellate courts have treated NGRI determinations as different than "acquittals" as understood in *Evans*, and determined that an erroneous NGRI determination does not implicate double jeopardy. *See*, *e.g.*, *Gorthy*, 145 A.3d at 158 (reversing and remanding for a new trial on stalking charge because the defendant was forced to present NGRI defense against her will, and she was found NGRI); *Handy II*, 73 A.3d at 439 (rejecting the defendant's argument that, because his acquittal based upon NGRI was vacated, double jeopardy prevented the state from trying him on the underlying charges); *Handy I*, 25 A.3d at 1169 ("Most importantly for our purposes, double jeopardy did not attach in *Lewis*, because the judgment there had declared the defendant not guilty by reason of insanity."); *see also*, *e.g.*, *State ex rel. Koster v. Oxenhandler*, 491 S.W.3d 576, 606 (Mo. Ct. App. 2016) ("The import of our disposition is to vacate [the petitioner's] assertion of, and the State's and the underlying trial court's acceptance of, the NGRI defense;

to vacate the underlying trial court's July 9, 2007 order and judgment of commitment; and to return [the petitioner] to the procedural position he was in immediately prior to July 9, 2007."); *State v. Lewis*, 188 S.W.3d 483, 490 (Mo. Ct. App. 2006) (double jeopardy does not attach to judgment of NGRI later found invalid); *State v. Kent*, 515 S.W.2d 457, 460–61 (Mo. 1974) (holding that a verdict of not guilty by reason of mental disease or defect that is later found to be invalid does not place the defendant in jeopardy of being found guilty).

In *Kent*, the Supreme Court of Missouri stated: "We do not believe *Fong Foo* . . . controls our disposition of this case because it involved an acquittal on the general question of guilt, and not, as here, on the basis of the defense of mental disease and defect." *Id.* at 461. The United States Supreme Court denied the petition for writ of *certiorari* filed by the defendant in *Kent*, *Ex parte Kent*, 414 U.S. 1077, 38 L. Ed. 2d 484 (1973); however, three justices dissented, arguing the defendant's double jeopardy argument should be heard because the defendant's "double jeopardy claim is properly reviewable at this point since his objection to standing trial has been rejected and petitioner has been ordered to stand trial in accordance with the mandate of the State's highest court." *Id.* at 1078, 38 L. Ed. 2d 484 at 485.

Whether reversal of a judgment of NGRI implicates the double jeopardy clause has not been settled by the United States Supreme Court, and we find no North Carolina opinion on point. However, because of the particular facts of the case before us, we find that we do not have to answer this constitutional question broadly. *State v. Goodman*, 298 N.C. 1, 20, 257 S.E.2d 569, 582 (1979) (constitutional questions will not be decided if there is an alternative basis upon which the decision can be made).

D. *N.C.G.S. § 15A-959(c) and the Trial Court's Order*

The language of N.C.G.S. § 15A-959(c) is discretionary, not mandatory:

> Upon motion of the defendant and with the consent of the State the [trial] court may conduct a hearing prior to the trial with regard to the defense of insanity at the time of the offense. If the [trial] court determines that the defendant has a valid defense of insanity with regard to any criminal charge, it may dismiss that charge, with prejudice, upon making a finding to that effect.

N.C.G.S. § 15A-959(c). The trial court is not *required* to conduct a hearing on a defendant's potential defense of insanity, even upon a motion

by the defendant and consent of the State. *Id.* (emphasis added) ("the [trial] court *may* conduct a hearing prior to the trial with regard to the defense of insanity"). Further, even if the trial court conducts a hearing, and "determines that the defendant has a valid defense of insanity[,]" it may still decide to *deny* the defendant's motion for a pretrial determination of NGRI. *Id.* (emphasis added) ("[i]f the [trial] court determines that the defendant has a valid defense of insanity with regard to any criminal charge, it *may* dismiss that charge, with prejudice, upon making a finding to that effect"). Therefore, unlike a defendant's right to a fair trial, a defendant has no right to either a pretrial determination of NGRI, nor the right to have her charges dismissed even if the trial court makes a pretrial determination of NGRI. However, the language of N.C.G.S. § 15A-959(c) suggests that, if a trial court decides in its discretion to dismiss a defendant's charges based upon a pretrial finding of NGRI, it should do so with prejudice.[10] *Id.* ("it may dismiss that charge, with prejudice").

In the present case, the trial court used the following language in the decretal portion of its 19 May 2016 order: "That the charges against [D]efendant be dismissed with leave by the State based on the [trial c]ourt's determination that under N.C.G.S. § 15A-959, [D]efendant was insane at the time the acts for which she is charged were committed." This language makes clear the trial court made a determination pursuant to N.C.G.S. § 15A-959(c) that Defendant was legally "insane" at the time she allegedly committed the crimes; however, that determination alone did not compel the trial court to dismiss Defendant's charges and preclude Defendant from proceeding to trial. *Id.* The trial court did purport to dismiss Defendant's charges; however, the trial court did *not* dismiss Defendant's charges "with prejudice" as contemplated by N.C.G.S. § 15A-959(c).

We need not, and therefore do not, decide whether the trial court had the authority to dismiss Defendant's charges "with leave;" however, the practical effect is the same. The 19 May 2016 order did not constitute an "acquittal" to which jeopardy attached. In light of the peculiar and singular nature of a pretrial NGRI hearing, and on the facts before us, where the trial court purported to dismiss Defendant's charges, but with leave we hold that the order in the present case was more akin to a "procedural dismissal" than a "substantive ruling" as contemplated by

10. Because we are not required to do so in this opinion, we do not make any holding concerning whether N.C.G.S. § 15A-959(c) might allow dismissal without prejudice in certain circumstances, or in the discretion of the trial court.

Evans, 568 U.S. at 319–20, 185 L. Ed. 2d at 134. As such, double jeopardy concerns do not prevent this Court from granting the relief Defendant requests, which is to "vacate the trial court's NGRI order and remand for appropriate proceedings."

In light of the substantial amount of time that has passed since Defendant's last competency hearing, upon remand the trial court shall order a new competency hearing. If Defendant is found not competent to stand trial, the trial court shall proceed in accordance with Chapter 122C and other relevant sections of our General Statutes. If, or when, Defendant is found competent to stand trial, she shall be afforded all the constitutional rights of a competent defendant, including final decision-making authority over what plea to enter, and whether or not to pursue the defense of NGRI at trial, or at a pretrial hearing pursuant to N.C.G.S. § 15A-959(c).

VACATED AND REMANDED.

Judges TYSON and INMAN concur.

STATE OF NORTH CAROLINA
v.
BERTYLAR PEACE, JR., DEFENDANT

No. COA17-62

Filed 21 November 2017

1. Constitutional Law—effective assistance of counsel—premature assertion—dismissal without prejudice

Defendant's ineffective assistance of counsel claim in a driving while impaired case based on defense counsel's failure to raise the statute of limitations as an affirmative defense was prematurely asserted and thus dismissed without prejudice.

2. Criminal Law—prosecutor's argument—impairment—willful refusal to submit to blood alcohol screening—alcohol consumption—not conjecture or personal opinion

The trial court did not err in a driving while impaired case by failing to intervene ex mero motu during the State's closing argument where the pertinent statements (that defendant was impaired by some substance and willfully refused to submit to blood alcohol

screening) were consistent with the evidence presented to the jury and did not delve into conjecture or personal opinion. Further, defendant failed to show prejudice.

Appeal by defendant from judgment entered 21 July 2016 by Judge Henry W. Hight, Jr. in Granville County Superior Court. Heard in the Court of Appeals 10 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Christine Wright, for the State.

Irons & Irons, PA, by Ben G. Irons II, for defendant-appellant.

BERGER, Judge.

Bertylar Peace, Jr. ("Defendant") was charged with driving while impaired on April 18, 2013. Defendant appealed to Superior Court where a Granville County jury found him guilty of driving while impaired on July 20, 2016. Defendant alleges his trial counsel provided ineffective assistance by failing to raise the statute of limitations as an affirmative defense, and further contends that the prosecutor made improper statements during closing argument that would entitle him to a new trial. As to both, we disagree.

Factual & Procedural Background

On April 18, 2013, Detective Brian Carey with the Oxford Police Department observed a GMC pickup truck fail to stop at a stop sign at the intersection of Henderson and Hunt Streets. After making a left onto Henderson Street, the vehicle was observed exiting the roadway. Detective Carey followed the vehicle for approximately one-half mile. After Defendant's vehicle crossed the center line and veered back off the road, Detective Carey initiated a traffic stop.

As Detective Carey approached the GMC pickup truck, Defendant was exiting the driver's side door. He stumbled towards the officer and attempted to steady himself by grabbing the bed of the truck. Detective Carey instructed Defendant to get back into the vehicle, but Defendant refused to comply.

Detective Carey asked Defendant to produce his license and registration. Defendant sifted through various cards, but was unable to locate his driver's license. Detective Carey witnessed him pass his license in the stack of cards at least four times, and ultimately had to identify the

license for Defendant. Defendant indicated he did not have a registration card for the vehicle.

While interacting with Defendant, Detective Carey observed that Defendant's speech was slurred, he was swaying, and unable to keep his eyes open. Detective Carey asked Defendant if he had anything to drink, and Defendant admitted he had consumed alcohol "approximately five hours" prior to the stop. Detective Carey observed a pint of Seagram's Gin in the front seat of Defendant's vehicle that was nearly empty. Defendant was not asked to perform field sobriety tests because "he was so unstable on his feet, [Detective Carey] felt that it would be unsafe[.]"

A preliminary breath test administered to Defendant at the scene was positive for alcohol. However, the trial court struck this testimony after it was determined that the preliminary breath test was improperly administered. Defendant requested, and the trial court instructed the jury, that

> Detective Brian Carey testified as to the administration and results of a preliminary breath test or P-B-T that was administered to Bertylar Peace on April 18, 2013. The Court instructs you that Detective Carey did not administer the P-B-T properly. I instruct you that you are to disregard all the testimony you've heard relating to the administration and-or results of any P-B-T test to Mr. Peace on April the 18th, 2013, and that evidence should have no bearing whatsoever on your consideration and determination of the facts in this case.

Defendant was arrested and transported to the Oxford Police Department for a separate breath test. Defendant informed Officer Alice Judkins that he would not provide a breath sample for the test, and the testing sheet was marked as a refusal. However, both Detective Carey and Officer Judkins testified that, in their opinion, Defendant had consumed a sufficient amount of an impairing substance to appreciably impair his physical and mental faculties.

Following a jury trial which took place on July 19 and 20, 2016, Defendant was found guilty of driving while impaired, and was sentenced to twenty-four months imprisonment as a Level 1 offender. Defendant timely appealed, contending that (1) his trial counsel was ineffective by failing to raise the statute of limitations as an affirmative defense to his prosecution for impaired driving, and that (2) the trial court erred in failing to intervene concerning comments made during the prosecutor's closing argument. As to both contentions, we disagree.

Analysis

I. Ineffective Assistance of Counsel Claim

[1] "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), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). *See also State v. Todd*, ___ N.C. ___, ___, 799 S.E.2d 834, 838 (2017) (holding that where the record "is insufficient to determine whether defendant received ineffective assistance of counsel," the trial court should determine if counsel's performance was deficient and if defendant was prejudiced). Because Defendant's claim for ineffective assistance of counsel is prematurely asserted on direct appeal, the same is dismissed without prejudice.

II. Comments During Closing Arguments

[2] Defendant next contends that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. At trial, Defendant failed to object to the statements which he now contends were improper comments by the prosecutor. Defendant's contentions are meritless at best.

Defendant claims that the following comment by the prosecutor was an improper expression of opinion: "[t]he State has proven beyond a reasonable doubt that this man was under the influence of some impairing substance." Defendant further asserts that the prosecutor made an improper statement of the law when he said,

> And implied consent means when everyone here who gets their license, if a police officer asks you to blow into that machine, you have to blow into that machine.
>
> . . . .
>
> This clearly says that you're required to take the test, and that if you don't take the test, you're going to lose your license for a year and possibly longer.

Finally, Defendant claims that the prosecutor's statement that "Defendant said 'I have been drinking tonight' " was not supported by the evidence.

North Carolina General Statute §15A-1230 plainly states:

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make

> arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2015).

The trial court correctly instructed the jury that "lawyers are permitted in their final statements, to argue, to characterize the evidence, and to attempt to persuade you to a particular verdict." Indeed, "counsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *State v. Jones*, 355 N.C. 117, 128, 558 S.E.2d 97, 105 (2002) (citation and internal quotation marks omitted).

Judge Dillon, writing for this Court, recently stated:

> Control of counsel's arguments is left largely to the discretion of the trial court. When no objections are made at trial . . . the prosecutor's argument is subject to limited appellate review for gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*. Our review requires, a two-step inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial.
>
> In order to determine whether a prosecutor's remarks are grossly improper, the remarks must be viewed in context and in light of the overall factual circumstances to which they refer. An argument is not improper when it is consistent with the record and does not travel into the fields of conjecture or personal opinion.

State v. Madonna, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, COA16-1300, 2017 WL 4629562, *4 (2017) (citations and internal quotation marks omitted).

The statements at issue herein were consistent with the evidence presented to the jury, and did not delve into conjecture or personal opinion. The prosecutor was merely summarizing the evidence in the first statement, arguing that the State had proven what is required by law, and attempting to persuade the jury "to a particular verdict." With regards to the second argument concerning Defendant's willful refusal, the prosecutor reasonably summarized the impact of Defendant's failure to submit to

blood alcohol screening pursuant to N.C. Gen. Stat. § 20-16.5(b), which is not an element the jury was required to decide. Finally, Defendant admitted that he consumed alcohol five hours earlier that evening. Whether Defendant's merriment ended in the late afternoon or early evening, it cannot reasonably be argued that the prosecutor misstated the evidence regarding Defendant's admission to alcohol consumption.

Even if there were some legitimacy to Defendant's contentions regarding closing arguments, the trial court's instructions to the jury were, once again, more than adequate to address any concern:

> At the conclusion of these arguments, I will instruct you on the law in this case[.]
>
> . . . .
>
> Now, if in the course of making a final argument to you, a lawyer attempts to restate part of the evidence, and what you remember the evidence to be is different from that of the lawyer, then it is your duty in recalling and remembering the evidence to guide it exclusively and solely by what you determine the evidence to be.

See State v. Campbell, 359 N.C. 644, 679, 617 S.E.2d 1, 23 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006) (holding that defendant's right to a fair trial was not impeded when the prosecutor made alleged improper statements, but the trial court instructed the jury "not to rely on the closing arguments as their guide in evaluating the evidence").

Even if, assuming *arguendo*, the remarks made by the prosecutor were improper, which they were not, Defendant's argument still fails because he has not demonstrated prejudice. *See State v. Huey*, ___ N.C. ___, 804 S.E.2d 464 (2017); *see also* N.C. Gen. Stat. § 15A-1443(a) (2015). Given the overwhelming evidence presented at trial, there is no "reasonable possibility . . . a different result would have been reached[.]" *Huey*, ___ N.C. at ___, 804 S.E.2d at 473.

Conclusion

Defendant's ineffective assistance of counsel claim is dismissed without prejudice. Furthermore, the statements made by the prosecutor during closing arguments were not improper, and Defendant received a fair trial free from error.

DISMISSED IN PART; NO ERROR IN PART.

Judges DILLON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
DARIS LAMONT SPINKS

No. COA17-413

Filed 21 November 2017

1. Evidence—testimony—another child victim—common scheme or plan—Rule 404(b)—Rule 403

The trial court erred in a statutory sexual offense, statutory rape, and indecent liberties case by admitting testimony from another child victim under N.C.G.S. § 8C-1, Rule 404(b) where the testimony tended to prove defendant had a common scheme or plan to have intercourse with young female children who were asleep at night while he was a guest staying overnight in a home and offered a bribe to his victims afterwards to buy their silence. Further, its probative value substantially outweighed the danger of unfair prejudice under N.C.G.S. § 8C-1, Rule 403.

2. Evidence—expert testimony—child sexual abuse—no vouching for child witness's credibility

The trial court did not commit plain error in a statutory sexual offense, statutory rape, and indecent liberties case by admitting a doctor's assessment of child sexual abuse where her expert opinions did not impermissibly bolster and vouch for a child witness's credibility. Further, there was overwhelming evidence, including the victim's detailed testimony about the alleged assault, corroborating witnesses for defendant's access to the victim, and testimony from another child victim about defendant's common scheme to have intercourse with young females.

3. Constitutional Law—effective assistance of counsel—failure to object—expert witness—expert report—dismissal without prejudice

Defendant's ineffective assistance of counsel claim in a statutory sexual offense, statutory rape, and indecent liberties case based on defense counsel's failure to object when the State tendered an expert witness or when the State introduced the expert's report was dismissed without prejudice where it was prematurely asserted.

4. Appeal and Error—preservation of issues—failure to argue constitutional issue at trial

Although defendant's petition for writ of certiorari to review the trial court's imposition of satellite-based monitoring (SBM) in a statutory sexual offense, statutory rape, and indecent liberties case was allowed, his appeal of SBM as applied to him was dismissed where he waived direct appellate review of any Fourth Amendment challenge by failing to raise the constitutional issue at trial.
Judge STROUD concurring in separate opinion.

Appeal by defendant from judgments entered 26 May 2016 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 4 October 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jennie W. Hauser and Assistant Attorney General Michael E. Bulleri, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

TYSON, Judge.

Daris Lamont Spinks ("Defendant") appeals from judgments entered upon jury verdicts convicting him of two counts of statutory sexual offense, one count of statutory rape, and two counts of indecent liberties. We find no error in Defendant's convictions. We dismiss Defendant's appeal of the trial court's order on lifetime satellite based monitoring ("SBM") without prejudice.

I. Factual Background

A. State's Evidence

The State's evidence tended to show the victim ("Amy") and Defendant knew each other through Amy's older sister, Alexis, for a period of about five years. When Amy's sister had her own apartment, Amy would visit and Defendant would bring his 10-year old daughter over. Amy testified at one of these visits Defendant attempted to pull her pants down and put his lips to her bottom to make a noise.

Amy testified Defendant and her sister had a baby daughter together. She testified Defendant, Alexis and their baby daughter stayed at Amy's house twice in December 2014. Amy was 13 years old at this time. Around 1:00 a.m. on the first night, Defendant entered Amy's room and threated to harm her if she said anything. Defendant pulled down her pants and touched her buttocks, stomach, and breasts. Defendant then engaged in

vaginal intercourse with Amy. Amy pushed him away. Defendant then performed cunnilingus upon her. Amy told him to stop, but he continued. Defendant told Amy if she told anyone, his child would be taken away, and he would hurt Amy or have someone else hurt her.

The next time Defendant stayed at Amy's house in December 2014, Amy set up a computer tablet in her room to record any other incidents which may occur. Defendant entered Amy's room during the night and threatened to hurt her. Defendant again engaged in vaginal intercourse with and performed cunnilingus on Amy. He left Amy's room when his child began to cry in another room. Amy told Defendant the following morning that she had recorded him. Defendant repeated to Amy that his child would be taken away if she told anyone. He told Amy he would kill her.

Several days later, Defendant gave Amy a new pair of Nike shoes. Defendant told her the shoes were provided for her to "shut up" and to delete the video. Amy deleted the video, while in front of Defendant, and accepted the shoes.

Amy told Defendant sometime in mid-January she was going to report the incidents. Soon thereafter, a rock was thrown through her window in the middle of the night. Defendant came to Amy's house the following day to look at the window. While Defendant was in the home, Amy told him she was going to tell someone about his assaults. Amy testified Defendant told her he was going to kill her.

A few days later, Amy told her mother that Defendant had sexually assaulted her in December. Amy, her mother, and brother went to the police department two days later to report the sexual assaults.

Dr. Stacy Thomas testified she had practiced as a pediatrician for over ten years. Dr. Thomas estimated she has examined over 500 child victims of alleged sexual abuse. Dr. Thomas was qualified as an expert witness in pediatrics, especially the evaluation and treatment of physically and sexually abused children. She was admitted to testify as an expert witness without Defendant's objection.

Dr. Thomas testified she physically examined Amy on 16 March 2015. Prior to the examination, Dr. Thomas was briefed about the contents of an interview of Amy by Greensboro Police Detective Hines. Detective Hines told Dr. Thomas that Amy had disclosed one act of cunnilingus and one act of vaginal intercourse by Defendant. Dr. Thomas testified Amy exhibited symptoms "consistent with depression and anxiety." Amy's physical examination revealed she was in good physical health, and her external genital and anal exams were normal. During Amy's exam, Amy became hysterical, cried and shook.

Dr. Thomas compiled her findings into a report after completing her examination of Amy. This report was admitted into evidence without Defendant's objection.

The State offered the testimony of child witness ("Katy") over Defendant's Rule 404(b) and Rule 403 objections. Katy testified she was six years old in 2011. Katy testified she went to her friend's birthday party, where Defendant and Defendant's daughter also attended. Katy testified the party included a sleep over. Katy testified Defendant opened the door to the bedroom during the night where she and her friend slept, but closed it after both girls woke up. Katy testified someone had later entered into the room and engaged in anal intercourse with her. Katy identified Defendant as the person who had sexually assaulted her. After the assault, Defendant told Katy to be quiet and he would give her a dollar. Katy testified the next morning Defendant gave her a dollar.

B. Defendant's Evidence

Keisha Oats, testified Defendant was her nephew. Ms. Oats testified Defendant, Alexis, their baby, and Alexis' sister, Amy, visited at her home on Christmas Eve 2014. Ms. Oats testified Defendant and the others left her home around 1:30 am.

Defendant testified when they left Ms. Oats home on Christmas Eve, he, Alexis, their baby and Amy went to Amy's mother's home, where he and Alexis had cooked and wrapped presents. Defendant denied performing any sexual acts upon Amy in December of 2014 and January of 2015, threatening Amy in December of 2014 and January of 2015, and going to Amy's home on New Year's Eve 2014 and giving Amy a pair of shoes.

Defendant testified he found out about Amy's allegations after the Super Bowl in February and Detective Hines had contacted him soon thereafter. Defendant met with Detective Hines and denied the allegations. Defendant also denied the allegations against him by Katy. Defendant admitted he had stayed overnight at Amy's home on Christmas Eve and on another night around Thanksgiving of 2014.

The jury returned verdicts finding Defendant guilty of two counts of statutory sexual offense of a person who was thirteen years old, one court of statutory rape of a person who was thirteen years old, and two counts of indecent liberties. The trial court sentenced him to two consecutive terms of 280 to 396 months in prison, and ordered lifetime sex offender registration and SBM. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015) and N.C. Gen. Stat. § 15A-1444 (2015).

III. Issues

Defendant asserts three issues on appeal: (1) testimony from Katy concerning a previous alleged assault was improperly admitted under Rule 404(b) and unfairly prejudicial to him under Rule 403; (2) the trial court committed plain error by admitting Dr. Thomas' expert diagnosis and opinions, and he received ineffective assistance of counsel on this matter; and (3) the trial court erred by ordering Defendant to a lifetime registration on the sexual offender registry and SBM.

IV. Katy's Testimony

[1] Defendant contends the trial court erred in admitting testimony from Katy under Rule 404(b). He argues the alleged acts at issue were different, the children were of significantly different ages, the circumstances surrounding the alleged assaults were different in nature, and the circumstances following each of the alleged acts were different.

A. Standard of Review

Our Supreme Court has 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).

B. Analysis

1. Rules 401 and 402

" '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 (2015). "All relevant evidence is admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2015).

2. Rule 404(b)

Our Supreme Court has held "a careful reading of Rule 404(b) clearly shows, 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. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986) (citing 1 Brandis on North Carolina Evidence § 91 (2d rev. ed. 1982)).

> 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 other than the defendant's propensity to commit the crime. In addition, this Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant.

Beckelheimer, 366 N.C. at 130, 726 S.E.2d at 159 (internal citations and quotation marks omitted).

North Carolina courts have interpreted Rule 404(b) as a rule of *inclusion*, not exclusion. *Id.* at 131, 726 S.E.2d at 159. This inclusion is constrained by the requirements of similarity and temporal proximity of the evidence of the acts. *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002).

Rule 404(b) is "subject to but *one exception* requiring the exclusion of evidence if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Lyons*, 340 N.C. 646, 668, 459 S.E.2d 770, 782 (1995) (emphasis original) (citation omitted).

The record indicates the State offered Katy's testimony to establish Defendant had a common scheme or plan to commit assaults upon young females. The trial court determined Katy's testimony to be "very

similar to what the allegations are in this case" and "if [the State] [is] offering to show there is an existence in the mind of the defendant, a common scheme or plan in the crime involved and the charge in this case, I think it's admissible."

Defendant argues the allegations are too dissimilar to show a common scheme or plan. Defendant relies upon *State v. Gray*, which found the proffered 404(b) evidence was not "substantial evidence tending to support a reasonable finding by the jury that the defendant committed [a] *similar* act." *State v. Gray*, 210 N.C. App. 493, 512, 709 S.E.2d 477, 490-91 (2011) (emphasis original) (citations and quotations omitted). In *Gray*, the defendant engaged in forcible anal intercourse with a young boy at night and later sexually assaulted a young girl by inserting his finger into the girl's vagina during daylight hours. *Id.* at 511-12, 709 S.E.2d at 490. The defendant was a guest in the home where each child victim was staying. *Id.* at 512, 709 S.E.2d at 490.

This Court held the similarities in the two acts "show little more than that the alleged perpetrator of both acts was attracted to young children, and that he used the fact that he was a welcome guest in the house where each child was staying to find time alone with that child in order to commit the assaults." *Id.* This Court recognized "[t]hese facts are all too common in cases involving sexual assaults on minors by an adult." *Id.*

The case and incidents before us are distinguishable from *Gray*. Amy and Katy are of the same sex; Defendant allegedly had forcible intercourse with both of them; and the assaults took place during the early hours of the morning. In addition to these factors, here Defendant was a guest in the home where each child was staying, entered their bedrooms well after midnight, and later bribed both victims for their silences.

"Our case law is clear that near identical circumstances are not required; rather, the incidents need only share some unusual facts that go to a purpose other than propensity for the evidence to be admissible." *Beckelheimer*, 366 N.C. at 132, 729 S.E.2d at 160 (citation and quotations omitted).

Here, Katy's testimony tended to prove Defendant had a common scheme or plan to have (1) intercourse; (2) with young female children who were asleep; (3) at night; (4) while he was a guest staying overnight in a home; and (5) offered a bribe to his victims afterwards to buy their silence. The trial court correctly concluded that Katy's testimony was

offered to show a purpose other than simply Defendant's propensity to commit the crimes.

> [E]ven though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried.

State v. Bagley, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (emphasis original) (citation and quotations omitted).

The purpose of the evidence was relevant to show the common scheme or plan held by Defendant, although this evidence may also tend to show Defendant's propensity to commit sexual assaults. *See id.* ("evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them . . . .").

Record evidence demonstrates the trial court's admission of the 404(b) evidence was not arbitrary or the result of an unreasoned decision. We find no error in the admission of Katy's testimony under Rule 404(b).

3. Rule 403

Admissible evidence under Rule 404(b) must also meet the criteria of Rule 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2015). Otherwise admissible evidence, whose probative value is outweighted by the danger of unfair prejudice, is inadmissible under this rule. *State v. Scott*, 331 N.C. 39, 43, 413 S.E.2d 787, 789 (1992). However, "[e]vidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990) (citation omitted). It is within the trial court's discretion whether to admit such evidence. *Id.*

Defendant argues the testimony of alleged anal intercourse against a much younger child by a much older adult, inflamed the jury to compel his conviction. The evidence showed Defendant's common scheme or plan to have forcible intercourse with young female victims asleep in their bedrooms, while he and his daughter were guests staying overnight in a home and to bribe the victims afterwards for their silence. The

probative value of Katy's testimony, although prejudicial, did not substantially outweigh the danger of unfair prejudice. Defendant has failed to show the trial court abused its discretion in admitting Katy's Rule 404(b) testimony under Rule 403.

V. Dr. Thomas' Testimony

[2] Defendant next argues the trial court committed plain error by admitting (1) Dr. Thomas' assessment of "Child sexual abuse" and (2) her expert opinions which impermissibly bolstered and vouched for Amy's credibility. Defendant acknowledges he did not preserve these errors by objection at trial. Defendant also argues that because of this plain error, he received ineffective assistance of counsel.

A. Standard of Review

Unpreserved errors in criminal cases are reviewed only for plain error. N.C.R. App. P. 10(a)(4); *State v. Black*, 308 N.C.736, 739-41, 303 S.E.2d 804, 805-07 (1983).

> 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 and quotation marks omitted).

Defendant must show an error occurred and that the error was "fundamental" such that the jury "probably would have returned a different verdict[,]" to receive a new trial. *Id.* at 519, 723 S.E.2d at 335.

B. Analysis

1. "Child Sexual Abuse"

Our Rules of Evidence prohibit an expert witness from commenting on the credibility of another witness. *State v. Wise*, 326 N.C. 421, 426, 390 S.E.2d 142, 145, *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990). "[A]n expert may not testify that sexual abuse has occurred without physical evidence supporting her opinion." *State v. Towe*, 366 N.C. 56, 60, 732 S.E.2d 564, 567 (2012) (citation and quotation marks omitted). "However, if a proper foundation has been laid, an expert may testify about the characteristics of sexually abused children and whether an alleged victim exhibits such characteristics." *Id.* at 62, 732 S.E.2d at 567-68 (citation and quotation omitted).

Defendant asserts his case is controlled by *Towe*. The expert in *Towe* was the director of the child sexual abuse team at the local hospital. *Id.* at 63, 732 S.E.2d at 569. The jury heard she was a published author in the field of sexual exploitation of children and had frequently been qualified as an expert in pediatrics and child sexual abuse in previous cases. *Id.* at 63-64, 732 S.E.2d at 569.

The expert in *Towe* testified that between 70-75% of children who have been sexually abused have no abnormal physical findings, and she would place the victim in that category. *Id.* at 60, 732 S.E.2d at 566. The Supreme Court found this testimony to be improper and qualified as plain error. *Id.* at 64, 732 S.E.2d at 568.

Dr. Thomas testified to general characteristics of abused children, but did not offer an opinion that Amy had been sexually abused, or that Amy fell into the category of children who have been sexually abused, but who showed no physical symptoms of such abuse. The report published to the jury includes a statement "Chief Concern: Possible child sexual abuse." The controverted statement in Dr. Thomas' examination report of Amy is a paragraph titled "ASSESSMENT AND RECOMMENDATIONS," where the paragraph begins with "Child sexual abuse by [Amy's] disclosure."

While the jury has the duty to weigh the credibility of the expert's testimony, the expert's opinion tendered in *Towe* left little room for the jury to find the victim incredible. The proffered testimony by the expert in *Towe* impermissibly bolstered the credibility of the child victim. *Towe*, 366 N.C. at 63, 732 S.E.2d at 568. Dr. Thomas' testimony was not conclusory and left the ultimate issue to the jury to determine whether the facts and circumstances of the case were explainable by the possibility presented by Dr. Thomas.

Dr. Thomas did not offer an opinion that Amy had been sexually abused. The phrase in her report merely introduces the paragraph of the report dealing with Amy's disclosures. Dr. Thomas' testimony did not impermissibly bolster or vouch for Amy's veracity. *See id.* Defendant's argument to the contrary is overruled.

2. "Consistent," "Compelling" and "Concerning"

Defendant argues Dr. Thomas' statements in her written report published to the jury that Amy's disclosures have been "consistent and compelling" and subsequently that she "agree[s] with law enforcement in this compelling and concerning case" served to impermissibly bolster Amy's credibility.

Defendant argues *State v. Aguallo*, *State v. O'Connor* and *State v. Frady* require a new trial in this case. In *Aguallo*, the expert testified she thought the child victim "was believable." *State v. Aguallo*, 318 N.C. 590, 599, 350 S.E.2d 76, 81 (1986). The Supreme Court held this was an impermissible expert opinion as to the credibility of the victim. *Id.* at 599, 350 S.E.2d at 81. The Court in *Aguallo* found the error to be prejudicial and allowed a new trial where the State's evidence of the defendant's guilt was "not overwhelming." *Id.*, 350 S.E.2d at 82.

In *O'Connor*, the expert testified she had found no physical indications of sexual assault. *State v. O'Connor*, 150 N.C. App. 710, 711, 564 S.E.2d 296, 297, *disc. review denied*, 356 N.C. 173, 567 S.E.2d 144 (2002). She stated the victim had told her he had been sexually assaulted on three occasions. *Id.* The expert's written report of her findings and conclusions was admitted into evidence without objection. *Id.* The report contained the statement, "It is my impression that [J.M.'s] disclosure was credible." *Id.* This Court held it was plain error to admit into evidence that portion of the report. *Id.* at 712, 564 S.E. 2d at 297.

In *Frady*, the expert neither examined nor interviewed the victim. *State v. Frady*, 228 N.C. App. 682, 684, 747 S.E.2d 164, 166 (2013). The trial court allowed the expert witness to testify that the victim's "disclosure [was] consistent with sexual abuse." *Id.* This Court held the expert's statement was "essentially" an expression of her opinion that the victim was credible. *Id.* at 686, 747 S.E.2d at 167. The Court held this admission to be a prejudicial error where the only evidence of the defendant's guilt was the victim's testimony and the State offered the expert testimony as rebuttal, being the last testimony the jury would hear before retiring to deliberate. *Id.*

Our appellate courts have repeatedly held that it is not improper for an expert to testify to a victim's examination being "consistent" with the victim's statements of abuse. *State v. Kennedy*, 320 N.C. 20, 31-32, 357 S.E.2d 359, 366 (1987) (no error to admit physician's opinion that victim's symptoms were consistent with sexual abuse); *State v. Wise*, 326 N.C. 421, 427, 390 S.E.2d 142, 146 (1990) (no error where expert merely described her personal observations concerning the emotions of the victim during the counseling sessions); *State v. Marine*, 135 N.C. App. 279, 281, 520 S.E.2d 65, 66 (1999) (no error where expert testified that one of the indicators that she used to conclude victim suffered from post-traumatic stress syndrome was that the victim "has experienced actual or threatened serious injury….").

While our courts have allowed admission upon proper foundation, an expert opinion that the victim's symptoms or physical examination

are "consistent" with the victim's statements of abuse, Defendant asserts Dr. Thomas' use of the terms "consistent and compelling" and "compelling and concerning" are tantamount to stating Amy's allegations are credible.

Our "courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988).

At oral argument, Defendant argued the problematic word here is "compelling." Dr. Thomas' report contains the term "compelling" twice. In the first use, Dr. Thomas' written statement is "Her disclosures have been consistent and compelling." Merriam Webster offers three definitions of compelling as "forceful," "demanding attention" or "convincing." *Compelling Definition*, **Merriam-webster.com**, https://www.merriam-webster.com/dictionary/compelling (last visited Oct. 26, 2017). The term "compelling" as used here could be construed as impermissible opinion testimony regarding Amy's credibility. *Bailey*, 89 N.C. App. at 219, 365 S.E.2d at 655.

The second use, the expert witness' agreement with "law enforcement['s] involvement in this compelling and concerning case" is not as troubling. The context of this statement reveals Dr. Thomas used the terms "compelling" and "concerning" to connote forceful, demanding attention, gut-wrenching, troubling, worrying or any of the many other adjectives that could describe the sex offenses.

Presuming *arguendo*, the court's admission of the statements in the doctor's report was error, we must determine whether it rises to the level of plain error. "A plain error is one so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Carroll*, 356 N.C. 526, 539, 573 S.E.2d 899, 908 (2002). Thus our question is whether the jury would probably have reached a different verdict if this testimony had not been admitted. *Bagley*, 321 N.C. at 213, 362 S.E.2d at 251.

In *State v. Hammett*, 361 N.C. 92, 97, 637 S.E.2d 518, 522 (2006), our Supreme Court held the expert witness improperly vouched for the child victim's credibility when the expert added "that she would reach the same conclusion based on [the child victim's] history alone and that the physical evidence was not a necessary basis for her conclusions" to her previous admissible testimony that her findings were consistent with abuse. While the Court held the admission of this part of the expert's testimony was

error, the Court recognized, as here, the issue had not been preserved by the defendant and applied plain error review. *Id.* at 98, 637 S.E.2d 522. Under a plain error review, the Supreme Court "believe[d] the jury would not have acquitted defendant if the challenged statements had been excluded." *Id.* at 99, 637 S.E.2d at 523.

Here, the victim testified and described in detail about the alleged assault. The State offered witnesses, who corroborated Defendant's access to the victim, as well as a 404(b) witness showing Defendant's common scheme to have intercourse with young females. This other evidence along with Dr. Thomas' trial testimony of Amy's demeanor, emotional state and behavior since the alleged incident provide sufficient other evidence of Defendant's guilt. Defendant has failed to show prejudice in the trial court in the admission of Dr. Thomas' statements and reports. The trial court's admission of Dr. Thomas' statements in her report that Amy's disclosures have been "consistent and compelling" does not rise to the level of plain error.

3. Ineffective Assistance of Counsel ("IAC")

[3] Defendant asserts an alternative argument if this Court does not find plain error in the admission of Dr. Thomas' report. Defendant argues his counsel was ineffective because he failed to object when the State tendered Dr. Thomas as an expert witness or when the State introduced Dr. Thomas' report. "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 693 (1984)).

To meet this burden, Defendant must satisfy *Strickland's* 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 error were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687, 80 L.Ed.2d at 693.

IAC claims brought on direct review are "decided on the merits when the cold record reveals that no further investigation is required." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 525 (2001) *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). Our Supreme Court has recently held that whether defense counsel "made a particular strategic decision remains a question of fact, and is not something which can be hypothesized" by an appellate court on direct appeal. *State v. Todd*, __ N.C. __, __, 799 S.E.2d 834, 838 (2017).

Defendant presents attorney conduct that cannot be determined by the "cold record" alone. We dismiss Defendant's IAC claim without prejudice.

VI. Lifetime SBM

[4] Defendant petitions this Court issue our writ of certiorari to hear his appeal. We allow Defendant's petition to review his claim. He asserts the State failed to establish his enrollment in SBM constituted a reasonable search under the Fourth Amendment as required by *Grady v. North Carolina*, __ U.S. __, __, 191 L. Ed. 2d 459, 462-63 (2015). This Court has made it clear that "the State shall bear the burden of proving that the [satellite-based monitoring] program is reasonable." *State v. Blue*, __ N.C. App. __, __, 783 S.E.2d 524, 527; *State v. Morris*, __ N.C. App. __, __, 783 S.E.2d 528, 530.

The transcript of Defendant's SBM hearing shows:

> [Prosecutor]: Your Honor, looking at the AOC-CR 615 form, Judicial Findings and Order Sex Offenders Active Punishment, the State would contend--
>
> THE COURT: Do you have it filled out?
>
> [Prosecutor]: No, sir.
>
> THE COURT: Let's get it. You have it filled out here?
>
> THE CLERK: No, it's not filled out.
>
> [Prosecutor]: The State contends that number one, that would be a B1 sexually violent offense.
>
> THE COURT: That's also a rape of a child.
>
> [Prosecutor]: No, sir, that's a different statute. That is under the age of 13.
>
> THE COURT: A B1?
>
> [Prosecutor]: Yes, sir.

> THE COURT: And two would be the defendant has not been classified as a sexually violent predator. Number three; the defendant is not a recidivist. Number four; the offense of conviction is an aggravated offense and that's as to the statutory rape, and five; the offense did involve the physical, mental and sexual abuse of a minor.
>
> [Prosecutor]: Yes, sir. As to the order, we would contend number one should be A; natural life registration because you find one of the factors two to four was found in the affirmative.
>
> THE COURT: For his natural life?
>
> [Prosecutor]: Yes, sir, and satellite based monitoring, I believe 2B, which is because the aggravating factors were found in the affirmative.
>
> THE COURT: That's correct, 2B?
>
> [Prosecutor]: Yes, sir.
>
> THE COURT: All right. I'm going to find that he has been convicted of a reportable conviction under 14-208.6, he has a sexually violent offense. Under 14-208(5), he has not been classified as a sexually violent predator, under the procedure set out in 14-208.20, he is not a recidivist; in number three, it is an aggravated offense and it did involve the physical[,] mental[,] and sexual abuse of a minor, and the registration is going to be for his natural life upon release from imprisonment. He is enrolled in satellite based monitoring for his natural life unless terminated pursuant to the statute. That's going to be the judgment of the Court as well.
>
> . . . .
>
> [Defense counsel]: Your honor, I talked to my client if this were to happen we are giving Notice of Appeal.

Under our precedents, if Defendant had challenged the constitutionality of the SBM as applied to him, we would have been required to reverse the court's order of SBM. *See State v. Greene*, __ N.C. __, __ S.E.2d __, 2017 WL 4364396, at *2 (N.C. Ct. App. Oct. 3, 2017). However, here Defendant raised no constitutional challenge at any point of this "hearing." Defendant's counsel filed no motion, objection or argument that the SBM imposed upon Defendant was an unreasonable search.

In *State v. Bishop*, __ N.C. __, __ S.E.2d __, 2017 WL 4364391 (2017), the defendant was convicted of taking indecent liberties with a child. The trial court sentenced him to SBM for thirty years. 2017 WL 4364391 at 1. At the hearing, the defendant did not challenge the court's imposition of SBM on constitutional grounds. *Id.* Further, the defendant did not timely file a notice of appeal. Defendant petitioned this Court for a writ of certiorari. Before this Court, the defendant argued the petition should issue and sought this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure, because his constitutional argument was otherwise waived on appeal. *Id.* This Court held the defendant was "no different from other defendants who failed to preserve their constitutional arguments in the trial court, and because he has not argued any specific facts that demonstrate manifest injustice if we decline to invoke Rule 2, we do not believe this case is an appropriate use of that extraordinary step." *Id.* at 2.

As with the defendant in *Bishop*, Defendant cannot prevail on this issue without invoking Rule 2, because his constitutional argument was waived. In our discretion, we decline to invoke Rule 2 to issue a writ of certiorari to review Defendant's unpreserved argument on direct appeal. Defendant's purported appeal of his SBM is dismissed.

As with the admission of expert testimony, Defendant argues in the alternative that his counsel rendered IAC and that the designation of SBM proceedings as civil should not bar a determination that he received ineffective assistance of counsel on this issue. Defendant concedes we are bound by our precedents in *State v. Wagoner*, 199 N.C. App. 321, 332, 683 S.E.2d 391, 400 (2009) (holding IAC claims are only available in criminal matters and SBM is not a criminal punishment) and *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (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[.]"). Defendant's argument is dismissed.

VII. Conclusion

The trial court properly allowed Katy's testimony of Defendant's sexual assault under Rules 404(b) and 403. Defendant failed to demonstrate any plain error with respect to the admission of Dr. Thomas' expert testimony and report. Defendant has waived direct appellate review of any Fourth Amendment challenge to the order requiring him to enroll in the SBM program for life.

We find no error in the jury's convictions or in the judgments entered thereon. Defendant's petition for writ of certiorari to review the trial

court's imposition of SBM is allowed. His appeal of SBM as applied to him is dismissed without prejudice. Defendant's IAC claims regarding the expert testimony have been prematurely asserted on direct appeal and are dismissed without prejudice. *It is so ordered.*

NO ERROR IN PART. IAC CLAIMS DISMISSED WITHOUT PREJUDICE IN PART.

Judge HUNTER concurs.

Judge STROUD concurs with separate opinion.

STROUD, Judge, concurring.

I concur in the majority opinion fully on all issues except the last, as to the SBM order. On this issue, I concur in the result only. I write separately to note my concern regarding the trial court's failure to consider the *Grady* issues arising from the SBM order. But I will not address the substance of the issue or dissent primarily because a hearing to consider "the reasonableness of [the] search" depends upon "the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady v. North Carolina*, __ U.S. __, __, 191 L. Ed. 2d 459, 462, 135 S. Ct. 1368, 1371 (2015). The reasonableness of the search and the totality of the circumstances under which the SBM will operate will depend necessarily upon the defendant's circumstances and the operation of SBM at the time the monitoring will be done of the defendant. Attempting to determine the reasonableness of satellite based monitoring which will not take effect for nearly 50 years and possibly as long as 66 years would be an exercise in futility.

At the time of his conviction and sentencing, defendant was almost 32 years old. He was sentenced to two consecutive terms of imprisonment of a minimum of 280 months and a maximum of 396 months. In other words, he will be in prison for at least 46 years, 7 months or as much as 66 years. If he is released from prison upon completion of his minimum sentences, he will be nearly 79 years old; if he is released after completing his maximum sentences, he will be nearly 98 years old.

If the trial court were to conduct a *Grady* hearing, it would need to consider evidence presented about various factors, such as "the nature of the privacy interest upon which the search . . . intrudes"; "the character of the intrusion that is complained of" and the type of private

information the search discloses; and "the nature and immediacy of the governmental concern at issue . . ., and the efficacy of [government action] for meeting it." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654, 658, 660, 132 L. Ed. 2d 564, 575, 577-78, 579, 115 S. Ct. 2386, 2391, 2393, 2394 (1995). One type of evidence at this type of hearing would be information regarding the size and intrusiveness of the monitoring device as well as how it functions to monitor the defendant and how the device is maintained. Even if a court were to consider only the facts relevant to the monitoring device -- ignoring whether a 98 year old man presents the same potential threats to society as a 32 year old man -- it is simply impossible to predict what sort of satellite-based monitoring technology will be used in 2063, or in 2083, or anywhere in between. The SBM technology as it exists *now* is irrelevant to *this* defendant. The changes in technology in the last 47 years have been tremendous. The cell phone is just one example of these changes. Wireless phones existed only in science fiction 47 years ago; cell phones were not invented until 1973. Cell phones used to be large, bulky devices that weighed several pounds. Even just a few years ago, cell phones had one function: phone calls. Cell phones now weigh a few ounces and have more computing and data storage capability than the largest and most advanced computers in the world of 47 years ago. And 66 years ago, in 1951, the first commercial computer produced in the United States, the UNIVAC, debuted. It weighed about 16,000 pounds and took up about 382 square feet of floor space; its computing speed was glacial compared to the most basic cell phone available today.

The United States Supreme Court has recognized in recent cases the need to consider how modern technology actually works as part of analysis of the reasonableness of searches. *See Riley v. California*, __ U.S. __, __, 189 L. Ed. 2d 430, 446-47, 134 S. Ct. 2473, 2489-90 (2014) ("One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. . . . But the possible intrusion on privacy is not physically limited in the same way when it comes to cell phones. The current top-selling smart phone has a standard capacity of 16 gigabytes (and is available with up to 64 gigabytes). Sixteen gigabytes translates to millions of pages of text, thousands of pictures, or hundreds of videos. . . . . The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information . . . that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than

previously possible. . . . Third, the data on a phone can date back to the purchase of the phone, or even earlier. . . . Finally, there is an element of pervasiveness that characterizes cell phones but not physical records." (Citations omitted)). And again, the technology of SBM is just one part of the analysis of the "totality of the circumstances" which the trial court must undertake based on *Grady*.

I would encourage the General Assembly to consider addressing the absolute futility of having trial courts conduct SBM hearings immediately upon sentencing offenders who are to serve extremely long sentences. Holding this type of hearing so many years before any possible release is simply a waste of time and resources for prosecutors, defense counsel, and the trial courts. A hearing to consider SBM held shortly before a convicted sex offender is to be released upon completion of his sentences would allow the trial court to make a meaningful assessment of SBM based upon technology available and the offender's circumstances at that time.

I therefore concur with the majority opinion on all issues except the last. On that last issue -- relating to the SBM order -- I concur only in the result.

SURGICAL CARE AFFILIATES, LLC, PETITIONER
v.
NORTH CAROLINA INDUSTRIAL COMMISSION, RESPONDENT

No. COA17-78

Filed 21 November 2017

Hospitals and Other Medical Facilities—ambulatory medical centers—Workers' Compensation

The Industrial Commission correctly determined (and the superior court erred by reversing the Commission) that the General Assembly intended to include ambulatory surgical centers in the definition of "hospital" in a session law involving costs attributable to injured workers. When a statute uses a word without defining it, the method of determining the plain meaning is to consult a dictionary rather than to look at other statutes or regulations, as the trial court did here.

Appeal by respondent from decision entered 9 August 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 22 August 2017.

Parker Poe Adams & Bernstein LLP, by Renee J. Montgomery and Matthew W. Wolfe, for petitioner-appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amar Majmundar and Assistant Attorney General Bethany A. Burgon, for respondent-appellant.

Wyrick Robbins Yates & Ponton LLP, by Frank Kirschbaum, Charles George, and Tobias Hampson, for Greensboro Orthopaedics, P.A., OrthoCarolina, P.A., Raleigh Orthopaedic Clinic, P.A., Surgical Center of Greensboro, LLC, Southeastern Orthopaedic Specialists, P.A., Orthopaedic & Hand Specialists, P.A. (Hand Center of Greensboro), Cary Orthopaedic and Sports Medicine Specialists, P.A., and Stephen D. Lucey, M.D., as amici curiae in support of petitioner-appellee.

Troutman Sanders LLP, by Christopher G. Browning, Jr. and Gavin B. Parsons, for North Carolina Retail Merchants Association, North Carolina Home Builders Association, North Carolina Chamber, North Carolina Farm Bureau, North Carolina Association of Self-Insurers, American Insurance Association, Property Casualty Insurers Association of America, Employers Coalition of North Carolina, North Carolina Forestry Association, North Carolina Automobile Dealers Association, North Carolina Association of County Commissioners, Builders Mutual Insurance Company, Dealers Choice Mutual Insurance Company, First Benefits Insurance Mutual, Inc., Forestry Mutual Insurance Company and the North Carolina Interlocal Risk Management Agency, and P. Andrew Ellen for North Carolina Retail Merchants Association, J. Michael Carpenter for North Carolina Home Builders Association, Amy Y. Bason for the North Carolina Association of County Commissioners, Kimberly S. Hibbard and Gregg F. Schwitzgebel, III, for North Carolina Interlocal Risk Management Agency, T. John Policastro for North Carolina Auto Dealers Association, and H. Julian Philpott, Jr., for North Carolina Farm Bureau, as amici curiae in support of respondent-appellant.

BRYANT, Judge.

Because we hold the Superior Court erred in defining the term "hospital," as used in the context of 2013 N.C. Sess. Laws ch. 410, § 33.(a) and concluding that "hospitals are separate and legally distinct entities from ambulatory surgical centers," we reverse the court's decision that our General Assembly did not authorize the Industrial Commission to adopt new maximum fees for ambulatory surgical centers pursuant to 2013 N.C. Sess. Laws ch. 410, § 33.(a) and remand the matter for entry of an order affirming the Commission's declaratory ruling.

On 1 October 2015, petitioner Surgical Care Affiliates, LLC, ("petitioner") filed a request for a declaratory ruling with respondent, the North Carolina Industrial Commission ("the Commission").

> [Petitioner] has requested a declaratory ruling regarding the validity of certain of the Commission's rules affecting the fee schedule for services performed at ambulatory surgery centers. Specifically, [petitioner] has requested that the Commission declare invalid its adoption of a new fee schedule for ambulatory surgery center services set forth in 04 NCAC 10J .0103(g) and (h) (also referenced in 04 NCAC 10J .0103(i)), and its amendment of 04 NCAC 10J .0101(d)(3) and (5) to remove the former fee schedule.

On 25 July 2013, our General Assembly ratified 2013 N.C. Sess. Laws ch. 410, § 33.(a), which set out mandates for the Commission regarding its medical fee schedule. The Commission noted in its 14 December 2015 Declaratory Ruling that "[w]ith respect to the schedule of maximum fees for *physician and hospital compensation* adopted by [the Commission] pursuant to G.S. 97-26, those fee schedules shall be based on the applicable Medicare payment methodologies." (Emphasis added). Furthermore, the Commission noted that in developing the new fee schedules, 2013 N.C. Sess. Laws ch. 410, § 33.(a) provided that "[the Commission was] exempt from the certification requirement of G.S. 150B-19.1(h) and the fiscal note requirement of G.S. 150B-21.4."

Addressing the new mandate, the Commission adopted rules 04 NCAC 10J .0102 and .0103 and amended rules 04 NCAC 10J .0101 and .0102. Under Rule 04 NCAC 10J .0101, the Commission set out its "Hospital Fee Schedule," which included reimbursement for services provided by ambulatory surgery centers. Further, the Commission reasoned that by following the procedures for rulemaking, as set out in General Statutes, Chapter 150B, a rebuttable presumption was created that the rules were adopted in accordance with the Administrative Procedure Act.

Petitioner challenged the Commission's determination that the mandates set out in 2013 N.C. Sess. Laws ch. 410, § 33.(a), "[w]ith respect to the schedule . . . for *physician and hospital compensation*" (emphasis added), directed the Commission to change the fee schedule for medical treatment provided at *ambulatory surgery centers*.[1] Furthermore, petitioner challenged the assertion that the session law's exemption from the fiscal note requirement of N.C. Gen. Stat. § 150B-21.4 was applicable to the Commission. Thus, petitioner argued that the adopted new rules (04 NCAC 10J .0102 and .0103) and the amended existing rules (04 NCAC 10J .0101 and .0102) were also invalid due to the Commission's failure to meet the fiscal note requirements of section 150B-21.4. Petitioner asserts that "as a result of substantially reduced maximum reimbursement rates for surgical procedures provided pursuant to Chapter 97, and the Commission's failure to promulgate a fee schedule that includes all surgical procedures performed at ambulatory surgery centers, [petitioner] will lose a significant amount of revenue."

However, as reflected in its declaratory ruling, the Commission reasoned that petitioner failed to rebut the presumption of validity regarding the Commission's adopted and amended rules and denied petitioner's requested relief.

On 13 January 2016, petitioner filed a petition for judicial review of the Commission's declaratory ruling in Wake County Superior Court. Prior to the hearing, the following parties, Greensboro Orthopedics, P.A.; OrthoCarolina, P.A.; Raleigh Orthopaedic Clinic, P.A.; Surgical Center of Greensboro, LLC; Southeastern Orthopaedic Specialists, P.A.; Orthopaedic & Hand Specialists, P.A.; Cary Orthopaedic and Sports Medicine Specialists, P.A.; and Stephen D. Lucey, filed a motion to intervene as *amicus curiae*: which was allowed. The matter was heard before the Honorable Paul C. Ridgeway, Superior Court Judge presiding.

On 9 August 2016, Judge Ridgeway entered his decision concluding that hospitals were separate and legally distinct entities from ambulatory surgical centers and that 2013 N.C. Sess. Laws ch. 410, § 33.(a) authorized the Commission to use an expedited rulemaking process only in adopting new maximum fees for physicians and hospitals,

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1. In its declaratory ruling, the Commission found that "[t]he Hospital Fee Schedule set out in 04 NCAC 10J .0101 at the time 2013 N.C. Sess. Laws ch. 410, § 33.(a) was ratified applied to reimbursement of inpatient hospital fees, outpatient hospital fees, and ambulatory surgery fees, and S.L. 2013-410, s. 33.(a) contains no indication that the General Assembly intended for that to change in the Hospital Fee Schedule adopted pursuant to its law."

not ambulatory surgical centers. The trial court determined that "the Commission was required to comply with the fiscal note requirements [of N.C. Gen. Stat. §§ 150B-21.2(a) and 150B-21.4] in adopting a new fee schedule for ambulatory surgical centers and failed to do so, [and thus,] the Commission exceeded its statutory authority and employed an unlawful procedure." Therefore, the trial court granted petitioner's request for relief and reversed the Commission's declaratory ruling. The Commission appeals.

On appeal, the Commission raises four questions: whether the superior court erred by (I) defining hospitals and surgical centers pursuant to General Statutes, Chapter 131E (governing "Health care facilities and services") and (II) failing to properly defer to the Commission in the interpretation of 2013 N.C. Sess. Laws ch. 410, § 33.(a). Further, the Commission argues that (III) petitioner is estopped from arguing the hospital fee schedule does not apply to ambulatory surgical centers and (IV) the filed-rate doctrine bars Surgical Care Affiliates' collateral attack on 04 NCAC 10J .0103(g) and (h). However, because we hold the trial court erred as to the dispositive question—whether ambulatory surgical centers are "hospitals" within the meaning of the hospital fee schedule—we need not address petitioner's additional arguments on appeal.

Standard of Review

[W]hen an appellate court reviews

> a superior court order regarding an agency decision, the appellate court examines the [superior] court's order for error of law. The process has been described as a twofold task: (1) determining whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.

Mann Media, Inc. v. Randolph Cty. Planning Bd., 356 N.C. 1, 14, 565 S.E.2d 9, 18 (2002) (quoting *ACT–UP Triangle v. Commission for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)).

The statutes governing a superior court's review of a final agency decision are provided in the Administrative Procedure Act, codified within Chapter 150B of our General Statutes. Article 4, governing "Judicial review," sets out the scope and standard of review.

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b), (c) (2015).

In its 9 August 2016 decision, the Superior Court stated that

> [petitioner] contends that the Commission's Declaratory Ruling is in excess of its statutory authority, made upon unlawful procedure, and affected by other error of law. Because of these errors asserted by [petitioner], this [c]ourt has applied de novo standard of review to review the Commission's decision as required under N.C. Gen. Stat. § 150B-51(c).

We agree that the appropriate standard is de novo review. "Under the *de novo* standard of review, the trial court consider[s] the matter anew[] and freely substitutes its own judgment for the agency's." *N.C. Dep't of Envtl. & Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (alteration in original) (citation omitted). We review the record

in light of the Commission's arguments to determine if the standard was properly applied. *See Mann Media*, 356 N.C. at 14, 565 S.E.2d at 18.

As noted *infra*, the dispositive question, as set forth by the Commission, is whether the trial court erred when it relied on an inapplicable definition to determine that ambulatory surgical centers are not "hospitals" within the meaning of the hospital fee schedule. The Commission argues that the Superior Court erroneously used the definition of "hospital" that is exclusive to the Hospital Licensure Act and further erred by adopting an overly narrow definition of "hospital," thereby failing to acknowledge the intent of our General Assembly. We agree.

At issue is the Superior Court's interpretation of "hospital" as the term is used in 2013 N.C. Sess. Laws ch. 410, § 33.(a) ("Industrial Commission Hospital Fee Schedule"), and whether that term encompasses ambulatory surgical centers. Section 33.(a)(1) under 2013 N.C. Sess. Laws ch. 410, is entitled "Medicare methodology for physician and *hospital* fee schedules." 2013 S.L. 410, sec. 33.(a)(1) (emphasis added).[2]

"In the interpretation and construction of statutes, the task of the judiciary is to seek the legislative intent." *Housing Auth. v. Farabee*, 284 N.C. 242, 245, 200 S.E.2d 12, 14 (1973) (citations omitted). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation omitted). Here, the parties do not direct our attention to any provision in General Statutes, Chapter 97 ("Workers' Compensation Act"), which defines "hospital."

> [U]ndefined words are accorded their plain meaning so long as it is reasonable to do so. In determining the plain meaning of undefined terms, this Court has used "standard, nonlegal dictionaries" as a guide. Finally, statutes should be construed so that the resulting construction harmonizes with the underlying reason and purpose of the statute.

Midrex Techs., Inc. v. N.C. Dep't of Revenue, ___ N.C. ___, ___, 794 S.E.2d 785, 792 (2016) (alteration in original) (citations omitted); *see id.* (referring to the New Oxford American Dictionary for a definition of the word "building").

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2. We note that N.C. Gen. Stat. § 97-26 ("Fees allowed for medical treatment; malpractice of physician"), codified within Chapter 97, Article 1 ("Workers' Compensation Act"), does not define "hospital" or "ambulatory surgical center."

When a statute employs a term without redefining it, the accepted method of determining the word's plain meaning is not to look at how other statutes or regulations have used or defined the term—but to simply consult a dictionary. *See Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 356, 542 S.E.2d 668, 673 (2001) ("Absent a contextual definition, the courts may infer the ordinary meaning of a word from its dictionary definition." (citation omitted)). Turning to a nonlegal dictionary, "hospital" is defined as "[a]n institution that provides care and treatment for the sick or the injured." *Hospital*, American Heritage College Dictionary (3d ed. 1993); *see also hospital*, https://www.merriam-webster.com/dictionary/hospital (last visited Oct. 25, 2017) (defining "hospital" in part as "1 :a charitable institution for the needy, aged, infirm, or young" and "2 :an institution where the sick or injured are given medical or surgical care . . . ."). *Cf. In re Appeal of Found. Health Sys. Corp.*, 96 N.C. App. 571, 577, 386 S.E.2d 588, 591 (1989) (addressing whether an ambulatory surgery center was a hospital for purposes of taxation under the Revenue Act, the Court reasoned that the definition set forth in North Carolina's Hospital Licensure Act, codified under General Statutes, Chapter 131E, "ha[d] no applicability to the construction of the term under the Revenue Act," and referring to the definition of "hospital" as stated in Black's Law Dictionary (rev. 5th ed. 1979) as a generally accepted definition that encompassed the ambulatory surgery center at issue).

We also look to the purpose of 2013 N.C. Sess. Laws ch. 410, § 33.(a).

> (1) Medicare methodology for physician and hospital fee schedules.—With respect to the schedule of maximum fees for physician and hospital compensation adopted by the Industrial Commission pursuant to G.S. 97-26, those fee schedules shall be based on the applicable Medicare payment methodologies, with such adjustments and exceptions as are necessary and appropriate to ensure that (i) injured workers are provided the standard of services and care intended by Chapter 97 of the General Statutes, (ii) providers are reimbursed reasonable fees for providing these services, and (iii) medical costs are adequately contained.

2013 N.C. Sess. Laws ch. 410, § 33.(a)(1). The focus of this session law is to contain medical care costs attributable to injured workers, while reasonably reimbursing medical care providers for services. The inclusion of ambulatory surgical centers in the definition of hospital, subjecting petitioner to the "Medicare methodology for . . . hospital fee schedules" does not appear to frustrate this objective and may be construed as in harmony with the reason for 2013 N.C. Sess. Laws ch. 410, § 33.(a).

See Midrex Techs., ___ N.C. at ___, 794 S.E.2d at 792 ("[S]tatutes should be construed so that the resulting construction harmonizes with the underlying reason and purpose of the statute.").

In the order appealed from, the Superior Court referred to General Statutes, section 131E-76 (providing definitions applicable to Article 5, codifying the "Hospital Licensure Act," within Chapter 131E, governing "Health Care Facilities and Services") to define the term "hospital" as it was used in 2013 N.C. Sess. Laws ch. 410, § 33.(a), which regards a fee schedule adopted by the Commission pursuant to G.S. section 97-26 (codified within the "Workers' Compensation Act"). On this basis, the court concluded "that hospitals are separate and legally distinct entities from ambulatory surgical centers." We hold the court erred. As that definition of "hospital" was essential to the lower court's determination that the session law did not authorize the Commission to adopt new maximum fees for ambulatory surgical centers, we reverse the court's 9 August 2015 decision and remand for entry of an order affirming the Commission's 14 December 2015 declaratory ruling.

REVERSED AND REMANDED.

Judges DAVIS and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 NOVEMBER 2017)

CHATHAM FOREST HOMEOWNERS ASS'N, INC. v. PHIL STONE HOMES, INC. No. 17-417	Chatham (16CVS439)	Affirmed
ESTATE OF PEYTON v. N.C. DEP'T OF TRANSP. No. 17-257	N.C. Industrial Commission (TA-21514) (TA-21515)	Affirmed
IN RE COLVARD No. 15-923-2	N.C. Industrial Commission (U00556)	Affirmed
IN RE L.C. No. 17-589	Cleveland (14JT100)	Reversed and Remanded
IN RE WARE No. 15-909-2	N.C. Industrial Commission (U00178)	Affirmed
IN RE X.L.S. No. 17-590	Wilkes (15JT140)	Affirmed
IN RE ZIMMERMAN No. 15-937-2	N.C. Industrial Commission (U00540)	Affirmed
MEDLIN v. MEDLIN No. 17-425	Scotland (12CVD1206)	Affirmed
PLASMAN v. DECCA FURNITURE (USA), INC. No. 17-358	Catawba (12CVS2832)	Dismissed
PRESSLEY v. JONES No. 17-445	Rowan (15CVD1316)	Affirmed
STATE v. DALE No. 17-320	Wake (16CRS4189)	Affirmed
STATE v. FARRAR No. 17-215	Alamance (15CRS1994) (15CRS50316)	No Plain Error
STATE v. FREEMAN No. 17-347	Orange (14CRS51886) (15CRS14) (16CRS23)	No Error

STATE v. GARDNER No. 17-511	Beaufort (09CRS1295) (09CRS52281)	No Error
STATE v. GORE No. 17-267	Columbus (10CRS53881)	No Error
STATE v. GRIFFIN No. 17-373	Mecklenburg (15CRS232996-3000)	Affirmed
STATE v. HAIR No. 17-330	Cumberland (15CRS63040)	No Error
STATE v. McCURRY No. 17-169	Rutherford (15CRS50532)	NO ERROR AT TRIAL; REMANDED FOR RESENTENCING.
STATE v. MOSBY No. 16-1295	Brunswick (13CRS2034)	Vacated and Remanded
STATE v. REAVES No. 17-316	Person (15CRS52133)	No Error
STATE v. SCOGINS No. 17-526	Mecklenburg (15CRS230053)	Affirmed
STATE v. SINGLETON No. 17-392	Buncombe (15CRS1081-82)	Vacated and Remanded
STATE v. WOMBLE No. 17-572	Cumberland (15CRS3790) (15CRS53324)	Dismissed

CHAPEL H.O.M. ASSOCIATES, LLC AND CHAPEL HILL MOTEL ENTERPRISES, INC., PLAINTIFFS
v.
RME MANAGEMENT, LLC, DEFENDANT

No. COA16-1030

Filed 5 December 2017

1. Estoppel—equitable estoppel—failed commercial lease renewal negotiation

The trial court did not err in an action involving a failed commercial lease negotiation by dismissing a claim for equitable estoppel where plaintiff companies' allegations were not elements of a legally cognizable claim for relief.

2. Unfair Trade Practices—failed commercial lease renewal negotiation—breach of contract

The trial court did not err in an action involving a failed commercial lease renewal negotiation by dismissing a claim for unfair and deceptive trade practices where plaintiff companies merely alleged a claim for breach of contract.

3. Declaratory Judgments—particularity of genuine controversy—not mere disagreement

The trial court erred in an action involving a failed commercial lease renewal negotiation by dismissing plaintiffs' declaratory judgment claim, where the claim was pleaded with sufficient particularity, alleging a genuine controversy between the parties and not a mere disagreement between the parties.

Judge HUNTER, JR. concurring with separate opinion.

Appeal by plaintiffs from order entered 9 June 2016 by Judge R. Allen Baddour, Jr. in Orange County Superior Court. Heard in the Court of Appeals 8 March 2017.

Troutman Sanders LLP, by Ashley H. Story and D. Kyle Deak, for plaintiffs-appellants.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and James R. Baker, for defendant-appellee.

BERGER, Judge.

Chapel H.O.M. Associates, LLC ("H.O.M.") and Chapel Hill Motel Enterprises, Inc. ("Chapel Hill") (collectively "Plaintiffs") appeal from an order filed June 9, 2016 granting the motion to dismiss of RME Management, LLC ("Defendant") made pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiffs argue the complaint states claims for which relief may be granted, and the trial court erred by granting Defendant's motion. We affirm in part and reverse in part.

Factual & Procedural Background

H.O.M. entered into a forty-nine year lease on March 17, 1966 for a parcel of land in Chapel Hill, North Carolina. The lease contained a renewal option for an additional forty-nine years that, if written notice was given at least six months before lease termination, would have allowed the renewal lease term to begin on January 1, 2016. Chapel Hill sublet the property from H.O.M. beginning on January 9, 1967 for the operation and management of a hotel, and after exercising renewal options, continues to sublet the property.

While it is unclear when Defendant acquired the subject property from the original landowner, Defendant was the owner of the property as early as January 2014. In accordance with the terms of the original lease, the parties began negotiating renewal of the lease and sublease as early as December 3, 2013 when Chapel Hill communicated its intent to H.O.M. to extend the sublease, and on September 16, 2014 when H.O.M. notified Defendant that it intended to renew its lease. Both parties gave notice to renew well before the six month requirement of the lease and sublease.

Negotiations for renewal of the lease broke down because the parties could not agree on the method by which the price terms for the renewal of the lease would be set. To establish this price term for the lease contract, the parties were to each appoint a commercial property appraiser, and these two appraisers would appoint a third appraiser. These three appraisers would then negotiate to reach an equitable and fair value of the property and its corresponding lease value to be paid monthly to RME. However, the parties could not agree on the appraisal methodology, and the third appraiser was never appointed.

After renewal negotiations broke down, Plaintiffs filed a complaint in the United States District Court for the Middle District of North Carolina on September 29, 2014. This complaint was dismissed on jurisdictional grounds. Plaintiffs refiled their complaint in Orange County Superior Court on August 28, 2015 stating causes of action for declaratory

judgment, equitable estoppel, and unfair and deceptive trade practices. Defendant filed a motion on October 2, 2015 requesting the case be heard in the North Carolina Business Court, and seeking to dismiss Plaintiffs' complaint for failure to state a claim on which relief could be granted. On October 23, 2015, the Superior Court refused to designate the case as a complex business case, and so the case proceeded in Orange County Superior Court. Following a May 31, 2016 hearing on Defendant's motion to dismiss, the trial court entered an order on June 9, 2016 granting the motion with prejudice. It is from this order dismissing each of its causes of action that Plaintiffs have timely appealed.

Standard of Review

When a trial court considers a Motion to Dismiss under Rule 12(b)(6), the court must determine "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." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (citation and internal quotation marks omitted), *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). "[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*." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citation and internal quotation marks omitted), *disapproved of on other grounds by Dickens v. Puryear*, 302 N.C. 437, 448, 276 S.E.2d 325, 332 (1981). "[A]ll the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970) (citation and internal quotation marks omitted).

Analysis

I. Equitable Estoppel

[1] In North Carolina, the elements of equitable estoppel are:

> (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied

> upon the conduct of the party sought to be estopped to his prejudice.

Friedland v. Gales, 131 N.C. App. 802, 807, 509 S.E.2d 793, 796-97 (1998) (quoting *Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 370, 396 S.E.2d 626, 628-29 (1990)). Generally, equitable estoppel is not a cause of action, and may not be used as a sword in a complaint. *See id.* at 806, 509 S.E.2d at 796.

Here, Plaintiffs assert equitable estoppel in their amended complaint as an affirmative claim for relief. Plaintiffs allege:

> h. Defendant actively and knowingly engaged in the Lease renewal process and even admittedly engaged an appraiser pursuant to the terms of the Lease to determine the rent payable during the Renewal Term;
>
> i. . . . In detrimental reliance thereon, HOM traveled to Atlanta, Georgia on several occasions to negotiate the terms of the extension, HOM has had numerous telephone conferences and correspondence with RME regarding the renewal issues, HOM has engaged and paid for the services of legal counsel . . . ;
>
> . . . .
>
> l. Plaintiffs relied to their detriment upon Defendant's representations concerning the Lease Renewal, and have been damaged thereby.

Plaintiffs' allegations are not elements of a legally cognizable claim for relief. The trial court can conclude to a certainty that Plaintiffs would not recover under this theory. Therefore, the trial court did not err when it dismissed Plaintiffs' claim for equitable estoppel.

II. Unfair and Deceptive Trade Practices

[2] This Court has stated "[u]nder N.C.G.S. § 75-1.1, a trade practice is unfair if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to [consumers]. A trade practice is deceptive if it has the capacity or tendency to deceive." *Branch Banking And Trust Co. v. Thompson*, 107 N.C. App. 53, 61-62, 418 S.E.2d 694, 700 (citation and internal quotation marks omitted), *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992). Claims for unfair and deceptive trade practices "are distinct from actions for breach of contract." *Id.* at 62, 418 S.E.2d at 700. "[A] mere breach of contract, even if intentional, is not sufficiently

unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." *Id.* (citation omitted).

In *Branch Banking & Trust Co.* we adopted the Fourth Circuit Court of Appeal's interpretation of North Carolina's Unfair and Deceptive Trade Practices Act stating, "a plaintiff must show substantial aggravating circumstances attending the breach to recover under the Act, which allows for treble damages." *Id.* (quoting *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989)). Our cases finding sufficient aggravating factors have generally involved forms of forgery or deception. *See Garlock v. Henson*, 112 N.C. App. 243, 246, 435 S.E.2d 114, 115 (1993) (finding substantial aggravating circumstances where the evidence showed "defendant repeatedly denied the sale of the bulldozer when he knew it had been sold" and "defendant forged a bill of sale in an attempt to extinguish plaintiff's ownership interest in the bulldozer"); *see also Talbert v. Mauney*, 80 N.C. App. 477, 480-81, 343 S.E.2d 5, 8 (1986) (holding "plaintiffs' allegations of wrongful and intentional harm to their credit rating and business prospects" along with allegations defendant told a potential investor "plaintiffs' credit documents were 'probably forged' " was sufficient to state a claim under the Unfair and Deceptive Trade Practices Act); *Walker v. Sloan*, 137 N.C. App. 387, 395-96, 529 S.E.2d 236, 243 (2000) (holding plaintiffs' allegations were sufficient to support a claim where defendant "attempted to break up the employee group . . . by attempting to bribe the portfolio managers into withdrawing from the group . . . ; refus[ed] to participate [in negotiations] in good faith . . . ; and . . . terminat[ed] the plaintiffs [from employment]").

Here, Plaintiffs' complaint merely alleges Defendant "has taken a contrary position" regarding the rent payable during the Renewal Term. Defendant now argues the term is void, whereas Defendant previously indicated an intention to abide by the terms of the lease. These facts do not allege substantial aggravating circumstances required to demonstrate a claim for unfair and deceptive trade practices. Plaintiffs merely allege a claim for breach of contract. Therefore, the trial court properly dismissed Plaintiffs' claim for unfair and deceptive trade practices.

III. Declaratory Judgment

[3] In North Carolina, declaratory judgments are subject to the Uniform Declaratory Judgment Act ("NCUDJA"). N.C. Gen. Stat. § 1-253 to -267 (2015). *See Augur v. Augur*, 356 N.C. 582, 573 S.E.2d 125 (2002). A jurisdictional prerequisite of a declaratory judgment claim is that a controversy must exist between the interested parties both at the time of filing the complaint and the time of hearing at which the matter comes before

the trial court for a hearing. *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 584-85, 347 S.E.2d 25, 29 (1986) (citation omitted).

"To satisfy the jurisdictional requirement of an actual controversy, it must be shown in the complaint that litigation appears unavoidable. Mere apprehension or the mere threat of an action or suit is not enough." *Wendell v. Long*, 107 N.C. App. 80, 82-83, 418 S.E.2d 825, 826 (1992) (citations omitted). "The courts of this state do not issue anticipatory judgments resolving controversies that have not arisen." *Id.* at 83, 418 S.E.2d at 826 (citation and internal quotation marks omitted). An actual controversy must exist to prevent courts from rendering a "purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." *Tryon v. Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942) (citations omitted).

"A court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding[.]" *Augur*, 356 N.C. at 585, 573 S.E.2d at 128 (brackets omitted) (citing N.C. Gen. Stat. § 1-257 (2001)). Section 1-257 expressly grants trial courts discretion when evaluating a declaratory judgment remedy "because trial courts are best positioned to assess the facts bearing on the usefulness of declaratory relief in a particular case." *Id.* at 587, 573 S.E.2d at 130.

Accordingly, this Court reviews a trial court's decision under an abuse of discretion standard when ruling on a motion of declaratory relief. *Id.* Further, this Court has previously held that "our courts have jurisdiction to render declaratory judgments only when *the complaint* demonstrates the existence of an actual controversy." *Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 45, 621 S.E.2d 19, 29 (2005) (emphasis added) (citation and internal quotation marks omitted). Therefore, our review is limited to the contents of Plaintiffs' complaint.

"When the record shows . . . no basis for declaratory relief, or the complaint does not allege an actual, genuine existing controversy, a motion for dismissal under G.S. 1A-1, Rule 12(b)(6) will be granted." *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234-35, 316 S.E.2d 59, 62 (1984) (citation omitted). However, "[a] motion to dismiss for failure to state a claim is seldom appropriate in actions for declaratory judgments, and will not be allowed simply because the plaintiff may not be able to prevail." *Morris v. Plyler Paper Stock Co.*, 89 N.C. App. 555, 557, 366 S.E.2d 556, 558 (1988) (citation and internal quotation marks omitted).

In *Morris*, the plaintiffs contended that their declaratory judgment claim was sufficient to obtain a judicial determination of the validity of lease renewal terms, and the trial court had erred in granting defendant's Rule 12(b)(6) motion. *Id.* at 556, 366 S.E.2d at 557. This Court ruled that the plaintiffs had established a justiciable controversy over lease renewal terms and that dismissal pursuant to Rule 12(b)(6) was improper. *Id.* at 556-57, 366 S.E.2d at 557-58. The Court declined to review the lease agreement for validity because "[t]he issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Id.* at 557, 366 S.E.2d at 558 (citation and internal quotation marks omitted).

Our Supreme Court has stated that a motion to dismiss "is allowed only when the record *clearly shows* that there is no basis for declaratory relief as when the complaint does not allege an actual, genuine existing controversy." *Consumers Power v. Power Co.*, 285 N.C. 434, 439, 206 S.E.2d 178, 182 (1974) (emphasis added) (citations omitted). While a "mere difference of opinion between the parties is not sufficient for purposes of the Declaratory Judgment Act," *Fabrikant*, 174 N.C. App at 44, 621 S.E.2d at 29 (citation and internal quotation marks omitted), our Supreme Court has stated that a sufficient declaratory judgment claim exists when:

> (1) . . . a real controversy exists between or among the parties to the action; (2) . . . such controversy arises out of *opposing contentions* of the parties, made in good faith, *as to the validity* or construction of a deed, will or *contract in writing*, or as to the validity or construction of a statute, or municipal ordinance, contract, or franchise; and (3) . . . the parties to the action have or may have legal rights, or are or may be under legal liabilities which are involved in the controversy, and may be determined by a judgment or decree in the action . . . ."

Power Co., 285 N.C. at 449, 206 S.E.2d at 188 (emphasis added) (quoting *Light Co. v. Iseley*, 203 N.C. 811, 820, 167 S.E 56, 60 (1933)).

In their complaint, Plaintiffs allege:

> 16. Pursuant to the terms of the Lease, the rental payment for the Renewal Term shall be negotiated between the parties, and if not able to be agreed upon each party shall choose an appraiser, who shall in turn chose a third appraiser, and the appraisers shall determine the annual rent to be paid during the Renewal Term.

. . . .

20. HOM and RME, however, have been unable to agree upon the rent payable during the Renewal Term, and each party has, respectively, appointed an appraiser pursuant to paragraph 8 of the Lease.

21. Subsequent to such appointment, however, the appraiser for RME has taken a position that is contrary to the terms of the Lease and has attempted to create a conflict, thus interfering with the appointment of a third appraiser to set rent for the Renewal Term.

22. Plaintiffs submit that the reason why the appraisers have been unable to agree upon a third appraiser is because Defendant has taken a contrary position regarding the manner and method pursuant to which the rent payable during the Renewal Term shall be determined in order to improperly and tortiously attempt to create an ambiguity and argument for voiding the Lease, or in an attempt to extract more monies from Plaintiff.

23. Plaintiffs submit that a true and accurate reading of the Lease as a whole and the manner or mechanism by which the rent was originally determined under the terms of the Lease shows that the Property and the rent applicable thereto during the Renewal Term shall be determined by appraising the Property "as is" . . . .

24. RME, conversely, takes the position that the Property and the rent applicable thereto during the Renewal Term shall be determined based upon the highest and best use of the Property . . .

. . . .

28. An actual controversy exists among HOM and RME as to the rights and obligations with regard to the Lease and the parties' respective interpretation as to the terms of the Lease with regard to Plaintiffs' exercise of their Renewal Term rights [in Paragraph 8] and the rent payable therefore.

29. A determination by this Court of the rights, duties, and liabilities as between HOM and RME under the terms of the Lease is necessary.

Plaintiffs' claim for declaratory relief was sufficient under the NCUDJA. Taking the allegations in the complaint as true, Plaintiffs pleaded their claim for declaratory relief with particularity alleging a genuine controversy between the parties before the trial court, not a mere disagreement between the parties. Dismissal was improper at this stage of the litigation, and we therefore reverse the trial court in regards to the declaratory judgment claim.

Conclusion

The trial court correctly dismissed the claims for equitable estoppel and unfair and deceptive trade practices, and we affirm that portion of the judgment. The trial court erred in dismissing the declaratory judgment action, and we therefore reverse as to that claim.

AFFIRMED IN PART, REVERSED IN PART.

Judge CALABRIA concurs.

Judge HUNTER, JR. concurs with separate opinion.

HUNTER, JR., Robert N., Judge, concurring in separate opinion.

I agree Plaintiffs' claims for equitable estoppel and unfair and deceptive trade practices were properly dismissed. I also agree with the majority's decision reversing the trial court's dismissal of Plaintiffs' claim for declaratory relief, but I write separately to address the relief which should be afforded.

Dismissal of Plaintiffs' declaratory judgment claim was error, as the rights of the parties under the contract should have been declared. In *Connor v. Harless*, this Court addressed the validity of an option to purchase at a price to be determined in the future based on at least two appraisals. 176 N.C. App. 402, 626 S.E.2d 755 (2006). We first noted "[i]t is essential to the formation of any contract that there be *mutual assent* of both parties to the *terms of the agreement* so as to establish a meeting of the minds." *Id.* at 405, 626 S.E.2d at 757 (emphasis in original) (quoting *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 550, 613 S.E.2d 322, 327 (2005)). Thus, "as to the essential and material contractual term of price, there must be a meeting of the minds." *Id.* "[A] contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations." *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974).

The option to purchase at issue in *Connor* provided for the price to be an "amount in cash fair market value at the time of such purchase (based on at least two appraisals)." *Connor*, 176 N.C. App. at 406, 626 S.E.2d at 758. We held the term was void because:

> [N]o mechanism existed within the agreement to address any potential price discrepancies. Specifically, there were no additional provisions stating how to proceed if the appraisals produced vastly different property values. . . . With no specification in the agreement as to how to address . . . greatly varying estimates in the value of defendants' property, the price term is not, as it must be, certain and definite.

Id. We ultimately held "[b]ecause there was no meeting of the minds as to the essential term of price, the agreement between plaintiffs and defendants is not an enforceable contract." *Id.*

This case is distinguishable from *Connor* in that here, the parties did provide a solution for resolving potential price discrepancies. Unlike the parties in *Connor*, the parties here provided an additional safeguard to address a potential impasse between the two original appraisers. In the event the two appraisers cannot reach an agreement, the two shall in turn appoint a third appraiser and the three will determine the rental term. This provision of the contract evidences mutual assent, and the parties' intention to be bound to the terms of the agreement. Thus, the contract is not void for vagueness. We should reverse the trial court's dismissal of this claim and remand the case, in order for the trial court to appoint a third appraiser. We are confident the three appraisers will be capable of determining the appropriate price term based upon industry standards.

HALL v. U.S. XPRESS, INC.

[256 N.C. App. 635 (2017)]

HARRISON HALL, EMPLOYEE-PLAINTIFF
v.
U.S. XPRESS, INC., EMPLOYER
AND
LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA17-333

Filed 5 December 2017

1. Workers' Compensation—payment under Tennessee Workers' Compensation Act—jurisdiction of Industrial Commission

The North Carolina Industrial Commission had subject matter jurisdiction over a truck driver's claim for workers' compensation benefits where plaintiff worked for a Tennessee company but was injured in North Carolina and was initially paid under the Tennessee Workers' Compensation Act. Plaintiff did not learn that he was not being paid under the N.C. Workers' Compensation Act until the insurer stopped making per diem payments. Plaintiff then filed the necessary N.C. form within two years, as required by N.C.G.S. § 97-24(a)(ii). Additionally, plaintiff's entitlement to payments under the North Carolina act had not been determined at that time and the North Carolina statute did not require that an employer keep a claimant informed of the legal status of payments or that a plaintiff investigate the matter.

2. Workers' Compensation—medical compensation—payments made to out-of-state providers—medical compensation

Workers' compensation payments made to health care providers in Boston constituted medical compensation, even though N.C.G.S. § 97-24 did not refer to compensation paid pursuant to a statutory structure in another state. Although defendants argued that the Industrial Commission's interpretation of N.C.G.S. § 97-24 was inconsistent with the rules of statutory construction, the Commission properly applied precedent rather than interpreting the statute on a blank slate.

3. Workers' Compensation—medical care provider—definition

The Industrial Commission employed the correct statutory definitions of "medical compensation" and "health care provider" in a workers' compensation case. The structure of the phrasing in the definition did not support the insurance company's position, the definition of "medical compensation" included the phrase "including but not limited to," and plaintiff's injury occurred before the 2011 amendment.

4. Workers' Compensation—award of attendant care—supported by findings

The Industrial Commission did not err in a Workers' Compensation case by awarding plaintiff retroactive benefits for the cost of his attendant care where the Commission found that plaintiff filed his request for attendant care with the Commission within a reasonable time of having selected his wife to provide those services and requested approval from the Commission within a reasonable time of filing his North Carolina claim.

5. Workers' Compensation—sanctions—unfounded litigiousness

The Industrial Commission did not abuse its discretion in a workers' compensation case by imposing sanctions on defendants for unfounded litigiousness. Defendants did not direct the Court of Appeals to any legal or factual basis for their denial of compensability, and the issue of jurisdiction was resolved in prior Court of Appeals opinions that were indistinguishable from this case in all material respects.

6. Workers' Compensation—attendant care—hours per day

The Industrial Commission did not err in a workers' compensation case by limiting the award of the cost of attendant care services to eight hours per day. Plaintiff was, in essence, asking the Court of Appeals to reweigh the evidence, which it will not do.

7. Workers' Compensation—per diem payments discontinued —estoppel

The Industrial Commission did not err in a workers' compensation case by ruling that defendants were not estopped from ceasing payment of the per diem allowance. Plaintiff did not establish that he relied upon a misrepresentation that the payments would continue indefinitely.

8. Workers' Compensation—handicapped housing allowance— contribution by plaintiff

The Industrial Commission did not err in a workers' compensation case by requiring plaintiff to contribute to the cost of renting a handicapped-accessible apartment. In North Carolina, an employer may be required to pay the expense of handicapped housing, but the Commission had the discretion to require the claimant to contribute a reasonable amount towards rent.

Appeal by plaintiff and defendants from Opinion and Award entered 7 December 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 September 2017.

R. James Lore, Attorney at Law, and Law Office of James S. Aven, by James S. Aven, for plaintiff-appellee, cross-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Matthew J. Ledwith and M. Duane Jones, for defendant-appellants, cross-appellees.

ZACHARY, Judge.

U.S. Xpress, Inc. (defendant, with Liberty Mutual Insurance Company, collectively, defendants) appeals from an opinion and award of the North Carolina Industrial Commission that awarded Harrison Hall (plaintiff) workers' compensation benefits. Defendants argue that the Commission lacked subject matter jurisdiction over plaintiff's claim for workers' compensation benefits, and that the Commission erred by awarding plaintiff benefits for attendant care that was provided prior to the date upon which plaintiff filed an Industrial Commission Form 18, and by sanctioning defendants. Plaintiff has filed a cross-appeal in which he argues that the Commission erred by limiting the award of attendant care to eight hours per day, by failing to continue a per diem allowance defendants had previously paid to plaintiff and his wife, and by requiring plaintiff to contribute $400 per month toward the rental of a handicapped-accessible apartment. We conclude that the Commission's opinion and award should be affirmed.

Factual and Procedural Background

The pertinent facts are largely undisputed. Plaintiff was born in 1959 and was 56 years old at the time of the hearing on this matter. In 1999, plaintiff began working as a long distance truck driver for defendant, a trucking company based in Tennessee. Plaintiff was living in Fayetteville, North Carolina, at that time. On 5 July 2002, while plaintiff was delivering merchandise in North Carolina, he was pinned between his delivery truck and another vehicle. Defendants have not disputed that this was an injury by accident arising from his employment with defendant, or that "plaintiff sustained injury to his back and right leg during the performance of his job duties for defendant-employer. . . ." Following the accident that injured plaintiff, defendants reported the accident to the legal entity that administers the Tennessee Workers' Compensation Act. Since 6 July 2002, defendants have voluntarily paid

workers' compensation wage loss benefits of $463.30 per week to plaintiff, pursuant to the Tennessee Workers' Compensation Act.

In addition to weekly indemnity payments, defendants have paid workers' compensation medical benefits of approximately $8,406,832.00 for treatment of the injuries plaintiff suffered in the accident, pursuant to the Tennessee Workers' Compensation Act and fee schedule. Plaintiff was initially treated by medical providers in North Carolina; he later moved to West Virginia, in order to receive assistance from his girlfriend, who is now his wife. In 2004, defendants transferred plaintiff's medical care from West Virginia to Boston, Massachusetts, where plaintiff and his wife were residing at the time of the hearing on his claim. Unfortunately, despite receiving medical care, plaintiff has continued to suffer serious health problems. As a result of the accident in 2002, plaintiff has had approximately 390 surgical procedures, including amputation of his right leg. Because plaintiff's leg was amputated up to his buttock, he is not a candidate for a prosthetic leg. He has also suffered from kidney failure, which makes him dependent upon dialysis, as well as other medical problems, including diabetes, elevated cholesterol levels, dental problems, and depression.

Between the date of plaintiff's accident and 2013, defendants provided workers' compensation medical and indemnity benefits to plaintiff pursuant to the Tennessee Workers' Compensation Act. As part of the agreement between plaintiff and defendants for the transfer of plaintiff's medical care to Boston, defendants agreed to pay plaintiff and his wife each a $25.00 per diem allowance for meals. In 2011, defendants discontinued payment of the per diem allowance, and plaintiff learned that his workers' compensation benefits had been paid under Tennessee's, rather than North Carolina's, workers' compensation law. On 8 April 2013, plaintiff filed Industrial Commission Form 18 with the North Carolina Industrial Commission, seeking workers' compensation medical and indemnity benefits. Defendants then filed Industrial Commission Form 19 reporting plaintiff's accident to the North Carolina Industrial Commission on 23 April 2013. On 2 May 2013, defendants filed Industrial Commission Form 61, asserting that the Industrial Commission lacked jurisdiction over plaintiff's claim. In response, plaintiff filed Industrial Commission Form 33 requesting that his claim be heard by the Commission.

The parties agreed to a bifurcated proceeding, in which a hearing on the issue of subject matter jurisdiction was conducted prior to a hearing on plaintiff's entitlement to workers' compensation benefits. Following a videoconference conducted in February of 2014, Deputy

Commissioner Stephen T. Gheen entered an opinion on 12 January 2015, concluding that the Industrial Commission had jurisdiction over plaintiff's claim. Deputy Commissioner Gheen entered a modified order on 10 February 2015, making minor changes to his original order. On 25 February 2015, defendants gave notice of their appeal from the Deputy Commissioner's order.

Additional proceedings by the Commission addressed the issue of plaintiff's claim for workers' compensation medical and indemnity benefits. On 29 October 2015, an interlocutory opinion and award was entered by Deputy Commissioner J. Brad Donovan in which he incorporated the order entered by Deputy Commissioner Gheen, noting that it was "favorable to the plaintiff on the issue of jurisdiction. . . ." This order left open the calculation of certain benefits. On 8 January 2016, Deputy Commissioner Donovan entered an order finalizing the award and otherwise incorporating his earlier order awarding plaintiff workers' compensation medical and indemnity benefits. Plaintiff appealed to the Full Commission for review of aspects of the award of benefits, and defendants appealed to the Full Commission, challenging the Commission's subject matter jurisdiction as well as certain parts of Deputy Commissioner Donovan's award.

The case was heard by the Full Commission on 23 June 2016. On 7 December 2016, the Commission, by means of an order entered by Commissioner Bill Daughtridge, Jr. with the concurrence of Commissioners Bernadine S. Ballance and Tammy Nance, awarded plaintiff certain workers' compensation medical and indemnity benefits. The specific provisions of the Commission's order are discussed below, as pertinent to the issues raised by the parties on appeal. Plaintiff and defendants entered timely notices of appeal to this Court from the Commission's opinion and award.

Standard of Review

"Generally, appellate review of the Commission's decisions is limited to 'whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law.' " *Burley v. U.S. Foods, Inc.*, 368 N.C. 315, 317, 776 S.E.2d 832, 834 (2015) (quoting *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004)). In addition, "[b]ecause the Industrial Commission is the sole judge of the credibility of the witnesses and the weight of the evidence[, w]e have repeatedly held that the Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to

the contrary." *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014) (internal quotation omitted).

"On appeal, this Court may not reweigh the evidence or assess credibility. Findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them[.]" *Kelly v. Duke Univ.*, 190 N.C. App. 733, 738-39, 661 S.E.2d 745, 748 (2008) (internal quotation omitted). Findings that are not challenged on appeal are "presumed to be supported by competent evidence" and are "conclusively established on appeal." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003) (citation omitted). The "Commission's conclusions of law are reviewed *de novo*." *McRae*, 358 N.C. at 496, 597 S.E.2d at 701 (citation omitted).

The Industrial Commission's findings regarding subject matter jurisdiction are subject to a different standard:

> "The finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record." . . . This Court makes determinations concerning jurisdictional facts based on the greater weight of the evidence.

Capps v. Southeastern Cable, 214 N.C. App. 225, 226-27, 715 S.E.2d 227, 229 (2011) (quoting *McCown v. Hines*, 353 N.C. 683, 686, 549 S.E.2d 175, 177 (2001)).

Appeal by Defendants

Subject Matter Jurisdiction

[1] Defendants argue first that the Industrial Commission lacked subject matter jurisdiction over plaintiff's claim for workers' compensation benefits. Defendants contend that plaintiff's claim was barred by the provisions of N.C. Gen. Stat. § 97-24 (2016). This statute provides in relevant part that:

> (a) The right to compensation under this Article shall be forever barred unless (i) a claim . . . is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim . . . is filed with the Commission within two years after the last payment of medical compensation

> when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

In this case, plaintiff did not file a claim with the North Carolina Industrial Commission within two years of his accident, and thus jurisdiction is not proper under N.C. Gen. Stat. § 97-24(a)(i). The jurisdictional dispute between the parties is whether plaintiff filed a claim "within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article," as specified in § 97-24(a)(ii). "Under section 97-24(a)(ii), a plaintiff must show that: (1) his claim was filed within two years after the last payment of 'medical compensation,' (2) no 'other compensation' was paid, and (3) the employer's liability has not otherwise been established under the Act." *Clark v. Summit Contrs. Group, Inc.*, 238 N.C. App. 232, 235, 767 S.E.2d 896, 898-99 (2014).

The facts of *Clark* are comparable to those of the instant case. In *Clark*, this Court held that "the record clearly shows that [the] defendants' liability had not otherwise been established under the Act because [the] defendants had not been held liable for [the] plaintiff's injuries pursuant to a North Carolina workers' compensation claim[.] . . . Thus, the third element is satisfied." *Id.* The same is true in this case; when plaintiff filed Industrial Commission Form 18, defendants' liability had not been determined pursuant to a North Carolina workers' compensation claim. The *Clark* opinion explained that "whether [the] plaintiff can satisfy the remaining two elements of N.C. Gen. Stat. § 97-24(a)(ii) turns on this Court's understanding of the terms 'medical compensation' and 'other compensation' as they are contemplated within the North Carolina Workers' Compensation Act." *Clark*, 238 N.C. App. at 235, 767 S.E.2d at 899.

N.C. Gen. Stat. § 97-2 (2016) sets out the legal definition of various terms "[w]hen used in this Article, unless the context otherwise requires[.]" These definitions include, as relevant to this appeal, the following:

> (11) Compensation. -- The term "compensation" means the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided herein.
>
> (19) Medical Compensation. -- The term "medical compensation" means medical, surgical, hospital, nursing,

> and rehabilitative services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability[.] . . .
>
> (20) Health care provider. -- The term "health care provider" means physician, hospital, pharmacy, chiropractor, nurse, dentist, podiatrist, physical therapist, rehabilitation specialist, psychologist, and any other person providing medical care pursuant to this Article.

Two previous North Carolina cases have interpreted these definitions in a factual context that is functionally indistinguishable from the present case: that of a workers' compensation claimant who (1) suffers a compensable injury; (2) receives medical and indemnity compensation that is voluntarily provided by the employer, pursuant to the workers' compensation statutes of a state other than North Carolina; and (3) files a claim within two years of the last medical compensation provided under the other state's workers' compensation act. *McGhee v. Bank of America Corp.*, 173 N.C. App. 422, 618 S.E.2d 833 (2005), addressed the question of whether, for purposes of determining whether a plaintiff filed a claim within two years of the last payment of medical compensation, payments to out-of-state medical providers should be considered. In *McGhee*, the plaintiff filed a claim for workers' compensation benefits in North Carolina within two years of her last medical compensation payment to her Virginia health care providers. This Court upheld the Commission's finding that the "plaintiff had timely filed a claim within two years after the last payment of medical compensation pursuant to N.C. Gen. Stat. § 97-24(a)(ii) because the employer paid medical providers in Virginia" within two years of the date that the plaintiff filed her claim. *Clark*, 238 N.C. App. at 236, 767 S.E.2d at 899 (discussing *McGhee*, 173 N.C. App. at 427, 618 S.E.2d at 836).

In *Clark*, the claimant filed a claim within two years of last receiving medical compensation in Florida. As in *McGhee*, the defendant argued that, for purposes of determining whether a plaintiff filed a workers' compensation claim within two years of the last payment of medical compensation, payments from a state other than North Carolina should not be considered. This Court expressly rejected that argument:

> While it is clear that, pursuant to [the] plaintiff's Florida workers' compensation claim, [the] defendants made payments for his medical treatment in Florida, the issue is whether those payments constituted "medical compensation" under the Act. . . . [The] defendants contend that "[n]one of [the] plaintiff's medical payments were made 'in the judgment of' the North Carolina Industrial Commission or in a matter before the North Carolina Industrial Commission." Thus, according to [the] defendants, [the] plaintiff did not receive any payments of "medical compensation" and subsection (ii) is inapplicable. . . . There is no basis for [the] defendants' contention that "medical compensation" only includes payments made in a matter pending before the North Carolina Industrial Commission. In contrast, our caselaw establishes that an employee's claim is timely filed under section 97-24(a)(ii) if it is filed within two years after the defendant's last payment of "medical compensation" to the plaintiff regardless of where the medical treatment occurs and regardless of whether that payment was ordered as a result of a pending workers' compensation action in North Carolina.

Clark at 235-36, 767 S.E.2d at 899 (emphasis added) (citing *McGhee*, 173 N.C. App. at 426-27, 618 S.E.2d at 836). *McGhee* and *Clark* have also rejected the instant defendants' argument that disability payments that are not provided pursuant to North Carolina workers' compensation are "other compensation" within the meaning of N.C. Gen. Stat. § 97-24(a)(ii). As stated in *Clark*:

> The next issue is whether the benefits [the] plaintiff received under Florida law constitute "other compensation" for purposes of section 97-24(a)(ii). If they do, [the] plaintiff would be unable to satisfy the second element under section 97-24(a)(ii).
>
> " 'Compensation' under the Workers' Compensation Act means 'the money allowance payable to an employee or to his dependents *as provided for in this Article*[.]' ". . . In *McGhee*, this Court interpreted the term "other compensation" and determined that any benefits "paid . . . in lieu of workers' compensation benefits and not made payable . . . pursuant to [North Carolina's] Workers' Compensation Act" did not qualify as "other compensation," and we are bound by that definition[.] In *McGhee*, 173 N.C. App. at 427,

> 618 S.E.2d at 836, the plaintiff received short-term disability benefits from the employer. On appeal, the defendants argued that the short-term disability benefits constituted "other compensation," making section 97-24(a)(ii) inapplicable. *Id.* However, this Court disagreed, concluding that because the short-term disability benefits were "paid to [the] plaintiff in lieu of workers' compensation benefits and not made payable to [the] plaintiff pursuant to the Workers' Compensation Act[,]" they did not qualify as "other compensation" under section 97-24(a)(ii). Based on *McGhee*, since the workers' compensation benefits [the] plaintiff received in Florida were also "not made payable to [him] pursuant to [North Carolina's] Workers' Compensation Act," *id.*, they do not qualify as "compensation," as defined in section 97-2(11) (2013), or "other compensation," as defined in *McGhee*, for purposes of N.C. Gen. Stat. § 97-24(a)(ii).

Clark at 237-238, 767 S.E.2d at 900 (emphasis in original) (quoting *McGhee* at 427, 618 S.E.2d at 836-37, and citing *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)).

In sum, *McGhee* and *Clark* establish that (1) medical compensation provided to a health care provider outside of North Carolina or pursuant to the workers' compensation laws of another state may be considered in determining whether a plaintiff has filed a workers' compensation claim in North Carolina within two years of the last medical compensation, but that (2) for purposes of determining a plaintiff's compliance with N.C. Gen. Stat. § 97-24(a)(ii), disability or other indemnity payments are not considered "other compensation" within the meaning of the statute unless the payments were made pursuant to a North Carolina workers' compensation claim.

In the present case, plaintiff filed Industrial Commission Form 18 seeking workers' compensation benefits within two years of the last payment of medical compensation. The fact that the payments were made to health care providers in Boston, pursuant to the Tennessee workers' compensation statute and fee schedule, does not invalidate them for purposes of determining whether plaintiff's claim was timely filed. In addition, plaintiff's entitlement to disability payments under the North Carolina Workers' Compensation Act had not been previously determined at the time that plaintiff filed a workers' compensation claim. We conclude that plaintiff met the criteria specified in N.C. Gen. Stat. § 97-24(a)(ii), and that the Industrial Commission had jurisdiction over plaintiff's claim.

In reaching this conclusion, we have considered, but have ultimately rejected, defendants' arguments for a contrary result. Preliminarily, we note that the parties have directed our attention to the circumstances of defendants' payments to plaintiff, as pertinent to whether plaintiff was informed that the medical compensation and disability payments were made pursuant to Tennessee law. Plaintiff characterizes the payments made by defendants as having been made "unilaterally and secretly," while defendants note that plaintiff failed to make inquiries or to pursue the question of whether Tennessee or North Carolina law was the basis of the payments. However, N.C. Gen. Stat. § 97-24(a)(ii) does not include a requirement either that an employer keep a claimant informed of the legal status of disability or medical compensation payments or, alternatively, that a plaintiff investigate this matter. Accordingly, we do not consider the parties' arguments on this issue. Similarly, our conclusion that the Industrial Commission had subject matter jurisdiction has been reached without consideration of plaintiff's estoppel arguments.

[2] Defendants further argue that the payments made to plaintiff's health care providers in Boston do not constitute medical compensation within the meaning of N.C. Gen. Stat. § 97-24(a)(ii). Defendants state that:

> N.C. Gen. Stat. § 97-24 only refers to compensation and medical compensation defined by N.C. Gen. Stat. § 97-2 and paid pursuant to N.C. Gen. Stat. § 97-18 and N.C. Gen. Stat. § 97-25. N.C. Gen. Stat. § 97-24 does not refer to medical compensation paid pursuant to a statutory structure of another state.

Contrary to defendants' contention, there is no reference in N.C. Gen. Stat. § 97-24 to § 97-2, § 97-18, or § 97-25. While it is true that N.C. Gen. Stat. § 97-24 "does not refer to compensation paid pursuant to a statutory structure of another state," defendant ignores the fact that *McGhee* and *Clark* have explicitly held that such payments are "medical compensation." We conclude that this argument lacks merit.

Defendants next argue that the Commission's "interpretation" of N.C. Gen. Stat. § 97-24 is "inconsistent with the rules of statutory construction." However, the Commission was not charged with developing an "interpretation" of N.C. Gen. Stat. § 97-24 on a blank slate; rather, the Commission properly applied the holdings of *McGhee* and *Clark* to the facts of this case.

[3] Defendants also contend that the Commission failed to employ the statutory definitions of the terms "medical compensation" and "health care provider." The basis of defendants' argument on this issue is a 2011

amendment to § 97-2(19). Previously, the statute defined medical compensation in relevant part as "medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief [.]" Effective 23 June 2011 and applying to claims arising after that date, the definition was changed to "medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief," with the addition of the underlined phrase "including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission[.]"

The basis of defendants' argument is not entirely clear. However, it appears that defendants contend that the proper way to interpret § 97-2(19) is to apply the phrase "prescribed by a health care provider" to all the listed types of medical compensation. Defendants contend that, because "health care provider" is defined as including only medical care performed pursuant to the North Carolina Workers' Compensation Act, "only those payments made to clinicians providing medical services pursuant to the North Carolina Workers' Compensation Act constitute 'medical compensation.' " We do not agree. First, the structure of the phrasing in the definition does not support defendants' position. Secondly, the phrase at issue specifies that medical compensation is defined as "including, but not limited to" the attendant care that is described. Moreover, the injury upon which plaintiff's claim is based occurred in 2002, well before the 2011 amendment to the text of N.C. Gen. Stat. § 97-2(19). As a result, the earlier version of the statute governs our analysis of this issue.

Finally, defendants fail to consider the precedential effect of our opinion in *Clark* which, citing *McGhee*, held that medical compensation paid pursuant to the workers' compensation laws of a state other than North Carolina could be considered for purposes of determining a claimant's compliance with N.C. Gen. Stat. § 97-24(a)(ii). Defendants first contend that *McGhee* is distinguishable from the present case because in *McGhee* the "defendants stipulated that [their] medical payments constituted 'medical compensation.' " We are at a loss to understand the basis of this erroneous assertion, given that in *McGhee* the "Defendants argue[d] that [the] plaintiff neither filed her claim within two years

of the accident, nor within two years after the last payment of medical compensation by [the] defendants" and that "the payment at issue, $ 72,554.38 paid to medical providers in Virginia, does not meet the statutory definition of 'medical compensation' under section 97-2(19) of the North Carolina General Statutes[.]" *McGhee* at 425-26, 618 S.E.2d at 836. We conclude that defendants have misstated the facts of *McGhee* and that the defendants in that case did not stipulate that the medical compensation at issue met the statutory definition.

In their Reply Brief, defendants acknowledge our holding in *Clark*, and essentially argue that *Clark* was wrongly decided. We do not agree with defendants on this point. Moreover, regardless of the merits of our decision in *Clark*, it is long-established that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty* at 384, 379 S.E.2d at 37. For the reasons discussed herein, we conclude that the Industrial Commission had jurisdiction over plaintiff's claim.

Award of Attendant Care

[4] In this case, plaintiff's wife provided attendant care services for plaintiff beginning in 2006, when plaintiff underwent his first leg amputation surgery. When plaintiff filed Industrial Commission Form 18 seeking workers' compensation benefits, he requested retroactive and prospective compensation for the cost of the attendant care provided by his wife. Defendants do not dispute that a workers' compensation claimant may receive reimbursement for the cost of attendant care provided prior to the date when he filed a claim for North Carolina workers' compensation benefits. However, in order "to receive compensation for medical services, an injured worker is required to obtain approval from the Commission within a reasonable time after he selects a medical provider. If [the] plaintiff did not seek approval within a reasonable time, he is not entitled to reimbursement." *Mehaffey v. Burger King*, 367 N.C. 120, 128, 749 S.E.2d 252, 257 (2013) (citing *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 593, 264 S.E.2d 56, 63 (1980)). Defendants argue that the Commission erred by awarding plaintiff compensation for the cost of attendant care provided by his wife prior to the date on which he filed Industrial Commission Form 18, on the grounds that plaintiff failed to seek approval for attendant care within a reasonable time after he selected his wife to provide this service. We disagree.

The crux of defendants' argument is that, in determining whether plaintiff sought approval from the Commission to receive attendant care

within a reasonable time, our starting point should be the date of plaintiff's injury or, at the latest, the year 2006 when plaintiff's wife began providing full-time attendant care. We have concluded above that plaintiff properly filed a claim for workers' compensation benefits within two years of the last payment for medical compensation. Prior to his filing a claim, there was no basis upon which the North Carolina Industrial Commission might have exercised jurisdiction over plaintiff's entitlement to workers' compensation benefits, including the approval of payment for attendant care services. As discussed above, we are resolving the issues raised in this appeal without formal consideration of the doctrine of estoppel. Nonetheless, we observe that between 2002 and 2011 plaintiff had no reason to file a claim with the North Carolina Industrial Commission. The Commission found that plaintiff made his request for attendant care "within a reasonable time of having selected his wife to provide those services and requested approval from the Industrial Commission of his wife as his attendant care provider within a reasonable time of having filed his North Carolina claim." We hold that this finding is supported by the evidence, and that it supports the Commission's conclusion that:

> 20. . . . Immediately upon filing his claim for workers' compensation benefits in North Carolina in 2013, plaintiff did request approval from the North Carolina Industrial Commission of attendant care services payable to his wife, Mrs. Hall. The Commission, therefore, concludes that plaintiff's request for retroactive reimbursement of attendant care to his wife was made within a reasonable time.

We conclude that the Commission did not err by awarding plaintiff retroactive workers' compensation benefits for the cost of his attendant care, and that defendants are not entitled to relief on the basis of this argument.

Sanctions

[5] Defendants' final argument is that the Industrial Commission erred by imposing a sanction against them for unfounded litigiousness. In its award, the Commission stated that:

> As sanctions for defendants' unfounded litigiousness of the jurisdictional issue and denying the compensability of plaintiff's various medical conditions that Dr. Pribaz correlated to plaintiff's original compensable right leg injury, without presenting expert medical evidence to the contrary, defendants shall be responsible for paying to plaintiff's counsel the lump sum of [$5,000.00]. . . .

N.C. Gen. Stat. § 97-88.1 (2016) provides that if "the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." Our review of the Commission's decision to impose a sanction is a two-step process:

> First, whether the defendant had a reasonable ground to bring a hearing is reviewable by this Court *de novo*. If this Court concludes that a party did not have reasonable ground to bring or defend a hearing, then we review the decision of whether to make an award and the amount of the award for an abuse of discretion. In conducting the first step of the analysis, the reviewing court should consider the evidence presented at the hearing to determine [the] reasonableness of a defendant's claim. As such, the burden is on the defendant to place in the record evidence to support its position that it acted on reasonable grounds.

Blalock v. Southeastern Material, 209 N.C. App. 228, 231-32, 703 S.E.2d 896, 899 (2011) (internal citations and quotation marks omitted).

On appeal, defendants make a conclusory assertion that "[b]ased upon the statutory argument above, the arguments distinguishing this matter from *McGhee*, and the facts of this matter, Defendants did not engage in unfounded and stubborn litigiousness." Defendants have not directed our attention to any legal or factual basis for their denial of the compensability of the medical conditions to which the Commission referred in its award. In regard to defendants' denial of the Commission's jurisdiction, we conclude that the issue of jurisdiction was previously resolved in opinions issued by this Court that are, in all material respects, indistinguishable from the present case and that therefore constitute binding precedent. We conclude that the Commission did not err by concluding that defendants had engaged in unfounded litigiousness and did not abuse its discretion in its award of attorney's fees to plaintiff's counsel.

Appeal by Plaintiff

Attendant Care

[6] Plaintiff first argues that the Commission erred by limiting its award of the cost of attendant care to eight hours per day. Plaintiff offered expert medical testimony that he was in need of eight to twelve hours of attendant care per day, seven days per week. It is plaintiff's contention

that the Commission must view the evidence in the light most favorable to the claimant, and that this requirement strips the Commission of the authority to exercise its discretion to choose the appropriate award when presented with a range of possible awards. We do not agree.

Plaintiff directs our attention to the statement in *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), that "[t]he evidence tending to support [the] plaintiff's claim is to be viewed in the light most favorable to [the] plaintiff, and [the] plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." However, the issue in *Adams* was whether the plaintiff was entitled to any workers' compensation benefits. The opinion did not address the Commission's discretion to choose an appropriate award based upon its consideration of the evidence. Plaintiff contends that, in a situation such as the present case in which the sole medical expert testifies to a high to low range of the number of hours of medical services as being medically necessary, if the Commission has the discretion to select any number of hours within that range, this would "render[] the *Adams* mandate meaningless." In essence, plaintiff is asking us to reweigh the evidence, which we will not do:

> Because it is the fact-finding body, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The Commission's findings of fact are conclusive on appeal if they are supported by any competent evidence. Accordingly, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight.

Shaw v. US Airways, Inc., 217 N.C. App. 539, 541-42, 720 S.E.2d 688, 690 (2011) (internal quotation omitted). We conclude that the Commission did not err by awarding plaintiff eight hours per day of attendant care.

Per Diem Allowance

[7] Plaintiff argues next that the Commission erred by failing to require defendants to continue payment of a per diem allowance of $50.00 per day for meals that defendants had previously paid to plaintiff between 2004 and 2011. The sole basis of plaintiff's argument on this issue is that defendants should be estopped from discontinuing these payments. We conclude that plaintiff is not entitled to relief on the basis of this argument.

The parties agree that the per diem allowance was for meals. Plaintiff's only argument is that defendants should be estopped from discontinuing the per diem payments.

> [T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Gore v. Myrtle/Mueller, 362 N.C. 27, 33-34, 653 S.E.2d 400, 405 (2007) (quoting *Hawkins v. M & J Fin. Corp.*, 238 N.C. 174, 177-178, 77 S.E.2d 669, 672 (1953)).

Defendants paid the per diem meal allowance for seven years. Plaintiff has not established that he relied upon a misrepresentation that these payments would continue indefinitely. In addition, the Commission found that the per diem payments did not constitute medical compensation. We conclude that plaintiff has failed to establish that he produced evidence of the elements of equitable estoppel and that the Commission did not err by ruling that defendants were entitled to cease payment of the per diem allowance.

Housing Allowance

[8] Plaintiff's final argument is that the Commission erred by requiring him to contribute $400 per month toward the cost of renting his apartment. Plaintiff contends that the Commission improperly allowed defendants a "credit" against their obligation to pay the entire cost of plaintiff's housing. Upon review of the facts of this case, in the context of the relevant jurisprudence, we conclude that plaintiff is not entitled to relief on the basis of this argument.

A leading case on the issue of an employer's responsibility to provide handicapped accessible housing for a workers' compensation claimant is *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (1986).[1] In *Derebery*:

> The parties agree[d that] the applicable statutory provisions are contained in the following part of N.C.G.S. § 97-29: "In cases of total and permanent disability, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care of [sic] rehabilitative services shall be paid for by the employer during the lifetime of the injured employee."[2]

Id. at 199, 347 S.E.2d at 818. After reviewing this statute and cases from other jurisdictions, our Supreme Court "conclude[d] on the basis of the legislative history surrounding N.C. Gen. Stat. § 97-29, this Court's prior interpretation of that statute and the persuasive authority of other courts interpreting similar statutes that the employer's obligation to furnish 'other treatment or care' may include the duty to furnish alternate, wheelchair accessible housing." *Id.* at 203-04, 347 S.E.2d at 821 (emphasis added).

In *Timmons v. North Carolina DOT*, 123 N.C. App. 456, 460, 473 S.E.2d 356, 358 (1996), *aff'd per curiam*, 346 N.C. 173, 484 S.E.2d 551 (1997), another case in which the claimant was permanently and totally disabled, the plaintiff was building a house. The Commission held that the defendant should pay the additional cost of rendering the house handicapped accessible, but was not responsible for the entire cost of the construction:

> At the time of [the] plaintiff's injury in 1980, G.S. § 97-25 required, in relevant part: "medical, surgical, hospital, nursing services, medicines, . . . rehabilitation services, and other treatment including medical and surgical supplies as

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1. *Derebery* addressed an employer's obligation to a claimant who was permanently and totally disabled. In this case, the Commission has awarded plaintiff temporary total disability benefits, but the issue of whether defendant is permanently and totally disabled has not been resolved. This distinction does not affect the outcome of plaintiff's appeal.

2. Effective 23 June 2011 and applying to cases arising after that date, the lifetime entitlement to medical compensation was replaced by a requirement that the issue of a claimant's total disability be revisited approximately every ten years. Because the present case arose before 2011, if plaintiff is determined to be permanently and totally disabled, he will be entitled to lifetime medical compensation.

> may reasonably be required to . . . give relief . . . shall be provided by the employer." . . . In *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (1986), the North Carolina Supreme Court held that an employer's duty to provide "other treatment or care" as contained in G.S. § 97-29, was sufficiently broad as to include the duty to provide handicapped accessible housing. . . . In our view, the words "and other treatment" contained in G.S. § 97-25 are susceptible of the same broad construction accorded the similar language of G.S. § 97-29 by the Supreme Court in *Derebery*, and we reject [the] defendant's argument to the contrary.
>
> We do not agree with [the] plaintiff, however, that *Derebery* requires [the] defendant to pay the entire cost of constructing his residence. . . . [T]he expense of housing is an ordinary necessity of life, to be paid from the statutory substitute for wages provided by the Workers' Compensation Act. The costs of modifying such housing, however, to accommodate one with extraordinary needs occasioned by a workplace injury, such as the plaintiff in this case, is not an ordinary expense of life for which the statutory substitute wage is intended as compensation. Such extraordinary and unusual expenses are, in our view, properly embraced in the "other treatment" language of G.S. § 97-25, while the basic cost of acquisition or construction of the housing is not.

Id. at 461-62, 473 S.E.2d at 359.

In *Burnham v. McGee Bros. Co.*, 221 N.C. App. 341, 727 S.E.2d 724 (2012), the plaintiff, who was permanently and totally disabled, rented a two-bedroom handicapped accessible apartment and asked defendants to pay the additional cost for the second bedroom that he required for storage of equipment related to his disability. "Plaintiff specified that he sought compensation for 'the additional cost of housing due to [his] injury.' In response, [the] defendants asserted that they had no obligation to contribute to [the] Plaintiff's ongoing rental expenses because applicable 'case law establishes that rent is an ordinary expense of life.' " *Id.* at 344, 727 S.E.2d at 726. The Commission ordered the defendants to pay the additional rent for the second bedroom. On appeal, the plaintiff argued that the defendants had no valid basis upon which to challenge their obligation to pay the additional part of the plaintiff's rent. This Court disagreed, noting that only a few cases had addressed such issues:

> . . . [The] Plaintiff argues that [the] Defendants had no valid legal basis for resisting his request for assistance with his rental expenses given that an employer's "responsibility to pay for proper accommodative housing has been part of North Carolina law for many years." However, our review of the pertinent decisions in this area indicates that the exact point at issue in this case has not been specifically addressed.

Id. at 347, 727 S.E.2d at 728. *Burnham* then summarized the two earlier opinions, noting that "both *Derebery* and *Timmons* draw a distinction between the ordinary expenses of life and the extraordinary expenses associated with modifying or constructing housing for the purpose of rendering it handicapped-accessible" but that "neither decision addresses an employer's obligation to pay ongoing rental expenses that are attributable to a plaintiff's disability such as the cost of an additional bedroom used to store the equipment, supplies, and mobility-related devices needed to accommodate [the] Plaintiff's paraplegia." *Id.* at 348-49, 727 S.E.2d at 729. This Court concluded that, given "the paucity of published cases addressing the extent to which an employer or insurance carrier is liable for the additional costs associated with housing for handicapped individuals and the complete absence of any decision addressing the extent to which employers and their carriers are liable for ongoing increased rental payments stemming from needs like those present here," the Commission did not err by determining that the defendants did not act unreasonably in defending against the plaintiff's claim for rental payments. *Id.* at 349, 727 S.E.2d at 729-30.

In 2013, this Court decided *Espinosa v. Tradesource, Inc.*, 231 N.C. App. 174, 752 S.E.2d 153 (2013), which reviewed an opinion of the Industrial Commission in which the defendants were ordered to pay, *inter alia*, the *pro rata* difference between the permanently and totally disabled plaintiff's pre-injury rent and his post-injury rent. Both parties appealed, with the defendants arguing that it was error to require them to pay anything beyond the cost of rendering the apartment handicapped accessible, and the plaintiff arguing that the Commission erred by reducing his award by the amount he paid for rent before the injury. This Court upheld the Commission:

> As a preliminary point, we note that the parties' arguments assume rules that are rigid and broadly applicable in the cases discussed above. A reading of section 97-25 makes it clear, however, that an award of "other treatment" is in the discretion of the Commission. . . . Section

> 97-2(19), as written at the time of [the] Plaintiff's injury, further explained that the type of medical compensation the employer must pay is "*in the judgment of the Commission*[.]" . . . The Supreme Court's decision in *Derebery* and our own decision in *Timmons* represent the outer limits of the Commission's authority under those statutes, not entirely new rules to be followed in place of or in addition to the statutes created by our legislature.
>
> In this case, the Commission determined that [the] Defendants should pay the *pro rata* difference between the rent required for [the] Plaintiff's new, handicapped-accessible home and the rent [the] Plaintiff had to pay as an ordinary expense of life before his injury. The Commission sensibly reasoned that living arrangements constitute an ordinary expense of life and, thus, should be paid by the employee. The Commission also recognized, however, that a change in such an expense, which is necessitated by a compensable injury, should be compensated for by the employer. Because [the] Plaintiff did not own his own home in this case, he was required to find new rental accommodations that would meet his needs. In this factual circumstance, it was appropriate for the Commission to require the employer to pay the difference between the two.
>
> While circumstances may occur in which an employer is required to pay the entire cost of the employee's adaptive housing, neither the Supreme Court's opinion in *Derebery* nor our holding in *Timmons* support [the] Plaintiff's assertion that such a requirement is necessary whenever an injured worker does not own property or a home. Such a ruling would reach too far.

Id. at 186, 752 S.E.2d at 160-61 (emphasis in original).

We conclude that *Espinosa* is functionally indistinguishable from the present case and that our jurisprudence clearly establishes both that (1) an employer may be required to pay for the expense of providing handicapped housing for a disabled claimant, and that (2) the Commission has the discretion to require the claimant to contribute a reasonable amount toward rent, such as the amount of his pre-injury rent. We conclude that the Commission did not err by requiring plaintiff to contribute to the cost of renting a handicapped-accessible apartment.

Conclusion

Thus, for the reasons discussed above, we conclude that the Industrial Commission did not err and that its opinion and award should be affirmed.

AFFIRMED.

Judges DAVIS and MURPHY concur.

DAVID HAMPTON, AND WIFE, MARY D. HAMPTON, PETITIONERS
v.
CUMBERLAND COUNTY, RESPONDENT

No. COA16-704

Filed 5 December 2017

Zoning—Shooting range—farm use exception—findings not sufficient

The trial court erred by making its own findings of fact on an appeal from a board of adjustment in a case involving a non-permitted firing range in a rural residential zoning area. The county zoning ordinance required a zoning permit for use or building, with an exception for bona fide farms and occasional target practice by individuals, but there were issues of fact concerning the use of firearms on the property which the board of adjustment did not address. The superior court implicitly recognized the inadequacy of the board's findings, but overstepped by making its own findings. Furthermore, without adequate findings by the board of adjustment, the Court of Appeals could not engage in meaningful appellate review.

Judge TYSON dissenting.

Appeal by Respondent from order entered 13 April 2016 by Judge Robert F. Floyd, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 11 January 2017.

Yarborough, Winters & Neville, P.A., by Garris Neil Yarborough, for Petitioners-Appellees.

Cumberland County Attorney's Office, by Robert A. Hasty, Jr., for Respondent-Appellant.

INMAN, Judge.

This appeal concerns the interpretation and application of a county zoning ordinance to firing ranges constructed on property without an approved site plan and permit. We hold that a Farm Identification Number obtained by property owners from the federal government prior to constructing firing ranges does not, as a matter of law, establish that operation of the ranges is a farm use exempt from zoning regulations. We also hold that because the county board of adjustment which first heard the matter failed to resolve material disputed issues of fact, we must vacate the orders below and remand for necessary findings of fact by the county board.

Cumberland County (the "County") appeals from a superior court's order reversing a decision by the Cumberland County Board of Adjustment (the "Board") affirming in part and modifying in part a Notice of Violations penalizing David Hampton and his wife, Mary Hampton (collectively the "Hamptons"), for violating the County's zoning ordinance by operating a firing range on their property without a site plan and permit. On appeal, the County argues that the superior court erred in construing certain exceptions to the ordinance in the Hamptons' favor. After careful review, we vacate and remand for proceedings consistent with this opinion.

I. Factual & Procedural Background

The record tends to show the following:

The Hamptons, both retired First Sergeants with the United States Army, purchased an approximately 74-acre tract of land in Cumberland County (the "Property") in September of 2011. The Property was zoned as rural residential. After purchasing the Property, they obtained a Farm Identification Number from the United States Department of Agriculture, Farm Services Agency. Per a letter presented by the Hamptons to the Board, they purchased the Property with the express intent to "build our final home, a running trail and firing/archery ranges . . . ." Beyond the Hamptons' personal enjoyment, the firing ranges were to be constructed "for the purpose of teaching others the fundamentals of safe gun handling and marksmanship, and the maintenance of firearms proficiency." In a notarized letter to the Board, the Hamptons' real estate agent stated that the couple "made it clear to me from the outset that they have always planned to build ranges, so they could teach the use of firearms to others . . . ." The Hamptons' ranges would not be open to the public, but instead would be available "by appointment-only" to "family, friends and those with similar interests . . . ." In another

notarized letter submitted to the Board, a friend of the Hamptons stated that the ranges were made available to the Hamptons' "family, friends and formal students . . . ."

The Hamptons started clearing land for the ranges in May of 2012 and built their first range, 25 yards in length, that summer. David Hampton then began using the range to instruct students in defensive handgun methods, rifle and carbine training, and tactical pistol use. The Hamptons expanded the 25-yard range to 40 yards and allowed their friends to use the range in the spring of 2013. In the summer of 2014, the Hamptons constructed a 100-yard firing range adjacent to the first range. David Hampton continued to provide training, including instruction in firing shotguns and tactical shooting techniques, through the beginning of 2015. The Hamptons reported to the Board that they "introduced more than 30 people to the safe use of firearms, allowed 25 experienced shooters to increase their proficiency, and qualified another 26 persons for their North Carolina Concealed Carry Handgun Permit" over the course of approximately two years.

Although the use of firearms is integral to the facts of this case, our review involves only the interpretation and application of a zoning ordinance and related statutes. No argument concerning the application or legal relevance of the Second Amendment to the Constitution of the United States has been advanced by either party.

On 6 May 2015, in response to a report from a North Carolina Department of Environmental and Natural Resources official of an unauthorized firing range on the Property, a Cumberland County Code Enforcement Officer (the "Officer") obtained a warrant to inspect the Property. After inspecting the Property, the Officer issued a Notice of Violations to the Hamptons citing a lack of an approved site plan or permits required by the local zoning ordinance. The Notice of Violations ordered the Hamptons to raze the firing range.[1]

The Hamptons appealed the Notice of Violations to the Board. The Board conducted a quasi-judicial hearing on 20 August 2015. According to the procedure provided in the County Code, the Board heard sworn testimony from witnesses and received documentary evidence from the parties.[2] At the conclusion of the hearing, the Board voted to find

1. Although the Hamptons have constructed two component ranges, this opinion will refer to the entire operation as a single firing range, consistent with the language in the local ordinance, the Notice of Violations, and the proceedings below.

2. Fourteen members of the public who were not parties to the proceeding were also permitted to speak under oath to the Board in the course of the meeting.

certain facts, to modify the corrective action in the Notice of Violations from removal of the range to "ceas[ing] any use of the firing range as it conflicts with the Cumberland County Ordinance[,]" and to affirm the Notice of Violations as modified. These findings and conclusions were memorialized in the Board's order dated 14 September 2015. The Board's order contains only the following eight findings of fact:

> 1. The Hamptons purchased the subject property September 26, 2011, and began construction of the firing range thereafter.
>
> 2. Mrs. Hampton testified that only a small berm had been constructed on the property in April 2013.
>
> 3. The Hamptons have continued to improve and expand the firing range until they were contacted by DENR in May 2015.
>
> 4. The Hamptons have not used the subject property for a residence but have obtained a permit to install a septic tank and intend to construct a dwelling on the property.
>
> 5. The use of the property for a firing range does not constitute a farm or a farm use on that portion of the property on which the firing range is constructed.
>
> 6. Section 107 of the Cumberland County Zoning Ordinance has required a zoning permit for any use of land since the amendments of June 20, 2005.
>
> 7. The Hamptons do not have a permit for the use of their property as a firing range.
>
> 8. The Hamptons have not applied for a permit for the use of their property as a firing range.

The Hamptons filed a Petition for Writ of Certiorari to the Cumberland County Superior Court on 2 October 2015 and filed an Amended Petition for Writ of Certiorari on 3 November 2015.[3]

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3. The original and amended petitions were made "pursuant to N.C. Gen. Stat. §153A-345.1 and §160A-388[.]" The superior court's order states the Hamptons' appeal was heard pursuant to the same statutes. These statutes govern hearings before boards of adjustment, not appeals therefrom. The superior court had jurisdiction to hear the Hamptons' appeal because N.C. Gen. Stat. §§ 153A-349 and 160A-393 (2015), *et seq.*, authorize appeals from orders of boards of adjustment to superior court by writ of certiorari.

The Hamptons' amended petition challenged the Board's order on several grounds, alleging the Board failed to: (1) exclude certain inadmissible evidence; (2) follow proper procedure in making findings of fact; and (3) provide the Hamptons with procedural due process. The Hamptons also alleged that the Board acted arbitrarily and capriciously, made findings without sufficient evidence, and made errors of law in its decision. The Hamptons petitioned the Cumberland County Superior Court to "remand this matter to the [Board], directing it to dismiss the Notice of Violation[s] and recognize the legal, non-conforming use of the [Property], *inter alia*, for the non-commercial use of the [Hamptons], their family and friends as a sport shooting range."

The superior court heard the Hamptons' appeal on 28 March 2016 and entered an order reversing the Board's decision and declaring that the Hamptons' "non-commercial use of the 100-yard range facility for target shooting and weapon sighting with family and friends is a legal use of their property." The superior court also made findings of fact not contained in the Board's order, including, among others, the following:

> 8. . . . [The Hamptons] have used this portion of their homesite and farm for target practice and weapons sighting with family and friends . . . .
>
> 9. No commercial activity has been involved in their personal use of this range.
>
> . . .
>
> 14. The [Hamptons'] principal use of the subject property is for the [Hamptons'] home and farming operations.
>
> 15. The range is incidental to the enjoyment of the [Hamptons'] home and farm.
>
> . . .
>
> 17. The [Hamptons'] ongoing and proposed use is to "shoot with family and friends[.]"

The superior court reversed the Board's decision for "errors at law in its legal interpretation" of the "occasional target practice" exception set forth in the zoning ordinance. The superior court also concluded that "any use of the property for a commercial firing range would subject the property to the permit requirements of the currently existing Firing Range Ordinance." The County timely appealed to this Court.

II. Standard of Review

We review a trial court's legal conclusions concerning a board of adjustment's decision for errors of law. *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 155, 712 S.E.2d 868, 871 (2011). Appellate review of a trial court's interpretation of a zoning ordinance is conducted *de novo*, and we apply the same principles of construction utilized in interpreting statutes. *Fort v. Cnty. of Cumberland*, 235 N.C. App. 541, 549, 761 S.E.2d 744, 749 (2014). "Our review asks two questions: Did the trial court identify the appropriate standard of review, and, if so, did it properly apply that standard?" *Morris Commc'ns Corp.*, 365 N.C. at 155, 712 S.E.2d at 870 (citation omitted).

This Court has no authority to make findings of fact on appellate review. *Nale v. Ethan Allen*, 199 N.C. App. 511, 521, 682 S.E.2d 231, 238 (2009) ("It is not the role of the appellate courts to make findings of fact."). Similarly, a superior court reviewing a decision by a board of adjustment "*is not the trier of fact* but rather sits as an appellate court . . . ." *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjustment*, 334 N.C. 132, 136, 431 S.E.2d 183, 186 (1993) (emphasis added) (citations omitted). In so sitting, the superior court may determine only whether:

> 1) the [b]oard committed any errors in law; 2) the [b]oard followed lawful procedure; 3) the petitioner was afforded appropriate due process; 4) the [b]oard's decision was supported by competent evidence in the whole record; and 5) [whether] the [b]oard's decision was arbitrary and capricious.

Overton v. Camden Cnty., 155 N.C. App. 391, 393, 574 S.E.2d 157, 159 (2002) (alterations in original) (quoting *Capital Outdoor, Inc. v. Guilford Cnty. Bd. of Adjustment*, 152 N.C. App. 474, 475, 567 S.E.2d 440, 441 (2002) (citation omitted)); *see also* N.C. Gen. Stat. §§ 153A-349 and 160A-393(k) (establishing the scope of review on appeals from a board of adjustment to superior court).

The superior court's standard of review of a board of adjustment's decision is determined by the particular issues raised on appeal. "If a petitioner contends the [b]oard's decision was based on an error of law, 'de novo' review is proper." *JWL Invs., Inc. v. Guilford Cnty. Bd. of Adjustment*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 717 (1999) (citation omitted). "When the petitioner 'questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole

record" test.' " *ACT-UP Triangle v. Comm'n for Health Servs. of the State of N.C.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993)).

When applying *de novo* review, the superior court interprets and applies the controlling law and substitutes its judgment for that of the board of adjustment. When applying the whole record test, the superior court examines all competent evidence in the record to determine whether the decision below was supported by the evidence. *Myers Park Homeowners Ass'n v. City of Charlotte*, 229 N.C. App. 204, 208, 747 S.E.2d 338, 342 (2013). When a petition for writ of certiorari from a board of adjustment decision involves both standards, the superior court should "apply both standards of review if required, but the standards should be applied separately to discrete issues." *Blue Ridge Co., L.L.C. v. Town of Pineville*, 188 N.C. App. 466, 470-71, 655 S.E.2d 843, 846 (2008) (citing *Sun Suites Holdings, LLC v. Bd. of Aldermen of Town of Garner*, 139 N.C. App. 269, 273-74, 533 S.E.2d 525, 528 (2000)).

Section 160A-393(*l*) of the North Carolina General Statutes provides that when reviewing a board of adjustment decision, the superior court "may affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings." N.C. Gen. Stat. § 160A-393(*l*). The statute provides specific procedures in the event the superior court does not affirm a board of adjustment's decision in its entirety:

> If the court concludes that the decision by the decision-making board is . . . based upon an error of law, then the court may remand the case with an order that directs the decision-making board to take whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error.

N.C. Gen. Stat. § 160A-393(*l*)(3). Alternatively,

> [i]f the court concludes that the decision-making board has erred by failing to make findings of fact such that the court cannot properly perform its function, then the court may remand the case with appropriate instructions so long as the record contains substantial competent evidence that could support the decision below with appropriate findings of fact.

N.C. Gen. Stat. § 160A-393(*l*)(2).

Here, the superior court, per its order, reversed the Board's decision, concluding that the Board "made errors at law in its legal interpretation." The interpretation of a zoning ordinance is subject to *de novo* review by the superior court, *Welter v. Rowan Cnty. Bd. of Comm'rs*, 160 N.C. App. 358, 362, 585 S.E.2d 472, 476 (2003), which the superior court properly recognized in its order. We now address whether the superior court properly applied this standard.

III. Analysis

A. Applicable Sections of the Cumberland County Zoning Ordinance

In 2005, several years before the Hamptons purchased the Property, the County adopted a zoning ordinance section making it "unlawful to commence the . . . use of any land or building . . . until the [the County] issue[s] a zoning permit for such work or use." Cumberland Cnty., N.C., Zoning Ordinance § 107.

Since 2010, the County's ordinance has exempted from permitting requirements farm uses on a bona fide farm, provided that the property owners have received a United States Department of Agriculture Farm Identification Number. Cumberland Cnty., N.C., Zoning Ordinance § 109 (2010) (the "Farm Exemption"). However, the Farm Exemption expressly provides that "non-farm uses *are* subject to the provisions of [the zoning] ordinance." *Id.* (emphasis added). This language tracks N.C. Gen. Stat. § 153A-340(b)(1) (2015), which exempts from zoning regulation "bona fide farm[s,]" provided the use in question is not for "nonfarm purposes." Our courts have acknowledged the qualified nature of this exemption. *See, e.g.*, *Sedman v. Rijdes*, 127 N.C. App. 700, 703, 492 S.E.2d 620, 622 (1997) (noting that, under N.C. Gen. Stat. § 153A-340 (1991), "county zoning regulations may not affect bona fide farms, but any use of farm property for nonfarm purposes is subject to the regulations[,]" and observing that "[b]ona fide farm purposes" is defined under the statute as "includ[ing] the production and activities relating or incidental to the production of crops, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agricultural products . . ." (internal quotation marks omitted)); *see also* N.C. Gen. Stat. § 153A-340(b)(2) (2015) (defining bona fide farm purposes to "include the production and activities relating or incidental to the production of crops, grains, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agriculture, as defined in [N.C. Gen. Stat. §] 106-581.1").

In April of 2011, several months before the Hamptons purchased the Property, the County Board of Commissioners (the "Commissioners") revised the zoning ordinance to provide:

> All uses of property are allowed as a use by right except where this ordinance specifies otherwise or where this ordinance specifically prohibits the use. In the event, [sic] a use of property is proposed that is not addressed by the terms of this ordinance, the minimum ordinance standards for the use addressed by this ordinance that is most closely related to the land use impacts of the proposed use shall apply.

Cumberland Cnty., N.C., Zoning Ordinance § 402. In 2012, the County determined that standards for outdoor recreation "are the most similar and more closely address the land use impacts that would result from an outdoor firing range than any other use specific provisions in our ordinance."

On 17 June 2013, after the Hamptons had constructed one firing range on the Property, the Commissioners passed a Text Amendment (the "Firing Range Amendment") to the zoning ordinance specifically concerning the zoning and permitting of firing ranges, which added the following definition:

> **Firing Range, Outdoor:** A facility, including its component shooting ranges, safety fans or shortfall zones, parking areas, all structures for classrooms; administrative offices, ammunition storage areas and other associated improvements, designed for the purpose of providing a place for the discharge of various types of firearms or the practice of archery. For purposes of this ordinance, outdoor firing ranges are a principal use of property and therefore, [sic] shall not be considered incidental or accessory. *This ordinance is exclusive of occasional target practice by individuals on property owned or leased by the individuals, sighting of weapons for purposes of hunting, or temporary turkey shoots conducted on a property no more than 12 days in any calendar year.*

Cumberland Cnty., N.C., Zoning Ordinance Text Amendment P11-20 (2013) (emphasis added).[4] The Firing Range Amendment also added

4. In addition to the exception for occasional target practice, sighting of weapons, and temporary turkey shoots, the Firing Range Amendment provides a second exception

permitting requirements and restricted the operation of outdoor firing ranges to sites no smaller than 200 acres. *Id.*

The ordinance sections governing the Hamptons' firing ranges reflect a changing dynamic in the County's regulation of outdoor firing ranges and their exemption from regulation. At the time the Hamptons purchased the Property, no County ordinance expressly regulated firing ranges, so except with respect to farm uses, the Property was subject to permitting consistent with the most analogous land use ordinance standards. Since 17 June 2013, the operation of outdoor firing ranges in the County requires permitting unless the use is a farm use or falls within one of the exceptions provided in the Firing Range Amendment. Therefore, the Firing Range Amendment provides additional exceptions from zoning regulation of outdoor firing ranges. The Board could not affirm the Notice of Violations without resolving factual disputes relating to these additional exceptions. As explained below, the Board failed to make necessary findings of fact regarding these exceptions and the superior court had no authority to make those necessary findings.

B. The Superior Court's Interpretation of Applicable Law

In interpreting the Firing Range Amendment, the superior court correctly noted that "[z]oning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they must be liberally construed in favor of such owner." *See, e.g.*, *In re W. P. Rose Builders' Supply Co.*, 202 N.C. 496, 500, 163 S.E.2d 462, 464 (1932) ("Zoning ordinances are in derogation of the right of private property, and, where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner."); *Coleman v. Town of Hillsborough*, 173 N.C. App. 560, 564, 619 S.E.2d 555, 559 (2005) ("Zoning regulation is in derogation of common law property rights and therefore must be strictly construed to limit such derogation to that intended by the regulation." (citation omitted)).

The Hamptons argue that the superior court's interpretation of the Firing Range Amendment should be upheld because: (1) it harmonizes the Firing Range Amendment with a prior existing firearms ordinance; and (2) the distinction between commercial and non-commercial use—crafted by the superior court—aligns with the County's intent in passing the Firing Range Amendment.[5]

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for firing ranges in operation as of 20 June 2005. The Hamptons do not contend that the Property falls within this exception.

5. We do not reach the parties' arguments as to commercial and non-commercial uses for the reasons set forth *infra*, Part III.C.

The Hamptons' argument that the Firing Range Amendment must be harmonized with the County's firearms ordinance is misplaced. The firearms ordinance makes it unlawful to discharge a firearm within certain distances of various persons, places, and objects. Cumberland Cnty., N.C., Code of Ordinances § 9.5-100. While it is true that "[s]tatutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each[,]" *Bd. of Adjustment of Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993), the Firing Range Amendment and the firearms ordinance do not govern the same subject matter and are not in conflict.

The Firing Range Amendment governs the use of land; the firearms ordinance governs the use of firearms. The fact that a person may run afoul of one ordinance does not create a conflict with the other. By analogy, simply because a homeowner may lawfully operate a motor vehicle on her private property does not mean she is permitted to build a private racetrack in her backyard in contravention of a zoning ordinance.

The Hamptons argue that "for homeowners to comply with the provisions of the County's Firearms Ordinance, [they are not] require[d] to own 200 acres of land[,] as [required by the] Amendment . . . ." This is not a conflict. A homeowner can, as provided in the Firing Range Amendment, make "occasional" use of a firearm without meeting the Firing Range Amendment's criteria for permitting a firing range. A homeowner can more frequently use a firearm in many different places that he does not own—such as at a permitted firing range. Because the Firing Range Amendment and firearms ordinance do not concern the same subject matter and are not in conflict, this argument is without merit.

The County argues that the superior court erred in concluding that the Board misinterpreted the exemption in the Firing Range Amendment concerning "occasional target practice by individuals." The County also contends that the superior court improperly invalidated the Notice of Violations based on findings that the Hamptons engaged in non-commercial use of the firing ranges "for target shooting and weapon sighting with family and friends," and erred in finding such use was "incidental to the[ir] enjoyment of the [Property]" such that the Hamptons were shielded by the County's Farm Exemption and N.C. Gen. Stat. § 153A-340(b)(1). The County directs our attention to evidence it contends shows that: (1) the Hamptons' use of the Property for firearms practice and training was routine and not occasional; (2) the ranges were not used for "target practice" but instead for formal training; and (3) the users were not limited to individuals owning or leasing the Property, or even their friends or family, but included formal students.

C. Unresolved Factual Issues Preclude Appellate Review

In urging this Court to reverse the superior court, the County overlooks and entreats this Court to make a critical error that we are unwilling to repeat: basing an appellate decision on facts not decided below. The Board made no findings as to how frequently the Hamptons or their invitees used firearms on the Property, whether the Property was used for target practice or formal firearms training, or who the Hamptons allowed to use the Property. Absent those material factual findings, we are unable to determine on appellate review: (1) how the Board interpreted the Farm Exemption, N.C. Gen. Stat. § 153A-340(b)(1), and the "occasional use" exception in the Firing Range Amendment; and (2) how the Board applied those interpretations to the facts before it. Nor should the superior court have made such a determination. We therefore must reverse the superior court—not because we disagree with its legal conclusions, but because it lacked the necessary factual findings to review the Board's decision.

Interpretation of a term in a zoning ordinance is a question of law. *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 202 N.C. App. 631, 636, 689 S.E.2d 880, 883 (2010), *rev'd on other grounds*, 365 N.C. 152, 712 S.E.2d 868 (2011). But whether the specific actions of a property owner fit within that interpretation is a question of fact. *Id.* at 636, 689 S.E.2d at 883 (holding that interpreting the term of a zoning ordinance is a question of law subject to *de novo* review but determining whether a party violated that interpretation is a question of fact subject to the whole record test); *see also N.C. Dep't of Env't. and Natural Res.*, 358 N.C. 649, 665-66, 599 S.E.2d 888, 898 (2004) (noting that whether a state employee engaged in certain acts is a question of fact and whether those acts constitute "just cause" for discipline under N.C. Gen. Stat. § 126-35 (2003) is a question of law). The mixed questions of fact and law disputed in this appeal stymy our review and precluded the superior court from engaging in a meaningful review.

Neither party argued to this Court that the Board's findings of fact were insufficient to allow meaningful appellate review. However, when a reviewing court determines that it cannot do its job without exceeding its limited jurisdiction to determine issues of law, rather than issues of fact, remand is the proper disposition. *See, e.g.*, *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980) ("Our decision to remand this case for further evidentiary findings is not the result of an obeisance to mere technicality. Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support

findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.").

The superior court reversed the Board's decision on the basis that the Hamptons' conduct did not violate the zoning ordinance, even though the Board made no factual findings as to the Hamptons' conduct. While the superior court could interpret the ordinance on *de novo* review, absent factual findings by the Board regarding the Hamptons' conduct, the superior court could not find new facts to reverse the Board's order and summarily invalidate the Notice of Violations.

The Firing Range Amendment's exception to the zoning ordinance allows firing ranges without a permit where the use is: (1) "occasional" (2) "target practice" (3) "by individuals on property owned or leased by the individuals[,]" but the trier of fact—the Board—made no findings as to any of these three factual elements. The same is true for the applicability of the Farm Exemption and N.C. Gen. Stat. § 153A-340(b)(1): while the Board found that the Hamptons' use of the ranges "does not constitute a farm or a farm use[,]" it made no finding as to *what* the Hamptons' actual use was. We therefore cannot determine whether the Hamptons' conduct fell outside the exceptions such that the Notice of Violations was properly issued.

The superior court, by making its own factual findings, implicitly recognized the inadequacy of the findings made by the Board. Instead of remanding the case to the Board with instructions to make sufficient findings to allow for appellate review as provided by N.C. Gen. Stat. § 160A-393(*l*)(2), or remanding with the instructions necessary to correct an error of law as provided by N.C. Gen. Stat. § 160A-393(*l*)(3), the superior court overstepped its role as an appellate tribunal by making its own findings of fact regarding how the ranges were used and who used them. *See Thompson v. Town of White Lake*, ___ N.C. App. ___, ___, 797 S.E.2d 346, 352-53 (2017) (reversing a superior court's order reviewing a board of adjustment's zoning decision because the superior court impermissibly made its own findings of fact); *Deffet Rentals, Inc. v. City of Burlington*, 27 N.C. App. 361, 363-64, 219 S.E.2d 223, 226 (1975) (vacating a superior court's order on writ of certiorari from a board of adjustment's decision on the grounds that "[t]he [superior] court is empowered to review errors in law but not facts. . . . It is not the function of the reviewing court, in such a proceeding, to find the facts

. . . . It follows that in the instant case the trial court was without authority to make findings of fact and conclusions of law thereon. In so doing, it committed error.").

N.C. Gen. Stat. § 160A-393(*l*)(2) states that "findings of fact are not necessary when the record sufficiently reveals the basis for the decision below or when the material facts are undisputed and the case presents only an issue of law." But here, the record reveals that facts material to the Board's decision were disputed. Specifically, the County introduced evidence that it contended showed that the Hamptons were advertising their range and firearms training,[6] while the Hamptons themselves introduced evidence showing that their use was not limited to family and friends but was extended to "formal students." This evidence raises issues of material fact as to the nature of the use of the Property relevant to an application of the Farm Exemption, N.C. Gen. Stat. § 153A-340(b)(1), and the exception in the Firing Range Amendment. The superior court impermissibly resolved these issues when it made findings of fact that no commercial activity occurred in connection with the ranges and that the Hamptons' use of the Property was limited to target practice and weapon sighting with family and friends. These factual issues were for the Board to resolve, not the superior court sitting as an appellate court.

The Board's order, however, did not resolve these factual disputes. The Board's order does not find—does not even mention—how often the ranges were used, what they were used for, or who used them. The Board's order does not mention any farming operations on the Property. Nor does the order mention the Farm Exemption, N.C. Gen. Stat. § 153A-340(b)(1), or the Firing Range Amendment's exception for occasional target practice or other exempt uses. The transcript of the Board's hearing reveals no indication from the Board members as to how they interpreted these exceptions; indeed, the Board members themselves made absolutely no reference to the Firing Range Amendment's exceptions or exemptions. During the Board's discussion as to farm uses in their fact-finding deliberations, one member commented: "I think we need to make the fact for sure about the permit and the use of it as a firing range versus the farm. I think we really need to go on that . . . I'm saying that they didn't submit for a permit for the firing range, but they did submit for the farm use. We need to make that as a facts [sic] finding." However, the Board did not include such a finding in its decision

6. The Hamptons contended before the Board that this website was unrelated to their activity on the Property. It is for the Board, as finder of fact, to resolve this conflict in the evidence. *See*, *e.g.*, *State v. Bromfield*, 332 N.C. 24, 36, 418 S.E.2d 491, 497 (1992) ("[C]ontradictions in the evidence are for the finder of fact to resolve." (citation omitted)).

and the record does not indicate how a majority of the Board's members would interpret the Farm Exemption or N.C. Gen. Stat. § 153A-340(b)(1) as applied in this matter.

The parties also disputed before the Board the nature of the Hamptons' use of the Property, including whether their use was commercial or non-commercial. A print-out of a website operated by the Hamptons advertising firearms training for $60 while offering "a climate-controlled classroom and . . . our own ever-improving, private training facilities. . . . No range fees . . . !" was admitted into evidence. The website print-out, which the Hamptons conceded accurately depicted their website, also advertised concealed carry courses, a practical carbine course, and a 100-yard range, which match both the training the Hamptons admitted to offering to users of their ranges and the length of one of the ranges on the Property. While the Hamptons on appeal challenge, without particular specificity, the admission by the Board of "testimony and exhibits" that were "incomplete or irrelevant[,]" the Board may rely "on evidence that would not be admissible under the rules of evidence as applied in the trial division of the General Court of Justice if (i) the evidence was admitted without objection or (ii) the evidence appears to be sufficiently trustworthy and was admitted under such circumstances that it was reasonable for the decision-making board to rely upon it." N.C. Gen. Stat. § 160A-393(k)(3). The Hamptons' counsel did not object to the introduction of the website print-out into evidence before the Board, and they admitted to its accuracy. As for the import of this evidence, that is for the Board—as the finder of fact—to decide in the first instance.[7]

While the parties made well-stated arguments in their briefs and at oral argument concerning whether the Firing Range Amendment is designed to prohibit commercial firing ranges rather than non-commercial ones, the absence of any findings of fact by the Board concerning that distinction's relevance to its decision means we may only hypothesize as to its import. Nor may we rely on factual findings made by the superior court to resolve the question, as they were made beyond its limited scope of review. *Capricorn Equity Corp.*, 334 N.C. at 136, 431

7. Our dissenting colleague asserts that the Hamptons' use of the ranges, if commercial, is akin to, among other things, "hay rides[,] corn mazes[, and] tractor pulls" and therefore may constitute a *bona fide* farm use. It is unclear to us, however, how use of the ranges to instruct individuals in defensive handgun methods, rifle and carbine training, tactical pistol use, tactical shooting techniques, and concealed carry handgun permit qualification involve and integrate farming in the same way as the activities that constitute agritourism under the statute.

S.E.2d at 186 ("The superior court is not the trier of fact but rather sits as an appellate court . . . ."). Unfortunately, we are unable to provide guidance under these circumstances, as "courts do not provide mere advisory opinions with respect to hypothetical situations." *First-Citizens Bank & Trust Co. v. Barnes*, 257 N.C. 274, 276, 125 S.E.2d 437, 439 (1962).

Our holding that the superior court erred by making its own findings of fact is compelled by binding precedent. *See*, *e.g.*, *Myers Park Homeowners Ass'n*, *Inc.*, 229 N.C. App. at 214, 747 S.E.2d at 341 (affirming a superior court's denial, in a *de novo* review of a board of adjustment's order interpreting a zoning ordinance, of motions requesting additional findings of fact under Rules 52 and 59 of the North Carolina Rules of Civil Procedure on the basis that "the [s]uperior [c]ourt . . . functions as an appellate court rather than a trier of fact" (internal quotation marks and citation omitted)); *Capricorn Equity Corp.*, 334 N.C. at 136, 431 S.E.2d at 186 (reversing, in an appeal from a superior court's review of a board of adjustment order, this Court's decision to remand to superior court for additional findings of fact on the basis that "[t]he superior court is not the trier of fact but rather sits as an appellate court . . . . [T]he Court of Appeals erred in remanding this case to the superior court for findings of fact." (citations omitted)); *Coastal Ready-Mix Concrete Co.*, *Inc. v. Bd. of Com'rs Town of Nags Head*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980) (reversing an opinion of this Court that upheld a superior court's review of a quasi-judicial zoning decision partially because "[i]n proceedings of this nature, the superior court is not the trier of fact. Such is the function of the town board" (citation omitted)); *Thompson*, ___ N.C. App. at ___, 797 S.E.2d at 352-53; *Deffet Rentals*, *Inc.*, 27 N.C. App. at 363-64, 219 S.E.2d at 226.

This Court has, in proper cases involving the appeal of local government zoning decisions to superior court, decided the merits of an issue irrespective of legal errors committed by the superior court in exercising its limited appellate review. *Sun Suites Holdings*, *LLC v. Bd. of Aldermen of Town of Garner*, 139 N.C. App. 269, 274, 533 S.E.2d 525, 528-29 (2000) (reversing and remanding to the trial court, and in turn to a municipal board, with direction to issue a conditional use permit where the whole record "fails to reflect that the Board's decision was sustained by 'substantial evidence[]' "). But in this case, we are hamstrung by the same problem that beset this Court in *Welter*: "[I]nterpretation by our Court of the portions of the zoning ordinance at issue in this case would not necessarily be dispositive of the case given the need for further findings of fact." 160 N.C. App. at 363-64, 585 S.E.2d at 477. In that case, we declined to adopt a particular interpretation of a zoning

ordinance and to resolve the case on appeal to this Court because "[i]f [a particular] interpretation were adopted, the case would not be disposed of because there is still an issue of fact as to whether [the petitioners conduct violated this interpretation]. . . . [T]he findings [found] by the Board of Adjustment . . . do not include sufficient findings of fact on this issue." *Id.* at 365, 585 S.E.2d at 478. The same is true here.

Our dissenting colleague asserts that two of the superior court's additional findings of fact were merely "summarizations of the uncontradicted evidence presented to the Board" and therefore did not constitute prejudicial error under *Cannon v. Zoning Bd. of Adjustment of City of Wilmington*, 65 N.C. App. 44, 47, 308 S.E.2d 735, 737 (1983). But the findings identified in the dissent—that the Hamptons' principal use of the Property was as a home and farming operation and that the range was incidental thereto—plainly contradict the Board's findings that "[t]he Hamptons have not used the subject property for a residence" and that "[t]he use of the property for a firing range does not constitute a farm or a farm use on that portion of the property on which the firing range is constructed."

Nor does any evidence in the record show that the use of the firing ranges was incidental to farming. The Hamptons stated to the Board that they had instructed 81 people in the use of firearms from 2013 through 2015, but they were not actively engaged in farming at the time of the hearing. The Officer who issued the Notice of Violation testified before the Board that he saw no timbering or farming activity taking place at the Property.

On this record, our colleague's reliance on *Cannon* is misplaced. In that case, the superior court's findings were "recitation[s] of largely uncontroverted evidence" that did not contradict any findings of fact made by the board of adjustment, were "unnecessary" to the decision, and, in fact, resulted in the superior court affirming the board's decision. 65 N.C. App. at 47, 308 S.E.2d at 737. We have since followed *Cannon* to hold that findings that merely "recite the [lower tribunal's] findings of fact and synthesize the evidence before [said lower tribunal]" do not constitute "prejudicial error." *Cary Creek Ltd. P'ship v. Town of Cary*, 207 N.C. App. 339, 342, 700 S.E.2d 80, 83 (2010) (citing *Cannon*, 65 N.C. App. at 47, 308 S.E.2d at 737) (affirming a superior court's affirmation of a town council's zoning decision). By contrast, this Court has consistently held that a superior court, sitting on appellate review of a board of adjustment's order, may not make findings of fact that contradict those made by the board as fact-finder, nor may it resolve factual questions that determine the outcome of the action. *See supra* Part III.C.

The dissent also asserts that the Hamptons' acquisition of a federal Farm Identification Number, alone, compels the conclusion that the use of the later constructed firing ranges was exempt from any and all zoning regulation under N.C. Gen. Stat. §§ 153A-340(b)(1)-(2) and the Farm Exemption. This reductive approach contradicts language in the statute and Farm Exemption and ignores longstanding precedent.

At the time this matter was decided by the trial court, state law provided that a Farm Identification Number constituted "sufficient evidence the property is being used for bona fide farm purposes." N.C. Gen. Stat. § 153A-340(b)(2).[8] But the statute, like the County Farm Exemption, provides a qualified exemption that applies *only to farm related purposes*. *Id.* Thus, to claim the benefit of the statute and the County Farm Exemption, the Hamptons needed to show two things: (1) that the Property was generally being used for bona fide farm purposes (by, for instance, obtaining a Farm Identification Number); *and* (2) that the actual use in question was a farm purpose. N.C. Gen. Stat. § 153A-340(b)(1) ("These regulations may affect property used for bona fide farm purposes only as provided in subdivision (3) of this subsection. This subsection does not limit regulation under this Part with respect to the use of farm property for nonfarm purposes.").

This two-step analysis has been applied by this Court for more than three decades.

In *Sedman*, we addressed the challenged construction and use of a driveway by large trucks to export plants from greenhouses, operation of large heaters and fans emitting a low frequency sound in connection with the greenhouses, and sale of flowers on farm property. 127 N.C. App. at 704, 492 S.E.2d at 622-23. Although it was undisputed that the greenhouse operation was a bona fide farm, an adjacent landowner sued for nuisance and alleged that the activities supplementing the greenhouse operation violated local zoning ordinances. *Id.* at 701-02, 492 S.E.2d at 621. In affirming partial summary judgment in favor of the farm owners, we held that the driveway and trucks were "so essential to large-scale agricultural production that their exclusion from the exemption would render it meaningless[,]" that the heaters and fans were "incidental to the

8. The provision in N.C. Gen. Stat. § 153A-340(b)(2) concerning Farm Identification Numbers was repealed by the General Assembly effective 12 July 2017, and such a number alone no longer constitutes sufficient evidence that land is being used for bona fide farm purposes. 2017 N.C. Sess. Laws 2017-108. Each version of the statute, however, excludes from zoning regulation only those uses that constitute, relate to, or are incidental to "bona fide farm purposes[.]" *Compare* N.C. Gen. Stat. § 153A-340(b)(1) (2015) *with* 2017 N.C. Sess. Laws 2017-108.

year-round raising of plants inside greenhouses[,]" and that the "s[ale] of products raised on the premises is also an exempt activity." *Id.* at 704, 492 S.E.2d at 622-23. Because the farm owners presented undisputed evidence about the challenged operations and their necessity to growing and selling plants, we held that the trial court did not err in granting partial summary judgment in favor of the farm owners on the issue of an alleged violation of a county zoning ordinance. *Id.* at 704-05, 492 S.E.2d at 622-23. Similarly, in *County of Durham v. Roberts*, 145 N.C. App. 665, 551 S.E.2d 494 (2001), we held not only that the defendant's breeding of horses was a bona fide farm use, but further held that excavation of the property was exempt from zoning regulations because "the activity undertaken by defendant was related and incidental to the farming activities of boarding, breeding, raising, pasturing and watering horses." 145 N.C. App. at 670-71, 551 S.E.2d at 498.

But non-farm uses, even on bona fide farms, are not exempt from zoning regulation. For this reason, this Court in *North Iredell Neighbors for Rural Life v. Iredell County*, 196 N.C. App. 68, 674 S.E.2d 436, *disc. rev. denied*, 363 N.C. 582, 682 S.E.2d 385 (2009), reversed a ruling by the trial court allowing biodiesel production on an industrial farm. 196 N.C. App. at 77, 674 S.E.2d at 442. The proposed biodiesel production would include gathering seeds grown by the farm owner and neighboring farmers, pressing oil from the seeds, and converting the oil to a combustible fuel. *Id.* at 76-77, 674 S.E.2d at 442. The trial court found that the proposed operation would produce 500,000 gallons of biodiesel fuel per year, of which 100,000 gallons would be consumed in the farm's operation and excess fuel would be sold for use on other farms. *Id.* at 77, 674 S.E.2d at 442. This Court held that the trial court's findings did not support a conclusion that the biodiesel production was exempt from zoning regulations, and instead established a use which "removes this production from the realm of bona fide farm use to a non-farm independent commercial enterprise." *Id.* at 77, 674 S.E.2d at 442. We explained:

> While the [landowners'] large scale industrial farming operation has certainly fit under the bona fide farm exception to date, this added industrial process, as they currently intend, is not 'the production and activities relating or incidental to the production of crops, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agricultural products . . . .' N.C. Gen. Stat. § 153A-340(b)(2). The [landowners'] intended biodiesel production is therefore subject to zoning.

Id. at 77, 674 S.E.2d at 442.

In *Baucom's Nursery Co. v. Mecklenburg County, N.C.*, 62 N.C. App. 396, 303 S.E.2d 236 (1983), this Court addressed the interaction between Section 153A-340 and a county ordinance and acknowledged that zoning regulations apply, even on bona fide farms, to non-farm uses, adopting the hypothetical that "a used car lot upon an area of a farm would be a non-farm use made of farm properties" and therefore subject to regulation by zoning ordinances. 62 N.C. App. at 402, 303 S.E.2d at 240 (Braswell, J.) (internal quotation marks omitted).

Our dissenting colleague's assertion that the Hamptons' construction and operation of the firing ranges is as a matter of law exempt from county regulation simply because they obtained a Farm Identification Number is in direct conflict with the binding precedent of this Court's holding in *North Iredell Neighbors for Rural Life*. 196 N.C. App. at 77, 674 S.E.2d at 442. If processing seeds grown on a bona fide farm to produce biodiesel fuel on that farm is not exempt from zoning regulation, as we held in that decision, the Hampton's use of the Property for firing ranges, in the absence of any evidence that the ranges are incidental to any agricultural activity, surely cannot be exempt from zoning regulation as a matter of law.

We can certainly conceive of instances where a firing range could be incidental to bona fide farming purposes, such as training farmhands in the use of firearms in order to kill pests, varmints, or predators that threaten crops or livestock. Whether such a use or similar uses are demonstrated by the evidence in this case is for the Board to resolve on remand. But the logical extension of our dissenting colleague's analysis would allow the owner of a bona fide farm to engage in unlimited non-farm uses—such as weapons training or industrial manufacturing—as a matter of law based on possessing a Farm Identification Number.

Our holding does not ignore N.C. Gen. Stat. § 153A-340's mandate that a Farm Identification Number "shall constitute sufficient evidence that the property is being used for bona fide farm purposes[.]" Rather, it recognizes that "sufficient evidence" does not equate to conclusive evidence. When sufficient evidence as to one conclusion is contradicted by sufficient evidence of the opposite, it is for the finder of fact to resolve the issue. *See, e.g.*, *Baker v. Mass. Mut. Life Ins. Co.*, 168 N.C. 87, 87, 83 S.E. 16, 17 (1914) ("The evidence as to suicide . . . while sufficient to justify an answer to the issue in favor of the defendant, . . . was not conclusive, and the inference of an accidental killing could be accepted. If so, it was for the jury, and not his Honor, to draw the inference . . . ."); [9]

9. This opinion was reprinted in 1936 at 168 N.C. 147.

State v. Sampson, 72 N.C. App. 461, 465, 325 S.E.2d 514, 517 (1985) ("While there may be sufficient evidence so that the trial court could have found the existence of those mitigating factors, we do not believe that the evidence so clearly establishes the fact in issue that no reasonable inference to the contrary can be found[.]").

On remand from the trial court, the Board must make findings as to the frequency of the use of the ranges and Property for shooting, who the Hamptons invited or permitted to shoot on the Property, and how the ranges were in fact used. It must then determine whether the use falls within the Firing Range Amendment's exceptions for occasional target practice, weapon sighting for hunting, or turkey shoots, or other exceptions, or whether it constitutes a farm use not subject to zoning regulation under the Farm Exemption, N.C. Gen. Stat. § 153A-340, and N.C. Gen. Stat. § 106-581.1. On remand, "[t]he [Board] may in its discretion receive additional evidence and hear further argument from the parties, but is not required to do so." *In re Appeal of Willis*, 129 N.C. App. 499, 503, 500 S.E.2d 723, 727 (1998).

D. Alternative Arguments

The Hamptons mention in passing several alternative bases to affirm the order reversing the Board in their brief, contending: (1) they were prejudiced by the period of public comment at the Board's hearing; (2) the Board did not understand its adjudicative function; (3) the Board was biased against the Hamptons, resulting in an arbitrary and capricious decision; and (4) the Board impermissibly relied on the advice of counsel from the County Attorney's office. The superior court did not address these issues in its order, and we do not reach them.

Here, the Hamptons sit as appellees, not appellants, and seek to preserve the order of the superior court; it is understandable, then, that their brief and oral argument before this Court focused on issues that court did reach in its order and offered sparse legal analysis regarding the four issues enumerated above that it did not reach. Resolution of these issues by this Court at this stage would be limited to those arguments as stated in the parties' briefs. *Bernold v. Bd. of Governors of Univ. of N.C.*, 200 N.C. App. 295, 298, 683 S.E.2d 428, 430 (2009) ("This Court's task when reviewing a superior court's order reviewing an administrative decision is simply to consider those grounds for reversal or modification raised by the petitioner before the superior court and properly *assigned as error and argued on appeal to this Court*." (emphasis added) (internal quotation marks and citations omitted)). The superior court, sitting as the first appellate court on a petition for writ of certiorari from any subsequent

order from the Board in this matter, is in a better position to consider any such arguments appropriately raised and presented to it on future review, and the interests of justice and fairness to the parties are better served by allowing full and complete argument, squarely presented, on these four additional issues above as they apply to any such future order and review thereof. *See, e.g.*, *Nw. Prop. Grp., LLC v. Town of Carrboro*, 201 N.C. App. 449, 466, 687 S.E.2d 1, 12 (2009) ("Having concluded that the Board failed to make sufficient findings of fact . . . , we do not believe that it is necessary or appropriate for us to address these issues at this time . . . . Having decided that the Board should make a new decision containing proper findings of fact . . . , we should not presume . . . that we are in a position to ascertain the exact nature of the factual findings that the Board will make . . . . As a result, we believe that the most appropriate course is for us to simply remand this case to the trial court for further remand to the Board for the making of a new decision that addresses all the issues . . . and to leave the remaining issues that Petitioner has brought to our attention for decision on another day, assuming that those issues ever need to be decided." (internal citation omitted)).

While it is true that this Court may, in certain circumstances, resolve issues on appeal from a superior court's review of a board of adjustment's decision irrespective of the superior court's treatment of them, that is so only where such review would be dispositive and remand is therefore not automatic. *Morris Commc'ns Corp.*, 365 N.C. at 158-59, 712 S.E.2d at 872 ("Remand is not automatic when an appellate court's obligation to review for errors of law can be accomplished by addressing the dispositive issue(s). Under such circumstances the appellate court can determine how the trial court *should have* decided the case upon application of the appropriate standards of review." (internal quotation marks and citations omitted) (emphasis in original)). We are not obligated to do so, however. *N.C. Dep't of Env't. and Natural Res.*, 358 N.C. at 665-675, 599 S.E.2d at 898-904 (acknowledging that "[o]rdinarily, when an agency fails to make a material finding of fact or resolve a material conflict in the evidence, the case must be remanded to the agency for a proper finding" but electing to resolve the issues on appeal where doing so served "the interests of judicial economy and fairness to the parties . . .").

As stated *supra*, remand in this case is automatic because material issues of fact must be resolved by the trier of fact (and not this appellate court) in order for us to fulfill our appellate function. *Welter*, 160 N.C. App. at 363-65, 585 S.E.2d at 477-78. The lack of sufficient finding of facts for meaningful appellate review undoubtedly impacts these other arguments. *See, e.g.*, *Crist v. City of Jacksonville*, 131 N.C. App. 404, 405,

507 S.E.2d 899, 900 (1998) ("Findings of fact are an important safeguard against arbitrary and capricious action by the Board of Adjustment because they establish a sufficient record upon which this Court can review the Board's decision." (citation omitted)).

IV. Conclusion

We vacate the decision of the superior court and remand with instructions to further remand the case to the Board for further findings of fact concerning how and how often the firing ranges were used, who the Hamptons allowed to use them, and, following application of those findings to the various zoning exceptions and exemptions at issue in this case, to determine whether those findings support a conclusion that the Hamptons violated the zoning ordinance sufficient to uphold the Notice of Violations. The Board may take additional evidence, or not, in its discretion.

VACATED AND REMANDED.

Judge CALABRIA concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

Cumberland County (the "County") appeals from a superior court's order reversing a decision by the Cumberland County Board of Adjustment (the "Board"). The Board had affirmed in part and modified in part a code inspector's Notice of Violations penalizing David Hampton, and wife, Mary Hampton, and ordering the demolition of improvements located on their property (collectively the "Hamptons"). The code enforcement officer had cited the Hamptons for violating the County's zoning ordinance by constructing and operating a target range on their property without applying for a zoning permit and submitting a site plan.

The County argues that the superior court erred in construing certain exceptions to and exemptions from the zoning ordinance in the Hamptons' favor. The majority's opinion asserts this Court is unable to review the superior court's order, vacates the superior court's order, and remands for further findings of fact. The superior court's conclusions of law in its order construing *de novo* certain exceptions to and exemptions from the zoning ordinance in the Hamptons' favor is properly

affirmed and remanded ultimately to the Board to dismiss the Notice of Violations. I respectfully dissent.

I. Factual & Procedural Background

The Hamptons both retired as First Sergeants with the United States Army. They purchased approximately 74-acres of land outside of any city or town limits in Cumberland County (the "Property") during September 2011. The Property is zoned as Rural Residential ("RR"). After purchasing the Property, the Hamptons applied for and were issued a Farm Identification Number from the United States Department of Agriculture Farm Services Agency ("FSA").

The Hamptons' evidence before the Board showed they had purchased the Property with the express intent to "build our final home, a running trail and firing/archery ranges . . . ." The target ranges were constructed for the Hamptons' personal enjoyment, and "for the purpose of teaching others the fundamentals of safe gun handling and marksmanship, and the maintenance of firearms proficiency."

In a notarized letter to the Board, the Hamptons' real estate agent also stated the couple "made it clear to me from the outset that they have always planned to build ranges, so they could teach the use of firearms to others . . . ." The Hamptons' target ranges would not be open to the public, but instead would be available "by appointment-only" to "family, friends and those with similar interests . . . ." In another notarized letter submitted to the Board, a friend of the Hamptons stated that the ranges were made available to the Hamptons' "family, friends and formal students . . . ."

The Hamptons started clearing land for a target range in May 2012 and cleared a 25-yards long target range that summer. David Hampton began using that range for personal use and also to instruct others in defensive handgun methods, rifle and carbine training, and tactical pistol uses. The Hamptons expanded the 25-yard range to 40 yards in the spring of 2013.

In the summer of 2014, the Hamptons constructed a 100-yard target range adjacent to the first range. David Hampton and his family used the ranges and continued to provide training, including instruction in firing shotguns and tactical shooting techniques, through the beginning of 2015. The Hamptons stated to the Board that they "introduced more than 30 people to the safe use of firearms, allowed 25 experienced shooters to increase their proficiency, and qualified another 26 persons for their North Carolina Concealed Carry Handgun Permit" over the course of approximately two years.

On 6 May 2015, a Cumberland County code enforcement officer (the "Officer") obtained an administrative warrant to inspect the Property, after a North Carolina Department of Environmental and Natural Resources official reported a target range being located on the Property. After inspecting the Property, the Officer issued a Notice of Violations, which cited the Hamptons for lack of an approved site plan or zoning permit as purportedly required by the zoning ordinance. The Officer ordered the Hamptons to raze the firing range.

The Hamptons appealed the Notice of Violations to the Board. The Board conducted a quasi-judicial hearing on 20 August 2015. The Board heard sworn testimony from witnesses and received documentary evidence. Fourteen members of the public, who were not parties to the proceeding, testified under oath to the Board during the course of the meeting.

At the conclusion of the hearing, the Board found certain facts, voted to modify the Notice of Violations from requiring razing of the target range to "ceas[ing] any use of the firing range as it conflicts with the Cumberland County Ordinance[,]" and to affirm the Notice of Violations as modified. These findings and conclusions are stated in the Board's written order dated 14 September 2015. The Board's order labeled the following as "findings of fact":

> 1. The Hamptons purchased the subject property September 26, 2011, and began construction of the firing range thereafter.
>
> 2. Mrs. Hampton testified that only a small berm had been constructed on the property in April 2013.
>
> 3. The Hamptons have continued to improve and expand the firing range until they were contacted by DENR in May 2015.
>
> 4. The Hamptons have not used the subject property for a residence but have obtained a permit to install a septic tank and intend to construct a dwelling on the property.
>
> 5. The use of the property for a firing range does not constitute a farm or a farm use on that portion of the property on which the firing range is constructed.
>
> 6. Section 107 of the Cumberland County Zoning Ordinance has required a zoning permit for any use of land since the amendments of June 20, 2005.

7. The Hamptons do not have a permit for the use of their property as a firing range.

8. The Hamptons have not applied for a permit for the use of their property as a firing range.

The Hamptons filed a petition for writ of certiorari to the Cumberland County Superior Court on 2 October 2015 and filed an amended petition for writ of certiorari on 3 November 2015.

The Hamptons' amended petition challenged the Board's order on several grounds and alleged the Board had failed to: (1) exclude certain inadmissible evidence; (2) follow proper procedure in making findings of fact; and, (3) provide the Hamptons with procedural due process. The Hamptons also alleged that the Board had acted arbitrarily and capriciously, made findings without sufficient or supporting evidence, and committed errors of law in its decision. The Hamptons petitioned the Cumberland County Superior Court to "remand this matter to the [Board], directing it to dismiss the Notice of Violation[s] and recognize the legal, non-conforming use of the [Property], *inter alia*, for the non-commercial use of the [Hamptons], their family and friends as a sport shooting range."

The superior court heard the Hamptons' appeal on 28 March 2016 and entered an order, which declared the Hamptons' "non-commercial use of the 100-yard range facility for target shooting and weapon sighting with family and friends is a legal use of their property."

The superior court reversed the Board's decision for "errors at law in its legal interpretation" of the "occasional target practice" exception set forth in the zoning ordinance amendment (the "Text Amendment"). The superior court concluded that "Petitioners' non-commercial use of the 100-yard range facility is a reasonable and incidental use of the property as both a home and farm site[,]" but that "any use of the property for a commercial firing range would subject the property to the permit requirements of the currently existing Firing Range Ordinance." The County timely filed its notice of appeal on 12 May 2016.

II. Standard of Review

A. Review of the Board's order by the Superior Court

"The [County bears] the burden of proving the existence of an operation in violation of its zoning ordinance." *City of Winston-Salem v. Hoots Concrete Co.*, 47 N.C. App. 405, 414, 267 S.E.2d 569, 575, *disc. review denied*, 301 N.C. 234, 283 S.E.2d 131 (1980). The superior court's

standard of review of a board of adjustment's decision is determined by the particular issues raised on appeal.

"If a petitioner contends the [b]oard's decision was based on an error of law, 'de novo' review is proper." *JWL Invs., Inc. v. Guilford Cty. Bd. of Adjustment*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 717 (1999) (citation omitted). In conducting *de novo* review, the superior court interprets and applies the controlling law *de novo* over that of the Board. *Hayes v. Fowler*, 123 N.C. App. 400, 404, 473 S.E.2d 442, 444-45 (1996) (citations omitted).

"When the petitioner 'questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test.' " *ACT-UP Triangle v. Comm'n for Health Servs. of the State of N.C.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993)). When applying the whole record test, the superior court examines *all competent evidence* in the record to determine whether the Board's decision was legally correct and supported by the evidence. *Myers Park Homeowners Ass'n v. City of Charlotte*, 229 N.C. App. 204, 208, 747 S.E.2d 338, 342 (2013) (citation omitted).

When a petition for writ of *certiorari* from a board of adjustment decision involves both standards of review, the superior court may "apply both standards of review if required, but the standards should be applied separately to discrete issues." *Blue Ridge Co., L.L.C. v. Town of Pineville*, 188 N.C. App. 466, 469-70, 655 S.E.2d 843, 846 (2008) (citing *Sun Suites Holdings, LLC v. Bd. of Aldermen of Town of Garner*, 139 N.C. App. 269, 273-74, 533 S.E.2d 525, 528 (2000)).

In reviewing the decision of a board of adjustment, the superior court must determine whether:

> 1) the [b]oard committed any errors in law; 2) the [b]oard followed lawful procedure; 3) the petitioner was afforded appropriate due process; 4) the [b]oard's decision was supported by competent evidence in the whole record; and 5) [whether] the [b]oard's decision was arbitrary and capricious.

Overton v. Camden Cty., 155 N.C. App. 391, 393, 574 S.E.2d 157, 159 (2002) (alterations in original) (quoting *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjustment*, 152 N.C. App. 474, 475, 567 S.E.2d 440, 441 (2002) (citation omitted)); *see also* N.C. Gen. Stat. §§ 153A-349

and 160A-393(k) (2015) (establishing the scope of review on appeals from a board of adjustment in counties and cities, respectively, to superior court).

B. Review of the Superior Court's order

Appellate review of a superior court's interpretation of a zoning ordinance is conducted *de novo*, and this court applies the same principles of construction utilized in interpreting statutes. *Fort v. Cty. of Cumberland*, 235 N.C. App. 541, 549, 761 S.E.2d 744, 749 (2014). "Our review asks two questions: Did the trial court identify the appropriate standard of review, and, if so, did it properly apply that standard?" *Morris Commc'ns Corp v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 155, 712 S.E.2d 868, 870 (2011) (citation omitted).

A superior court's legal conclusions concerning a board of adjustment's decision are reviewed *de novo* for errors of law. *Id.* When such review would be dispositive, this Court may also review issues on appeal *de novo* from a superior court's review of a board of adjustment's decision, irrespective of either the board's or the superior court's treatment of them. *Id.* at 158-59, 712 S.E.2d at 872 ("Remand is not automatic when an appellate court's obligation to review for errors of law can be accomplished by addressing the dispositive issue(s). Under such circumstances, this Court can determine how the [superior] court *should have* decided the case upon application of the appropriate standards of review." (internal quotation marks and citations omitted) (emphasis in original)).

III. Analysis

N.C. Gen. Stat. § 153A-349 provides that when reviewing a board of adjustment decision, the superior court "may affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings." N.C. Gen. Stat. § 153A-349 (applying the provisions of N.C. Gen. Stat. § 160A-393 to appeals of the decisions of counties); N.C. Gen. Stat. § 160A-393(*l*). The statute also provides specific procedures in the event the superior court does not affirm a board of adjustment decision in its entirety.

> If the court concludes that the decision by the decision-making board is . . . based upon an error of law, then the court may remand the case with an order that directs the decision-making board to take whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error.

Id.

As noted, the interpretation and application of a zoning ordinance is subject to *de novo* review by the superior court. *Welter v. Rowan Cty. Bd. of Comm'rs*, 160 N.C. App. 358, 362, 585 S.E.2d 472, 476 (2003). The superior court concluded the Board had "made errors at law in its legal interpretation" and reversed the Board's decision, The superior court properly recognized its role of *de novo* review of the Board's legal conclusions under the statute and precedents in its order. On the proper interpretation of zoning ordinances, our Supreme Court has repeatedly stated:

> Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly [within] their express terms. It has been held that well-founded doubts as to the meaning of obscure provisions of a Zoning Ordinance should be resolved in favor of the free use of property. *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966) (citation and quotations marks omitted); *see also Vance S. Harrington & Co. v. Renner*, 236 N.C. 321, 324, 72 S.E.2d 838, 840 (1952) ("Every person owning property has the right to make any lawful use of it he sees fit, and restrictions sought to be imposed on that right must be carefully examined . . . ."); *Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 354, 578 S.E.2d 688, 691 (2003) ("Zoning ordinances derogate common law property rights and must be strictly construed in favor of the free use of property.").

Dellinger v. Lincoln Cty., __ N.C. App. __, __, 789 S.E.2d 21, 27, *review denied*, 369 N.C. 190, 794 S.E.2d 324 (2016).

The majority's opinion correctly notes, "the use of firearms is integral to the facts of this case." Although the parties have not advanced any arguments related to the Second Amendment to the Constitution of the United States, the facts and legal issues of this case implicate the Hamptons' right to keep, bear and use arms. *See* U.S. Const. amend. II. This Constitutional implication reinforces our strict construction of zoning restrictions on possession and uses of privately owned property. *See Dellinger*, __ N.C. App. at __, 789 S.E.2d at 27; *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966); *see also Vance S. Harrington & Co. v. Renner*, 236 N.C. 321, 324, 72 S.E.2d 838, 840 (1952).

A. Relevant Sections of the Cumberland County Zoning Ordinance

Several years before the Hamptons purchased the Property, the County adopted an overly broad zoning ordinance section in 2005

making it "unlawful to commence the . . . use of any land or building . . . until the [the County] issue[s] a zoning permit for such work or use." Cumberland Cty., N.C., Zoning Ordinance § 107.

Since 2010, the County's zoning ordinance has expressly exempted from permitting requirements under the ordinance any farm uses or purposes conducted on a bona fide farm:

> The provisions of this ordinance *do not apply* to bona fide farms. This ordinance does not regulate croplands, timberlands, pasturelands, orchards, or other farmlands, or any farmhouse, barn, poultry house or other farm buildings, including tenant or other dwellings units for persons working on said farms, so long as such dwellings shall be in the same ownership as the farm and located on the farm. *To qualify for the bona fide farm exemption*, the land must be a part of a farm unit with a North Carolina State Cooperative Extension Office or *United State Department of Agriculture farm number assigned*. Residences for non-farm use or occupancy and other non-farm uses are subject to the provisions of this ordinance.

Cumberland Cty., N.C., Zoning Ordinance § 109 (2010) (the "Farm Exemption") (emphasis supplied). It is undisputed the Hamptons applied for and obtained a Farm Identification Number for this Property, which was issued by the FSA.

The following year in April of 2011, and several months before the Hamptons purchased the Property the following September, the County Board of Commissioners (the "Commissioners"), recognizing the error in its ordinance, also amended the 2005 zoning ordinance to provide:

> *All uses of property are allowed as a use by right* except where this ordinance specifies otherwise or where this ordinance specifically prohibits the use. In the event, a use of property is proposed that is not addressed by the terms of this ordinance, *the minimum ordinance standards* for the use addressed by this ordinance that is *most closely related* to the land use impacts of the proposed use shall apply.

Cumberland Cty., N.C., Zoning Ordinance § 402 (emphasis supplied).

In 2012, maintaining and using target ranges were not specifically addressed in the ordinance. The County's zoning staff determined that standards applicable for outdoor recreation "are the most

similar and more closely address the land use impacts that would result from an outdoor firing range than any other use specific provisions in our ordinance."

After the Hamptons had constructed their target range on the Property, on 17 June 2013, the Commissioners also passed the Text Amendment to the zoning ordinance, which specifically addresses the zoning and permitting of target ranges, which added the following definition and exemptions:

> **Firing Range, Outdoor:** A facility, including its component shooting ranges, safety fans or shortfall zones, parking areas, all structures for classrooms; administrative offices, ammunition storage areas and other associated improvements, designed for the purpose of providing a place for the discharge of various types of firearms or the practice of archery. For purposes of this ordinance, outdoor firing ranges are a principal use of property and therefore, [sic] shall not be considered incidental or accessory. This ordinance is exclusive of occasional target practice by individuals on property owned or leased by the individuals, sighting of weapons for purposes of hunting, or temporary turkey shoots conducted on a property no more than 12 days in any calendar year.

Cumberland Cty., N.C., Zoning Ordinance Text Amendment P11-20 (2013) (emphasis supplied).

In addition to the exemption for "occasional target practice," "sighting of weapons," and "temporary turkey shoots," the Text Amendment provides a second retroactive exemption for all firing or target ranges in operation as of 20 June 2005. The Hamptons do not contend that their Property falls within this second exemption, as that date occurred prior to their purchase of the Property. The Text Amendment also added permitting requirements and restricted the operation of non-exempt outdoor firing ranges to sites no smaller than 200 acres. *Id.*

At the time the Hamptons purchased the Property, no County ordinance expressly regulated target ranges. Except for the exemptions for bona fide farm purposes and uses in the statute and ordinance, and the 2011 Amendment to the ordinance, providing "all uses of property are allowed as a use by right," the Property was otherwise subject to zoning regulation consistent with the most analogous land use ordinance standards.

Since 17 June 2013, the operation of "outdoor firing ranges", which expressly includes "[a] facility, including its component shooting ranges, safety fans or shortfall zones, parking areas, all structures for classrooms; administrative offices, ammunition storage areas. . ." requires permitting, unless the property was issued a farm identification number for a bona fide farm use or purpose under Cumberland Cty., N.C., Zoning Ordinance § 109 (2010) or the uses fall within the stated exemptions provided in the Text Amendment. *Id.*

B. Bona Fide Farm Use

1. Standard of Review

Error will not be presumed on appeal. "Instead, the ruling of the court below in the consideration of an appeal therefrom is presumed to be correct." *Beaman v. Southern Ry. Co.*, 238 N.C. 418, 420, 78 S.E.2d 182, 184 (1953) (internal quotation marks and citation omitted). It is the appellant's burden to show error occurring at the superior court.

This Court has also repeatedly emphasized that it is not the role of the appellate court to create an appeal for an appellant or to supplement an appellant's brief with legal authority or arguments not contained therein. *See, e.g.*, *Eaton v. Campbell*, 220 N.C. App. 521, 522, 725 S.E.2d 893, 894 (2012) (citations omitted).

2. County's Argument

The County argues that the superior court erred in concluding the Board had misinterpreted the exemption in the Text Amendment concerning "occasional target practice by individuals." The County also contends the superior court improperly invalidated the Notice of Violations, based upon a conclusion that the Hamptons used their property "for target shooting and weapon sighting with family and friends." The County also argues the superior court erred in concluding such use was "incidental to the[ir] enjoyment of the [Property]," such that the Hamptons' use is allowed without permitting under either, or both, of the County's Farm Exemption or Text Amendment exemptions.

The County directs our attention to evidence it contends shows that: (1) the Hamptons' use of the Property for firearms practice and training was routine and not occasional; (2) the ranges were not used for "target practice" but instead for formal training; and (3) the users exceeded the scope of "friends and family" to include "formal students."

The County specifically points to findings of fact 14 and 15 in the superior court's order as being contradicted by competent evidence

presented before the Board. The County also argues the superior court's conclusion of law 7 is contrary to law.

Findings of fact 14 and 15 of the superior court's order read:

> 14. The Petitioners' principal use of the subject property is for the Petitioners' home and farming operations.
>
> 15. The range is incidental to the enjoyment of the Petitioners' home and farm.

Conclusion of law 7 in the superior court's order reads:

> 7. The Petitioners' non-commercial use of the 100-yard range facility is a reasonable and incidental use of the property as both a home and farm site.

Findings of fact 14 and 15 in the superior court's order are summarizations of the uncontradicted evidence presented to the Board that the Hamptons' target range is an incidental use of their Property within bona fide farm purposes, based upon their improvements and uses after being issued a Farm Identification Number by the FSA. *See Cannon v. Zoning Bd. of Adjustment of City of Wilmington*, 65 N.C. App. 44, 47, 308 S.E.2d 735, 737 (1983) (finding it permissible for trial court to recite uncontroverted evidence in findings of fact section of order).

The superior court's conclusion of law 7 is supported by both findings of fact 14 and 15, which are recitations of the competent, uncontroverted evidence of the Hamptons' uses and improvements after having been issued a Farm Identification Number by the FSA. Conclusion of law 7 is a proper interpretation and conclusion, based on the bona fide farm purposes exemption contained in both N.C. Gen. Stat. § 153A-340 and § 109 of the Cumberland County Zoning Ordinance.

N.C. Gen. Stat. § 153A-340 provides bona fide farm purposes are exempt from permitting and use requirements of county zoning ordinances. N.C. Gen. Stat. § 153A-340 (2015).

> [W]hen the General Assembly granted authority to the counties to regulate and restrict the use of land by means of zoning ordinances in N.C. Gen. Stat. § 153A-340, including the power to regulate and restrict the "use of buildings, structures, and land for trade, industry, residence, or other purposes," it carved out one important exception to the counties' jurisdiction: the authority to regulate land being used for "[b]ona fide farm purposes." Specifically, county zoning "regulations may not affect bona fide farms, but

> any use of farm property for nonfarm purposes is subject to the regulations." N.C. Gen. Stat. § 153A-340. Although the statute does not define "bona fide farm," it does define "[b]ona fide farm purposes" to "include the production and activities relating or incidental to the production of crops, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agricultur[e,] [as defined in G.S. 106-581.1. *Id.*]

Sedman v. Rijdes, 127 N.C. App. 700, 703, 492 S.E.2d 620, 622 (1997); N.C. Gen. Stat. § 153A-340 (2015).

N.C. Gen. Stat. § 153A-340(a) provides a limited delegation of power to counties to implement zoning regulations. However, the statute preserves un-delegated power to the General Assembly and ultimately to the People, and severely limits the county's delegated police power to enact zoning regulations which may affect and purport to regulate property uses under the bona fide farm exemption. All property uses under bona fide farm purposes, with the exception of swine farms, are *exempt* from zoning permitting and use regulations. N.C. Gen. Stat. § 153A-340(b).

N.C. Gen. Stat. § 153A-340(b) provides:

> (b)(1) . . . This subsection does not limit regulation under this Part with respect to the *use* of farm property for nonfarm purposes.
>
> (2) . . . For purposes of determining *whether a property is being used for bona fide farm purposes*, any of the following *shall constitute sufficient evidence* that the property is being *used for bona fide farm purposes*:
>
> . . . .
>
> e. *A Farm Identification Number issued by the United States Department of Agriculture Farm Service Agency.*

N.C. Gen. Stat. § 153A-340(b)(1)-(2) (emphasis supplied).

"When 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." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citations omitted). The language of N.C. Gen. Stat. § 153A-340(b)(1)-(2) is clear and unambiguously provides that if the owners of real property have been issued a Farm Identification Number by the FSA, then that issuance and designation under the statute constitutes "sufficient evidence the property is being used for bona fide farm

purposes." N.C. Gen. Stat. § 153A-340(b)(1)-(2); *see Correll*, 332 N.C. at 144, 418 S.E.2d at 235.

The County does not dispute the Hamptons applied for and were issued a Farm Identification Number by the FSA for their Property. Furthermore, the County presented no evidence that the Hamptons' Property did not qualify for a Farm Identification Number or that the FSA improperly issued a Farm Identification Number to the Hamptons for their Property to be entitled to the exemption.

Earlier this year, the General Assembly amended N.C. Gen. Stat. § 153A-340(b)(2)e to remove "A Farm Identification Number issued by the United States Department of Agriculture Farm Service Agency" from the list of factors constituting sufficient evidence of bona fide farm use in 2017. That action does not affect the facts and controlling law before us. The County cited the Hamptons in violation of the county ordinance long prior to the effective date of the amendment of N.C. Gen. Stat. § 153A-340(b)(2). N.C. Sess. Laws 2017-108, effective 12 July 2017.

Because the Hamptons were undisputedly issued a Farm Identification Number by the FSA for the Property, their use of the Property for a bona fide farm purpose is established under the statute and ordinance as a matter of law. N.C. Gen. Stat. § 153A-340(b)(1)-(2). Their use of the property for target practice and related purposes is exempt from the County's zoning regulations under N.C. Gen. Stat. § 153A-340(b)(1) and Cumberland Cty., N.C., Zoning Ordinance § 109 (2010).

The majority's opinion asserts that finding the Hamptons' use of their property to be exempt from county zoning regulation, solely because of them having a Farm Identification Number, is in direct conflict with this Court's holding in *North Iredell Neighbors for Rural Life v. Iredell Cty.*, 196 N.C. App. 68, 77, 674 S.E.2d 436, 442 (2009). The instant case is not analogous with and is distinguishable from *North Iredell Neighbors*, as well as *Cty. of Durham v. Roberts*, 145 N.C. App. 665, 551 S.E.2d 494 (2001); *Sedman*, 127 N.C. App. 700, 492 S.E.2d 620; and *Baucom's Nursery Co. v. Mecklenburg County, N.C.*, 62 N.C. App. 396, 303 S.E.2d 236 (1983). None of those cases cited by the majority's opinion dealt with the issue of property having one of the five items listed in N.C. Gen. Stat. § 153A-340(b)(1)-(2), including a Farm Identification Number, which constitute sufficient evidence of bona fide farm use as a matter of law.

The majority's opinion interprets the five items listed in N.C. Gen. Stat. § 153A-340(b)(2), as only *generally* establishing a property is a bona fide farm. However, this interpretation contradicts the plain language of

the statute, which says "any of the following shall constitute sufficient evidence that *the property is being used for bona fide farm purposes*[.]" N.C. Gen. Stat. § 153A-340(b)(2) (emphasis supplied). The statute contains no qualification that limits the extent to which the five items listed therein expressly establish a "property is being used for bona fide farm purposes[.]" *Id.*

The majority opinion's interpretation of N.C. Gen. Stat. § 153A-340(b)(2) effectively overlooks or judicially "repeals" the plain statutory language that a Farm Identification Number, and the other four items in the statute, constitutes sufficient evidence that a property is being used for bona fide farm purposes. The plain language of the statute contains no such limitation. Our standards of review and canons of statutory construction do not allow the majority's "nose under the tent." We are compelled to give a statute "its plain and definite meaning." Under controlling canons of construction and the lack of any ambiguity, such a judicially "enacted" limitation should not be read into N.C. Gen. Stat. § 153A-340(b)(2). *See Correll*, 332 N.C. at 144, 418 S.E.2d at 235.

The superior court properly applied *de novo* review to reverse the Board's legal conclusion, incorrectly labeled as Finding of Fact number 5, "that the Hampton[s'] use of the subject property for a firing range is not a permitted use under the Cumberland County Zoning Ordinance." Under strict construction of the ordinance, the superior court properly applied both N.C. Gen. Stat. § 153A-340(b)(1)-(2) and the express farm exemption in the Cumberland County Zoning Ordinance § 109 in concluding the Hamptons' use of their Property for a target range "is a reasonable and incidental use of the property as both a home and farm site" and the uncontested fact recited in the superior court's order that the Hamptons "obtained a farm number from the United States Department of Agriculture for the subject property."

"The [County bears] the burden of proving the existence of an operation in violation of its zoning ordinance." *City of Winston*-Salem, 47 N.C. App. at 414, 267 S.E.2d at 575. It is the County's burden as the appellant to show reversible error occurring at the superior court. *See Beaman*, 238 N.C. at 420, 78 S.E.2d at 184.

The County does not contest the Hamptons' evidence that they applied for and were issued a Farm Identification Number from the FSA for the property at issue. The County failed to meet or carry its burden of proving the existence of any violation of its zoning ordinance. The County's assignments of error in the superior court's findings of fact 14 and 15 and that portion of conclusion of law 7 are properly overruled.

C. Commercial v. Non-Commercial

The County argues the superior court made an incorrect distinction between commercial and non-commercial uses in its conclusions of law 7 through 10 in interpreting the County zoning ordinance. The superior court's conclusions of law 7 through 10 read as follows:

> 7. The Petitioners' *non-commercial* use of the 100-yard range facility is a reasonable and incidental use of the property as both a home and farm site.
>
> 8. The Petitioners' *non-commercial* use of the 100-yard range facility for target shooting and weapon sighting with family and friends is a legal use of their property.
>
> 9. However, any use of the property for a *commercial* firing range would subject the property to the permit requirements of the currently existing Firing Range Ordinance.
>
> 10. Furthermore, any use of the property for a *non-commercial* firing range exceeding a distance of 100 yards may make the use of the firing range non-incidental to the use of the property for farm and residential purposes. (Emphasis supplied.)

The Text Amendment applying to target ranges, County Zoning Ordinance § 402, and the County's Farm Exemption make no distinction between "commercial" and "non-commercial" uses. Furthermore, the bona fide farm exemption provided by N.C. Gen. Stat. § 153A-340(b)(1)-(2) and the county zoning ordinance make no distinction between "commercial" and "non-commercial" bona fide farm purposes when exempting uses of property from regulation and required permitting under county zoning ordinances. N.C. Gen. Stat. § 153A-340(b)(1)-(2).

The *only* evidence in the record to support the distinction made by the superior court between "commercial" and "non-commercial" uses comes from the testimony of the Code Enforcement Officer, who had cited the Hamptons in violation of the zoning ordinances. The officer testified at the Board's hearing that his basis for issuing the Notice of Violations was that he believed the target range was being used for "commercial activity."

As correctly noted and argued by the County, the zoning ordinances and the statutes do not distinguish between "commercial" and "non-commercial" uses of target ranges. Furthermore, the Notice of Violations issued to the Hamptons does not state it was issued because

their property was being used for "commercial purposes" as opposed to "non-commercial" or not for "bona fide farm purposes."

Also, charging admission or fees for or selling items produced by rural or agricultural activities, such as: hay rides; corn mazes; tractor pulls or contests; boarding and riding stables and lessons; rodeos; petting zoos; livestock; milk and cheese sales; hunting and fishing leases or access; turkey and ham shoots and contests; saw mills and wood sales; selling plants and seedlings; egg production and sales; winery tours and tastings; "you-pick" fruit and vegetable fields and gardens; roadside stands; and many other related activities, are part and parcel of North Carolina's common rural heritage and farming operations and are protected agritourism. *See* N.C. Gen. Stat. § 106-581.1(6) (2015) (including "agritourism" as within the meaning of "agriculture"), N.C. Gen. Stat. § 153A-340(b)(2) (including forms of "agriculture," as defined in N.C. Gen. Stat. § 106-581.1, to constitute bona fide farm purposes that are exempt from zoning).

The superior court's use of "non-commercial" and "commercial," specifically conclusion of law 9, stating "any use of the property for a commercial firing range would subject the property to the permit requirements of the currently existing Firing Range Ordinance[,]" is without any basis in the either the applicable County zoning ordinances or under North Carolina's general statutes. Those portions of the superior court's conclusions of law 7 through 10, to the extent they purport to establish "non-commercial" and "commercial" uses not mentioned in the ordinance, should be disregarded as surplus. Cumberland Cty., N.C., Zoning Ordinance § 402 ("All uses of property are allowed as a use by right. . . .").

The County has not challenged, and the Hamptons have not cross-appealed, that portion of the superior court's conclusion of law 10, which states the Hamptons' use of their property as a firing range would become non-incidental to a farm use or other exempt purposes, if it were expanded to exceed 100 yards in length. *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999) (stating that "[f]ailure to [challenge a conclusion] constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts.") In light of the lack of challenges from either party, the superior court's conclusion of law 10 properly remains undisturbed.

IV. Conclusion

"Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which

is not clearly [within] their express terms. It has been held that well-founded doubts as to the meaning of obscure provisions of a Zoning Ordinance should be resolved in favor of the free use of property." *Yancey*, 268 N.C. at 266, 150 S.E.2d at 443 (citation and quotation marks omitted). The superior court properly construed the statutes and ordinances consistent with these canons of construction.

"The longstanding rule is that there is a presumption in favor of regularity and correctness in proceedings in the [superior] court, with the burden on the appellant to show error." *L. Harvey & Son Co. v. Jarman*, 76 N.C. App. 191, 195-96, 333 S.E.2d 47, 50 (1985) (citing *In re Moore*, 306 N.C. 394, 293 S.E.2d 127 (1982), *app. dism.*, 459 U.S. 1139, 74 L.Ed.2d 987 (1983)). The County, as the appellant, had the burden on appeal to show reversible error in the superior court's order. They have failed to do so here. The portion of the superior court's order, which reversed the Board of Adjustment's conclusion and decision, that the Hamptons' use of their property for target practice of firearms and sighting of weapons was in violation of the County zoning ordinance's permit and site plan requirements, is properly affirmed.

As the County correctly notes, the superior court's conclusion to distinguish between "commercial" and "non-commercial" uses, which is based solely upon the County's code enforcement officer's testimony of his motivation to issue the Notice of Violations, is surplus and without any basis under either the bona fide farm use provisions under the controlling statutes or the farm and Text Amendment exemptions in the County zoning ordinance.

The superior court's conclusion of law 10, which states the Hamptons' use of their property as a target range would become non-incidental to bona fide farm uses, if it were expanded to exceed 100 yards in length, is unchallenged by either party and properly remains undisturbed.

The superior court's order should be affirmed and remanded to the superior court with instructions to further remand to the Board for the purpose of rescinding the Notice of Violations. I respectfully dissent.

APRIL HAWKINS, EMPLOYEE, PLAINTIFF
v.
WILKES REGIONAL MEDICAL CENTER, EMPLOYER, AND KEY RISK INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA16-893

Filed 5 December 2017

Workers' Compensation—validity of claim—failure to name specific insurance company—claim against employer

The Industrial Commission erred in a workers' compensation case by denying plaintiff worker's claim due to her failure to file a claim against a specific insurance company. Plaintiff's claim was against her employer who had the statutory obligation to maintain workers' compensation insurance. Any dispute plaintiff's employer may have had with its insurers over coverage was not relevant to the validity of plaintiff's claim against her employer.

Appeal by plaintiff from opinion and award entered on or about 31 May 2016 by the Full Commission. Heard in the Court of Appeals 6 February 2017.

The Law Offices of Timothy D. Welborn, P.A., by Timothy D. Welborn, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones and Tonya D. Davis, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from an opinion and award denying her additional compensation because she failed to file a claim against her employer's insurance company. Because plaintiff timely filed her claim for her back injury against her employer, the Industrial Commission erred in denying her claim due to her failure to file a claim against a specific insurance company. Plaintiff's claim is against her employer; her employer has the statutory obligation to maintain workers' compensation insurance and is responsible for work-related compensable injuries. Any dispute plaintiff's employer may have with its insurers is not relevant to the validity of plaintiff's claim against her employer. We therefore reverse and remand for further proceedings.

I. Background

Plaintiff sustained a lower back injury while working for defendant-employer as a nurse in 2007; plaintiff filed a workers' compensation claim, and defendant-employer admitted plaintiff's right to compensation. In 2008, plaintiff filed Form 28B and requested additional compensation for her 2007 injury. Over the course of the next five years, plaintiff had several other incidents at work which exacerbated her back injury, with no dispute as to whether these were compensable injuries, and defendant-employer continued to provide medical compensation, until plaintiff eventually returned to full duty work.[1] During this five year period, defendant-employer's insurance company changed at least twice. In January of 2012, plaintiff again "sustained another injury" to her back at work and "was diagnosed with recurrent lumbar pain[.]" Plaintiff returned to Dr. Maxy, who had treated her starting in 2007 for her lower back injury. As the Commission found,

> Dr. Maxy examined Plaintiff, and given that she had failed conservative treatment, he referred her for a new MRI. Plaintiff had been out of work, and he continued light duty work until she could be re-evaluated.
>
> 38. Plaintiff was out of work from January 14 through February 9, 2012 due to the January 12, 2012 accident and injury.
>
> 39. After Dr. Maxy referred Plaintiff for a lumbar MRI on February 3, 2012, Plaintiff requested that Synergy authorize the MRI. Upon Synergy's refusal to authorize the MRI and treatment, Plaintiff filed a Motion to compel authorization, to which Synergy responded in opposition. Synergy pointed out that Plaintiff was required to file a new claim against United Heartland considering that she had sustained an injury to her low back on January 12, 2012.
>
> 40. Plaintiff never underwent the MRI recommended by Dr. Maxy on February 3, 2012.

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1. Plaintiff also reported and was treated for a work-related incident which injured her neck and shoulders at work on 7 August 2010, and she was in an automobile accident in December 2010 which mildly increased her neck pain. In 2012, "Plaintiff entered into a full and final settlement agreement with Synergy Coverage Solutions [,the employer's insurance carrier in 2010,] regarding the August 7, 2010 incident." According to the Commission's findings, the 2012 incident in question in this appeal involved her low back, just as the 2007 back injury did. In 2015, plaintiff also sustained another work-related injury to her neck which is the subject of another workers' compensation claim not at issue before us.

In September of 2014, defendants filed a Form 33 requesting that plaintiff's claim be assigned for hearing because they "dispute[d] that Plaintiff's low back condition since January 12, 2012 is causally related to the accident and injury of April 10, 2007[;]" defendants did not contest that plaintiff was injured in 2012 but rather whether the 2012 injury was related to her 2007 injury. In response, on 15 September 2014, plaintiff filed a Form 33R stating that "Plaintiff contends that her back condition since January 12, 2012 is causally related to the accident and injury of April 10, 2007."

In 2007, defendant-employer's insurance company was defendant Key Risk Insurance Company, the named defendant-insurer in this appeal. But in 2012, defendant-employer's insurance company was United Wisconsin Insurance Company/United Heartland Insurance Company ("United Heartland") which is not a party on appeal. Thus, defendants argued that United Heartland was not liable for plaintiff's 2012 injury because it was a new injury, not related to the 2007 injury, and defendant Key Risk was not the insurer at the time of the 2012 injury.

Thereafter, in November of 2014, defendant Key Risk moved to add United Heartland as a party-defendant because "Plaintiff had long ago recovered by the time the January 2012 incident occurred[,]" and therefore United Heartland was the proper named insurer for the new 2012 injury. In December of 2014, United Heartland responded to defendant Key Risk's motion and requested it be denied because plaintiff had not filed for compensation against United Heartland within two years of the 2012 injury, and under North Carolina General Statute § 97-24, her "right to compensation expire[d]" for want of jurisdiction.

To be clear, United Heartland did not contest that plaintiff had filed a proper claim for her 2012 injury with defendant-employer, but rather contended that plaintiff was required to name United Heartland specifically as the insurer within the two-year period to file a valid claim. The Commission denied defendant Key Risk's motion to add United Heartland as a party. The order did not give any rationale for the denial but stated only: "IT IS HEREBY ORDERED that Key Risk Insurance Company's Motion to Add United Wisconsin Insurance Company/United Heartland Insurance Company is DENIED at this time. NO COSTS are assessed at this time." This order is not before us on appeal.

On 31 May 2016, the Full Commission of the North Carolina Industrial Commission entered an opinion and award regarding plaintiff's workers' compensation claim, addressing only plaintiff's request for additional compensation arising from her 2007 injury. The issue to be determined, as stated in the opinion and award, was "[w]hether

Plaintiff's current low back condition is causally related to the low back injury she sustained on April 10, 2007 such that Key Risk Insurance Company has ongoing liability?" The Full Commission made many findings of the history of plaintiff's injuries and treatment since 2007 and seven conclusions of law which demonstrate the Full Commission determined plaintiff sustained a work-related injury in January of 2012, but it did not determine that the 2012 injury "was caused by her" April 2007 injury. The Full Commission ultimately determined "Plaintiff's current back condition was caused by her January 12, 2012 injury, not her April 10, 2007 injury." The Commission concluded,

> The preponderance of the evidence in view of the entire record shows that Plaintiff's current back condition is related to the January 12, 2012 accident that materially aggravated a preexisting back condition. Defendant Key Risk was not the carrier for Employer-Defendant on this date. When an employee with a preexisting condition suffers an injury by accident arising out of and in the course of her employment, and the injury materially accelerates or aggravates the preexisting infirmity and thus proximately contributes to the disability of the employee, the injury is compensable. *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 64 S.E.2d 265 (1951). The January 12, 2012 accident was a separate accident that materially aggravated Plaintiff's preexisting back condition, and she could have filed a new workers' compensation claim against United Heartland, who was Employer-Defendant's workers' compensation insurance carrier on January 12, 2012. Plaintiff's current back condition was caused by her January 12, 2012 injury, not her April 10, 2007 injury. Therefore, Key Risk is not liable for disability compensation or medical expenses related to Plaintiff's current back condition. *Id.*

The Full Commission ultimately concluded that plaintiff's claim for further compensation failed because

> [t]he right to compensation under the North Carolina Workers' Compensation Act is forever barred unless a claim is filed with the Commission or the employee is paid compensation within two years after the accident. N.C. Gen. Stat § 97-24. Plaintiff had two years from January 12, 2012, or through January 12, 2014, to file a claim *against United Heartland*. Plaintiff failed to file a claim and is thus barred. N.C. Gen. Stat. § 97-24.

(Emphasis added.) Thus, the Commission ultimately determined plaintiff's claim was barred because she had not brought a timely claim *against the insurer*, United Heartland. Plaintiff appeals.

II. Named Insurer

On appeal, plaintiff argues she timely filed her claim against her employer and was not required to name a specific insurance company. There is no real dispute about the relevant facts of plaintiff's injuries, and as framed by the Commission, the issue of whether plaintiff was required by statute to specifically name the proper insurance company of her employer is a question of law, which we review *de novo*. *See Moore v. City of Raleigh*, 135 N.C. App. 332, 334, 520 S.E.2d 133, 136 (1999) (citation and quotation marks omitted) ("The Industrial Commission's conclusions of law are reviewable *de novo* by this Court.")

Since this case presents a question of law, we note first that neither the Commission's opinion and award nor defendants' brief cited any law to support the proposition that the employee must bring a workers' compensation claim against a specific insurance carrier, nor can we find any such law. The Commission's findings and defendants' arguments focus throughout on the identity of the insurance carrier for defendant-employer on the various dates of plaintiff's back injuries and treatment. But North Carolina General Statute § 97-97 clearly places the responsibility for compensation for work-related injuries on the *employer* and provides that notice to the employer is notice to the carrier:

> All policies insuring the payment of compensation under this Article must contain a clause to the effect that, *as between the employer and the insurer the notice to or acknowledgment of the occurrence of the injury on the part of the insured employer shall be deemed notice or knowledge as the case may be, on the part of the insurer; that jurisdiction of the insured for the purposes of this Article shall be jurisdiction of the insurer*, that the insurer shall in all things be bound by and subject to the awards, judgments, or decrees rendered against such insured employer, and that insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the insurer from the payment of compensation for disability or death sustained by an employee during the life of such policy or contract.

N.C. Gen. Stat. § 97-97 (2007) (emphasis added). In *Collins v. Garber*, our Court stated that "[p]ursuant to 97-97, notice to or acknowledgment

of the occurrence of the injury on the part of the insured employer shall be deemed notice or knowledge as the case may be, on the part of the insurer; that jurisdiction of the insured shall be jurisdiction of the insurer." 72 N.C. App. 652, 656, 325 S.E.2d 21, 23 (1985) (ellipses omitted).

North Carolina General Statute § 97-22 provides that

> [e]very injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the *employer* a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Article prior to the giving of such notice . . . .

N.C. Gen. Stat. § 97-22 (2007) (emphasis added). There is no question that plaintiff timely gave notice of "the occurrence" of her back injury in 2012 to defendant-employer, even if she identified the wrong insurance carrier. *Id.* Whether the 2012 injury was a new injury or an exacerbation of her prior 2007 injury, her employer was the same at all times, and her employer was provided prompt notice of each and every incident.

Since we can find no cases addressing this point beyond *Collins*, 72 N.C. App. at 656, 325 S.E.2d at 23, we turn to the Industrial Commission's own standard forms and find they also reflect the necessity for the employee to notify the *employer* of a claim, but place the burden of identification of the proper insurance carrier on the employer and Industrial Commission. For example, Form 18 requires the employee to name the employer, but the instructions accompanying the form, the "General Information on the Form 18" note the following:

> 4. What if I do not know who my employer's insurance carrier is?
>
> If you do not know who the employer's insurance carrier is you may either ask your employer for the information, call the Industrial Commission's Claims Administration Section at (800) 688-8349 then press "1" after the prompt, or simply leave the line blank.

The employee's correct identification of the employer's insurance carrier is not a jurisdictional requirement of a workers' compensation claim.

Defendants argue that "Plaintiff misconstrues the case law on specific traumatic incident" and notes that

> [t]he Workers' Compensation Act treats back injuries differently than other injuries. While most injuries must occur as a result of an accident,
>
> > [w]ith respect to back injuries, however, where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.
>
> N.C. Gen. Stat. § 97-2(6) (2016). This Court has confirmed that that (sic) a specific traumatic incident which aggravates a pre-existing condition is compensable. Goforth v. K-mart Corp., 167 N.C. App. 618, 622-23, 605 S.E.2d 709, 713 (2004). Our legislature has already liberalized the Act to include an aggravation of a pre-existing back injury without the need of an accident. As such, an employee may suffer several continuous compensable injuries merely by successively aggravating one original injury, whether or not that original injury was compensable.
>
> Once a successive back injury occurs which aggravates the pre-existing injury, the *employer becomes responsible both for any new injury and the aggravation of the previous injury.*

(Emphasis added.)

Defendants then note that plaintiff sustained a back injury on 7 August 2010 and filed a Form 18 which listed Builders Insurance/Synergy as the insurer, and Builders Insurance admitted liability for the back injury; this admission would have included "acceptance of the aggravation of any previous back injuries[;]" but the Commission did not make this finding. The Full Commission found that plaintiff settled her claim for the 2010 injury, but also found that the 2010 incident also involved her neck and shoulders, not only her back. In any event, the Commission did not determine that plaintiff had entered into a full and final settlement with Builders Insurance/Synergy which would have barred her from any claim for exacerbation of her lower back condition; the Commission simply determined that plaintiff brought her claim against the wrong insurance carrier since it determined that she sustained a new back injury in 2012.

But ultimately we agree with defendants' assertion that "[o]nce a successive back injury occurs which aggravates the pre-existing injury, the employer becomes responsible both for any new injury and the aggravation of the previous injury[;]" the *employer* is responsible either way. The Commission's findings support plaintiff's claim that she sustained a compensable back injury in 2012 and the defendant-employer had immediate notice of this injury. The defendant-employer is responsible for compensation for the plaintiff's back injury and plaintiff need only notify her employer under North Carolina General Statute § 97-97. *See* N.C. Gen. Stat. § 97-97. Any dispute defendant-employer may have with its insurance carriers as to coverage of its liability for plaintiff's injury is beyond the scope of this appeal. Because portions of the Commission's order were based upon an error of law, we reverse and remand.

III. Conclusion

For the foregoing reasons, we reverse and remand for further proceedings.

REVERSED and REMANDED.

Chief Judge McGEE and Judge TYSON concur.

IN THE MATTER OF J.S.K. AND J.E.K.

No. COA17-486

Filed 5 December 2017

1. Appeal and Error—appealability—denial of motion to dismiss—final judgment

The denial of a Rule 12(b)(6) motion to dismiss a motion in the cause to terminate a mother's parental rights was heard on appeal even though there was a final judgment. The motion to dismiss was an oral motion made at the beginning of the termination hearing, not a written motion with a pretrial hearing and a separate order. The final termination order was the only written order in the record referring to the denial of the motion to dismiss, and there was no other order from which the mother could appeal.

2. Termination of Parental Rights—allegations—repetition of statutory requirements—not sufficient

IN RE J.S.K.

[256 N.C. App. 702 (2017)]

The trial court erred by denying a mother's motion to dismiss a motion in a termination of parental rights case where the allegations in the motion to terminate were bare recitations of the statutory grounds for termination and were insufficient to put the mother on notice as to what was at issue. The motion to terminate did not incorporate prior orders, and the custody order did not contain sufficient additional facts to warrant termination.

Appeal by respondent-mother from order entered 17 February 2017 by Judge William G. Hamby, Jr. in Cabarrus County District Court. Heard in the Court of Appeals 16 November 2017.

Hartsell & Williams, P.A., by Brittany M. Love and H. Jay White, for petitioner-appellee Cabarrus County Department of Human Services.

Michelle S. Spak for guardian ad litem.

Julie C. Boyer for respondent-appellant mother.

BERGER, Judge.

Respondent-mother appeals from the trial court's order terminating her parental rights to her minor children, J.S.K. and J.E.K. Respondent-mother argues the trial court erred in denying her motion to dismiss because the motion to terminate her parental rights did not allege sufficient facts. For the following reasons, we reverse.

Factual & Procedural Background

The Cabarrus County Department of Human Services ("CCDHS") filed juvenile petitions on January 16, 2015 alleging that the children were neglected due to Respondent-mother's history of untreated mental health and substance abuse issues, domestic violence, and improper care.

CCDHS took the children into nonsecure custody, and a hearing was held on the petitions on June 11, 2015. The trial court's August 26, 2015 order adjudicated the children neglected as alleged in the petitions. The trial court set the permanent plan as reunification and granted Respondent-mother one hour of supervised visitation a week.

The trial court changed the permanent plan to adoption after a review hearing on November 12, 2015. The trial court found that Respondent-mother's progress in correcting the conditions which led

to the children's removal was "insufficient for the court to be assured that the juveniles could safely return to her care." The trial court ceased reunification efforts with Respondent-mother in a permanency planning order entered January 4, 2016.

On May 20, 2016, CCDHS filed a motion in the cause to terminate Respondent-mother's parental rights to both children. The motion alleged that the minor children were neglected and dependent juveniles; that Respondent-mother had willfully left the children in care or placement outside her custody for twelve months without showing reasonable progress in correcting the conditions which led to their placement; and that Respondent-mother willfully failed to pay a reasonable cost of care. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3) (2015).

At the start of the termination hearing on November 10, 2016, Respondent-mother moved to dismiss the motion to terminate her parental rights, arguing that the motion merely recited the statutory grounds without alleging any specific facts. In an order entered February 17, 2017, the trial court terminated Respondent-mother's parental rights to both children based on all alleged grounds. Respondent-mother timely appealed, and argues the trial court erred in denying her motion to dismiss because the motion to terminate her parental rights did not state facts sufficient to warrant a determination that one or more grounds for termination of parental rights existed. We agree.

Standard of Review

"On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted." *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation, internal quotation marks, and brackets omitted), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 234 (2009). "We consider the allegations in the complaint true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Green v. Kearney*, 203 N.C. App. 260, 266-67, 690 S.E.2d 755, 761 (2010) (citation omitted).

Analysis

[1] Initially, we address the well-settled rule that denial of a motion to dismiss is not reviewable on appeal when there is a final judgment on the merits. *See Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 682-83, 340 S.E.2d 755, 758-59, *cert. denied*, 317 N.C. 333, 346

S.E.2d 137 (1986). However, this Court has deviated from that rule in termination proceedings. *See In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002); *see also In re Quevedo*, 106 N.C. App. 574, 578, 419 S.E.2d 158, 159, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992).

CCDHS argues that Respondent-mother's appeal must be dismissed because she seeks review of the trial court's denial of her Rule 12(b)(6) motion having only given notice of appeal from the final order terminating her parental rights. However, Respondent-mother's motion to dismiss pursuant to Rule 12(b)(6) was not a written motion made at a pretrial hearing from which a separate order was entered. Rather, it was an oral motion made at the beginning of the hearing on the motion to terminate her parental rights. Thus, the final termination order is the only written order in the record on appeal referencing the denial of Respondent-mother's motion to dismiss. In finding of fact number eight, the trial court found that it denied her motion because CCDHS filed a motion in the cause to terminate Respondent-mother's parental rights, and not a petition for termination of parental rights, and therefore Respondent-mother "had notice from the underlying Abuse, Neglect, and Dependency file as to the specific allegations and grounds for termination." Given that there is no other order from which Respondent-mother could appeal the denial of her motion to dismiss, we address Respondent-mother's argument.

[2] A petition or motion to terminate parental rights must allege "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights [listed in N.C.G.S. § 7B–1111(a)] exist." N.C. Gen. Stat. § 7B-1104(6) (2015). While the facts alleged need not be "exhaustive or extensive," they must be sufficient to "put a party on notice as to what acts, omissions or conditions are at issue." *Hardesty*, 150 N.C. App. at 384, 563 S.E.2d at 82. A petition which sets forth only a "bare recitation . . . of the alleged statutory grounds for termination" does not meet this standard. *Quevedo*, 106 N.C. App. at 579, 419 S.E.2d at 160 (emphasis omitted) (construing predecessor statute, N.C. Gen. Stat. § 7A-289.25(6)). N.C. Gen. Stat. § 7B-1104 makes no distinction between the facts required to be alleged in a petition or motion to terminate parental rights. In other words, the mere fact that a motion in the cause to terminate parental rights has been filed, as opposed to a petition to terminate parental rights, does not relieve the moving party of the necessity to follow N.C. Gen. Stat. § 7B-1104(6).

In *Hardesty*, the respondent challenged the sufficiency of the petition to terminate her parental rights by a Rule 12(b)(6) motion to dismiss for failure to state a claim, which the trial court denied. *Hardesty*,

150 N.C. App. at 383, 563 S.E.2d. at 82. On appeal, this Court reversed the trial court's termination order holding that the petition, which "merely used words similar to those in the statute setting out grounds for termination, alleged illegitimacy, and alleged that [the juvenile] had spent his entire life in foster care[,]" was insufficient to put the party on notice as to what acts, omissions, or conditions were at issue, and the motion to dismiss should have been granted. *Id.* at 384, 563 S.E.2d at 82 (citation omitted).

In *Quevedo*, the respondent made a pretrial motion for judgment on the pleadings pursuant to Rule 12(c), which the trial court denied. *Quevedo*, 106 N.C. App. at 578, 419 S.E.2d at 159. On appeal, this Court treated the respondent's motion as a Rule 12(b)(6) motion to dismiss for failure to state a claim because the basis of the motion was that the petition failed to state sufficient facts as required by the statute. *Id.* This Court held that "petitioners' bare recitation . . . of the alleged statutory *grounds* for termination does not comply with the [statutory] requirement [ ] that the petition state *facts* which are sufficient to warrant a determination that grounds exist to warrant termination." *Id.* at 579, 419 S.E.2d at 160 (citation and internal quotation marks omitted). However, the *Quevedo* Court upheld the denial of the motion because the petition incorporated an attached custody order which stated sufficient facts to warrant such a determination. *Id.*

Here, the motion to terminate parental rights alleged that Respondent-mother:

> a. Has caused the juveniles to be neglected, as defined in N.C. Gen. Stat. §[]7B-101(15) as set out in N.C. Gen. Stat. §7B-1111(a)(1) in that each is in need of assistance of placement, because her known parent is unwilling and unable to provide for her care or supervision and lacks an appropriate alternative to childcare arrangement. The juveniles do not have a parent, guardian, or custodian that will accept responsibility for the juveniles' care or supervision and the juveniles' parent, guardian, or custodian is unwilling and unable to provide for the juveniles' care or supervision and lacks an appropriate alternative child care arrangement.
>
> b. Has willfully left the juveniles in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juveniles on January 16, 2015, N.C. Gen. Stat. §7B-1111(a)(2);

> c. Has willfully failed to pay a reasonable portion of the costs of care for the juveniles, although physically and financially able to do so, for a continuous period of six months next preceding the filing of this Motion while the juveniles have 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, N.C. Gen. Stat. §7B-1111(a)(3);
>
> d. Has caused the juveniles to be dependent as defined in N.C. Gen. Stat. §[]7B-101 (9) as set out in N.C. Gen. Stat. §7B-1111(a)(1) in that the parent is incapable of providing the proper care and supervision of the juveniles and there is reasonable probability that such incapability will continue for the unforeseeable future, N.C. Gen. Stat. §7B-1111(a)(6).

Because these allegations are bare recitations of the alleged statutory grounds for termination listed in N.C. Gen. Stat. § 7B-1111, the motion to terminate Respondent-mother's parental rights failed to comply with N.C. Gen. Stat. § 7B-1104(6) and was insufficient to put Respondent-mother on notice as to what acts, omissions, or conditions were at issue. *See Hardesty*, 150 N.C. App. at 384, 563 S.E.2d at 82. Unlike in *Quevedo*, the motion to terminate parental rights in this case did not incorporate any prior orders and the attached custody order did not contain any additional facts sufficient to warrant a determination that grounds existed to terminate Respondent-mother's parental rights. Therefore, the trial court erred in denying Respondent-mother's motion to dismiss. Accordingly, we reverse the trial court's order terminating Respondent-mother's parental rights.

REVERSED.

Judges ELMORE and ARROWOOD concur.

MAXTON McDOWELL AND WANDA McDOWELL, PLAINTIFFS
v.
RANDOLPH COUNTY AND THE RANDOLPH COUNTY BOARD OF COUNTY COMMISSIONERS, DEFENDANTS

No. COA17-401

Filed 5 December 2017

1. Zoning—rezoning amendment—modified site plan—not arbitrary and capricious

The trial court did not err in a zoning case by concluding defendant county board of commissioners did not act arbitrarily and capriciously when it rezoned property to approve a modified site plan where the proposed relocation of a chemical vat could make the property safer, reduce emissions, and lower the probability of runoff or spills onto adjoining properties.

2. Zoning—rezoning amendment—consistency statement—not null and void—reasonable—public interest

The trial court did not err in a zoning case by concluding a rezoning amendment was not null and void where defendants adopted a proper consistency statement under N.C.G.S. § 153A-341 that showed the amendment was reasonable and in the public interest.

3. Zoning—rezoning amendment—spot zoning—relocation of existing chemical vat

The trial court did not err in a zoning case by concluding a rezoning amendment was not null and void based on alleged illegal spot zoning where defendant County Board of Commissioners merely approved the relocation of an existing chemical vat to another location on the subject property when it approved the modification to a site plan.

Appeal by plaintiffs from order entered 26 January 2017 by Judge Edwin G. Wilson in Randolph County Superior Court. Heard in the Court of Appeals 1 November 2017.

The Brough Law Firm, PLLC, by Robert E. Hornik, Jr. and Kevin R. Hornik, for plaintiff-appellants.

Smith Moore Leatherwood LLP, by Kip David Nelson and Thomas E. Terrell, Jr., for defendant-appellees.

TYSON, Judge.

Maxton McDowell and Wanda McDowell ("Plaintiffs") appeal the trial court's entry of summary judgment in favor of Randolph County ("Defendant-County") and the Randolph County Board of County Commissioners ("Defendant-Board") (collectively, "Defendants"). This case involves the question of whether Randolph County properly "re-zoned" certain real property bordering Plaintiffs' property. We affirm the superior court's order.

I. Background

The record tends to show the following: Plaintiffs own and reside on certain real property located at 5354 Old N.C. Highway 49 in Randolph County. Maxton McDowell also owns a parcel of land on the south side of Old N.C. Highway 49 adjacent to certain real property owned by the McDowell Family Limited Partnership ("MFLP"). A portion of MFLP's property (the "Subject Property") is used by the McDowell Lumber Company (the "Lumber Company") as a saw mill, planing operation, and pallet-making operation.

Since about 1987, Defendant-County has maintained a zoning ordinance, referred to as the Unified Development Ordinance ("UDO") which governs and regulates the uses of land in the county. Defendant-County also maintains a land use plan called the "Randolph County Growth Management Plan" (the "Plan").

In 2009, Randolph County amended the Plan to include the Rural Industrial Overlay District zoning classification. The Rural Industrial Overlay District "is intended to accommodate industrial activities and uses requiring proximity to rural resources where the use of site specific development plans, natural buffers and landscaping, would lessen adverse impact upon the general growth characteristics anticipated by the Growth Management Plan." Randolph County, Uniform Development Ordinance Art. VII, § I (Apr. 6, 2009).

Also included in the Plan is the Rural Industrial Overlay Conditional District zoning classification. The Rural Industrial Overlay Conditional District is "identical to the Rural Industrial Overlay District except site plans and individualized development conditions are imposed only upon petition of all owners of the land." *Id.*

The Subject Property was rezoned by Defendant-Board to the Rural Industrial Overlay Conditional District classification ("CZ-RIO") in 2010 at the request of MFLP. The representative for the Lumber Company

submitted a site plan for the Subject Property with the 2010 rezoning request. Defendant-Board approved the 2010 rezoning request with the condition that the Lumber Company conform its use of the property to the specifications set out in the site plan.

In April 2016, the Lumber Company filed and requested a rezoning application to modify its site plan, by relocating a chemical vat. On 6 June 2016, Defendant-Board approved the Lumber Company's rezoning request. Defendant-Board made no change in the Subject Property's, nor any other adjoining property's, zoning classification, but approved only a modification to the Subject Property's site plan. The modification to the site plan permits the Lumber Company to relocate an existing chemical-containing vat to a different location within the Subject Property and to build a concrete pad and structure to partially enclose it.

Plaintiffs brought suit against Defendants on 3 August 2016. Plaintiffs alleged that the rezoning was null and void because (1) Defendant-Board's decision was arbitrary and capricious, (2) Defendants had failed to adopt a proper consistency statement, and (3) Defendants engaged in illegal spot zoning.

Defendants moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure on the grounds that the Board retained the statutory authority to "change the zoning and zoning conditions of all properties within the county, and the rezoning decision complied with all statutorily required procedures and was not illegal spot zoning." *See* N.C. Gen. Stat. § 1A-1, Rule 56 (2015). Plaintiffs filed a cross-motion for summary judgment pursuant to Rule 56. *Id.*

On 26 January 2017, the trial court granted Defendants' motion for summary judgment and denied Plaintiffs' motion for summary judgment. Plaintiffs timely appealed the superior court's judgment.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b) (2015) as an appeal from a superior court's order in a civil action disposing of all the parties' issues.

III. Standard of Review

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A–1, Rule 56(c). The moving party bears the burden

of demonstrating the lack of triable issues of fact. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). On appeal from summary judgment, "[w]e review the record in the light most favorable to the non-moving party." *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 165, 557 S.E.2d 610, 612 (2001) (citing *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975)), *aff'd*, 355 N.C. 485, 562 S.E.2d 422 (2002). "We review a trial court's order granting summary judgment *de novo[.]" Adkins v. Stanly Cty. Bd. of Educ.*, 203 N.C. App. 642, 644, 692 S.E.2d 470, 472 (2010).

IV. Analysis

Plaintiffs renew their arguments made before the superior court in opposition to Defendants' motion for summary judgment and in support of their own motion for summary judgment. Plaintiffs assert Defendants' rezoning amendment is null and void because: (1) Defendant-Board's decision was arbitrary and capricious, (2) Defendants failed to adopt a proper consistency statement, and (3) Defendants engaged in illegal spot zoning. We address each argument in turn.

A. *Arbitrary and Capricious*

[1] Plaintiffs argue Defendant-Board acted arbitrarily and capriciously when it rezoned the property to approve the modified site plan. We disagree.

> The Constitution imposes limits on the legislative power to zone by forbidding arbitrary, capricious, and unduly discriminatory interference with the rights of property owners. This standard is a very difficult standard to meet. A decision is arbitrary and capricious if it was patently in bad faith, whimsical, or if it lacked fair and careful consideration. In deciding whether a decision is arbitrary and capricious, courts must apply the whole record test.

Summers v. City of Charlotte, 149 N.C. App. 509, 518, 562 S.E.2d 18, 25 (2002) (internal quotations and citations omitted).

Under *de novo* review, on questions of law "[a] reviewing court is not free to substitute [its] opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body." *Ashby v. Town of Cary*, 161 N.C. App. 499, 503, 588 S.E.2d 572, 574 (2003) (internal quotations and citation omitted). A rezoning decision can only be deemed improper if "the record demonstrates that it had no foundation in reason and bears no substantial relation to the

public health, the public morals, the public safety or the public welfare in its proper sense." *Id.* (quotation marks and citation omitted).

Under the deferential review of the Board's factual findings, "[t]he whole record test requires the reviewing court to examine all the competent evidence . . . which comprises the whole record to determine if there is substantial evidence in the record to support the [Board's] findings and conclusions." *Northwest Prop. Grp., LLC v. Town of Carrboro*, 201 N.C. App. 449, 456, 687 S.E.2d 1, 6 (2009) (internal quotations and citations omitted). "The 'whole record' test does not allow the reviewing court to replace the [Board's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Id.* (quoting *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)).

Defendant-Board reached its decision to rezone the Subject Property by granting the Lumber Company's modified site plan. The modified site plan specifies moving the existing chemical-containing vat at issue onto a concrete pad to divert storm water runoff to an on-site retention pond, adding a cover over the vat, and the addition of walls to block the view of the vat.

The minutes of the 6 June 2016 hearing of Defendant-Board on the decision to review the Lumber Company's petition show Defendant-Board received testimony from the Lumber Company's representative. The Lumber Company representative asserted the relocation of the vat as shown on the proposed site plan would reduce the dust, noise, and emissions on and from the Subject Property, and cut the driving time of the Lumber Company's vehicles in half.

Defendant-Board found the rezoning amendment to be in furtherance of the 2009 Randolph County Growth Management Policy by furthering the goal of "[e]nsur[ing] the opportunity for landowners to achieve the highest and best uses of their land that are consistent with growth management policies in order to protect the economic viability of the County's citizens and tax bases."

Defendant-Board had several plausible bases to justify its decision to rezone the Subject Property by granting the Lumber Company's modification to the site plan. No genuine issue of material fact exists to show Defendants' conduct was whimsical or exercised patently in bad faith. The proposed relocation of the chemical vat arguably will make the Subject Property safer, reduce emissions and lower the probability of runoff or spills onto adjoining properties. Plaintiffs' arguments are overruled.

B. *Statement of Consistency*

[2] Plaintiffs argue Defendant-Board did not adopt a valid statement of consistency contemporaneously with, or prior to, approving the rezoning of the Subject Property. We disagree.

N.C. Gen. Stat. § 153A-341 (2015) requires:

> Zoning regulations shall be made in accordance with a comprehensive plan. Prior to adopting or rejecting any zoning amendment, the governing board shall adopt a statement describing whether its action is consistent with an adopted comprehensive plan and explaining why the board considers the action taken to be reasonable and in the public interest. That statement is not subject to judicial review.

Our Supreme Court in *Wally v. City of Kannapolis*, 365 N.C. 449, 453-54, 722 S.E.2d 481, 484 (2012), held a zoning amendment to be void, where the city council had failed to approve a statement of reasonableness when adopting the amendment. The Supreme Court in *Wally* stated:

> The statute requires that defendant take two actions in this situation: first, adopt or reject the zoning amendment, and second, approve a proper statement. The approved statement must *describe* whether the action is consistent with any controlling comprehensive plan and *explain* why the action is "reasonable and in the public interest."

Id. at 452, 722 S.E.2d at 483 (emphasis in original) (citations omitted).

This Court, in *Morgan v. Nash Cty.*, 224 N.C. App. 60, 69, 735 S.E.2d 615, 622 (2012), held "the statute at issue in *Wally*, N.C. Gen. Stat. § 160A-383, is substantially similar to N.C. Gen. Stat. § 153A-341, but section 160A-383 applies to zoning amendments adopted by cities and towns rather than by counties."

This Court, in *Atkinson v. City of Charlotte*, 235 N.C. App. 1, 4, 760 S.E.2d 395, 397 (2014) held the following statement of consistency not to be in compliance with N.C. Gen. Stat. § 160A-383: "STATEMENT OF CONSISTENCY This petition is found to be consistent with adopted policies and to be reasonable and in the public interest . . . ." The Court concluded the statement merely contained summary language that tracked the statute, and did not actually contain both a description of whether the zoning amendment is consistent with any controlling land use plan and an explanation as to why the amendment is reasonable and in the public interest. *Id.*

Although N.C. Gen. Stat. § 160A-383 [applicable to cities] and N.C. Gen. Stat. § 153A-341 [applicable to counties] both plainly state that a statement of consistency "is not subject to judicial review," the Court in *Atkinson*, following *Wally*, held that while the content of a statement of consistency is not subject to judicial review, whether the statement includes the required description and explanation *is* subject to judicial review. *Id.* at 5, 760 S.E.2d at 398. The Court reversed the trial court's order granting summary judgment in favor of the defendants and remanded for the entry of summary judgment in favor of the plaintiffs on the basis the amendment was void for lack of a valid consistency statement. *Id.* at 6, 760 S.E.2d at 398.

Here, the minutes of the Board hearing, during which the Board voted to approve the zoning amendment at issue, contains the following statement of consistency:

> On motion of Kemp, seconded by Lanier, the Board voted 3-2, with Commissioners Frye and Allen opposing, to approve the request of McDowell Family Limited Partnership, as determined consistent with the standards and policies contained within the Growth Management Plan; and *having further found from information and testimony provided at public hearing*, that the following Growth Management policies support the Determination of Consistency and *find the decision reasonable and in the public interest.*
>
> Policy 3.9[:] Individual rezoning decisions within Rural Growth Areas will depend upon the scale of the development, and the specific nature of the site and its location.
>
> Resolution Adopting the 2009 Randolph County Growth Management Plan, Policy #2[:] Recognize that growth management policies should afford flexibility to County boards and agencies that will enable them to adapt to the practical requirements often necessary for rural development.
>
> Resolution Adopting the 2009 Randolph County Growth Management Policy #3[:] Ensure the opportunity for landowners to achieve the highest and best uses of their land that are consistent with growth management policies in order to protect the economic viability of the County's citizens and tax bases. [Emphasis supplied.]

Plaintiffs argue the Board's statement of consistency fails to comply with N.C. Gen. Stat. § 153A-341, because it does not include an

explanation to show the amendment is reasonable and in the public interest. We disagree.

Defendant-Board's statement of consistency shows Defendant-Board, based upon the "information and testimony produced at public hearing" found the rezoning to be consistent with the Growth Management Plan, and to be reasonable and in the public interest because it was consistent with the three listed plan policies. Unlike the city council in *Wally*, Defendant-Board clearly found and adopted a sufficient statement of consistency. Unlike the statement of consistency at issue in *Atkinson*, Defendant-Board found and adopted a statement which goes beyond merely reciting the language of N.C. Gen. Stat. § 153A-341. Defendant-Board's statement of consistency lists the bases of its finding and "describe[s] whether the action is consistent with any controlling comprehensive plan and explain[s] why the action is 'reasonable and in the public interest.' " *Wally*, 365 N.C. at 452, 722 S.E.2d at 483 (emphasis omitted). Plaintiffs' argument is overruled.

C. *"Spot Zoning"*

[3] Plaintiffs argue Defendants engaged in illegal spot zoning by rezoning the Subject Property to accepting the modified site plan. We disagree.

Our Supreme Court has defined "spot zoning" to be:

> A zoning ordinance, or amendment, which singles out and *reclassifies* a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected[.]

Blades v. City of Raleigh, 280 N.C. 531, 549, 187 S.E.2d 35, 45 (1972) (emphasis supplied). North Carolina appellate courts have repeatedly followed this definition of spot zoning. *See Musi v. Town of Shallotte*, 200 N.C. App. 379, 382, 684 S.E.2d 892, 895 (2009) (applying the *Blades* definition of spot zoning), *Friends of Mt. Vernon Springs, Inc. v. Town of Siler City*, 190 N.C. App. 633, 638, 660 S.E.2d 657, 661 (2008) (applying the *Blades* definition of spot zoning), *Childress v. Yadkin Cty.* 186 N.C. App. 30, 34, 650 S.E.2d 55, 59 (2007) (applying the *Blades* definition of spot zoning). "Spot zoning is not invalid *per se* in North Carolina so long as the zoning authority made a clear showing of a reasonable basis for such distinction." *Childress*, 186 N.C. App. at 35, 650 S.E.2d at 59 (citation and internal quotation marks omitted).

No genuine issue of material fact exists of Defendant-Board's approval of the modified site plan of the Subject Property in 2016. Defendants rezoned the Subject Property to Rural Industrial Overlay Conditional District zoning classification in 2010. In the 2016 rezoning action Plaintiffs challenge here, Defendant-Board did not change the classification of the subject property from Rural Industrial Overlay Conditional District to another zoning district, or reclassify any other tract of property to this zoning district.

Defendant-Board merely approved the relocation of the existing chemical vat to another location on the Subject Property, by approving the modification to the Subject Property's site plan.

> Within two months an action contesting the validity of any ordinance adopting or amending a zoning map or approving a special use, conditional use, or conditional zoning district rezoning request under Part 3 of Article 18 of Chapter 153A of the General Statutes or Part 3 of Article 19 of Chapter 160A of the General Statutes or other applicable law. Such an action accrues upon adoption of such ordinance or amendment.

N.C. Gen. Stat. § 1-54.1 (2015). Under N.C. Gen. Stat. § 1-54.1, 2010 would have been the appropriate time to have brought a spot zoning challenge to Defendants' classifying the subject property as Rural Industrial Overlay Conditional District. Plaintiffs cannot challenge this classification now, which is not a reclassification of zoning, but is merely a review and approval of the modification to the previously approved site plan.

No genuine issue of material fact exists to show Defendants' 2016 rezoning action constitutes illegal spot zoning. Plaintiffs' argument is overruled.

V. Conclusion

The superior court's judgment granting Defendants' motion for summary judgment, and denying Plaintiffs' motion for summary judgment, is affirmed. *It is so ordered.*

AFFIRMED.

Judges STROUD and HUNTER concur.

McKINNEY v. DUNCAN

[256 N.C. App. 717 (2017)]

SHIRLEY G. McKINNEY AND ROBERT J. McKINNEY, PLAINTIFFS
v.
MARK JEFFREY DUNCAN, DEFENDANT

No. COA17-565

Filed 5 December 2017

Appeal and Error—appealability—civil contempt—no-contact orders never entered—lack of subject matter jurisdiction

A defendant's appeal in a civil contempt and no-contact case was dismissed where the orders from which defendant attempted to appeal were never entered. The Court of Appeals did not have subject matter jurisdiction to review their contents.

Appeal by defendant from orders dated 12 December 2016 by Judge Mary F. Paul in Davidson County District Court. Heard in the Court of Appeals 19 October 2017.

David S. Doherty for plaintiffs-appellees.

Richard Croutharmel for defendant-appellant.

ZACHARY, Judge.

Mark Duncan (defendant) appeals from orders finding him in contempt of earlier orders that had directed him to have no contact with Shirley McKinney or Robert McKinney (plaintiffs). On appeal, defendant argues that the trial court erred by "failing to specify a deadline" within which defendant could purge himself of civil contempt, with the result that the court's order was "impermissibly vague in that it effectively held the defendant in civil contempt indefinitely." Defendant also argues that the trial court erred by failing to find that he had the present ability to comply with the purge condition that he obtain a psychological examination within 60 days of the entry of the order. For the reasons discussed below, we conclude that defendant has attempted to appeal from orders that were not entered. An order cannot be enforced or appealed until it is entered, and we are without jurisdiction to consider defendant's appeal, which must be dismissed.

Factual and Procedural Background

On 30 June 2016, plaintiffs filed complaints seeking entry of no-contact orders barring defendant from harassing or threatening them.

A hearing was conducted on plaintiffs' complaints in domestic violence court on 5 July 2016, before the Honorable B. Carlton Terry, Jr. Ms. McKinney testified that defendant and his wife had moved into a house across the street from plaintiffs' house about a year earlier. After moving into the neighborhood, defendant had engaged in threatening and upsetting behavior, including shouting at Ms. McKinney and making "pig noises" in her direction, displaying a banner that disparaged the condition of plaintiffs' yard, and sending letters to Ms. McKinney that she found frightening. On one occasion, defendant displayed a firearm and pointed it at plaintiffs' house, before firing it in a different direction. Mr. McKinney testified that he was 28 years old and lived with his mother, Ms. McKinney. His testimony generally corroborated that of Ms. McKinney; in addition, Mr. McKinney testified that defendant stalked and harassed him as Mr. McKinney walked from his home to his employment at a Walmart store a few minutes away. Defendant testified that he was a "62 year old grandfather, disabled veteran" and that he had not committed the acts to which plaintiffs testified.

At the conclusion of the hearing, the trial court ruled that plaintiffs had proven by the preponderance of the evidence that on one or more occasions defendant had harassed or tormented plaintiffs. The court informed defendant that it was entering no-contact orders and that for the following year defendant would be subject to restrictions:

> So for both of these cases for the next year, sir, I'm ordering that you should not visit, assault, molest or otherwise interfere with either of these Plaintiffs. Cease stalking of them is a term of art. Cease harassment. Do not abuse or injure them. Do not contact them by telephone, written communication, or electronic means, or in person. Do not enter or remain present at their residence, place of employment for the next year.

On 5 July 2016, Judge Terry entered no-contact orders barring defendant from having any contact with either plaintiff. Defendant did not appeal these orders.

Upon plaintiffs' motions filed on 22 August 2016, the assistant clerk of court issued orders that required defendant to appear and show cause why he should not be held in contempt of court for violating the terms of the no-contact orders entered on 5 July 2016. Plaintiffs' motions alleged that defendant had failed to comply with the no-contact orders and had continued to engage in harassing and threatening behavior. The parties subsequently reached an agreement resolving the issues raised

by plaintiffs' motions. At a hearing conducted on 10 October 2016 by the Honorable Mary F. Paul, the judge reviewed the terms of each of the memoranda of agreement, which were then signed by the parties, defense counsel, and the court. The judgments specified ways in which the parties agreed to respect one another's privacy and avoid contact, and provided that the judgments could be enforced by contempt proceedings.

Upon plaintiffs' motions filed on 8 November 2016, the assistant clerk of court issued orders that required defendant to appear and show cause why he should not be held in contempt of court for violation of the terms of the no-contact orders entered 5 July 2016 and of the consent judgments entered 10 October 2016 in response to plaintiffs' earlier motions for contempt. Plaintiffs alleged that defendant continued to engage in threatening and harassing behavior directed at plaintiffs. Judge Paul conducted a hearing on plaintiffs' motions on 12 December 2016. Ms. McKinney testified that defendant had continued to violate the terms of the original no-contact orders and the consent judgments. Defendant testified that he had abided by the orders.

On 12 December 2016, Judge Paul signed orders with respect to each plaintiff, finding defendant in contempt of both the no-contact orders and both of the judgments. The orders stated that defendant was to be incarcerated until he was no longer in contempt, but that the incarceration was stayed and that defendant could purge himself of contempt by committing "no further violations of the orders entered on 7/5/16 and 10/10/16" and by obtaining a psychological evaluation within 60 days. Defendant appealed to this Court from the orders finding him in civil contempt and setting out the means by which he could purge himself of contempt.

Jurisdiction over Appeal

Proceedings for civil contempt are governed by N.C. Gen. Stat. § 5A-23 (2016). N.C. Gen. Stat. § 5A-23(e) requires that if, at the conclusion of a hearing, the trial court finds the alleged contemnor to be in contempt, "the judicial official must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself or herself of the contempt." In the present case, the record fails to establish that the orders holding defendant in contempt were entered.

A "judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2016). "This Court has previously held that Rule 58 applies to orders, as well as judgments, such that an order is likewise entered when it is

reduced to writing, signed by the judge, and filed with the clerk of court." *Watson v. Price*, 211 N.C. App. 369, 370, 712 S.E.2d 154, 155 (2011) (citing *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737-38 (1997)). "[A] judgment that has merely been [orally] rendered, but which has not been entered, is not enforceable until entry." Watson, 211 N.C. App. at 371, 712 S.E.2d at 155. An order "cannot be modified or enforced or appealed before it is entered." *Spears v. Spears*, __ N.C. App. __, __, 784 S.E.2d 485, 502 (2016) (citing *Carland v. Branch*, 164 N.C. App. 403, 405, 595 S.E.2d 742, 744 (2004) ("Since there was no order 'entered' when defendant filed her motion to modify, there was nothing to modify.")).

In the present case, the trial court orally rendered judgment at the conclusion of the hearing.

> THE COURT: Now, I'm going to hold him in Civil Contempt. . . . The only way he can purge himself of this Contempt, is I want to see a full psychological evaluation. That is to be done within the next, I'll give him 60 days to complete it.
>
> . . .
>
> So the Order is that he gets 30 days in custody, that is suspended on the condition that he get a full psychological[] evaluation. And that he not violate any other portions of this Order. So the suspension is, is that if they file this and there's a problem and he hasn't done that psychological. It's not much of a hearing to be done. It's already there. I'm staying the execution of my judgment to give him that opportunity.

Defendant has attempted to appeal from orders that were signed by the trial court on 12 December 2016.[1] These orders do not bear a file stamp or other indication that they were ever filed with the clerk of court. As a result, the record fails to establish that the orders were entered:

> Clerk Hinshaw orally rendered her decision . . . on 26 April 2007 in open court. Thereafter, she reduced the order to writing and dated it. However, nothing in the record indicates that the order was filed with the clerk of court. The order is devoid of any stamp-file or other marking necessary to indicate a filing date, and therefore it was not

1. These orders differ from the court's orally rendered judgment in that they order defendant to be "committed to the county jail for an indefinite period" rather than for 30 days. The orders otherwise track the language used by the court in its orally rendered judgment.

> entered. *See Huebner v. Triangle Research Collaborative*, 193 N.C. App. 420, 422, 667 S.E.2d 309, 310 (2008) (asserting that a filing date is to be determined by the date indicated on the file-stamp); *see also Watson*, 211 N.C. App. at 373, 712 S.E.2d at 157 (standing for the proposition that a signed and dated order is insufficient to be considered filed).

In re Thompson, 232 N.C. App. 224, 228, 754 S.E.2d 168, 171 (2014). A properly entered order is essential to vest this Court with subject matter jurisdiction over an appeal:

> Entry of judgment by the trial court is the event which vests jurisdiction in this Court, and the judgment is not complete for the purpose of appeal until its entry. Since entry of judgment is jurisdictional, this Court has no authority to hear an appeal where there has been no entry of judgment. . . . [We] must dismiss this appeal since we lack jurisdiction. *See Mason v. Moore County Bd. of Comm'rs*, 229 N.C. 626, 629, 51 S.E.2d 6, 8 (1948) ("If [the record] fails to disclose the necessary jurisdictional facts we have no authority to do more than dismiss the appeal.")

In re Estate of Walker, 113 N.C. App. 419, 420-21, 438 S.E.2d 426, 427 (1994) (citing *Searles v. Searles*, 100 N.C. App. 723, 725-26, 398 S.E.2d 55, 57 (1990)). We conclude that the orders from which defendant has attempted to appeal were never entered, and we have no subject matter jurisdiction to review their contents. Accordingly, defendant's appeal is

DISMISSED.

Judges DAVIS and BERGER concur.

STATE OF NORTH CAROLINA
v.
MARK BURWELL, DEFENDANT

No. COA17-89

Filed 5 December 2017

1. Police Officers—assault on law enforcement officer inflicting serious bodily injury—motion to dismiss—sufficiency of evidence

The trial court did not err in an assault on a law enforcement officer inflicting serious bodily injury case under N.C.G.S. § 14-34.7(a) by denying defendant's motion to dismiss where the State provided substantial evidence of each essential element.

2. Search and Seizure—initial stop—arrest—motion to suppress—attack on police officer—fruit of the poisonous tree doctrine

The trial court did not err or commit plain error in an assault on a law enforcement officer inflicting serious bodily injury case by denying defendant's motion to suppress evidence of an attack on a police officer where defendant argued an initial stop or subsequent arrest violated his Fourth Amendment rights. Evidence of an attack on a police officer cannot be suppressed as fruit of the poisonous tree.

3. Police Officers—assault on law enforcement officer inflicting serious bodily injury—jury instructions—failure to instruct—right to resist unlawful arrest—objective probable cause

The trial court did not err or commit plain error in an assault on a law enforcement officer inflicting serious bodily injury case by failing to instruct the jury on the right to resist an unlawful arrest even though an officer did not have authority to take defendant to jail under N.C.G.S. § 122C-303 to detox him against his will. The officer had objective probable cause to arrest defendant for second-degree trespass under N.C.G.S. § 14-159.13, thus demonstrating that an objectively lawful and constitutional arrest occurred.

4. Police Officers—assault on law enforcement officer inflicting serious bodily injury—jury instructions—failure to instruct—right to defend from excessive force by law enforcement officer

The trial court did not err or commit plain error in an assault on a law enforcement officer inflicting serious bodily injury case by

failing to instruct the jury on the right to defend oneself from excessive force by a law enforcement officer where the officer used the amount of force necessary to bring the situation under control.

Appeal by Defendant from judgments entered 26 May 2016 by Judge Walter H. Godwin, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 7 June 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Ashish K. Sharda, for the State.

Meghan Adelle Jones, for Defendant-Appellant.

MURPHY, Judge.

Mark Burwell ("Defendant") appeals from his judgments for assault on a law enforcement officer inflicting serious bodily injury and attaining habitual felon status. On appeal, Defendant argues the following: (1) the trial court erred by denying his Motion to Dismiss because he only used the amount of force reasonably necessary to resist an unlawful arrest; (2) the trial court erred or plainly erred by denying his Motion to Suppress and admitting evidence obtained as a result of an unlawful arrest; (3) the trial court erred or plainly erred by failing to instruct the jury on the right to resist an unlawful arrest; and (4) the trial court erred or plainly erred by failing to instruct the jury on the right to defend oneself from excessive force by a law enforcement officer.

After careful review, we conclude Defendant received a fair trial, free from error.

Background

At approximately 4 a.m. on 12 October 2014, Officer Sean Cook ("the Officer") arrived at Kay Drive in Smithfield, in reference to a 911 call reporting a suspicious person who refused to leave the apartment complex. Kay Drive and the apartments therein are subject to Section 8 housing. Section 8 of the United States Housing Act of 1937, as amended in 1974, established "Section 8," the federally subsidized housing assistance payments program. *See* 42 U.S.C. § 1437f (2015). The Officer testified that Smithfield police officers have an agency agreement with Kay Drive, wherein they have the authority to remove trespassers from the property, as that section and the apartments therein are subject to Section 8 housing.

The Officer was given information that the suspicious person was a male in his thirties wearing all black, and could be found near or around an older model, black truck. Upon his arrival, the Officer noticed Defendant, a male wearing all black clothing, standing in front of an older model, black truck. The Officer determined Defendant matched the description given to him by dispatch. He approached Defendant, and saw a beer can in Defendant's hand. The Officer asked Defendant to walk towards him, and Defendant complied. Seeing Defendant no longer held the beer can, the Officer told Defendant to retrieve the can and dispose of it. Defendant again complied. The Officer and Defendant spoke "at length[,]" and he could smell the strong odor of an alcoholic beverage emitting from Defendant. Upon request, Defendant provided the Officer with his identification.

Investigating further, the Officer, accompanied by Defendant, went to the door of the individual who made the 911 call. The Officer spoke with the woman who answered the door, who he testified he believed to be the caller. The Officer explained, to her and to Defendant, that Defendant was trespassing on the property. Defendant "appeared to understand that he was going to be trespassing [sic] the property." "Based on the totality of the circumstances and his impairment" the Officer then asked Defendant how he was going to get home. Defendant had no clear answer, and "[h]is story constantly changed." The Officer decided to "detox"[1] Defendant. He informed Defendant that Defendant was being "trespassed[,]" and, although not under arrest, he was going to be taken for a detox.

Preparing for transport, the Officer attempted to handcuff Defendant, in accordance with his department's policy to handcuff individuals transported by police vehicles. Due to Defendant's large frame, Defendant could not put his hands together behind his back. The Officer reached for his handcuff pouch, and when the "snap of the handcuff pouch happened," Defendant became aggressive, used "foul language[,]" tensed up, and tried to pull away from the Officer. The Officer testified that, in response, he tried to get control of Defendant. The Officer pushed Defendant into the side of his police vehicle. The Officer testified that once Defendant resisted, he was under arrest for "resist, delay and obstruct[,]" and he told Defendant he was under arrest.

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1. The Officer defined "detoxing" as taking an intoxicated person who has not committed a crime into custody to be held until he regains sobriety. The Officer testified that once an officer decides to detox someone, handcuffs are placed on the individual, in accordance with department policy, to further officer safety, and the individual is then transported to jail.

Defendant tried to turn around and "raised his fist as if to throw a punch[,]" causing the Officer to disengage and stand back. The Officer pointed his Taser at Defendant, giving commands and advising him he was under arrest. Defendant took flight, and the Officer gave chase, Taser in hand. Defendant fell to the ground, lying on his back. The Officer commanded Defendant to roll over and place his hands behind his back. Defendant refused to comply, and raised his feet and hands towards the Officer, "taking a combat stance." The Officer fired his Taser, incapacitating Defendant for five seconds. The Officer testified that the "whole time [he] had been on the radio advising [he] was in a chase" and Defendant had been Tased. When Defendant began removing the Taser's probes, the Officer attempted to tase him again, but it was ineffective, as Defendant had removed one of the leads.

Defendant took flight a second time, and the Officer chased him. The Officer tackled Defendant. The Officer testified: "It's at this time that the fight was on." Defendant began striking the Officer, and the Officer responded, striking Defendant. The Officer testified that "the whole time [he was] giving verbal, clear commands, [and] also trying to talk on [his] radio."

The Officer's radio was positioned on his shirt, at the center of his chest. At one point, Defendant grabbed the radio and "slung it off to the side" so that the Officer could no longer use it. The blows continued. Defendant reached down and grabbed the Officer's pistol. The two struggled, and the Officer eventually regained control of the pistol. The Officer struck Defendant's thigh with his Asp Baton, but then threw it away because it was ineffective to restrain Defendant.

The Officer, still on top of Defendant, "took a rear mount" and placed his left forearm in front of Defendant's face to try to hold him down. Defendant continued to fight, and bit the Officer's left forearm, causing the Officer to reposition. Defendant bit him a second time, causing the Officer to release Defendant. Defendant tried to turn around, so the Officer again repositioned. Defendant bit him a third time, on the Officer's right bicep. Defendant was then able to get "a front mount" on top of the Officer. When the Officer's backup arrived, the Officer was lying on his back, attempting to defend himself. The Officer and Defendant continued to struggle as backup assisted in securing Defendant.

The Officer's injuries included: sustained puncture wounds on his left forearm and right bicep, severe bruising and depressions, permanent scarring, and scabbing. The scarring includes a large circle on his right bicep, "just over a half an inch to an inch in a circle" with a "large

depression[,]" and "a deep ridge" on his left arm. The Officer experienced loss of sleep and extreme stress. He also had to be tested multiple times for communicable diseases, which he described as "extremely nerve-racking[.]"

Defendant was indicted for: (1) assault on a law enforcement officer inflicting serious bodily injury by "biting [the Officer]" and "hitting him about his face with closed fists[;]" (2) assault with a deadly weapon inflicting serious bodily injury, the deadly weapon being Defendant's teeth; and (3) attaining habitual felon status. Defendant filed a pretrial Motion to Suppress, arguing the arrest was unlawful, and, thus, any acts after the arrest should be suppressed as fruits of the poisonous tree. The trial court denied this motion. At the end of the State's evidence, Defendant again argued the arrest was unlawful, moving to dismiss the charges. His motion was denied. Defendant did not present any evidence, and renewed his Motion to Dismiss. The trial court again denied the motion.

The jury returned verdicts of guilty for assault on an officer inflicting serious bodily injury, assault inflicting serious injury, and attaining habitual felon status. The trial court arrested judgment on the assault inflicting serious injury offense, and entered judgment on the offense of assault on a law enforcement officer inflicting serious bodily injury with the habitual felon enhancement. Defendant was sentenced to an active term of 146 to 188 months. Defendant gave oral notice of appeal.

Analysis

On appeal, Defendant presents four arguments: (1) the trial court erred by denying his Motion to Dismiss; (2) the trial court erred or plainly erred by denying his Motion to Suppress and admitting evidence obtained as a result of an unlawful arrest; (3) the trial court erred or plainly erred by failing to instruct the jury on the right to resist an unlawful arrest; and (4) the trial court erred or plainly erred by failing to instruct the jury on the right to defend oneself from excessive force by a law enforcement officer. We disagree and address the arguments in turn.

I. Motion to Dismiss

[1] Defendant argues the trial court erred by denying his Motion to Dismiss because he only used the amount of force reasonably necessary to resist an unlawful arrest when he fought the Officer. We disagree.

We review the 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 trial court properly denies a motion to dismiss if "there is substantial

evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense." *Id.* at 62, 650 S.E.2d at 33 (citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 62, 650 S.E.2d at 33 (quotation omitted). In making this determination, the trial court considers the evidence in the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192-93, 451 S.E.2d 211, 223 (1994) (citation omitted).

To prove assault on a law enforcement officer inflicting serious bodily injury, the State must show: (1) the defendant assaulted the victim; (2) serious bodily injury occurred; (3) the victim was a law enforcement officer performing his official duties at the time of the assault; and (4) the defendant knew or had reasonable grounds to know that the alleged victim was a law enforcement officer. N.C.G.S. § 14-34.7(a) (2015); *see also* N.C.P.I.—Crim. 208.94 (2015).

The State provided substantial evidence of each essential element of assault on a law enforcement inflicting serious bodily injury; therefore, it was proper for the trial court to deny Defendant's Motion to Dismiss. Element (1) requires the State provide substantial evidence of:

> an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

State v. Mitchell, 358 N.C. 63, 69-70, 592 S.E.2d 543, 547 (2004) (quotation omitted). The State provided such relevant evidence when the Officer testified that Defendant hit and bit him multiple times, wounding him.

Section 14-32.4(a) (2015) of the North Carolina General Statutes defines Element (2) as an injury "that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." *State v. Williams*, ___ N.C. App. ___, ___, 804 S.E.2d 570, 577 (2017) (quoting N.C.G.S. § 14-34.7(a)); *see also* N.C.P.I.—Crim. 208.94. Here, the Officer testified that Defendant's bites caused extreme pain, skin removal, permanent scarring, and hospitalization. Photographs of the injuries were shown to the jury. Further, the trial court permitted the Officer to show his scarring to the jury, which included a depressed circle on his right bicep

that is "just over half an inch to an inch in a circle" and scarring on his left arm that the Officer described as "a deep ridge[.]" A reasonable juror could find this evidence sufficient to conclude the Officer's injuries caused serious permanent disfigurement, or a permanent or protracted condition that caused extreme pain, or injury that resulted in prolonged hospitalization. Thus, viewing the evidence in the light most favorable to the State, there is substantial evidence that the Officer suffered a serious bodily injury.

With regard to Element (3), the Officer was a law enforcement officer at the time of the incident. In the light most favorable to the State, the evidence shows that, when the assault occurred, the Officer was attempting to discharge his official duties as a routine patrol officer by responding to a report about a trespasser, conducting investigative work, and acting on the results of his investigation. Whether an officer is engaged in the performance of his official duties includes both the hot pursuit of a suspect, and also "such duties as investigative work . . . and routine patrol by automobile." *State v. Gaines*, 332 N.C. 461, 471, 421 S.E.2d 569, 574 (1992). Moreover, "criminal liability for the offense of assaulting an officer is not limited to situations where an officer is engaging in lawful conduct in the performance or attempted performance of his or her official duties." *State v. Friend*, 237 N.C. App. 490, 495, 768 S.E.2d 146, 149 (2014). There is substantial evidence the Officer was a law enforcement officer performing his official duties at the time of the assault.

Finally, the State put forth substantial evidence of Element (4). Defendant knew or had reasonable grounds to know the alleged victim was a law enforcement officer, as the Officer arrived in a marked patrol vehicle, was uniformed, and told Defendant he was a law enforcement officer. Thus, the State provided such relevant evidence as a reasonable mind might accept as adequate to support a conclusion as to each element of assault on a law enforcement officer inflicting serious bodily injury. The trial court did not err in denying Defendant's Motion to Dismiss.

II. Motion to Suppress

[2] Defendant argues the trial court erred or plainly erred by denying his Motion to Suppress and admitting evidence obtained as a result of an unlawful arrest. We disagree. Even if a police officer's conduct violates a defendant's Fourth Amendment rights, evidence of an attack on an officer is not fruit of a poisonous tree subject to suppression. *Friend*, 237 N.C. App. at 495-96, 768 S.E.2d at 150 (citation omitted).

As a preliminary matter, Defendant did not adequately preserve appellate review of the denial of his Motion to Suppress because he failed to object to the evidence at the time it was offered at trial. *See State v. Golphin*, 352 N.C. 364, 449, 533 S.E.2d 168, 224 (2000) (explaining a pretrial motion to suppress is a type of motion *in limine* and that such a "motion . . . is not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial") (citation omitted); s*ee also State v. Waring*, 364 N.C. 443, 468, 701 S.E.2d 615, 631-32 (2010). Thus, Defendant waived any objection to the denial of his Motion to Suppress.

However, on appeal, Defendant specifically and distinctly requests we review the denial of the Motion to Suppress for plain error.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4) (2016). "[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error[,]" *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012), which includes the denial of a pre-trial motion to suppress when a defendant fails to object to the admission of evidence that was the subject of his pre-trial motion to suppress. *State v. Williams*, ___ N.C. App. ___, ___, 786 S.E.2d 419, 424-25 (2016). Plain error exists when "a fundamental error occurred at trial[,]" and, absent the error, it is probable the jury would have returned a different result. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

"The doctrine of the fruit of the poisonous tree is a specific application of the exclusionary rule[,]" providing for the suppression of "all evidence obtained as a result of illegal police conduct." *Friend*, 237 N.C. App. at 495, 768 S.E.2d at 150 (citing *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006)). However, this doctrine does not permit evidence of attacks on police officers to be excluded, even "where those attacks occur while the officers are engaging in conduct that violates a defendant's Fourth Amendment rights." *Friend*, 237 N.C. App. at 495-96, 768 S.E.2d at 150 (citation omitted). Thus, where a defendant argues an initial stop or subsequent arrest violated "his Fourth Amendment rights, the evidence of his crimes against the officers would not be considered excludable 'fruits' pursuant to the doctrine." *Id.* at 496, 768 S.E.2d at 150 (citation omitted).

Here, Defendant seeks the suppression of evidence of an attack on a police officer. Since evidence of an attack on a police officer cannot be suppressed as a fruit of the poisonous tree, *id.* at 495-96, 768 S.E.2d at 150, the evidence Defendant sought to suppress cannot be suppressed as a matter of law. Thus, although the trial court denied the Motion to Suppress on other grounds,[2] Defendant cannot establish prejudicial error, much less plain error.

III. Resisting an Unlawful Arrest Instruction

[3] Defendant argues the trial court erred or plainly erred by failing to instruct the jury on the right to resist an unlawful arrest. We disagree.

At trial, Defendant neither requested, nor objected to the omission of, a jury instruction on the defense of the right to resist an unlawful arrest. Thus, we review for plain error.

"When [a] defendant fail[s] to object to the instructions at trial but claims on appeal of improper jury instructions, the instructions are reviewed for plain error." *State v. Garris*, 191 N.C. App. 276, 287, 663 S.E.2d 340, 349 (2008) (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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (alteration in original) (citations, quotations, and internal quotation marks omitted). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d

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2. The order denying Defendant's Motion to Suppress determined that Defendant's Fourth Amendment rights were not violated, by concluding "the [O]fficer had reasonable suspicion to do an investigative detention based on the call from dispatch and all the observations that he had made at the scene and based on conversation with the lady that made the 911 call[;]" and "an arrest was not made until . . . there was a breach of the peace, at which time [Defendant] was arrested for pulling away and being disruptive with the [O]fficer in his request for his instruction which gave rise to probable cause for the arrest of resisting and delaying by pulling away and refusing to be handcuffed."

692, 697 (1993) (citation omitted). "However, before engaging in plain error analysis it is necessary to determine whether the instruction complained of constitutes error." *State v. Cummings*, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007) (citation omitted).

"A person . . . has the right to resist an unlawful arrest by the use of force, as in self-defense, to the extent that it reasonably appears necessary to prevent *unlawful* restraint of his liberty . . . ." *State v. Sanders*, 303 N.C. 608, 622, 281 S.E.2d 7, 15 (1981) (emphasis added and omitted) (quotation omitted). However, this "right is limited to the use of such force as reasonably appears to be necessary to prevent the unlawful restraint of his liberty." *State v. Branch*, 194 N.C. App. 173, 174, 669 S.E.2d 18, 19 (2008) (internal quotation marks omitted). If the evidence tends to show an unlawful arrest occurred, it is error for the trial court to fail to instruct the jury on the right to resist an unlawful arrest. *See State v. Sparrow*, 276 N.C. 499, 513, 173 S.E.2d 897, 906 (1970) (holding a trial court was in error when its instructions ignored whether the officers' actions were lawful when the evidence for the defendants tended to show the officers' actions were unlawful).

For a warrantless arrest to be lawful, it "must be supported by probable cause." *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E.2d 140, 145 (1984) (citations omitted). Probable cause to arrest exists:

> when there is 'a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.' (Citations omitted.) The existence of probable cause depends upon 'whether at that moment the facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' (Citation omitted.)

State v. Wrenn, 316 N.C. 141, 147, 340 S.E.2d 443, 447 (1986) (alterations in original) (quotation omitted).

Here, Defendant alleges the Officer's warrantless arrest was unsupported by probable cause, and, thus, was unlawful. Defendant presented no evidence at trial, and the State's evidence did not conflict with itself.

The Officer maintains he had not arrested Defendant when he attempted to secure Defendant's hands in handcuffs. Instead, he claims he acted pursuant to the authority in N.C.G.S. § 122C-303 (2015), and

only arrested Defendant once Defendant resisted the Officer's attempts to control Defendant's aggression. However, we are not bound by the Officer's articulation of when the arrest occurred. *See Zuniga*, 312 N.C. at 259, 322 S.E.2d at 145 ("An officer's testimony that the defendant was or was not under arrest is not conclusive.") (citations omitted).

When an "officer, by words or actions, indicates that an individual must remain in the officer's presence or come to the police station against his will, the person is for all practical purposes under arrest if there is a substantial imposition of the officer's will over the person's liberty." *State v. Sanders*, 295 N.C. 361, 376, 245 S.E.2d 674, 684 (1978) (citation omitted). Section 15A-401(b)(1) (2015) of the North Carolina General Statutes permits an officer to "arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense . . . in the officer's presence." Similarly, in *Devenpeck v. Alford*, 543 U.S. 146, 160 L. E. 2d 537 (2004), the Supreme Court of the United States held a warrantless arrest by an officer is reasonable under the Fourth Amendment if, given the objective facts available to the officer at the time of arrest, there is probable cause that a crime has been or is being committed. *Id.* at 152-53, 160 L. E. 2d at 544.

A. N.C.G.S. § 122C-303

The Officer testified that he acted pursuant to N.C.G.S. § 122C-303 when he attempted to detox Defendant, and that doing so did not constitute an arrest. We disagree. Although "[n]o person may be prosecuted solely for being intoxicated in a public place[,]" N.C.G.S. § 14-447(a) (2015), N.C.G.S. § 122C-303 permits an officer to take publicly intoxicated persons to jail, without arresting them, to assist such individuals. *Davis v. Town of S. Pines*, 116 N.C. App. 663, 671, 449 S.E.2d 240, 245 (1994). An officer may only so assist if an "intoxicated individual is apparently in need of and apparently unable to provide for himself food, clothing, or shelter but is not apparently in need of immediate medical care and if no other facility is readily available to receive him." N.C.G.S. § 122C-303; *see also Davis*, 116 N.C. App. at 671, 449 S.E.2d at 245 (applying N.C.G.S. § 122C-303). Taking an individual to jail under N.C.G.S. § 122C-303 against his will constitutes an arrest. *Davis*, 116 N.C. App. at 671, 449 S.E.2d at 245.

Therefore, as it is apparent that Defendant did not consent to the Officer taking him to jail pursuant to N.C.G.S. § 122C-303, the Officer did not have the authority to take Defendant to jail under § 122C-303 without it constituting an arrest. *See id.* at 671, 449 S.E.2d at 245. However, the Officer's failure to recognize this point of law does not make Defendant's

arrest a *per se* violation of the Fourth Amendment because objective probable cause to arrest Defendant existed prior to the Officer imposing his will over Defendant's liberty.

Indeed, the Officer himself testified: "I was just trying to simply do my job, trying to get this guy in detox. I decided not to charge him with anything *even though I had several charges on him*." (Emphasis added).

B. Objective Probable Cause to Arrest

The Officer had objective probable cause to arrest Defendant. In *Devenpeck*, the Supreme Court of the United States held warrantless arrests are reasonable under the Fourth Amendment if there is objective probable cause to arrest for the violation of an offense. *Devenpeck*, 543 U.S. at 152-53, 160 L.E. 2d at 544. Thus, it is not necessary that Defendant was arrested for the commission of the offense for which probable cause exists, so long as the facts known to the Officer objectively provided probable cause to arrest him. *See id.* at 153, 160 L.E. 2d at 544; *see also Whren v. United States*, 517 U.S. 806, 813, 135 L. Ed. 2d 89, 98 (1996) ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.") (quotation omitted).

Here, the objective facts known to the Officer provided him with sufficient probable cause to arrest Defendant for second-degree trespass. *See* N.C.G.S. § 14-159.13 (2015) ("second-degree trespass"). Under *Devenpeck*, it does not matter that the Officer did not arrest Defendant for second-degree trespass. The arrest was lawful because there was objective probable cause that Defendant committed second-degree trespass in his presence. *See Devenpeck*, 543 U.S. at 152-53, 160 L. E. 2d at 544.

Second-degree trespass occurs when a person "enters or remains on premises of another" without authorization:

> (1) After he has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person; or
>
> (2) That are posted, in a manner reasonably likely to come to the attention of intruders, with notice not to enter the premises.

N.C.G.S. § 14-159.13. Second-degree trespass is a Class 3 misdemeanor. *Id.*

Here, throughout the Officer's investigation, Defendant remained at the apartment complex without authorization, even after he had been notified not to enter or remain there by a person authorized to so notify him: the Officer. The trial court found the Officer had such authority, as the Smithfield police have authority to remove certain persons from Kay Drive. The Smithfield police officers have an agency agreement enforcing this authority.[3]

The Officer testified Defendant understood that he was trespassing, and it was only after the Officer notified Defendant that he was trespassing that the Officer advised Defendant he was going to be transported for a detox. Thus, even though the Officer did not arrest Defendant with second-degree trespass, there was objective probable cause to do so at the time of Defendant's arrest.

Defendant argues probable cause to arrest for second-degree trespass does not create objective probable cause to make Defendant's arrest lawful under *Devenpeck* because second-degree trespass is a misdemeanor, not a felony. However, neither N.C.G.S. § 15A-401(b) nor *Devenpeck* limit themselves in this way.[4] Since there was objective probable cause to arrest Defendant for second-degree trespass, the Officer lawfully arrested Defendant. Therefore, the trial court did not err when it did not include the right to resist an unlawful arrest in its jury instructions because the evidence demonstrated that an objectively lawful and constitutional arrest occurred. As there was no error, there was no plain error. *See Cummings*, 361 N.C. at 470, 648 S.E.2d at 807.

IV. Right to Defend Oneself From Excessive Use of Force by a Law Enforcement Officer Instruction

[4] Defendant argues the trial court erred or plainly erred by failing to instruct the jury on the right to defend oneself from excessive force by a law enforcement officer. Based on the evidence presented at trial, this argument lacks merit.

At trial, Defendant neither requested, nor objected to the omission of, a jury instruction on the right to defend oneself from the excessive

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3. The Officer testified the police have authority to remove persons from Kay Drive, as that section and the apartments therein are subject to Section 8 housing and there is an agency agreement giving the officers this authority.

4. Moreover, while not binding on our Court, we have previously applied *Devenpeck* in an unpublished case to a scenario where the objective probable cause to arrest a defendant was based on a misdemeanor crime. *See State v. Stephens*, No. COA05-1218, 178 N.C. App. 393, 631 S.E.2d 235 (N.C. Ct. App. July 5, 2006) (unpublished).

use of force by a law enforcement officer. Therefore, this issue is not properly preserved for our review on appeal. At Defendant's request, we review for plain error whether the trial court erred by not instructing the jury on the right to defend oneself from excessive use of force by a law enforcement officer.

We review Defendant's appeal of improper jury instructions for plain error. *See Garris*, 191 N.C. App. at 287, 663 S.E.2d at 349 (citation omitted); *see also Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citations omitted). However, we first determine "whether the instruction complained of constitutes error." *Cummings*, 361 N.C. at 470, 648 S.E.2d at 807.

"If attempting a lawful arrest, an officer has the right to use reasonable force to subdue the arrestee and the arrestee has no right to resist." *State v. Burton*, 108 N.C. App. 219, 226, 423 S.E.2d 484, 488 (1992) (citation omitted). However, if "an officer uses excessive force to execute a lawful arrest, the arrestee may defend against the excessive force." *Id.* at 226, 423 S.E.2d at 488; *see State v. Mensch*, 34 N.C. App. 572, 575, 239 S.E.2d 297, 299 (1977).

> [W]here there is evidence tending to show the use of such excessive force by the law officer, the trial court should instruct the jury that the assault by the defendant upon the law officer was justified or excused if the assault was limited to the use of reasonable force by the defendant in defending himself from that excessive force.

Mensch, 34 N.C. App. at 575, 239 S.E.2d at 299.

In the case before us, Defendant did not testify that his actions were an attempt to protect himself from excessive force, and the trial court did not instruct the jury about the right to defend oneself against the use of excessive force during an arrest. Only if the evidence tended to show that the use of force by the Officer was excessive did the trial court err by not instructing on this right. *See Mensch*, 34 N.C. App. at 575, 239 S.E.2d at 299.

The evidence did not tend to show the use of force by the Officer was excessive. As discussed *supra*, the Officer lawfully arrested Defendant. Defendant provoked the Officer's use of force when he became aggressive as the Officer reached for his handcuff pouch. Defendant tensed, pulled away from the Officer, and tried to turn around. The Officer responded by pushing Defendant into the vehicle to prevent Defendant from escaping. Defendant then attempted to punch the Officer. The Officer stepped away, removed his Taser, pointed the Taser at Defendant,

and told Defendant he was under arrest. Defendant fled, and then fell down. The Officer again pointed his Taser at Defendant, commanding Defendant to roll over and put his hands behind his back. Defendant did not comply; instead, he took "a combat stance[.]" Due to Defendant's noncompliance and aggressive stance, Defendant fired the Taser, momentarily incapacitating Defendant. Defendant then fled again. This time, the Officer gave chase, commanding Defendant to stop, and eventually tackling Defendant to the ground.

Defendant proceeded to hit the Officer, remove the Officer's radio, and grab the Officer's pistol. The Officer tried to get control of Defendant by striking him with his baton and his hands, attempting to protect himself, to effectuate the arrest, and to prevent Defendant's escape. The Officer could not gain control; Defendant continued to hit him. Defendant then bit the Officer multiple times. All the Officer "could do was just hold" on until backup arrived. Before backup arrived, Defendant was able to sit on top of the Officer, straddling him, delivering blows to the Officer's face, body, and head. Backup officers arrived, securing Defendant. This incident lasted approximately two and a half minutes.

This course of events, which Defendant did not present evidence to contradict, does not tend to show the Officer used excessive force. The Officer used the amount of force necessary to bring the situation under control. Therefore, since the trial court is only required to instruct the jury based on the evidence presented at trial, *see State v. Anderson*, 40 N.C. App. 318, 321, 253 S.E.2d 48, 50 (1979), the trial court did not err when it did not instruct on the right to defend oneself against the use of excessive force during an arrest. There cannot be plain error, as there was no error. *See Cummings*, 361 N.C. at 470, 648 S.E.2d at 807.

Conclusion

For the reasons stated above, the trial court did not err. The trial court properly denied Defendant's Motion to Dismiss and his Motion to Suppress. Furthermore, the trial court did not err when it did not *sua sponte* instruct the jury on the right to resist an unlawful arrest and the right to defend oneself against excessive force by a law enforcement officer. Defendant received a fair trial, free from error.

NO ERROR.

Judges HUNTER, JR. and DAVIS concur.

STATE v. EMIGH

[256 N.C. App. 737 (2017)]

STATE OF NORTH CAROLINA
v.
ALLEN MICHAEL EMIGH, DEFENDANT

No. COA17-148

Filed 5 December 2017

Animals—unlawfully taking deer with assistance of artificial lighting—jury instruction—not an expression of opinion

The trial court did not commit prejudicial error by instructing the jury on the substantive offense of unlawfully taking deer with the assistance of artificial lighting where the court's instruction was not the expression of an opinion, but instead an accurate restatement of the prima facie evidentiary requirements for the charged offense.

Appeal by defendant from judgment entered 6 September 2016 by Judge Alma L. Hinton in Gates County Superior Court. Heard in the Court of Appeals 21 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel S. Hirschman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

BERGER, Judge.

A Gates County jury found Allen Michael Emigh ("Defendant") guilty of unlawfully taking deer with the assistance of artificial lighting on September 6, 2016. Defendant received a probationary sentence, including electronic monitoring, and was ordered to pay a $500.00 fine. Defendant timely appealed, arguing that the trial court committed prejudicial error when instructing the jury on the substantive offense. We disagree.

Factual & Procedural Background

Evidence presented at trial tended to establish that on the evening of November 29, 2015, North Carolina Wildlife Resource Commission Officer Brandon Wilkins was on routine assignment in Gates County when he received a phone call regarding possible deer hunting at night. Officer Wilkins responded to the area of Indian Neck, where he observed a pick-up truck in the middle of a field with a spotlight emanating from

the interior of the vehicle and sweeping across the field. Officer Wilkins then heard gunshots coming from the direction of the pick-up truck.

Officer Wilkins initiated a stop of the vehicle after it left the field. Defendant was one of five occupants of the vehicle. Defendant informed Officer Wilkins that they were beaver hunting, and that they had discharged between fifteen and seventeen rounds of ammunition. Officer Wilkins testified that two of the three firearms located in the vehicle were typical "small- to mid-caliber rifles" used to hunt deer.

During the course of his investigation, Officer Wilkins observed blood in the back of the pick-up truck. According to the occupants of the vehicle, the blood was from a deer killed earlier in the day.

Officer Wilkins cited Defendant for unlawfully taking a deer with the aid of an artificial light. Defendant was convicted in District Court, and appealed for trial *de novo* in Superior Court. A Gates County jury convicted Defendant in Superior Court, and Defendant appeals, arguing that the trial court erred when it purportedly expressed an opinion while instructing the jury that "sweeping a spotlight over a field and firing a weapon" was an attempt to hunt deer. Defendant failed to object to the jury instructions at trial.

Standard of Review

"[T]he plain error standard of review applies on appeal to unpreserved instructional . . . error." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). To show plain error, a party must demonstrate that the instructional error was "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). "Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (2012) (citations, internal quotation marks, and brackets omitted).

Analysis

Defendant contends that the trial court improperly expressed an opinion when it instructed, "[a] person takes a deer when he intends to hunt deer and engages in any operation constituting an attempt to do so by sweeping a spotlight over a field and firing a weapon across the field." Defendant further asserts that he was prejudiced by this purported error. We disagree.

The citation alleged that Defendant "did unlawfully and willfully [t]ake deer between 1/2 hour after sunset and 1/2 hour before sunrise by displaying an artificial light in an area frequented or inhabited by wild deer, having in his possession a firearm." The citation then references N.C. Gen. Stat. § 113-291.1(b)(2), -302(b), and -294(e). These statutory provisions punish the unlawful taking of deer with the assistance of artificial lighting as a Class 2 misdemeanor with a fine of at least $500.00. N.C. Gen. Stat. § 113-291.1(b)(2) and -294(e) (2015).

N.C. Gen. Stat. § 113-302(b) sets forth the specific offense for which Defendant was charged and the significance of certain evidence related to the offense:

> The flashing or display of any artificial light between a half hour after sunset and a half hour before sunrise in any area which is frequented or inhabited by wild deer by any person who has accessible to him a firearm, crossbow, or other bow and arrow *constitutes prima facie evidence of taking deer with the aid of an artificial light.* This subsection does not apply to the headlights of any vehicle driven normally along any highway or other public or private roadway.

N.C.G.S. § 113-302(b) (2015) (emphasis added).

Prima facie evidence "simply carries the case to the jury for determination and no more. . . . It is no more than sufficient evidence to establish the vital facts without other proof, if it satisfies the jury." *State v. Bryant*, 245 N.C. 645, 647, 97 S.E.2d 264, 266 (1957) (citation and internal quotation marks omitted). Importantly, a defendant charged with taking deer with the aid of an artificial light need not actually kill a deer, or even discharge a weapon in the general direction of a deer. The proof required by N.C. Gen. Stat. § 113-302(b) to establish a *prima facie* case is that an individual have access to a weapon while displaying an artificial light at night in a location frequented by deer. It is then for the jury to determine if it is fully satisfied or entirely convinced by the evidence presented.

Defendant here was observed by Officer Wilkins displaying an artificial light in an area frequented by deer as evidenced by deer tracks in the field. Not only did Defendant have access to a firearm, but readily admitted that he and his companions discharged multiple rounds across the field. The parties stipulated that this incident occurred between one-half hour after sundown and one-half hour prior to sunrise. Thus, the State presented sufficient evidence to establish a *prima facie* case of unlawfully taking a deer with the aid of an artificial light, and it was for the jury to determine from these facts, along with the other evidence

presented at trial, whether defendant was spotlighting deer or actually hunting beaver.

Consistent with the evidence presented, N.C. Gen. Stat. § 113-302(b), and the Pattern Jury Instructions,[1] the trial court instructed the jury as follows:

> The defendant has been charged with unlawfully taking a deer with the aid of an artificial light. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant took a deer. A person takes a deer when he intends to hunt deer and engages in any operation constituting an attempt to do so by sweeping a spotlight over a field and firing a weapon across the field. Second, that the defendant did so with the aid of an artificial light. Third, that the defendant did so after 4:58 p.m. and before 6:55 a.m. . . .
>
> If you find from the evidence beyond a reasonable doubt that during the night on or about the alleged date, the defendant intended to hunt a deer and, in order to do

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1. Criminal Pattern Jury Instruction 273.10 reads as follows:

The defendant has been charged with unlawfully taking a deer with the aid of an artificial light. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

First, that the defendant took a deer. A person takes a deer when he

[a] [intentionally [captures] [kills] [harms] [pursues] [hunts] [reduces to possession] a deer] (or) [b] [intends to [capture] [kill] [harm] [pursue] [hunt] [reduce to possession] a deer and engages in any operation constituting [b1] [immediate preparation for an attempt to do so] [b2] [an attempt to do so] [b3] [conduct immediately subsequent to an attempt to do so]]. ((*Describe defendant's conduct, e.g., parking a pick-up truck beside an open field with a loaded rifle handy in the cab*) would be such an operation).

Second, that the defendant did so with the aid of an artificial light.

And Third, that the defendant did so after (*give time one half hour after sunset*) and before (*give time one half hour before sunrise*).

If you find from the evidence beyond a reasonable doubt that during the night on or about the alleged date the defendant [a] [intentionally (*describe conduct constituting successful attempt, e.g., shot*) a deer] [b] [intended to [capture] [kill] [harm] [pursue] [hunt] [reduce to possession] a deer] and in order to do so (*describe conduct constituting unsuccessful attempt or immediate preparation for an attempt, e.g., parked his pickup at the side of rural unpaved road 1407 adjacent to Joe Doe's cornfield with a loaded rifle handy in the cab*)], and that the defendant did so with the aid of an artificial light and that he did so after (*give time one half hour after sunset*) and before (*give time one half hour before sunrise*), it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty. N.C.P.I.--Crim. 273.10 (2001) (footnotes omitted).

> so, shined a light in a sweeping motion across a field and firing a weapon across a field and that the defendant did so with the aid of an artificial light and that he did so after 4:58 p.m. and before 6:55 a.m., it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The court's instruction was not the expression of an opinion, but rather an accurate restatement of the *prima facie* evidentiary requirements for the charged offense.

Even if, assuming *arguendo*, the instruction was improper, which it was not, Defendant failed to demonstrate prejudice. There was sufficient evidence to support the jury's verdict. Officer Wilkins testified he had never heard of beaver hunts at night in the area, and that spotlights were not used to hunt beaver. Rather, the evidence presented tended to show that the field where Defendant was observed was one frequented by deer, and that spotlighting was a method used to hunt deer. Moreover, Defendant had two rifles commonly used for deer hunting, and admitted to discharging them multiple times. In addition, the jury heard evidence that there was blood in the pick-up truck from an earlier successful deer hunt.

It cannot be said that the instruction, based upon the evidence presented at trial, "probably resulted in the jury reaching a different verdict than it otherwise would have reached." *Bagley*, 321 N.C. at 213, 362 S.E.2d at 251. Therefore, Defendant's argument is overruled.

Conclusion

Defendant received a fair trial free from error as the trial court properly instructed the jury on the offense of unlawfully taking deer with the assistance of artificial lighting.

NO ERROR.

Chief Judge McGEE and Judge DIETZ concur.

STATE OF NORTH CAROLINA
v.
ERNEST LEE GOODMAN

No. COA16-1263

Filed 5 December 2017

Appeal and Error—preservation of issues—failure to object at trial—suspension of appellate rules not warranted—Rule 2

Although defendant contended the trial court erred in an assault case by allegedly failing to exercise its discretion when it responded "no" to a juror's inquiry at the start of the third day of trial about whether jurors may question trial witnesses, defendant failed to preserve this issue by not objecting at trial. Further, defendant failed to satisfy his burden of demonstrating that his case warranted suspending the appellate rules, and the Court of Appeals declined to invoke N.C. Rule of Appellate Procedure 2.

Appeal by defendant from judgment entered 25 March 2016 by Judge Milton F. Fitch, Jr. in Gates County Superior Court. Heard in the Court of Appeals 6 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amar Majmundar, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for defendant-appellant.

ELMORE, Judge.

Ernest Lee Goodman (defendant) appeals from a judgment entered after a jury convicted him of assault with a deadly weapon with intent to kill and inflicting serious bodily injury. His sole contention on appeal is that the trial court erred by allegedly failing to exercise its discretion when it responded "no" to a juror's inquiry at the start of the third day of trial about whether jurors may question trial witnesses. Because defendant failed to object at trial, he failed to preserve for our review any issue arising from the trial court's denial of the juror's request. Recognizing this, defendant alternatively requests that we invoke our discretionary authority under Appellate Rule 2 to suspend the issue-preservation requirements of Appellate Rule 10 and conduct a merits-review of his argument. Because defendant has failed to demonstrate

his alleged error warrants the extraordinary measure of suspending our Appellate Rules, and because we conclude it would be inappropriate to invoke Appellate Rule 2 in this particular case, in our discretion we decline defendant's request. Accordingly, we dismiss his unpreserved alleged error and appeal.

I. Background

During the evening of 30 January 2009, Blane Riddick, a morbidly obese paraplegic, was shot twelve times in his bedroom while he was bedridden in his family's home in Gates, North Carolina. About twenty years earlier, Riddick was shot in the back while living in New York City, rendering him a paraplegic. He moved back into his parents' house in North Carolina a few years later. As a result of his New York gunshot wound, Riddick required substantial medical care and assistance. Rhonda Hurdle, an ex-girlfriend to both Riddick and defendant, served as Riddick's nurse and regularly attended to his medical needs for payment.

The State's evidence tended to show that, on the evening of the shooting, defendant dropped Hurdle off at Riddick's house to attend to his medical needs. Once Hurdle finished changing Riddick's bandages and bedding about an hour or two later, Riddick asked his brother and neighbor, Ben Riddick, to drive Hurdle home. As soon as Ben dropped off Hurdle, she called Riddick. While Hurdle was speaking on the phone with Riddick, she heard three gun shots, immediately hung up, and called 911.

The State's evidence also tended to show that Riddick's neighborhood friend, Patricia Howell, believed she saw defendant running from Riddick's home around the time of the shooting; that defendant's vehicle was found abandoned in a field near Riddick's house; that on two separate occasions, defendant confessed to two of his ex-girlfriends, Hurdle and April Pierce, that he shot Riddick and threatened their lives if they ever told anyone; and that, after shooting Riddick, defendant fled on foot, buried his guns and clothes in the woods, hitched a ride home from a school friend, Damon Boone, who just happened to be driving by and saw defendant walking down the street, and then defendant hid out in his camper for three days.

After the first two days of trial, the State had called eight witnesses, including Ben, Howell, Pierce, Hurdle, and Boone, and three initial responders. Near the end of the second day of trial, the State was directly examining its ninth and final witness, Captain Glynda Parker of the Gates County Sheriff's Department. Captain Parker testified that she arrived to the scene after the initial responding officers and EMS,

observed the paramedics treat Riddick and get him ready for transport to a hospital, and then spoke with the initial responding officers, who explained they found a shell casing in the hallway and a bullet hole in the television. Captain Parker described the layout of Riddick's house and laid a foundation for about twenty photographs she took at the crime scene, including the several guns, bullets, and bullet holes found at the residence. These photographs were introduced into evidence and published to the jury, ending the second day of trial.

At the start of day three, a juror asked the trial judge whether the jury may question trial witnesses, and the judge replied that they could not:

> THE COURT: Good morning. I understand that somebody had a question they wanted to ask me? Your name?
>
> JUROR SEVEN: My name is Jack Werk. I had a question. Do we get to ask any questions?
>
> THE COURT: No, sir. You are a juror. You are a fact finder. You are not a lawyer, you don't get to question. No, sir. Anything else?
>
> JUROR SEVEN: No, I guess that answered it. Thank you.
>
> THE COURT: Thank you. Call your next.
>
> [THE STATE]: Ms. Parker.
>
> THE COURT: Ma'am, if you will come back to the stand.

Defendant lodged no objection to the court's response, and there were no other jury requests to question witnesses. The State reminded Captain Parker that "yesterday, when we were finishing up I think just [sic] introduced the photographs you had taken there at the crime scene and see [sic] where [Riddick's] room was." Captain Parker resumed her testimony, explaining the grouping of Riddick's gunshot wounds, the types of bullets she collected from the crime scene, and how one of the five bullets was different from the others. She then testified about written statements she collected from Hurdle, Pierce, Boone, and defendant during her investigation. The State rested its case, defendant presented no evidence, and the jury was excused for the charge conference.

On day four, the trial court instructed the jury on the law. The jury deliberated from 10:29 a.m. to 6:57 p.m., sending twelve notes to the court. It asked for and received copies of the written statements from Hurdle, Pierce, Boone, and defendant that were introduced during

Captain Parker's testimony on the third day of trial. The jury notes also indicated that it was deadlocked, first at 8-4, then at 9-3, at 9-3 again, at 10-2, at 10-2 again, and then at 11-1. Eventually, the jury reached a unanimous split verdict finding defendant guilty of assault with a deadly weapon with intent to kill and inflict serious injury, and not guilty of attempted murder. The trial court sentenced defendant within the presumptive range of 83 to 109 months of active incarceration. Defendant gave oral notice of appeal.

II. Analysis

Defendant's sole argument on appeal is that the trial court erred by allegedly failing to exercise its discretion when it responded "no" to juror seven's question about whether jurors were allowed to question trial witnesses. The State retorts that this issue has not been preserved for appellate review because defendant failed to object, and we agree.

Under the North Carolina Rules of Appellate Procedure,

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

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

In *State v. Parmaei*, 180 N.C. App. 179, 636 S.E.2d 322 (2006), *disc. rev. denied*, 361 N.C. 366, 646 S.E.2d 537 (2007), we held that a defendant's failure to object after a trial judge denies a jury request to question trial witnesses forecloses appellate review of any alleged error arising from that denial. *Id.* at 184, 636 S.E.2d at 325. There, the jury sent a note at the beginning of trial inquiring whether it was allowed to ask witnesses follow-up questions, and the trial judge responded "no." *Id.*

On appeal, the defendant argued the trial court committed plain error by prohibiting the jury from questioning witnesses. Because the "[d]efendant failed to object to the trial judge's denial of the jury's request to question trial witnesses[,]" we held that his "assigned error [was] not preserved for our review," *id.* (citing N.C. App. R. App. P. 10(a)(1)), and, further, that it was "not reviewable under the limited scope of plain error review." *Id.* Accordingly, we dismissed it. *Id.* at 184–85, 636 S.E.2d at 325.

Here, juror seven asked the trial judge: "Do we get to ask any questions?" and the judge responded: "No, sir. You are a juror. You are a fact finder. You are not a lawyer, you don't get to question. No, sir." Defense counsel never objected. Accordingly, under *Parmaei*, defendant's failure to object after the trial court denied juror seven's request to question witnesses renders unpreserved any issue arising from that denial. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, . . . a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citations omitted)); *see also* N.C. R. App. P. 10(a)(1).

Recognizing that his failure to object may have foreclosed appellate review, defendant asks us to invoke Appellate Rule 2 to review the merits of this alleged error. In our discretion, we respectfully decline defendant's request.

This Court may invoke our discretionary authority under Appellate Rule 2 "[t]o prevent manifest injustice to a party," by "suspend[ing] or vary[ing] the requirements or provisions of any of [the appellate] rules," including Rule 10(a)(1)'s issue-preservation requirement. N.C. R. App. P. 2. But Appellate Rule 2 is limited to "exceptional circumstances, . . . and [should be invoked] only in such instances.' " *State v. Campbell*, ___ N.C. ___, ___, 799 S.E.2d 600, 602 (emphasis omitted) (quoting *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299–300 (1999)). The decision of whether to invoke Appellate Rule 2 "must necessarily be made in light of the specific circumstances of individual cases and parties," and "whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *Id.* at ___, 799 S.E.2d at 602, 603 (citations and footnote admitted).

Defendant concedes, and we agree, that "[i]t is impossible to determine what questions juror seven would have posed;" therefore, "this Court is unable to determine exactly how the trial court's [alleged] error might have prejudiced [defendant]." Nonetheless, defendant advances several creative hypothetical juror questions, and requests that we invoke Appellate Rule 2 because "[t]he trial court clearly failed to exercise its discretion and given the lengthy jury deliberations and the logically inconsistent verdict, a different result very well may have been obtained had the jurors been allowed to elicit additional evidence." Defendant's argument fails because it is purely speculative.

Based on the timing of the juror's inquiry—at the start of the third day of trial, after eight witnesses had already testified and in the middle

of Captain Parker's testimony about the crime scene photographs—combined with its vague nature—whether, generally, the jury may question witnesses—the record provides no indication at all about the subject matter of any question juror seven, or any other juror, might have wished to pose of which witness, or what additional evidence might have been elicited. We conclude that defendant has failed to demonstrate that "his matter is the rare case meriting suspension of our appellate rules[,]" *Campbell*, ___ N.C. at ___, 799 S.E.2d at 603, and based upon the particular circumstances of this case, we decline to exercise our discretionary authority under Appellate Rule 2.

We note, however, that " 'the propriety of juror questioning of witnesses is within the sound discretion of the trial court.' " *State v. Elliott*, 360 N.C. 400, 413, 628 S.E.2d 735, 744 (2006) (quoting *State v. Howard*, 320 N.C. 718, 725, 360 S.E.2d 790, 794 (1987)). Our Supreme Court has instructed that "[w]hile it may be permissible in the discretion of the trial court to allow jurors to orally ask witnesses questions, 'the better practice is for the juror to submit written questions to the trial judge who should have a bench conference with the attorneys, hearing any objections they might have.' " *Id.* at 413, 628 S.E.2d 744–45 (quoting *Howard*, 320 N.C. at 726, 360 S.E.2d at 795). "The judge[ ] . . . should then ask the questions of the witness. Questions should ordinarily be for clarification and the trial judge should exercise due care to see that juror questions are so limited." *Howard*, 320 N.C. at 726, 360 S.E.2d at 795. In our opinion, rather than a trial judge simply replying "no" in response to jury requests to question trial witnesses, we believe a better practice would be to ask the juror to submit written questions, as suggested by our Supreme Court in *Elliott*.

III. Conclusion

Because defendant failed to object after the trial judge denied the juror's request to question trial witnesses, he failed to preserve his alleged error for our review. Defendant failed to satisfy his burden of demonstrating that his case warrants suspending our Appellate Rules in order to conduct a merits-review of his unpreserved alleged error, and, given the pure speculation of what question any juror(s) might have sought to pose of which witness(es), in our discretion we decline to invoke Appellate Rule 2. We therefore dismiss his alleged error and appeal.

DISMISSED.

Judges STROUD and TYSON concur.

LEE VANDER THOMPSON, PLAINTIFF
v.
WALTER SPELLER, DEFENDANT

No. COA17-416

Filed 5 December 2017

1. Arbitration and Mediation—arbitration—pre-award interest and costs

The trial court erred by modifying an arbitration award to require the unnamed defendant (Farm Bureau Insurance Company) to pay pre-award interests and costs to plaintiff where the arbitration award did not make any provision for pre-award interest. Whether to award pre-award interest as part of compensatory damages is within the authority of the arbitrators, not the trial court, unless there was a mathematical error, an error relating to form, an error resulting from the arbitrator exceeding his authority, or the arbitrators expressly defer the issue to the trial court as part of the award.

2. Arbitration and Mediation—arbitration—post-award/pre-judgment interest

The trial court acted within its authority when confirming an arbitration award by awarding plaintiff post-award/pre-judgment interest from the date of the arbitration award to the date of the insurance company's payment to plaintiff. The arbitrators could not anticipate the delay, and the trial court could compensate the insured for the time value of the award until it was paid.

Appeal by Unnamed Defendant from judgment entered 27 September 2016 by Judge John E. Nobles, Jr. in Carteret County Superior Court. Heard in the Court of Appeals 21 September 2017.

Dodge Jones Law Firm, LLP, Robert C. Dodge, for the Plaintiff-Appellee.

Harris, Creech, Ward & Blackerby, P.A., by Heather M. Beam and Jay C. Salsman, for the Unnamed Defendant-Appellant.

DILLON, Judge.

The Unnamed Defendant, North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") appeals from a judgment entered

by the trial court confirming an arbitration award in favor of Lee Vander Thompson ("Plaintiff"). The arbitration panel awarded Plaintiff $110,000. In confirming the award, the trial court *also* granted Plaintiff pre-award and post-award/pre-judgment[1] interest on the $110,000 figure, as well as approximately $1,100 in costs associated with the action. For the following reasons, we affirm in part and reverse in part.

I. Background

In October 2013, Plaintiff and Walter Speller ("Defendant") were involved in a motor vehicle collision in which Plaintiff was injured. At the time of the accident, Farm Bureau was Plaintiff's underinsured motorist insurer. Under Plaintiff's policy (the "Policy"), Farm Bureau was obligated to pay compensatory damages to Plaintiff in the event that Plaintiff was injured by an at-fault driver whose liability coverage limits were too low to cover his damages.

Following the accident, Plaintiff settled with Defendant's liability insurance carrier. Also, Farm Bureau advanced to Plaintiff a total of $35,000, which included the following: (1) $5,000, the maximum medical payment under the Policy, and (2) $30,000, representing the liability limits of Defendant's liability policy.[2] However, because Farm Bureau and Plaintiff were ultimately unable to settle on the amount of total damages Plaintiff was entitled to recover, Plaintiff demanded arbitration pursuant to the arbitration provision of the Policy.

The case was heard by a three-member arbitration panel which rendered a unanimous arbitration award of $110,000. The award specifically provided that "[t]he arbitrators did *not* consider interest or costs in the determination of th[e] award." (Emphasis added.)

Plaintiff filed a motion with the trial court for an order confirming the $110,000 arbitration award *and* for interest and costs. In confirming the arbitration award, the trial court entered judgment for Plaintiff for $110,000 *plus* $8,000 in pre-award interest (calculated from the filing of the complaint to the date of the arbitration award) *plus* $805 in

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1. Our case law often refers to the interest which accumulates during the period before an *arbitration award* is entered as "prejudgment interest." In the interest of clarity, we refer to any potential interest which accumulates before an arbitration award is entered as "*pre-award* interest." Any potential interest which accumulates *after* the entry of an arbitration award but *before* entry of the trial court's judgment confirming the award is referred to as "post-award/pre-judgment interest."

2. N.C. Gen. Stat. § 20-279.21(b)(4) requires an insurer to advance a payment to its insured in an amount equal to the tentative settlement within thirty (30) days in order to preserve its right to exercise any right of subrogation. N.C. Gen. Stat. § 20-279.21(b)(4) (2015).

post-award/pre-judgment interest (calculated from the date of the arbitration award to the date of the judgment confirming the award) *plus* $1,100 in costs. Farm Bureau timely appealed.

II. Analysis

On appeal, Farm Bureau makes no argument concerning the confirmation of the $110,000 award. Rather, Farm Bureau argues that trial court exceeded its authority when it awarded Plaintiff costs, pre-award interest, and post-award/pre-judgment interest in its judgment confirming the arbitration award.

Our Supreme Court has stated that our courts have very limited authority to modify an arbitration award under our Revised Uniform Arbitration Act, codified in Article 45C of our General Statutes. *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 155, 423 S.E.2d 747, 751 (1992) (noting that the Act is "virtually a self-contained, self-sufficient code, [providing] controlling limitations upon the authority of our courts to vacate, modify, or correct an arbitration award"); *see also Cyclone Roofing Co., Inc. v. David M. LaFave Co., Inc.*, 312 N.C. 224, 236, 321 S.E.2d 872, 880 (1984) (holding that "[j]udicial review of an arbitration award is confined to determination of whether there exists one of the specific grounds for [modification] of an award under the Uniform Arbitration Act").

And our Supreme Court has specified that a trial court may modify an arbitration award only where the arbitrators make (1) a mathematical error, (2) an error relating to form, or (3) an error resulting from arbitrators' exceeding their authority. *Id.* at 236, 321 S.E.2d at 880; N.C. Gen. Stat. § 1-569.24 (2015). None of these grounds, however, apply in the present case.

On appeal, we must determine whether the trial court's grant of (1) pre-award interest, (2) post-award/pre-judgment interest, and (3) costs was proper. For the reasons stated below, we conclude that the trial court's grant of pre-award interest and costs constituted an impermissible modification of the arbitration award. *See Eisinger v. Robinson*, 164 N.C. App. 572, 576-77, 596 S.E.2d 831, 833-34 (2004). However, we further conclude that the trial court's grant of post-award interest was appropriate.

A. Pre-Award Interest and Costs

[1] We hold that the trial court exceeded its authority by adjudging that Plaintiff was entitled to recover pre-award interest and costs in this case.

In the absence of a policy exclusion, pre-award interest is considered part of compensatory damages for which an uninsured motorist insurer may be liable. *See Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, 11, 430 S.E.2d 895, 901 (1993) (holding that "prejudgment interest . . . is within the term 'damages' as that term is used in the UIM portion of plaintiff's policy"). Whether to include pre-award interest as part of compensatory damages is a matter within the authority of the arbitrators – not the trial court – to decide. *Hamby v. Williams*, 196 N.C. App. 733, 736, 676 S.E.2d 478, 479 (2009) (applying *Baxley* in an arbitration context); *Sprake v. Leche*, 188 N.C. App. 322, 658 S.E.2d 490 (2008) (holding that the arbitration panel had authority to award pre-award interest and the trial court properly confirmed the arbitration award as written); *Faison & Gillespie v. Lorant*, 187 N.C. App. 567, 654 S.E.2d 47 (2007) (holding that an arbitrator's authority was not exceeded by including pre-award interest in an arbitration award).

Typically, where the arbitration award fails to make any provision for pre-award interest, "the trial court [is] obligated to confirm the award as written, unless there was some mathematical error, error relating to form, or error resulting from the arbitrator exceeding his/her authority[.]" *Palmer v. Duke Power Co.*, 129 N.C. App. 488, 498, 499 S.E.2d 801, 807 (1998).

A trial court *may* grant pre-award interest *only if* the arbitrators expressly defer the issue of interest to the trial court's discretion as part of their award. *See Lovin v. Byrd*, 178 N.C. App. 381, 382, 631 S.E.2d 58, 59 (2006) (finding no error where a trial court added pre-award interest where the arbitration award provided that the issue of pre-award interest "is expressly left to counsel for the parties and a Superior Court Judge . . . to decide"); *see also Hamby*, 196 N.C. App. at 738, 676 S.E.2d at 481 (concluding that a grant by the trial court of pre-award interest is not a modification of an arbitration award where the arbitrators expressly deferred the issue to the trial court). In such cases, the trial court is merely enforcing the terms of the arbitration award.

Unlike in *Lovin* and *Hamby*, however, the arbitrators in the present case did not expressly defer the issue of pre-award interest to the discretion of the trial court. Here, the award simply provided that they "did not consider interest or costs in the determination of th[e] award." If the arbitration panel had wanted to authorize the trial court to award pre-award interest and costs, it could have done so in its arbitration award. But even if language to this effect was omitted in error by the arbitrators, our Supreme Court has held that such a mistake is not, by, itself a sufficient ground to set aside an award:

> If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no right of appeal, and the Court has no power to revise the decisions of "judges who are of the parties' own choosing." An award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens a door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus the object of references would be defeated and arbitration instead of ending would tend to increase litigation.

Patton v. Garrett, 116 N.C. 847, 21 S.E. 679, 682–83 (1895) (citing *Eaton v. Eaton*, 43 N.C. 102, 106-07 (1851)).

The trial court also lacked the authority to grant Plaintiff costs in this case. Although N.C. Gen. Stat. § 1-569.25 does allow the trial court to include "reasonable costs" in its judgment, these costs are limited to "reasonable costs *of the motion* [to confirm the award]" filed by the party *after* the arbitration award is entered. *See* N.C. Gen. Stat. §§ 1-569.22, 1-569.23, 1-569.24, 1-569.25. Here, however, the trial court granted Plaintiff costs related to the filing of the original action, the cost of the court reporter for depositions, an expert witness fee, and subpoena service fees.

In sum, we conclude that the trial court's modification of the arbitration award requiring Farm Bureau to pay pre-award interest and costs to Plaintiff was error. *See Eisinger*, 164 N.C. App. at 576, 596 S.E.2d at 834 (concluding that because plaintiff's request for pre-award *interest and costs* did not fall within any of the three grounds permitting modification, the trial court was without authority to modify the award to include pre-award interest or costs); *see also* M. Domke, *Domke on Commercial Arbitration* § 35:6 (3d ed. 2012) ("[C]ourts cannot add interest from a date prior to the award, since this would infringe on the arbitrators' authority.").

B. Post-Award/Pre-Judgment Interest

[2] The trial court also awarded Plaintiff approximately $800 in post-award/pre-judgment interest, calculated from the date of the arbitration award to the date Farm Bureau paid Plaintiff in full. For the reasons detailed below, we conclude that the trial court acted within its authority in granting interest from the date of the arbitration award to the date of Farm Bureau's payment to Plaintiff.

Neither party cites a North Carolina case which directly addresses the power of a trial court to grant interest which accrues after the arbitration award but before the trial court enters judgment confirming the award. The seminal treatise on commercial arbitration states that, generally, a trial court *does* have the discretion to grant interest which may accrue after the date of the award:

> If an arbitrator does not include a determination of interest in the award, courts have the discretion to award postarbitration award interest and postjudgment interest on actions to confirm arbitration award. . . . [G]enerally, prejudgment interest runs from the date of the arbitration award to the date that judgment is rendered, while postjudgment interest runs from the time that the award is confirmed.

M. Domke, *Domke on Commercial Arbitration* § 35:6 (3d ed. 2012). We agree with this general rule as stated. The time it will take for the arbitrators' award to be confirmed by a trial court is unknown to the arbitrators at the time they make the award. Consider a situation in which an arbitration award is entered against an insurer for $100,000, but the insurer obtains continuances such that the trial court does not enter its judgment pursuant to N.C. Gen. Stat. § 1-569.25 for some period of time. The arbitrators certainly could not anticipate this delay between the entry of the arbitration award and the trial court's entry of judgment on the award, and the trial court should be allowed to compensate the insured for the "time value" of the award between the time the award is made and the time the award is paid.

III. Conclusion

We affirm the trial court's judgment confirming the $110,000 arbitration award and its grant of post-award/pre-judgment interest. We reverse the trial court's grant of pre-award interest and costs.

AFFIRMED IN PART, REVERSED IN PART.

Judges HUNTER, JR., and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 DECEMBER 2017)

AOUN & COLE, INC. v. FITZPATRICK No. 17-240	Wake (16CVS5386)	Affirmed
BAXLEY v. BAXLEY No. 17-463	Moore (15CVD1522)	Affirmed
CABRERA v. CITY OF DURHAM No. 17-617	Durham (14CVS3297)	No Error
FED. NAT'L MORTG. ASS'N v. PRICE No. 17-672	Ashe (15CVS424)	Dismissed
FREEMAN v. N.C. DEP'T OF HEALTH & HUM. SERVS. No. 17-299	Office of Admin. Hearings (16OSP10316)	Dismissed
IN RE A.L.Z. No. 17-507	Rockingham (16JT59)	Affirmed
IN RE C.L.C. No. 17-522	Alamance (15JT50) (15JT51)	Affirmed
IN RE J.C. No. 17-548	Ashe (16JA37)	Affirmed
IN RE K.Q. No. 17-533	Durham (15J89)	Affirmed
IN RE K.R.T. No. 17-587	Watauga (16JT28) (16JT29)	Affirmed
IN RE L.G.S. No. 17-599 A	Haywood (15JT36) (15JT37)	ffirmed
IN RE S.F.-H. No. 17-381	Mecklenburg (11JT691)	Affirmed
IN RE T.M.B. No. 17-484	Guilford (14JT469)	Affirmed
JACOBS-SAMS v. DUKE UNIV. MED. CTR. No. 17-298	N.C. Industrial Commission (14-721140)	Affirmed

MARTIN v. SCARDINA No. 17-52	Wake (06CVD8057)	Affirmed
RIGGSBEE v. TAYLOR No. 17-560	N.C. Industrial Commission (839571)	Dismissed
STATE v. BLACKMON No. 17-397	Onslow (08CRS54995) (09CRS2340)	Dismissed
STATE v. COOK No. 17-610	Gaston (16CRS59251)	Dismissed
STATE v. COSTIN No. 17-521	Brunswick (15CRS1374)	No Error
STATE v. GREEN No. 17-375	Lenoir (12CRS51004) (12CRS51005) (12CRS51007) (14CRS281-282)	No Error
STATE v. HARRINGTON No. 17-362	Wake (14CRS205062)	Affirmed
STATE v. JOHNSON No. 17-670	Mecklenburg (16CRS28113-14)	No Error
STATE v. LOCKLEAR No. 17-310	Robeson (11CRS56050-52) (14CRS56135-36)	Dismissed
STATE v. MELGAR-ARGUETA No. 17-434	Wilkes (16CRS283)	No Error
STATE v. MILES No. 17-494	Mecklenburg (15CRS207289-90)	Dismissed In Part; Vacated and Remanded In Part
STATE v. PEGRAM No. 17-566	Stokes (04CRS52079)	Affirmed
STATE v. TART No. 17-561	Forsyth (14CRS143) (14CRS51953)	Vacate in Part; No Error in Part.
STATE v. WHITE No. 17-530	Carteret (15CRS52188) (15CRS52190)	No Error

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

Appealability—interlocutory order—separation of powers—The North Carolina Department of Transportation could not establish substantial grounds for appellate review of an interlocutory order by arguing separation of powers in an eminent domain case arising from a transportation corridor map. The taking was established, as discussed elsewhere in the case, and was deemed to have been admitted. The admission brought plaintiffs within the scope of a statutory avenue for compensation. **Beroth Oil Co. v. N.C. Dep't of Transp., 401.**

Appealability—interlocutory order—substantial right expense—transportation corridor map—The North Carolina Department of Transportation's policy argument concerning expense did not establish a substantial right through which to justify the appeal of an interlocutory order in an eminent domain case involving a transportation corridor map. **Beroth Oil Co. v. N.C. Dep't of Transp., 401.**

Appealability—motion to dismiss motion for appropriate relief—lack of jurisdiction—The Court of Appeals allowed defendant's motion to dismiss his motion for appropriate relief in a multiple murder case and vacated the trial court's order on the motion due to lack of jurisdiction. **State v. Cox, 511.**

Appealability—no statutory right of State to appeal expunction—writ of certiorari denied—Petitioner's motion to dismiss the State's appeal from an order granting a petition for expunction under N.C.G.S. § 15A-145.5 was granted where the State had no statutory right to appeal. The State's petition for writ of certiorari filed after the original opinion was denied. **Cty. of Onslow v. J.C., 199.**

Appealability—Rule 2—avoid manifest injustice—constitutional issues—Based on the specific circumstances in this child abduction, statutory rape, and sexual exploitation case—and in order to avoid the possibility of manifest injustice—the Court of Appeals exercised its discretion under N.C. Rule of Appellate Procedure 2 to reach the merits of defendant's constitutional arguments. **State v. Diaz, 528.**

Appealability—waiver—sentencing hearing—failure to object or request continuance—Rule 10(a)(1)—Defendant waived any argument in an opium trafficking case that a sentencing hearing should not have been conducted at a particular time, or in front of a particular judge, by failing to either object to the commencement of the hearing or request a continuance as required by N.C. R. App. P. 10(a)(1). **State v. Meadows, 124.**

Appealability—writ of certiorari—appeal of suppression order instead of judgments—The Court of Appeals exercised its discretion in a first-degree murder case to issue a writ of certiorari to address the merits of defendant's appeal where defendant's appeal of the suppression order instead of the judgments was technical in nature and the State did not oppose the petition. **State v. Wilkes, 385.**

Appealability—writ of certiorari—not guilty by reason of insanity—The Court of Appeals in an attempted first-degree murder case granted defendant's petition for writ of certiorari and denied the State's motion to dismiss defendant's appeal based upon its contention that no right of appeal existed from an order ruling that defendant was not guilty by reason of insanity. **State v. Payne, 572.**

Interlocutory appeal—substantial right—eminent domain—transportation corridor map—The North Carolina Department of Transportation (NCDOT) did not demonstrate that an interlocutory order was appealable as affecting a substantial right in an eminent domain case involving a transportation corridor map where the trial court order established the procedures and timetable by which NCDOT would

APPEAL AND ERROR—Continued

file plats identifying the interest and areas taken. NCDOT appealed the order immediately but had no substantial right because it had not yet filed a map or plat. **Beroth Oil Co. v. N.C. Dep't of Transp., 401.**

Interlocutory orders and appeals—denial of motion to dismiss—prior pending action—An interlocutory order that denies a motion to dismiss on the ground of a prior pending action is immediately appealable. **Johnston v. Johnston, 476.**

Interlocutory orders and appeals—worker's compensation—Industrial Commission certification of constitutional question—The Court of Appeals had jurisdiction under N.C.G.S. § 97-86 in a workers' compensation case over plaintiff administratrix's appeal from an interlocutory order of the Industrial Commission certifying a constitutional question to the Court of Appeals. **Booth v. Hackney Acquisition Co., 181.**

No constitutional claim on appeal—involuntary sterilization—Eugenics Asexualization and Sterilization Compensation Program—The Court of Appeals reaffirmed its opinion in *House I*, 245 N.C. App. 388 (2016), that involuntarily sterilized claimant could not demonstrate she was a qualified recipient of the Eugenics Asexualization and Sterilization Compensation Program where claimant made no constitutional claim in her appeal and there was nothing for the Court to consider pursuant to the mandate of our Supreme Court's 28 September 2017 order. **In re House, 464.**

Preservation of issues—abandoned during appellate oral arguments—The Court of Appeals did not address appellant's asserted claims for negligence and nuisance in his amended complaint where on appeal appellant's counsel abandoned these claims at oral argument. **Parker v. DeSherbinin, 55.**

Preservation of issues—child custody hearing—time constraint—failure to request additional time—The trial court did not abuse its discretion in a child custody case by terminating plaintiff life partner's testimony and limiting plaintiff's evidentiary presentation to one hour where plaintiff failed to request any additional time at the hearing. **Moriggia v. Castelo, 34.**

Preservation of issues—failure to argue constitutional issue at trial—Although defendant's petition for writ of certiorari to review the trial court's imposition of satellite-based monitoring (SBM) in a statutory sexual offense, statutory rape, and indecent liberties case was allowed, his appeal of SBM as applied to him was dismissed where he waived direct appellate review of any Fourth Amendment challenge by failing to raise the constitutional issue at trial. **State v. Spinks, 596.**

Preservation of issues—failure to move to dismiss—failure to argue insufficient elements of charge—Although defendant contended the trial court erred by denying defense counsel's motion to dismiss a charge of second-degree murder, defendant failed to preserve this issue for appellate review where the trial transcript showed defendant neither moved to dismiss the charge nor argued there was insufficient evidence of the elements. **State v. Cox, 511.**

Preservation of issues—failure to object at trial—suspension of appellate rules not warranted—Rule 2—Although defendant contended the trial court erred in an assault case by allegedly failing to exercise its discretion when it responded "no" to a juror's inquiry at the start of the third day of trial about whether jurors may question trial witnesses, defendant failed to preserve this issue by not objecting at trial. Further, defendant failed to satisfy his burden of demonstrating that his

CHILD CUSTODY AND SUPPORT—Continued

plaintiff husband in Caswell County and to have it transferred to Wake County where defendant already filed a claim in Wake County. The UCCJEA had no relevance to this case since both parties and the children were all in North Carolina. Further, the fact that the husband was avoiding service and the reasons the wife filed were of no consequence to the legal determination of who filed the action first. **Johnston v. Johnston, 476.**

Juvenile—dependent—findings—not sufficient—An adjudication that a neglected juvenile was dependent was reversed where the trial court's order did not include findings addressing the parent's ability to provide care and the availability to the parent of alternative child care arrangements. **In re H.L., 450.**

Life partners—standing—contradictory conclusions of law—subject matter jurisdiction—consideration of facts preceding child's birth—The trial court erred in a child custody case by granting defendant life partner's motion to dismiss under Rule 12(b)(1) and dismissing plaintiff life partner's complaint for lack of standing where the order made contradictory conclusions of law on subject matter jurisdiction. Further, the trial court should have considered the facts preceding the child's birth in making its conclusions and should not have relied upon the facts that the parties were not married, pursued no legal adoption, and did not list plaintiff as a parent on the birth certificate. **Moriggia v. Castelo, 34.**

Uniform Child Custody Jurisdiction and Enforcement Act—Michigan orders—subject matter jurisdiction—The trial court did not err in a child custody case by concluding that North Carolina had subject matter jurisdiction to enter two orders where the trial court's initial denial of enforcement of Michigan orders did not speak to the trial court's broader subject matter jurisdiction over the entire case. Further, the trial court followed the mandates of the Uniform Child Custody Jurisdiction and Enforcement Act. **Booker v. Strege, 172.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Pawn shop receipt—circumstantial evidence of guilt—The trial court did not err in an assault and robbery case by concluding that a pawn shop ticket was not barred by the doctrine of collateral estoppel where the pawn shop receipt was not introduced as evidence of a prior bad act, but instead as circumstantial evidence of defendant's guilt. Further, defendant did not challenge its general admissibility or argue that the pawn shop ticket should have been excluded under N.C. R. Evid. Rule 403. **State v. Jones, 266.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Motion to suppress—probable cause to arrest—witness testimony—corroborating evidence—breaking or entering—murder—The trial court did not err in a first-degree murder case by denying defendant's motion to suppress incriminating statements based on alleged lack of probable cause to arrest him. A witness's statements, in connection with a cut screen and other evidence corroborating his story, were sufficient to raise a fair probability in the officers' minds that defendant committed the crime of breaking or entering the victim's house (even though they also suspected he had murdered the victim and then burned her body inside her car to conceal the offense). **State v. Wilkes, 385.**

CONSTITUTIONAL LAW—Continued

EVIDENCE—Continued

EVIDENCE—Continued

result of a prior trial of obtaining property under false pretenses as an acquittal, the trial court did not err in a misdemeanor assault inflicting serious injury and robbery with a dangerous weapon case by allowing the State to introduce a pawn shop receipt at trial showing that defendant pawned jewelry soon after a jewelry store was robbed. The receipt was introduced as evidence of defendant's guilt of robbery with a dangerous weapon pursuant to the doctrine of recent possession. **State v. Jones, 266.**

Photographs—victim's injuries—crime scene—relevancy—probative value—corroboration—illustration—premeditation and deliberation—The trial court did not abuse its discretion in a first-degree murder and robbery with a dangerous weapon case by allowing into evidence numerous photographs depicting the victim's injuries and the crime scene, where the photographs were relevant and probative to corroborate defendant's statements, illustrated the medical examiner's testimony, and tended to support a finding of premeditation and deliberation. The trial court's decision was not so arbitrary that it could not have been supported by reason. **State v. Faulk, 255.**

State trooper testimony—results of chemical analysis—breath test—certification and procedures—foundation for admission—The trial court did not err in an impaired driving case by allowing a state trooper to testify about the results of a chemical analysis of defendant's breath test where the trooper's testimony—that he was certified to conduct chemical analysis by the Department of Human Resources and that he performed the chemical analysis according to its procedures—was adequate to lay the necessary foundation for its admission. **State v. Squirewell, 356.**

Testimony—another child victim—common scheme or plan—Rule 404(b)—Rule 403—The trial court erred in a statutory sexual offense, statutory rape, and indecent liberties case by admitting testimony from another child victim under N.C.G.S. § 8C-1, Rule 404(b) where the testimony tended to prove defendant had a common scheme or plan to have intercourse with young female children who were asleep at night while he was a guest staying overnight in a home and offered a bribe to his victims afterwards to buy their silence. Further, its probative value substantially outweighed the danger of unfair prejudice under N.C.G.S. § 8C-1, Rule 403. **State v. Spinks, 596.**

Testimony—gang activity—motion in limine—The trial court did not commit plain error in an attempted first-degree murder case by allowing the State to offer testimony related to gang activity where it was admitted in accordance with the relief sought by defendant in his motion in limine. **State v. Harris, 549.**

Witness testimony—contacted attorney—terminated pregnancies—reason for marrying victim—already admitted without objection—no prejudicial error—The trial court did not abuse its discretion in a first-degree murder case by allowing certain witness testimony, including a statement by defendant that she had already contacted an attorney when the police came to her house to investigate her husband's death, that defendant had terminated two pregnancies, and that defendant stated she married the victim because he had cancer and would be dying soon—where the same evidence was already admitted without objection or there was no reasonable possibility of a different result given the overwhelming evidence of defendant's guilt. **State v. Madonna, 112.**

WORKERS' COMPENSATION—Continued

having selected his wife to provide those services and requested approval from the Commission within a reasonable time of filing his North Carolina claim. **Hall v. U.S. Xpress, Inc., 635.**

Handicapped housing allowance—contribution by plaintiff—The Industrial Commission did not err in a workers' compensation case by requiring plaintiff to contribute to the cost of renting a handicapped-accessible apartment. In North Carolina, an employer may be required to pay the expense of handicapped housing, but the Commission had the discretion to require the claimant to contribute a reasonable amount towards rent. **Hall v. U.S. Xpress, Inc., 635.**

Medical care provider—definition—The Industrial Commission employed the correct statutory definitions of "medical compensation" and "health care provider" in a workers' compensation case. The structure of the phrasing in the definition did not support the insurance company's position, the definition of "medical compensation" included the phrase "including but not limited to," and plaintiff's injury occurred before the 2011 amendment. **Hall v. U.S. Xpress, Inc., 635.**

Medical compensation—payments made to out-of-state providers—medical compensation—Workers' compensation payments made to health care providers in Boston constituted medical compensation, even though N.C.G.S. § 97-24 did not refer to compensation paid pursuant to a statutory structure in another state. Although defendants argued that the Industrial Commission's interpretation of N.C.G.S. § 97-24 was inconsistent with the rules of statutory construction, the Commission properly applied precedent rather than interpreting the statute on a blank slate. **Hall v. U.S. Xpress, Inc., 635.**

Payment under Tennessee Workers' Compensation Act—jurisdiction of Industrial Commission—The North Carolina Industrial Commission had subject matter jurisdiction over a truck driver's claim for workers' compensation benefits where plaintiff worked for a Tennessee company but was injured in North Carolina and was initially paid under the Tennessee Workers' Compensation Act. Plaintiff did not learn that he was not being paid under the N.C. Workers' Compensation Act until the insurer stopped making per diem payments. Plaintiff then filed the necessary N.C. form within two years, as required by N.C.G.S. § 97-24(a)(ii). Additionally, plaintiff's entitlement to payments under the North Carolina act had not been determined at that time and the North Carolina statute did not require that an employer keep a claimant informed of the legal status of payments or that a plaintiff investigate the matter. **Hall v. U.S. Xpress, Inc., 635.**

Per diem payments discontinued—estoppel—The Industrial Commission did not err in a workers' compensation case by ruling that defendants were not estopped from ceasing payment of the per diem allowance. Plaintiff did not establish that he relied upon a misrepresentation that the payments would continue indefinitely. **Hall v. U.S. Xpress, Inc., 635.**

Sanctions—unfounded litigiousness—The Industrial Commission did not abuse its discretion in a workers' compensation case by imposing sanctions on defendants for unfounded litigiousness. Defendants did not direct the Court of Appeals to any legal or factual basis for their denial of compensability, and the issue of jurisdiction was resolved in prior Court of Appeals opinions that were indistinguishable from this case in all material respects. **Hall v. U.S. Xpress, Inc., 635.**